

Response to the Social Work England consultations on rules and standards

May 2019

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care (the Authority) 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. 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 nine health and care professional regulators and report annually to Parliament on their performance. This includes the Health and Care Professions Council, which currently regulates social workers in England and we will also have oversight of Social Work England when it takes over this function
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice
 - Accredite voluntary health and care occupational registers to improve consumer protection and raise standards.
- 1.3 We welcome the opportunity to provide comments on Social Work England's (SWE) consultations covering the draft rules for registration, education and training and fitness to practise as well as the draft professional and qualifying education and training standards. We have combined all of our comments into a single response document for simplicity but have provided comments on each document in turn.

Key points

- 1.4 We recognise the intention for SWE to be a modern and innovative regulator with a range of new powers, and that inevitably this will require a different approach from the other regulators we oversee in certain areas. However, we are of the view that where possible, SWE should seek to remain aligned with established conventions and practices which seek to promote transparency and fairness, and to maintain public confidence in them as a regulator.
- 1.5 Whilst social work as a profession has some unique aspects, social workers frequently work closely with other professionals as part of multi-disciplinary teams and it is important to reflect this in requirements for registrants. This will

help to ensure clarity for the public and employers on what to expect and a consistent approach to patient safety.

- 1.6 We note that whilst SWE has sought to align as far as possible with the approach taken by the devolved social care regulators which is positive in supporting movement of the workforce, there are some specific issues which we would like to have seen referenced in the SWE draft Standards. This includes the importance of multi-disciplinary working which is referenced in the education and training standards but not the professional standards and the duty of candour which is implied but not explicitly referenced. We know that there is ongoing confusion over the meaning and application of the duty of candour amongst professionals and the public and a consistent approach amongst regulators can help to address this.
- 1.7 We have some concerns about the potential public protection risks arising from the fitness to practise rules as drafted. One of our key concerns relates to the proposals for voluntary removal of registrants. These do not appear to have any basis in the legislation and in our view lack transparency and do not provide clarity on the kinds of cases which may be dealt with in this way, the status of such decisions and the circumstances in which someone might be able to come back onto the register in the future after potentially serious behaviour.
- 1.8 In addition, we were surprised with the lack of detail in the fitness to practise (FtP) rules with some significant elements covered instead in the guidance or not referenced at all. For example, there is a lack of clarity on the process for triage of concerns, who will make substantive decisions and SWE officers are also given significant flexibility in how to run hearings with the potential for inconsistent approaches which may raise issues of fairness and justice. We would welcome further clarity on the status of the guidance that sits alongside the rules and on whether SWE intends to consult on further guidance, for example indicative sanctions guidance. A clear and transparent approach in this area is essential to ensure public safety and maintain confidence in SWE as a regulator.
- 1.9 Finally, we note the need for clarity between the powers for SWE to make use of registration conditions and the use of conditions of practice imposed as part of the FtP process. We suggest that SWE should review whether conditional registration is appropriate for registrants who have ongoing FtP or completed disciplinary proceedings with another regulator and should ensure a clear process and guidance for staff to assist them with ensuring that is parity of outcomes between registrants who are subject to the conditional registration process and the FtP process.

2. Comments on Fitness to Practise rules

Overview

- 2.1 We welcome the opportunity to comment on these rules, which constitute the third tier of the legislation for Social Work England under the *Children and Social Work Act 2017*¹, and *The Social Workers Regulations 2018*.² Our responses to previous consultations are available on our website.³ For this consultation, we have commented on the consultation document and draft fitness to practise rules, as well as on the guidance document published alongside. Some of our comments also refer to the regulations, as the rules must be read and understood alongside the regulations that underpin them.
- 2.2 Overall, we found a number of areas of concern that in our view may affect SWE's ability to protect the public effectively and consistently. SWE would have a degree of flexibility to determine on a case-by-case basis who makes key fitness to practise decisions and how these decisions are made for which there is no precedent amongst the other regulators we oversee. The new regulator will also be implementing an entirely new model for consensual disposals. This reinforces the importance of our oversight of SWE through performance review, and the need for us to have powers to review decisions made by the regulator, adjudicators as well as case examiners (as defined in the draft Rules).
- 2.3 We would have welcomed greater clarity on the status of the guidance that was published alongside the consultation document. Is it intended solely to clarify and explain the rules for consultation respondents, or does it form the basis of guidance for staff and decision-makers? Linked to that, does SWE intend to consult on further guidance, such as indicative sanctions guidance? As we have highlighted in previous consultation responses, as well as in our report *Right-touch reform*, our support for consensual disposals is contingent in part on decisions being underpinned by a fair and transparent process that sufficiently protects the public and clear published guidance.

