

Response to consultation on the Regulation of Nursing Associates in England

December 2017

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 registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk
- 1.2 As part of our work we:
- Oversee the nine health and care professional regulators and report annually to Parliament on their performance
 - Set standards for and accredit registers of practitioners working in health and care occupations not regulated by law
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice.

2. General comments

- 2.1 We welcome the opportunity to respond to this consultation on the regulation of Nursing Associates in England. Whilst this consultation is on 'how' not 'whether' Nursing Associates should be regulated, we note that this is the first time the Department of Health has formally consulted on the regulation of nursing associates. We also note the Government's statement that it remains committed to the proportionate regulation of health and care professionals. We have therefore included a some additional comments which we hope will be useful.
- 2.2 As we have previously highlighted, we believe that decisions on regulation of professionals should be taken following an independent assessment of the risk of harm arising from practice. This is because statutory regulation, whilst an important tool in protecting the public can be inflexible and potentially restrictive or even counterproductive if used inappropriately. We were previously commissioned by Government to assess the risk of practice from the emerging role of nursing associate¹, however we were unable to complete our

¹ Professional Standards Authority 2016, *Interim report: Oversight of Nursing Associates*. [Online] Available at: <https://www.professionalstandards.org.uk/latest-news/latest->

assessment as the role was insufficiently developed to be able to develop an accurate picture of the risk of harm associated with practice. There was also a lack of clarity on whether nursing associates would be working in contexts requiring autonomous decision making or whether they would be working under the supervision of nurses. Generally, statutory regulation suggests that an individual needs to be individually accountable for their practice rather than supervised by another professional. We recommended assured registration rather than regulation as an interim measure, to allow additional evidence to be gathered about risk of harm once the role was more fully defined.

- 2.3 As the decision was subsequently made by the Secretary of State for Health to proceed with statutory regulation of the role we assume that the role is intended to be an autonomous role. However, we would urge ongoing monitoring of the impact of statutory regulation on this new occupation and as far as possible to avoid it placing an unnecessary burden on the flexible and efficient utilisation of the role as it develops.

Regulation of nursing associates in England

- 2.4 We are broadly comfortable with the draft provisions in the consultation for the regulation of nursing associates. Our main concern is that there should be consistency of approach to regulation of the different groups on the Nursing and Midwifery Council (NMC) register, unless there are justifiable reasons for departing from consistency. For example, we would expect nursing associates to be held to the same standards of conduct as nurses, but the scopes of practice will be different. The proposed provisions seem intended to promote consistency as far as possible, and we welcome this approach under the circumstances. We would nevertheless recommend that the NMC plan a review of the occupational risks associated with nursing associates once they are an established group, to ensure that the approach taken by the NMC is proportionate and adapted to the level and type of risks presented by this new profession. This would be particularly helpful in relation to the NMC's approach to revalidation, which we have long argued should be tailored and responsive to the risks of a profession.
- 2.5 In relation to costs and benefits identified in the consultation we note that the Department has never formally carried out a full impact assessment in relation to whether or not to regulate the role and covering any unintended consequences of statutory regulation. We therefore suggest that a broader assessment of the impact of statutory regulation may be required.
- 2.6 In reference to the analysis included, we note that some or all the benefits may be achieved by other forms of assurance, for example voluntary registration. Ongoing costs of regulating nursing associates are likely to be dependent on the level of registration fee that is ultimately charged to nursing associate registrants. In addition, the level of fees may impact on the projections for growth for the profession and statutory regulation may increase wages so there

is the potential for employers to seek to avoid increased wage costs by employing unregulated staff instead.

- 2.7 In relation to wider public protection risks associated with a role being regulated in fewer than four countries, we highlight the potential for a nursing associate who has been struck off or is subject to a sanction in England continuing to practise elsewhere in the UK. It is impossible to establish the likelihood of this risk materialising; however, it is a possibility that cannot be discounted. Cooperation between regulators and good communication with the public and employers will be very important to ensure that the relevant bodies have access to the information they may need about whether an individual is fit to practise. We would also recommend a four-country approach to communication with employers, the public and professionals, to raise awareness of regulatory arrangements in other countries.
- 2.8 In order to distinguish between an individual practising as a registered nursing associate in England and in an unregistered nursing associate role elsewhere in the UK, we would suggest that the title protected under this order should be 'registered nursing associate'. This would be consistent with nurses where the protected title is 'registered nurse'.
- 2.9 We also recommend that the Department should ensure they have fully considered any unintended consequences that may arise from regulating a role in just one part of the UK, and the potential impact this may have on the "market" for the provision of health care across the UK as a whole. This may include the risk that individuals from Scotland, Wales and Northern Ireland will face additional barriers to entry in that market, when seeking to practise as a nursing associate in England. Other issues may include inconsistencies in salary levels and expectations arising out of the perceived status of the new role in comparison to unregulated professionals performing similar roles outside England and extra burdens and increased costs for employers and health care commissioners seeking to employ those registered in England. It will be important to be aware of any of these possibilities and the potential interaction of the regulation of nursing associates with existing legislation, and with human rights and competition law.

