Nursing and Midwifery Council legislation and rules

Response to the Department of Health and Nursing and Midwifery Council consultations

June 2014

1. Introduction

1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.

1.2 As part of our work we oversee nine health and care professional regulators – including the Nursing and Midwifery Council (NMC) and report annually to Parliament on their performance. We also appeal fitness to practise cases to the courts if outcomes are unduly lenient and it is in the public interest. More information about our work and the approach we take is available at www.professionalstandards.org.uk.

1.3 We welcome the opportunity to comment on the Department of Health (DH) proposals to amend the NMC’s governing legislation and the NMC’s proposals to make associated changes to its fitness to practise and registration rules. We are submitting a combined response to these two consultations because we consider that this approach better communicates our views on these linked proposals.

1.4 Our comments below are made in the interests of patients, service users and other members of the public.

2. General comments

2.1 We observe that the DH and NMC proposals for –
- reviewing no case to answer decisions
- requesting and disclosing indemnity information

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are designed to address issues that we consider are unlikely to be unique to the NMC. We would therefore like to understand why these reforms are not being extended to other regulators.

2.2 Similarly we observe that the case examiner and striking-off proposals will address cost efficiency issues rather than improve public protection or public confidence in the NMC. Cost efficiency improvements are certainly desirable but in our view they should not be pursued at the expense of reforms which would improve public protection and or public confidence in the NMC. We would therefore like to understand why these reforms have been prioritised over other reforms that have been suggested for public protection and/or public confidence reasons.

2.3 Specific comments on each of the proposals follow below.

3. **Fitness to practise case examiners**

3.1 The Authority holds no views on whether case examiners should feature in a professional regulator’s process for deciding whether or not a case should be referred for a panel hearing. What is important is that the process adopted –

- is transparent, fair, proportionate and focused on public protection
- ensures all fitness to practise complaints are reviewed on receipt, serious cases are prioritised, and where appropriate an interim order is sought and imposed
- deals with each case as quickly as possible taking into account the complexity and type of case and the conduct of both sides
- does not cause delays that result in harm or potential harm to patients and service users
- keeps all parties to a case updated on progress and supports them to participate effectively in the process
- produces decisions that are well reasoned, consistent, protect the public and maintain confidence in the regulation of the profession.

We would expect the NMC to assure itself that its proposed case examiner arrangements will achieve these standards.

3.2 Furthermore we expect the NMC to have appropriate arrangements to assure itself and the public of the quality of the case examiners’ decisions. These arrangements would need to include continuous training, supervision, guidance and procedures for the case examiners and other staff who support the process and a mechanism for reviewing the quality, timeliness and impartiality of case examiners’ decisions and applying learning from such reviews.

3.3 We agree with the assumption that case to answer decisions should be more consistent if they are made by a small group of specialist and full time staff as opposed to a large group of contracted panel members. In theory at least, it is easier to train, supervise and performance manage staff rather than contracted panel members.
3.4 We question whether introducing case examiners will necessarily improve the quality of decisions. Any improvement will depend far more on the quality of the guidance and training provided to the case examiners and the quality of preliminary investigations conducted by the NMC. We are unclear what, if any, role the case examiners will have in preliminary investigations. It is important for both public and registrant confidence in the process that there is a clear separation between those ‘investigating’ the matter (in the sense of receiving the complaint and gathering further evidence) and those deciding whether or not there is a case to answer.

3.5 The NMC states that ‘case examiners will provide a more proportionate approach to the investigation of allegations while maintaining the independence in decision-making.’ It would have been helpful if the NMC had expanded on this point and explained the rationale behind it, as we do not feel that these points are self-evident. We note that there is an argument that the use of case examiners (who are staff) appears less independent than the use of panel members.

3.6 We consider decisions taken by two case examiners (one lay and one nurse/midwife) would be sufficient to promote public confidence in case examiner decisions. In addition, it seems that the NMC may be planning for pairs of case examiners to sit together to decide if there is a case to answer, in effect forming a smaller version of the current Investigation Committee panel. Our understanding is that the General Medical Council (GMC) procedures require GMC case examiners to reach their own independent decision (rather than expecting the case examiners to reach a consensus view). It would be helpful if the NMC could explain whether NMC cases examiners will make decisions together or separately and the reason for adopting or diverging from this aspect of the GMC’s system.