Main concerns

Powers of case examiners

- 2.4 We would have welcomed greater clarity and transparency about which sanctions and outcomes will be available to case examiners, as we find both the regulations and rules unclear in this respect. The consultation document mentions that case examiners can do 'almost everything that adjudicators can do [...], except remove someone from the register'. However, the previous consultation, on *The Social Workers Regulations 2018*, explicitly referred to their having the 'full suite of sanctions [...]' including suspension and removal

¹ Children and Social Work Act 2017. Available at: <https://services.parliament.uk/bills/2016-17/childrenandsocialwork.html>

² The Social Worker Regulations 2018. Available at: www.legislation.gov.uk/ukdsi/2018/9780111170090/contents

³ Professional Standards Authority, *Comments on the draft Social Worker Regulations*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/consultation-response/others-consultations/2018/180323-swe-regs-consultation-final.pdf?sfvrsn=9acc7220_2

from the register⁴, and the Government's summary of the consultation responses⁵ made no mention of changing this policy. Paragraph 13(2) of Schedule 2 of *The Social Workers Regulations* appears to be the clause that limits case examiners' powers in this way, however, we find the drafting of these clauses rather opaque, and would have welcomed some information in the current consultation on how and why this restriction was introduced. We are also concerned that the drafting of paragraph 13(2)(b) may have unintentionally restricted the power to impose a removal order following a continuous period of suspension or conditions by adjudicators (both the original and review decision). It is also unclear whether a period of suspension for one year and conditions for one year would satisfy this paragraph.

- 2.5 We would have welcomed some consideration of the possible implications of this limitation of case examiner powers. In particular, there may be a risk of case examiners opting to dispose of serious cases by means of suspensions because that is the power that is available to them, when a removal, and therefore a referral to adjudicators would be the appropriate sanction. A role for the Authority in reviewing such cases with a power which effectively ensures public protection would be one way to address this issue when it arose, but we would also expect SWE to mitigate the risk through clear guidance, training, and performance management of case examiners.
- 2.6 In the absence of powers to remove social workers, the regulations have been interpreted as allowing case examiners to dispose of a case with voluntary removal and a finding of impairment, but no sanction, provided the social worker commits to leaving the profession permanently. We would have welcomed more information on this proposal, and in particular details about the proposed publication policy for these outcomes. We did not identify any basis for voluntary removal as set out in the Regulations and therefore we question whether it was originally intended to allow voluntary removal by case examiners as an alternative to a consensual sanction or adjudication. We foresee a number of challenges for this method of disposing of potentially serious cases.
- 2.7 Firstly, there is no restriction on the severity of the cases that may be disposed of in this way, aside from where there is a public interest in holding a hearing – which is a different test altogether and would have merited further explanation in the consultation documents. In order to ensure a basic degree of public protection, these outcomes would therefore need to be subject to the same publication policy as removal orders, for which SWE is proposing five years, in line with the Authority's position⁶. While the registrant may have undertaken to leave the profession, they may seek work in other roles, such as care assistant

⁴ See paragraph 55 of the Government consultation on the regulations for Social Work England, available at <https://consult.education.gov.uk/social-work-england-implementation-team/social-work-england-consultation-on-secondary-legi/>.

⁵ Social Work England - Secondary Legislative Framework Government consultation response, June 2018. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/713240/SWE_Secondary_Legislative_Framework_Consultation_Response.pdf

⁶ Professional Standards Authority 2010, *Maximising the contribution of regulatory bodies' registers to public protection*. Available at: www.professionalstandards.org.uk/publications/detail/maximising-the-contribution-of-regulatory-bodies-registers-to-public-protection

roles, where they present a risk; they may also seek registration with other regulatory bodies.