NMC registrants lapsing before we can lodge an appeal

- 2.10 We welcome the fact that the Department has taken the opportunity to seek removal of the NMC's screening provisions which have never been used and may be confusing to the public.
- 2.11 However, we are disappointed that Government has not taken this legislative opportunity to address a loophole in the NMC's legislation which allows registration to lapse if a registrant has not paid the necessary registration fees. This can cause significant problems if the registration in question is due to lapse before the Authority is able to lodge an appeal under our Section 29 powers. If a registrant lapses before an appeal can be taken forward then they could be permitted to re-join the register at a later date.
- 2.12 This is an issue that we have raised several times in recent years including to the Secretary of State who recognised the challenges presented by this issue

and stated in his response that this issue would be reviewed as part of the Law Commissions work on reform of professional regulation. The Law Commissions included a proposal in their draft bill, however the bill wasn't taken forward within the legislative session.

- 2.13 In our 2015/16 Annual Report to Parliament, we highlighted that on several occasions over the past four years we have been forced to seek an injunction from the High Court to prevent the NMC from removing individual registrants from its register before the High Court could address our referral of the relevant fitness to practise panels' decisions. Such action is costly and time-consuming and we are disappointed that the proposed regulations do not take action to close this legislative loophole.

3. Questions

- 3.1 In addition to our general comments above, please see below answers the questions in the consultation document.

Question 1: Do you agree that nursing associates should be identified on a separate part of the NMC's register? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

- 3.2 Yes.

Question 2: Do you agree that nursing associates (in England) should be subject to the same registration requirements as nurses and midwives? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

- 3.3 Yes, see our general comments. We would expect the NMC to hold all its registrants (nurses, midwives, and nursing associates in England) to the same standards of conduct and therefore it will be important to ensure consistency across registration requirements unless there are justifiable reasons for departing from consistency.

Question 3: Do you agree with the approach taken to allow the NMC to recognise comparable training undertaken outside England, including applicants gaining qualifications in the EEA, overseas and Scotland, Wales and Northern Ireland, for the purposes of registration as a nursing associate in England?

- 3.4 Yes.

Question 4: Do you agree that these transitional arrangements are fair and would allow the NMC to ensure that applicants with a nursing associate qualification from an HEE course or from an Institute for Apprenticeships approved English apprenticeship meet the required standard for entry on the nursing associate part of the register? If not, please set out why you

disagree, any alternative suggestions and any evidence to support your views.

3.5 Yes.

Question 5: Do you agree that the NMC's Registrar should not have the power to annotate a nursing associate's entry in the register to enable them to prescribe in an emergency? If you do not agree, please set out your reasons why, any alternative suggestions and any evidence to support your views.

3.6 Our assumption would be that nursing associates will be practising as autonomous professionals and should be able to carry out further training to expand their skills set as appropriate, however we do not have a specific view on this issue.

Question 6: Do you agree with the proposed approach for education and training for nursing associates including the approval of courses and setting post-registration training requirements? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

3.7 Yes.

Question 7: Do you agree that the NMC should be permitted to select either a nurse or nursing associate as a visitor to inspect nursing associate education and training programmes? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

3.8 Yes.

Question 8: Do you agree with the approach to fitness to practise with regards to nursing associates in England? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

3.9 Yes.

Question 9: Do you agree with the proposed approach for appeals against registration and Fitness to Practise Committee decisions for nursing associates in England? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

3.10 Yes. However, it may be useful for Government and the NMC to clearly communicate that this will mean nursing associates living in Scotland and practising in England, or practising in Scotland but in another role, for example health care assistant (HCA), would have their appeals determined by the English High Court whilst the cases of Registered Nurses living in Scotland would be determined by the Court of Session. This would also mean that cases involving nursing associates living or working in Scotland should be heard by NMC Fitness to Practise Panels sitting in England only, even though potentially,

the misconduct might have been committed in Scotland or a conviction which gave rise to the fitness to practise proceedings, was obtained in Scotland.