3.7 We agree that a case should be referred to the Investigation Committee if the case examiners cannot agree whether or not there is a case to answer. In relation to this proposal we note that Rules 7 and 8 of the draft Rules provide (amongst other things) for Rules 4(1) and 5(1) to be omitted from the NMC’s current rules. Rules 4(1) and 5(1) provide that the Investigation Committee may meet in private to decide if there is a case to answer. We question the rationale for this omission, which could have the unfortunate effect of creating potentially disruptive and costly legal uncertainty about whether the Investigating Committee could still meet in private to make case to answer decisions.

3.8 Although the DH consultation paper says it proposes to give the NMC power to introduce case examiners in its fitness to practise process, we note that the relevant provision in the draft section 60 Order (Article 6) provides a broader power which would also enable the NMC to use case examiners in its process for allegations of fraudulently procured or incorrect register entries. We have no objections to this but it would be helpful if the DH clarified whether it intends to give the NMC this additional power and, if so, why the NMC is not proposing to utilise it.
4. **Reviewing no case to answer decisions**

4.1 Presently the GMC is the only regulator that has the power to review no case to answer decisions, and we support the NMC gaining this power. Indeed, for public protection and confidence reasons we have previously advised the DH to prioritise requests from the NMC and other non-medical regulators for powers to review no case to answer decisions.\(^3\) We suggest that the DH consultation paper may be mistaken in its suggestion that the General Dental Council’s Rule 10 contains such a power: as we understand it, that rule concerns reviews of decisions that there is a case to answer (as opposed to decisions that there is *no* case to answer).

4.2 A review of a no case to answer decision could only be in the public interest if the decision is materially flawed or new information has come to light which may have led to a different decision. We share the Law Commissions’ view that primary legislation should contain these restrictions on the power (rather than regulators’ rules).\(^4\) We therefore suggest the DH considers redrafting Article 26B of the draft section 60 Order so that it limits the review power to these circumstances.

4.3 We see that the drafting of Rule 7A of the NMC’s draft rules is almost identical to GMC Rule 12 except that the grounds for review are slightly different. Draft Rule 7A would require the NMC registrar to consider a review to be in the public interest. In contrast the GMC Rule 12 requires the GMC registrar to consider the review is necessary for the protection of the public; the prevention of injustice to the practitioner; or is otherwise necessary in the public interest. It would have assisted us if the consultation paper had identified and explained this difference.

4.4 The NMC’s proposed review processes seem appropriate. We particularly support the proposal to seek representations from the maker of the allegation before the no case to answer decision is reviewed and to inform them of the reviewers’ decision and the reasons for it.

4.5 However, in the absence of any explanation, we are unclear why the NMC is proposing a one year time limit for reviews. Furthermore as NMC Rule 7 already allows the NMC to reopen a closed fitness to practise allegation if within three years of that closure it receives a ‘fresh allegation’ about the registrant, it will be important for the NMC to assure itself that the drafting of its Rules are clear enough to enable it and others to distinguish between a ‘fresh allegation’ and ‘new information which may have led to a decision that is wholly or partly different from the no case to answer decision’. Otherwise there could be could be disruptive and costly disputes about whether the three year time limit in Rule 7 applies or the one year limit in the draft Rule 7A.

4.6 Suitable quality assurance arrangements will be required to ensure the review process works in the public interest and secures public confidence.

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\(^3\) Most recently in 2013.

5. **Interim orders**

5.1 We agree that the NMC should be able to review and make an interim order after it has referred an allegation to the Health Committee or to the Conduct and Competence Committee but before that Committee has begun its consideration of the case. If the NMC lacks this power then they should be given it because otherwise the public could be exposed to risks that suitable interim orders would mitigate. We understand that the governing legislation of Health and Care Professions Council (HCPC) is very similar to the NMC’s. Nevertheless the HCPC considers it can make an interim order any time after its Investigation Committee has referred an allegation for a fitness to practise hearing. The DH and NMC may like to consider the approach to this suggested in the relevant HCPC Practice Note.\(^5\)

6. **Striking-off orders in health and competence fitness to practise cases**

6.1 We agree that the NMC should have the power to make a striking-off order in a lack of competence case, provided the registrant has been the subject of a continuous substantive suspension or conditions of practise order for at least two years.