- 2.8 There is also the question of how SWE would consider applications for restoration from a former registrant who has been through this voluntary removal route – if this power were clearly expressed in the legislation, this would no doubt be covered in the regulations, but it is not, as far as we are aware. As above, given that this option is available for the most serious cases, such applications would need to be considered as if the registrant had been removed by adjudicators.
- 2.9 It is worth noting however that these disposals differ from removal because in theory less serious cases could also be disposed of through this route. This means that the types of cases that are disposed of in this way may be a mixed bag of serious and less serious behaviours. It is hard to see therefore how this outcome could effectively fulfil the wider public interest functions of maintaining public confidence and upholding professional standards because the in the eyes of the public the outcome does not necessarily match the severity of the actions of the registrant. This issue is further confused by the existence of an ‘impairment found, no sanction’ outcome available to adjudicators, which is likely to be imposed in less serious cases where there is a public interest in finding impairment. This makes it difficult for the public to equate the type of finding or sanction with the severity of the behaviour of the registrant.
- 2.10 We recognise that there may be a view that ultimately removal of the registrant from practice achieves public protection. However, the lack of basis in the legislation for these powers and lack of detail about how the concerns about transparency and ensuring public confidence in outcomes would be alleviated make it difficult for us to see how such a power would be appropriately used in practice.
- 2.11 More generally, this outcome adds an unnecessary layer of complexity, to a picture that we know to be confusing to the public and employers.⁷ In line with the position we set out in *Right-touch reform*,⁸ and the ‘keep it simple’ principle of *Right-touch regulation*, we believe it would be far preferable for case examiners to have powers to remove social workers, to avoid the perverse incentive described above, ensure that case outcomes fulfil the three limbs of public protection, and provide clarity for the public, employers, and other professionals and regulators.

Procedure at hearing and meetings

- 2.12 The rules give flexibility to both adjudicators and the regulator to decide how they conduct hearings or other proceedings. We were not clear about the

⁷ Professional Standards Authority 2011, *Modern and effective fitness to practise adjudication*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/advice-to-ministers/modern-and-efficient-fitness-to-practise-adjudication-2011.pdf

⁸ Professional Standards Authority 2017, *Right-touch reform*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

rationale for this proposal, and would have a number of concerns if it were implemented:

- How would SWE ensure that each case was compliant with Article 6 of the European Convention on Human Rights,⁹ and that proceedings and outcomes were fair?
- How would SWE ensure consistency of outcomes where proceedings can differ to the extent proposed?
- How would SWE provide clarity for registrants and witnesses taking part in hearings and maintain public confidence?

2.13 We would recommend that SWE set out some minimum requirements for proceedings, possibly with the option of deviating from them in appropriate circumstances where it can be demonstrated to be in the interests of justice and in accordance with the overarching objectives. Without this, SWE would be opening itself up to legal challenge from registrants and complainants. For example, we question the lawfulness under Article 6 of the suggestion in paragraph 67 of the guidance, that adjudicators can refuse to hear an application from the social worker following the presentation of the SWE case, if they think they have heard enough to support findings on facts and impairment.

2.14 Relatedly, under rule 34 (and paragraph 75 of the guidance) there is no requirement for a legally qualified person to be present at either review or interim order hearings. We question the assertion in the guidance that 'these hearing or meetings are invariably procedurally routine', particularly for interim order hearings. Interim orders are needed to protect the public in high-risk cases. They can also have a significant impact on the social worker, as they may result in a restriction on practise, and possible loss of livelihood. It is essential that these decisions are robust both to protect the public and to ensure fairness to the registrant. Adjudicators may be deterred, consciously or subconsciously, from adjourning in order to seek legal advice because doing so would delay proceedings.

2.15 We therefore strongly recommend that a legally qualified person is present at all interim order hearings. We note that it is also possible under the rules for other hearings, such as review hearings, to be conducted without the input of any legally-qualified person. We question the wisdom of decision being made which may affect legal rights without the benefit of appropriate legal advice.

Who can make fitness to practise decisions

2.16 Throughout the consultation documents, we found a lack of clarity about who was empowered to make decisions on the regulator's behalf, referred to variously as 'case examiners', 'adjudicators', 'staff', and 'the Regulator'. This no doubt stems from Regulation 25(7)(c) of *The Social Workers Regulations 2018*¹⁰, which gives Social Work England the flexibility to use both advisers,

⁹ The right to a fair trial. Human Rights Act 1988:

www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5

¹⁰ Available at: www.legislation.gov.uk/ukdsi/2018/9780111170090/contents. Accessed 15/04/2019.

which is a statutory role, and members of staff, as decision-makers at the key stages of the FtP process.

