professional standards authority

Nursing and Midwifery Council legislation – amendments to modernise midwifery regulation and improve the effectiveness and efficiency of fitness to practise processes

Response to the Department of Health consultation

June 2016

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 insufficient to protect the public. More information about our work and the approach we take is available at www.professionalstandards.org.uk.

2. General comments

2.1 We welcome the opportunity to comment on the Department of Health (DH) proposals to amend the NMC's governing legislation.

2.2 Across the regulators we oversee, an increasing number of cases are being disposed of consensually at the end of the investigation stage. We support the use of consensual disposals, but urge the Government to consider how, under the current adversarial fitness to practise framework, our section 29 scrutiny could be extended to these methods of disposal to ensure that they are sufficient to protect the public.

2.3 We were disappointed to see that the Order did not include amendments to prevent registrants lapsing off the NMC register immediately for non-payment where no sanction is imposed (or it is revoked), and where the Authority has concerns about the sufficiency of the decision (effectively negating our appeal power).

3. Removal of statutory midwifery supervision

Question 1: Do you agree that this additional tier of statutory supervision for midwives should be removed?

3.1 Yes.

3.2 We support the proposal to remove midwifery supervision from the NMC's legislation and take it out of the remit of professional regulation altogether. We agree that incorporating the supervision of midwives into the regulatory arrangements creates conflicts of interests between local supervision and independent regulatory action. We also note the King's Fund finding that there is no evidence these arrangements enhance public protection.

4. The midwifery committee

Question 2: Do you agree that the current requirement that the NMC's legislation for a Statutory Midwifery Committee should be removed?

4.1 Yes.

4.2 Professional representation should form no part of the governance structure of a professional regulator. It erodes the separation between public and professional interests that was identified as being essential to the proper functioning of regulation in the report of the Shipman Inquiry,[1] and given full government endorsement in the White Paper *Trust, Assurance and Safety*.[2]

5. Undertakings, warnings and advice

Question 3: Do you agree that when the Investigating Committee or the case examiners determine that there is no case to answer but there are some concerns as to past practice or conduct, the Investigating Committee and case examiners should have the power to issue a warning or advice to a nurse or midwife?

5.1 Yes.

We support the proposal to give Investigating Committees and case examiners powers to issue warnings where there is no case to answer. We assume that this disposal would not constitute an admission of impairment, but it would have been helpful if the consultation document had explained this clearly, along with whether it would constitute an admission of the facts. Both these points would need to be made clear for the public, professionals, and employers. In addition, it is not clear whether registrants would be required to make any admissions and be given an opportunity make submissions or to respond to a proposal to issue a warning. This is particularly important as warnings would be determined without a hearing and published.

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[1] The Shipman Inquiry (2004). Fifth Report – Safeguarding Patients. Lessons from the past, proposals for the future. Cm 6394. The Stationery Office

[2] Department of Health (2007). *Trust, Assurance and Safety: The regulation of healthcare professionals in the 21st Century.*

5.2 As for advice, it is unclear under what circumstances this disposal would be used, and how they would differ from the circumstances in which a warning would be issued. It would have been helpful if the consultation document had explained this with reference to the prospect of finding impairment so these two disposals could be compared. We also would have liked to know whether advice would be disclosed to current or prospective employers.

5.3 For both warnings and advice, it would have been helpful to know whether and how they would be taken into account by Investigating Committees and case examiners when considering new cases and for how long; how long they would be held on file; and whether the decision to close a case with either disposal could be revisited.

Question 4: Do you agree that, where the Investigating Committee or the case examiners determine that there is a case to answer in respect of an allegation, the Investigating Committee and the case examiners should have the power to agree undertakings with a nurse or midwife?

5.4 In part.

5.5 We support the use of undertakings by case examiners and Investigating Committees where there is no case to answer, and where appropriate checks and balances are in place to ensure that decisions are fair, consistent, and fulfil the threefold purpose of fitness to practise, namely: protecting the public, maintaining public confidence, and upholding professional standards. An important part of these assurance mechanisms is our section 29 scrutiny, which enables us to appeal decisions to the Courts if we judge them insufficient to protect the public. These powers do not however extend to cases disposed of by case examiners or Investigating Committees.

In principle

5.6 We are in favour of regulators using consensual disposals as a means of placing greater emphasis on the rehabilitation of registrants, and of reducing their expenditure on the fitness to practise function. However in our view undertakings should be offered only in cases where there is no case to answer[3]. All cases where there *is* a case to answer should be referred either to a hearing, or for consensual resolution signed off by a panel. By definition, these are cases where the misconduct is sufficiently serious that there is a realistic prospect of a panel finding impairment. It is therefore important that an independent panel has final power of decision over the outcome, and that the decision is taken in a public forum (though not necessarily in public) for reasons of transparency and public confidence.