- 3.11 The same situation will apply to Registration Appeals as an “English” NMC Panel and the English High Court may be determining issues arising out of Scottish qualifications (at least during the transitional period until April 2019).
- 3.12 This means there is the potential for professionals working together to be subject to different regulatory processes and even outcomes. For example, Scottish HCAs may become registered nursing associates on the English Register and once registered, they are bound by their code of conduct, wherever they are practising, even if they return to practise as a HCA in Scotland. Any misconduct as a HCA in Scotland would be actionable by the NMC in England, because they are on the English Register and bound by the NMC Code.
- 3.13 A nurse working in a care home in Scotland would be dealt with by an NMC panel sitting in Scotland and would have a right to appeal to the Court of Session. However, a HCA also working there who was also registered as a nursing associate in England would still be bound by their code of conduct but would be dealt with by an NMC Panel sitting in England and would have the right of appeal to the High Court. Two individuals involved in the same incident may therefore be subject to different sanctions as in our experience Scottish Courts appear to have a different view on the seriousness of misconduct.

Question 10: Do you agree with the proposed approach for the selection of registration appeal panel members to hear nursing associates' registration appeals? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views.

- 3.14 Yes.

Offences – Approach

The regulation of nursing associates will apply in England only. It is therefore proposed that the current offences under article 44(1) to 44(3) of the Nursing and Midwifery Order 2001 should apply with regards to the nursing associate profession but the application of these should be restricted to England. This would mean that a person would be committing an offence, in England, if with intent to deceive they:

- falsely represent themselves to be on the nursing associate part of the register***
- use the nursing associate title when not entitled to or falsely represent themselves to possess nursing associate qualifications***

It would also be an offence to:

- permit or cause another person to make a representation about themselves in connection with being registered in the nursing associate part of the register, with the intent that any other person shall be deceived***

- *make a representation of another person, in connection with being registered in the nursing associate part of the register, which is false to their own knowledge with intent to deceive*
- *fraudulently procure, or try to procure, the making, amendment, removal or restoration of an entry on to the register in connection with that of a nursing associate*

Offences - England Only Regulation

It is proposed that the regulation of nursing associates would extend to England only, therefore, the offences set out above, will only be offences if they are committed in England. Under this legislation an offence would not have been committed if one, or more, of these actions were committed in Scotland, Wales or Northern Ireland. However, such individuals may still be liable for prosecution under existing offences such as fraud (in Scotland) or fraud by false representation (in Wales or Northern Ireland).

It is, however, proposed that the offence at Article 44 (4) would remain a UK wide offence. This would mean that a person residing in any part of the UK would be guilty of committing an offence if, without reasonable excuse, they failed to comply with a requirement imposed by the NMC's Council or a Practice Committee to produce documents, give evidence or attend a fitness to practise hearing, even if it is an nursing associate who is the subject of the proceedings. This would ensure that the NMC could compel the disclosure of information by relevant witnesses during fitness to practise proceedings regardless of the country in which the witness lives.

Question 11: Do you agree with the approach to offences regarding regulation of nursing associate's in England? Do you agree with the proposal that, where the matter concerns the use of the nursing associate title, nursing associate qualifications or an entry in the nursing associate part of the register, the offences in article 44(1) to (3) of the Nursing and Midwifery Order (described below) will be offences only if committed in England? If not, please set out why you disagree, any alternative suggestions and any evidence to support your views

- 3.15 Yes, we agree that that the current offences under article 44(1) to 44(3) of the Nursing and Midwifery Order 2001 should apply with regards to the nursing associate profession in England as it is important that the NMC is able to carry out its fitness to practise functions effectively and protect the integrity of the nursing associate part of the register.
- 3.16 As the role will only be regulated in England it seems logical that the title itself cannot be protected across the rest of UK, and this would therefore entail the risk that the protected title could be used as a simple job title in any of the unregulated jurisdictions. In order to distinguish between an individual practising as a registered nursing associate in England and in an unregistered nursing associate role elsewhere in the UK, we would suggest that the title protected

under this order should be 'registered nursing associate'. This would be consistent with nurses where the protected title is 'registered nurse' and would make it easier for regulators and employers to identify whether an individual is seeking to present him/herself as a nursing associate registered with the NMC in England.