- 2.17 For example, at paragraph 51, the guidance document contrasts the use of adjudicators with that of ‘members of staff’ for review decisions – this is an arbitrary distinction, as far as the legislation is concerned, because adjudicators can be members of staff. Notwithstanding the restrictions in regulation 25(8) which prevent the same person from making decisions at different points on the same case, it would have been helpful to have greater clarity about who can make decisions at the various points to ensure proper separation of investigation and adjudication, transparency, and accountability of decision-makers. The apparent confusion in these documents provides little reassurance in these respects.

Triage

- 2.18 Rule 3 sets out a list of criteria that must be applied in order for SWE to determine whether there are grounds for progressing the concern from the triage stage to investigation. We would have expected to see an explicit reference to SWE’s three-part over-arching duty here, as well as to its own standards for social workers, in line with our recommendations in *Right-touch reform*. In this report we highlighted the lack of coherence in the approaches taken by the regulators we oversee, and we note that the SWE rules set out a decision-making framework which differs significantly from the current HCPC approach¹¹ with little justification for this variation presented in the consultation document.
- 2.19 We also concluded in *Right-touch reform* that some of the legislation defining the early stages of investigation lacked clarity – on this basis we would recommend that SWE consider amending the wording of rule 3(b), which refers to ‘further investigations’ being conducted in order to make a triage decision. This confuses this stage with the investigation stage that comes after triage. Perhaps the rules could refer here to ‘additional enquiries’ to avoid confusion.
- 2.20 We are also concerned that the guidance document describes the criterion in 3(a)(ii) as giving triage officers responsibility for deciding ‘whether there is or is likely to be credible evidence to support the concern’ (paragraph 15, guidance document). This is not what rule 3(a)(ii) says, rather the rule itself refers to sufficiency of evidence, which is a legitimate consideration at this stage. Assessing the credibility of available evidence on the other hand is an evaluative judgement that cannot and should not be made at such an early stage in proceedings particular with no requirement as to the seniority of the staff decision-maker.
- 2.21 With reference to Rule 3(a)(i), para 5 of the guidance document talks about the “age of the events” having relevance to considerations of the seriousness of the concern. We are not aware of this link having been made by other regulators, or of any evidence to support this claim. Indeed, we would caution against the

¹¹ The Health and Care Professions Council’s (HCPC) Threshold policy for fitness to practise investigations. Available at: www.hpc-uk.org/globalassets/resources/policy/threshold-policy-for-fitness-to-practise-investigations.pdf

introduction of any such considerations when assessing the seriousness of a concern, because the mere passage of time is not in itself evidence of remediation, and even if the registrant no longer poses a risk, their fitness to practise may be found impaired for public interest reasons.

- 2.22 The passage of time is however relevant to the likely availability of sufficient evidence. Although we do not support the ‘five-year rule’ as it is known, which a number of the regulators use to limit the age of events they will consider to five years (except where there is a public interest imperative), we accept that the age of events is likely to limit the availability of evidence.

Involvement of the complainant

- 2.23 The *Social Worker Regulations 2018* give SWE the option of sharing the registrant’s response to the grounds for investigation with the complainant. This is reflected in the wording of rule 9 (*‘If the investigators invite comments from the complainant’*¹²), and further emphasised in paragraph 30 of the guidance, which states that comments would only be sought where there were competing versions of the facts.
- 2.24 We argued the following in *Right-touch reform*:
- 2.25 ‘If consensual means of disposing of cases are to be used more and more across all regulators, one area in which there will need to be improvements is the involvement of the complainant or referrer at the screening and investigation stages. Such involvement is necessary to:
- help to establish the facts of a case
 - keep them informed of progress
 - enable their views to be taken into account, if appropriate when the decision is made about how to dispose of the case
 - explain to referrers what to expect from the FtP process and outcomes.
- 2.26 Meaningful and respectful involvement helps to maintain the public confidence in regulation that is essential if complainants are to come forward with their concerns. It demonstrates a degree of respect for the people on whom the FtP system is largely dependent. We know from our research with complainants for the *Modern and efficient fitness to practise adjudication* project that referrers often feel they are kept in the dark throughout the FtP process, and feel disenfranchised as a result.¹³ An additional benefit of greater involvement of referrers is that it gives the regulator a ready source of feedback on their experiences of the process.¹⁴ This was a key finding of the Authority’s review of

¹² Our emphasis.