5.7 In addition, the undertakings model proposed by the NMC takes those cases out of the jurisdiction of our section 29 powers, because under our legislation we can only review and appeal cases that have been to a final hearing.

5.8 We have also argued on a number of occasions that cases that would be likely to result in a suspension are too serious to be considered for consensual disposal. We would like to reiterate this point here, given that only striking-off

[3] The phrase ‘case to answer’ is another way of referring to the ‘real prospect test’.

cases will be exempt from consideration at the point in the process where undertakings may be offered. The decision not to extend this exemption to suspension cases seems at odds with the statement on page 22 that undertakings provide a '*more proportionate and targeted way of dealing with less serious cases […] when the decision of the Practice Committee panel would be likely to result in a substantially similar outcome to undertakings'*. The only panel outcome that is similar to undertakings is the imposition of conditions, which do not prevent a registrant from practising (suspension). There is also a risk that the distinction between undertakings and conditions would not be well understood by the public or employers.

5.9 As with advice and warnings, the consultation document does not provide sufficient information about the circumstances in which undertakings might be offered. In relation to factors that would influence a decision about whether to offer undertakings, we were concerned to note the absence of any reference to the maintenance of public confidence or to the upholding of professional standards, which, together with protecting the health, safety and well-being of the public are equally relevant considerations when deciding whether a fitness to practise outcome is sufficient for the protection of the public.

5.10 From the statement on page 21 that *'the registrant will be acknowledging [the deficiencies in their practice]'*, it appears that registrants would be required to admit impairment, and presumably also the facts of the case, in order for undertakings to be offered. We would certainly welcome this (although we would prefer these disposals to be made in a public forum), but it would have been helpful if these two points had been made explicit in the document.

In practice

5.11 In the last four Performance Reviews, the NMC has failed to meet the Standard of Good Regulation that relates to the quality of fitness to practise decision-making.[4] Before we could support the introduction of these powers for NMC case examiners, we would want to have greater experience of and confidence in the case examiners' decision-making. We would want to have confidence that the NMC has a robust process in place to scrutinise and quality-assure its case examiners' decisions. We would also want to be assured about its process for monitoring compliance with undertakings and taking appropriate action in the event of any breach, and about quality assurance arrangements around that process.

6. Single fitness to practise committee

Question 5: Do you agree that the Conduct and Competence Committee and Health Committee should be replaced by a single Fitness to Practise

[4] Fitness to Practise Standard Eight: All fitness to practice decisions made at the initial and final stages of the process are well reasoned, consistent, protect the public and maintain confidence in the profession.

Committee which will deal with allegations of impairment of fitness to practise on all grounds?

6.1 Yes.

6.2 We have fed back to the NMC in the past about the difficulties caused by their current framework, which means that they are unable to deal with FtP issues holistically (as the GMC can), and which has on occasion led in our view to cases being handled by the wrong type of panel and/or important issues being 'lost'. We therefore support this amendment, provided that the appropriate measures are in place to allow for hearings to be heard in private and medical evidence sought where appropriate, and for specialist medical advisors to be available to assist panels.

Question 6: Do you agree that the requirement for the NMC to specify in rules the size of its Practice Committees is unnecessary and should be removed?

6.3 Yes, although it is a little unclear from this section whether the proposal relates to the size of the overall pool of panellists, or to the size of the panels adjudicating on individual cases. We assume that is the former, as the latter would be a departure from the established practice across all the regulators we oversee, increase costs, and make it harder for panels to reach a decision. On the other hand, we would have no objections to the NMC having the power to expand its pool of panellists, as this would no doubt make it easier to schedule hearings, which over time could help the NMC work through its caseload more quickly.

7. Location of hearings

Question 7: Do you agree that the statutory requirement regarding the location of preliminary meetings and hearings of Practice Committees and hearings of appeals against the Registrar's decisions should be removed providing flexibility to hold these hearings in the most convenient location for all parties?

7.1 Yes.

7.2 We support this change (most other regulators have this), and agree that the discretion to hold hearings elsewhere should be exercised fairly. Guidance will be needed to ensure consistency and fairness of decision making in this area.

8. Interim order reviews

Question 8: Do you agree that all interim order reviews, including those where the court has granted an extension, should be held at six month intervals?

8.1 Yes in part.

8.2 In principle, we support extending the time limit for mandatory second and subsequent reviews of interim orders, provided this does not result in longer

investigations – currently the requirement for regular interim order reviews does tend to encourage faster investigations.

8.3 However, we do not support the proposed extension of the time limit for first review following a court's grant of an extension application. By definition, if the NMC has had to seek a court extension of the interim order, the investigation is already taking longer than might be acceptable and the court is likely to have given indications as to the steps it expects the NMC to take shortly after the extension is granted – in those circumstances we consider it important that the subsequent review takes place within a short timeframe.