- 3.17 There is also the risk that an individual seeking employment in Scotland, Wales or Northern Ireland could present themselves as being registered as a nursing associate in England. As highlighted above there may be the potential to seek redress under existing mechanisms e.g. offences relating to fraud and misrepresentation. However, both scenarios above highlight the importance of robust four country communication on regulatory arrangements and regular communications between employers and regulators across the regulated and unregulated area to ensure that individuals are not able to mislead regarding their training, qualifications or registration status.

Question 12: Do you have any comments on these proposed consequential amendments? The closure of sub-part 2 of the register is discussed further at para 3.4

- 3.18 No.

Question 13: Do you agree with the removal of the screener provisions at articles 23 and 24 of the Nursing and Midwifery Order? If not, please set out why you disagree, any alternative suggestions and any evidence to support your view.

- 3.19 Yes. We welcome the fact that the Department has taken the opportunity to seek removal of the NMC's screening provisions which have never been used and may be confusing to the public.

Question 14: Do you agree with the closure of sub-part 2 of the nurse part of the register to all new applicants? If not, please set out why you disagree, any alternative suggestions and evidence to support your view.

- 3.20 Yes.

Question 15: Do you have any further comments on the draft Order?

- 3.21 As highlighted in our general comments, we are disappointed that Government has not taken this legislative opportunity to address a loophole in the NMC's legislation which allows registration to lapse if a registrant has not paid the necessary registration fees. This can cause significant problems if the registration in question is due to lapse before the Authority is able to lodge an appeal under our Section 29 powers. A registrant who lapses before facing an appeal by the Authority may be allowed to re-join the register at a later date which could pose a public protection risk.
- 3.22 The NMC's legislation needs to be amended to clarify that the NMC's Registrar may not allow a registrant to lapse from the register until the expiry of the Authority's referral period under section 29 or resolution of any appeal.

- 3.23 This is an issue that we have raised several times in recent years. In our 2015/16 Annual Report to Parliament, we highlighted that on several occasions over the past four years we have been forced to seek an injunction from the High Court to prevent the NMC from removing individual registrants from its register before the High Court could address our referral of the relevant fitness to practise panels' decisions. Such action is costly and time-consuming and we are disappointed that the proposed regulations do not take action to close this legislative loophole.

Question 16: Do you agree with the costs and benefits identified in the table above? If not, please set out why you disagree, any alternative impacts you consider to be relevant and any evidence to support your views. We are keen to identify evidence on the likely benefits of statutory regulation and whether regulation will enable nursing associates to carry out any additional activities (benefit B1 above).

- 3.24 As noted in our general comments we would generally expect to see a broader impact assessment of the effect of statutory regulation covering any unintended consequences, as this is the first time that Government has consulted on the regulation of this role.
- 3.25 We note that some of the costs may be dependent on the fees ultimately charged to nursing associates for registration which are also currently being consulted upon. In addition, one of the effects of statutory regulation may be to increase the wages of the professional group in question. This may be more costly for employers who as a result may seek to employ more unregulated staff when they face pressure on resources.
- 3.26 We note that not all of the benefits outlined are exclusive to statutory regulation and similar benefits may be gained from assured registration or a formalised system of employer oversight.

Question 17: Our initial assessment assumes that nursing associate training numbers will increase to 5,000 per year in 2018 and 7,500 per year in 2020 and beyond, in line with the Secretary of State for Health's commitment to expand training numbers. We have assumed a 10% annual attrition rate during training and 4% per year attrition rate from fully qualified nursing associates leaving the NMC register. Do you agree with these these growth assumptions? If not, please set out why you disagree, any alternative forecasts and any evidence to support your views.

- 3.27 We cannot comment directly on these growth assumptions. However, as noted above, one of the effects of statutory regulation may be to increase the wages of the professional group in question. This may be more costly for employers who as a result may seek to employ more unregulated staff when they face pressure on resources.
- 3.28 In addition, the level of the registration fee for nursing associates may have an impact on these assumptions as this may influence the number seeking to qualify as nursing associates.

Question 18: Do you think that any of the proposals for how we are intending nursing associates are regulated will 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 persons who do not share it
- fostering good relations between persons who share a relevant protected characteristic and persons who do not share it

If yes, do you believe that the proposals could 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?

- 3.29 In the absence of a formal equalities assessment it is difficult to provide comment, but we would highlight that the Department will need to consider any unintended consequences in this area arising from the fact that the role will be regulated only in England and not in other parts of the UK.

4. Further information

- 4.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

Professional Standards Authority for Health and Social Care
157-197 Buckingham Palace Road
London SW1W 9SP

Email: daisy.blench@professionalstandards.org.uk

Website: www.professionalstandards.org.uk

Telephone: 020 7389 8013