¹³ Professional Standards Authority 2011, *Enhancing confidence in fitness to practise adjudication*. Available at: www.professionalstandards.org.uk/publications/detail/enhancing-confidence-in-fitness-to-practise-adjudication---research-report

¹⁴ Professional Standards Authority 2017, *Right-touch reform*, p.88. Available at: www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital.¹⁵

- 2.27 Our support for extensive use of consensual disposals is contingent on there being proper involvement of the complainant for the above reasons. We would therefore encourage SWE to make clear in rules and guidance that the social worker's response should be shared with the complainant and their comments sought as a matter of course, regardless of whether there was any dispute on facts. Finally on this topic, we suggest that the minimum length of time given to the complainant to respond be extended from seven days to a minimum of 14, to allow them a reasonable amount of time to give a considered response. It is important to recognise that most complainants will not have the benefit of either an employer, union or lawyer to help them in this task.
- 2.28 *Right-touch reform* recommended that for consensual disposals, decision-makers should be presented with a statement from the complainant similar to 'victim impact statements' used in criminal courts. This would ensure that the impact of the registrant's actions on the complainant was not lost in the consensual process.¹⁶ We would be happy to discuss this proposal further with SWE.

Agreeing to a disposal

- 2.29 Rule 12(b) allows case examiners to give the social worker more time to decide whether they agree to the proposals of the case examiner(s) in relation to disposal without a hearing. Paragraph 37 of the guidance document explains that this may apply where the social worker disagrees with 'the exact terms of the determination', and refers to the process as a 'negotiation'.
- 2.30 We are concerned that SWE considers it appropriate to enter into discussions with the registrant about the terms of the determination after the end of the investigation, and once case examiners have made their decision about the facts of the case, impairment, and what the appropriate sanction should be. We recognise that during consideration of the appropriate sanction there may be a need to discuss with the registrant the practicality and workability of the detail of a particular sanction, in particular conditions of practice. However, at this point in proceedings, if the registrant wishes to dispute any of the regulators' findings and conclusions, they should do so at a hearing. To allow even one round of negotiations behind closed doors would fundamentally undermine public confidence in the process and outcomes. We know from our research that while they support consensual approaches, members of the public are worried about the possibility of such bargaining taking place. But this is not just a point about public confidence: there would, in our view, be legitimate concerns that SWE might make concessions to the registrant in relation to any aspect of the final

¹⁵ Professional Standards Authority 2018, *Lessons Learned Review - The Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/nmc-lessons-learned-review-may-2018a0851bf761926971a151ff000072e7a6.pdf?sfvrsn=6177220_0

¹⁶ Professional Standards Authority 2017, *Right-touch reform*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

determination, in order to come to an agreed disposal, which could negatively affect SWE's ability to protect the public. The additional risks associated with this kind of disposal highlight the importance of the Authority having appropriate oversight of these decisions.

- 2.31 Furthermore, we would have expected the rules to set out the details of what a case examiner's decision should cover, because they are not contained within the Regulations. As far as we are aware, the only requirement is that the realistic prospect test is met (and provision of reasons to registrant), it is not in the public interest to hold a hearing, and the proposed final order. Contrary to what we would expect, there is nothing mapping the basis for the realistic prospect test decision to a decision on facts, misconduct, impairment and sanction. There is a consequent lack of clarity around what will be recorded.

Review of orders

- 2.32 With reference to Rule 16 and paragraph 51 of the guidance document, we found the sections relating to reviews of orders opaque. We accept that in certain circumstances it may be appropriate for a review order to be made by one person, and there is precedent for this among the regulators we oversee. However, we would have welcomed greater clarity on how it would be decided that a case could or should be considered by a single decision-maker. And as mentioned above, we would caution that a single decision-maker might need to be legally qualified in order for decisions to be robust.
- 2.33 We found the reference to decisions being made at meetings in rule 16 confusing, as this term could not apply to situations where there was a single decision-maker. We were also unclear what was meant by rule 17, 'meetings may be held by means of electronic communication' – what does this cover specifically? Would 'electronic communication' include email? If this is the case, we question whether an exchange of emails should properly be described as 'a meeting'.