9. Interim order appeals

Question 9: Do you agree that the court should have additional powers to replace an interim suspension order with an interim conditions of practice order (or vice versa)?

9.1 Yes.

9.2 We support this proposal on the grounds that it would enable faster public protection through the interim order procedure. It is not clear to us that the change would be necessary: our interpretation of the NMC's rules[5] is that the existence of one referral would not prevent another (including an interim order referral) on an additional matter such as a subsequent conviction.

10. Substantive order reviews

Question 10: Do you agree that it is not necessary for the Practice Committee panel to review all conditions of practice or suspension orders, but instead should have the discretion to direct whether an order needs to be reviewed before the expiry of that order?

10.1 In part.

10.2 We have reservations about this proposal. The description of the problem appears to overlook the importance of registrants developing insight into non-clinical misconduct and the fact that the further development of insight can only be tested at a review hearing. We are conscious that where panels have discretion about whether or not to require a review hearing, that discretion is not always exercised properly. Several of our successful section 29 appeals[6] have raised concerns about panels' failures to impose a requirement for a review hearing to be held (where the panels had the option whether or not to do so)

[5] Article 31 of the Order.

[6] Examples of such cases to date: CHRP v (1) GDC (2) Fleischmann [2005] EWHC 87 (Admin), CHRE v (1) GMC (2) Basiouny [2005] EWHC 68 (Admin), CHRE v (1) GMC (2) Shar CO/2540/2005, CHRE v (1) GDC (2) MacDonald CO/3725/2005, CHRE v (1) GDC (2) Marshall [2006] EWHC 1870 (Admin), CHRE v (1) GMC (2) Rajapakse CO/6051/2005, CHRE v (1) GDC (2) Wahlund [2012] EWHC 849 (Admin), Professional Standards Authority v (1) GOC (2) Chowdhury CO/17101/2013, Professional Standards Authority v (1) GCC (2) Briggs [2014] 2190 (Admin), Professional Standards Authority v (1) GDC (2) Llewellyn CO/3926/2013, Professional Standards Authority v (1) GMC (2) Anukwe CO/17608/2013.

and we have also argued successfully against non-reviewable sanctions (such as cautions) being imposed in serious cases where they are not sufficient to protect the public. There have also been cases where, at the subsequent review of a suspension/conditions of practice order, the registrant in question has been struck off, even though the original sanction was imposed on the basis of wider public interest concerns. It is an error to assume that review hearings serve no useful purpose if a sanction has been imposed in the wider public interest rather than for the purpose of public protection.

10.3 That being the case, we strongly support the default position that a review hearing would be required, unless clear reasons were given to justify a decision to the contrary. We would wish to see the NMC's detailed guidance to panels about when it would be appropriate not to impose a review hearing, and how to provide sufficient reasons.

10.4 The Department should be aware that this change could result in a greater number of appeals by the Authority, as where a sanction is imposed which places a restriction on a registrant's practice, failure to order a review hearing without good reason is likely to meet the threshold for a section 29 referral.

11. Notice requirements

Question 11: Do you agree that the requirement to notify specified persons, including governments of the four countries, when an allegation is referred to a Practice Committee panel for a hearing should be removed?

11.1 Yes.

11.2 We have no objections to this change, although we would urge the Department to seek clarification about the original intent behind this requirement, before it is removed. It is our understanding that a number of other regulators are also subject to this requirement.

11.3 Perhaps some consideration could be given to whether there should instead be requirements to notify employers at the point when an allegation is under investigation/has been referred for a hearing (if those requirements are not already in place).

12. Costs and benefits analysis

Question 12: Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of an increase, a decrease, stay the same, unsure.

12.1 Unsure.

12.2 The introduction of undertakings agreed by case examiners would result in the removal of cases from our section 29 appeal jurisdiction, so could result in a decrease in costs and activity relating to the review of NMC fitness to practise hearing outcomes. However, the proposal to make reviews of conditions and suspensions optional could, as we explain above, result in an increase in the

number of cases we appeal. The Department has not published the estimated number of cases that would be affected by each of these two proposals. It is therefore not possible for us to estimate whether on balance the changes would increase or decrease costs and workload for the Authority.

13. Equality Duty

Q13: Do you think that any of the proposals would help achieve any of the following aims?

- Eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010?
- Advancing equality of opportunity between persons who share a relevant protected characteristic and person who do not share it?
- Fostering good relations between person who share a relevant protected characteristic and person who do not share it?

If yes, could the proposals be changed so that they are more effective in doing so?

If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

13.1 We do not have a view.

14. The draft Order

Q14: Do you have any comments on the draft Order?

14.1 No.

15. Further information

15.1 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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