6.2 However, for well-established fairness and equality reasons, a striking off power should not be available in cases where a practitioner’s fitness to practise is impaired on the grounds of adverse physical or mental health (and no other ground). We understand that none of the other regulators make striking off orders in these circumstances and we strongly support the Law Commissions’ recommendation that none of the regulators should have the power to strike off a practitioner whose fitness to practise is impaired on the grounds of adverse health (and no other ground).\(^6\)

6.3 We therefore suggest that the DH revise this proposal so that in cases of impairment due to adverse health (and no other ground) the NMC could make an indefinite suspension order after two years of suspension or conditions. This would be consistent with other regulators’ powers in such cases. Moreover it would enable the registrant to seek a review if, for example, their health improves, as opposed to making an application for restoration which can only be done five years after being struck off.

7. **Composition of the registration appeal panel**

7.1 We consider it will improve public confidence in the NMC if its Council members could no longer sit on a registration appeal panel. We therefore support the DH and NMC proposals which will enable this change to the composition of the registration appeal panel.

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\(^6\) See footnote 4, paragraph 9.117
7.2 We also agree with the proposals to no longer require or allow a doctor to sit on the appeal panel in cases involving health issues. There is no need for the panel to include a doctor: any medical advice the panel requires is better provided by an appropriate expert witness (as we understand happens at other regulators).

7.3 We note that the NMC would need to add provisions to the draft Rules in order to implement its aspects of these proposals.

8. Requesting and disclosing information for indemnity verification purposes

8.1 We believe the NMC should be able to request and disclose information for indemnity verification purposes once it becomes a registration requirement for practising nurses and midwives to have an appropriate indemnity arrangement. However we question whether the DH needs to give the NMC a specific power to do this and whether the NMC needs to make rules about it.

8.2 If the indemnity requirement itself will not be sufficient to empower the NMC to request and disclose indemnity information we would have thought the NMC could seek and rely on consent if information needs to be shared with others for verification purposes.

8.3 If this is not the case, then we would have expected the DH to propose giving all the regulators this power through this section 60 order or more sensibly through the indemnity arrangements section 60 order recently laid before Parliament.7

9. Financial Impacts on the Professional Standards Authority

9.1 If the introduction of reviews and case examiners increases the proportion of NMC fitness to practise cases referred for a fitness to practise hearing then there will be a commensurate increase in the number of fitness to practise decisions we will need to scrutinise (for the purposes of section 29 of our own governing legislation8).

9.2 The introduction of no case to answer reviews could increase the number of complaints we receive about the NMC. The level of increase would depend on how well the review process is explained and whether it yields decisions that aggrieve anyone involved.

10. Equality impact

10.1 We anticipate that most nurses and midwives whose fitness to practise is impaired on health grounds will be a ‘disabled person’ for the purposes of equality legislation. If this is right, we expect the DH’s proposal to give the NMC a power to strike off in health cases, and the NMC’s proposal to utilise that power, to be more likely to affect (and therefore disadvantage) disabled

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8 National Health Service Reform and Health Care Professions Act 2002 (as amended)
registrants than non-disabled registrants. Registrants struck off for health reasons may experience financial losses if that striking off enables their employer to fairly dismiss them, and consequently the registrant loses valuable benefits their employment contract would have otherwise provided (for example sick pay, income protection insurance, private healthcare, early retirement, life insurance). We therefore consider that the proposal to allow striking off orders in health cases would conflict with the DH and NMC’s obligations under the public sector equality duty\(^9\), which could undermine public confidence in the NMC.

11. **Publication and processing of this response**

11.1 In accordance with our usual practices we will publish this consultation response on our website. We have no objections to the DH and NMC sharing this response with others or including its contents within their consultation reports.

12. **Further information**

12.1 We hope you find our comments helpful. Please get in touch if you would like to discuss this response further. You can contact us at:

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\(^9\) Equality Act 2010, section 149. This duty applies to Great Britain. A similar duty exists in Northern Ireland.