Further comments

- 2.34 Paragraph 8 of the consultation document refers to social work presenting particular challenges for the regulator. Given that SWE's over-arching duty is to protect the public, it might have been helpful to highlight that social work is also a relatively high risk activity because of the nature of the interactions social workers have with service users, and the vulnerability of many user groups.
- 2.35 We welcome the approach set out in Rule 27(e) allowing cases to be heard together where they relate either to the same social worker or to the same incident.
- 2.36 Rule 35 specifies that there must be at least one lay person on each panel of adjudicators, and we support this approach.¹⁷ It does not however define a quorum for fitness to practise hearings – this is another area where SWE is given great flexibility, and one that we would wish to keep under review. In

¹⁷ We note that the General Social Care Council had a lay majority on its hearings panels as the General Optical Council does currently for its panel hearings for optometrists and dispensing opticians: www.optical.org/en/Investigating_complaints/Hearings/How_hearings_work/Hearings_Panel.cfm

- theory at fitness to practise hearings (as opposed to interim order or review hearings) only contested cases and those serious enough to warrant removal would be heard by adjudicators, so we would be concerned if such cases were being heard by panels of fewer than three members.
- 2.37 In relation to Rule 49 and paragraphs 98, 99 of the guidance: we are aware that this stems from the regulations, but we felt it important to point out the confusing nature of warnings and advice under the SWE legislation:
- *published* warnings and advice are available to both case examiners and adjudicators with realistic prospect of or an actual finding of impairment;
 - *unpublished* warnings and advice are also available to both case examiners and adjudicators without a realistic prospect/actual finding of impairment.
- 2.38 In *Right-touch* reform, we recommended that advice and warnings should only be used where the real prospect test was not met, because of this scope for confusion. SWE will need to publish clear information about the meaning of these different sanctions for the public, employers and social workers. It may want to consider using different names for them, in particular to distinguish those outcomes that come with a finding of impairment from those that do not.
- 2.39 We have some concerns about the ability of SWE adjudicators to receive evidence that would not otherwise be admissible in UK civil courts (rule 32(b)(vii)). As far as we are aware this is out of step with the other regulators we oversee who align with procedure in the UK civil courts. It would have been helpful for SWE to clarify what, if any reasons they have for deviating from this precedent.
- 2.40 There does not appear to be any requirement for the regulator to be represented by a legally-qualified case presenter. This links with our previous concern about the lack of requirement for a legally qualified person to be present at interim order and review hearings and the risks associated with there being an absence of legal expertise at such proceedings.
- 2.41 In relation to the content of the rules, there are some areas that we would ordinarily expect to see covered which we did not see explicitly referenced in either the rules or the accompanying guidance which it may be useful for SWE to consider clarifying. These are:
- In relation to health cases – that episodic or recurrent conditions although currently in remission can impair fitness to practise
 - In relation to health, language and performance cases – that failure to cooperate with an assessment gives rise to a negative inference when considering impairment
 - In relation to conviction cases – that the certificate of conviction is conclusive proof.

3. Comments on professional standards

General comments

- 3.1 We welcome the opportunity to comment on SWE's draft professional standards. We are pleased that SWE is seeking stakeholder feedback to inform the development of its standards.
- 3.2 We also welcome SWE's collaboration with the social work regulators in the devolved nations to learn from their experience of the regulation of social work. As referenced in the consultation paper, this collaboration will contribute to alignment of the standards across the social care regulators. As the Authority has highlighted in a number of reports, we welcome and encourage consistency across the regulators to provide greater clarity for registrants and the public. For the same reasons, we welcome the collaborative work SWE carried out with its professional expert and experts by experience groups.
- 3.3 We note however that social workers frequently work in multi-disciplinary settings. Therefore, as well as ensuring alignment between social care regulators across the UK, it is important to have a consistent approach to core values and principles for professionals across all of the health and social care regulators to promote a unified approach to patient and service user safety.
- 3.4 In line with this point, we would have expected to see an explicit reference in the professional standards to multi-disciplinary working and importance of inter-professional communication.
- 3.5 In reference to the evolution of the relationship between the SWE standards, the Professional Capabilities Framework (PCF) and the Knowledge and Skills Statements for adults and child and family social workers (KSS), as explained in the consultation paper, we recognise the importance of integrating the key requirements of social workers and their practice into the professional standards. It is consistent with the Authority's position that the relevant guidance and standards are aligned to aid clarity for the intended audience and, to enable registrants to understand how they can meet standards.
- 3.6 The appointment of practising social workers as regional engagement leads appears to be a positive approach. From the consultation paper, we understand that the purpose of this role is to engage with a variety of stakeholders. The explanation in the paper that this role will actively contribute to consistent implementation of the standards and identify when registrants or education providers do not meet them, and enable analysis as to the reasons behind this, suggest that the role will be a constructive and valuable one.

Detailed comments

Standard 1 - Promote the rights, interests and wellbeing of people

- 3.7 We welcome the requirements around equality, diversity and inclusivity as highlighted in the statements that support Standard 1. This is in line with the requirements of our revised Standards of Good Regulation which will be

introduced from our 2019/20 performance review cycle.¹⁸ However, we found 1.8: 'Be aware of the impact of my own values on my practice and recognise, and use responsibly, the power and authority I have when working with people', unclear. There are two possible readings of this statement: that social workers need to have a shared set of professional values and understand the positive impact this can have on their practice; or that social workers may have their own personally held values and beliefs that could have a negative impact on their practice. This statement may need clarifying.

- 3.8 In addition, 1.8 reads to be potentially covering two separate statements and may be better divided to cover the subject of values and, separately, the responsibility around using power and authority responsibly.

Standard 2 - Establish and maintain the trust and confidence of people to affect change

- 3.9 The statements that support Standard 2 appear to be consistent and are clearly designed to support the overarching Standard. Those addressing the requirement for transparency around conflicts of interest and respectful relationships are particularly welcome. In referring to the requirement to be 'truthful, open, honest, ethical and trustworthy,' as we have addressed in our comments about Standard 1, above, statement 2.1 appears to highlight values that would be useful to reference at 1.8. Consequently, the Standards may benefit from some clarification or cross-referencing in respect of 1.8 and 2.1.

Standard 3 - Challenge unethical practice and report concerns

- 3.10 We recognise that Standard 3 supports whistleblowing and the professional duty of candour along with complaints procedures and transparency. We support both these issues being addressed in the Standards. However, in respect of candour, specific reference to the duty of candour could help to clarify the requirements of 3.4 'Be open and honest when things go wrong which have or may have caused physical, emotional, financial or any other harm or loss' and stress the importance of adhering to the legislation. It is particularly important to highlight that the duty of candour refers to being open with patients and service users and is envisaged as a more routine occurrence than whistleblowing which is primarily intended as a way of safely escalating concerns which have not been addressed either inside or outside of an organisation.
- 3.11 We have noted in our recent report on progress embedding the duty of candour that awareness of what candour is and when it should apply, including the difference between the organisational (statutory) and professional duty, remains inconsistent. It is important that regulators provide a strong and consistent steer to professionals on their responsibilities in this area and supporting guidance on

¹⁸ Professional Standards Authority, *Standards of Good Regulation 2018*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/standards/standards-of-good-regulation-2018-revised.pdf?sfvrsn=ce597520_4

how and when candour is relevant and its' importance to patients and service users.¹⁹

- 3.12 In respect of 3.7, 'Take appropriate action when a social worker's fitness to practise may be impaired', we are of the view that the term 'impaired' in this context is unnecessarily legalistic and appears to set a high threshold for action as opposed to taking action if the social worker is concerned about a colleague's behaviour or practice. We also believe it would be helpful to make explicit reference to referral to the regulator, as well as to other professions here, knowing that social workers often work in multi-disciplinary teams.

Standard 4 - Uphold trust and confidence in my practice and in the social work profession

- 3.13 We recognise the importance of the reference to the use of social media and technology at 4.7. This reflects the increasing pace of advances in technology and the challenges that this brings for registrants. Further, it may contribute to prevention of a number of cases that are the subject of fitness to practise concerns. However, the reference to using social media in a way that 'brings the profession into disrepute' may be seen as out of step with modern regulation, which places patients and the public at its heart and aims to maintain their confidence in the professionals who treat them, rather than to maintain the reputation of the profession for its own benefit. While we appreciate that this remains common wording amongst the professional regulators, this is an area we have recommended for review in a report recently delivered to the Department of Health and Social Care (DHSC) following a commission based on a recommendation from the Williams Review.²⁰ In the report we suggest that use of such wording may lead to perceptions of an outdated approach or a focus on reputation over public safety. SWE may, therefore, wish to review the wording at 4.7.
- 3.14 In respect of 4.6 'Allow someone's complaint to adversely affect support that is provided to them', we find this wording lacks clarity. The point about a complainant being treated unfairly due to their complaint appears implied rather than being clearly stated. On this basis, we suggest that SWE may wish to review this statement to clearly define the issue it is addressing.

Standard 5 - Be accountable for the quality of my work and the decisions I make

- 3.15 As we mentioned at 3.13, above, references to knowledge and awareness of advancing technologies are timely and proactive in addressing current and future challenges for registrants. Therefore, we welcome Social Work England addressing this issue at statement 5.8, 'Establish and maintain skills in

¹⁹ Professional Standards Authority 2019, *Telling patients the truth when something has gone wrong – how have professional regulators encouraged professionals to be candid to patients?* Available at: www.professionalstandards.org.uk/news-and-blog/latest-news/detail/2019/01/08/telling-patients-the-truth-when-something-has-gone-wrong-how-have-professional-regulators-encouraged-professionals-to-be-candid-to-patients

²⁰ *Williams review into gross negligence manslaughter in healthcare*. Available at: www.gov.uk/government/publications/williams-review-into-gross-negligence-manslaughter-in-healthcare

information and communication technology and adapt my practice to new ways of working, as appropriate'.

Standard 6 - Take responsibility for maintaining my professional identity and developing my knowledge and skills.

- 3.16 We find that the reference to 'professional identity' in the wording in this Standard is unclear in meaning. From research we have carried out we have learned that health and social care practitioners' professional identity is dependent on a number of factors such as work, technological and societal environments and has a limited connection to regulation.²¹ It is also a fluid concept that varies considerably between individuals and is not necessarily directly within a professional's control. We therefore do not find that the underpinning statements for this Standard sufficiently clarify Social Work England's expectations of social workers in maintaining their professional identity. Consequently, SWE may wish to review of the wording of this Standard and consider either removing the reference to professional identity or providing further explanation about how professional identity contributes to the safety of patients and service users and what specific requirements are placed on social workers in this context.

Potential Omissions

- 3.17 We understand that the environment in which social workers operate can be an isolated one. Given the nature of the role and the substantial responsibility it requires, it is, therefore, important that social workers have a strong support structure around them. Feedback from social workers has indicated that they are reliant on teamwork in respect of both emotional and practical support. It is, therefore, surprising that the proposed Standards do not focus more on this aspect of social work and that there is limited reference to working with colleagues throughout the Standards. Social Work England may want to consider this aspect of the role further when reviewing the proposed Standards.
- 3.18 Linked to this, we were surprised that there was no mention in the Standards of multi-disciplinary working. It is a feature of social work that it relies on close interaction with a range of other professions and services, such as the NHS, schools and the police. The Standards need to support social workers in working in this way and reflect the challenges that it poses for them. We note that this is currently referenced in the Health and Care Professions Council Standards of proficiency for social workers²² and also in the SWE draft qualifying education and training standards.

²¹ Professional Standards Authority 2018, *The regulator's role in professional identity: validator not creator*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/research-paper/professional-identity-and-the-role-of-the-regulator-overview.pdf?sfvrsn=dc8c7220_4

²² Health and Care Professions Council, *Standards of proficiency - Social workers in England*. Available at: www.hcpc-uk.org/globalassets/resources/standards/standards-of-proficiency---social-workers-in-england.pdf

4. Comments on registration rules

Key comments

- 4.1 With regard to the draft SWE registration rules, we have some comments around the importance of ensuring that the meaning of the information published and the timescales it is available for are clear to the public and employers, specifically the need for clear information around the use and status of warnings.
- 4.2 We query the use of conditional registration when an applicant or registrant is subject to ongoing or completed FtP proceedings with another regulator. We also reiterate our previously expressed view about the need for clarity around the use and purpose of conditional registration, to address the potential for confusion between registration conditions and the use of conditions of practise as part of the FtP process and the importance of ensuring parity of outcomes.
- 4.3 We highlight the importance of ensuring that any requirements to ensure that social workers remain fit to practice alongside broader CPD activity should be underpinned by an assessment of the specific risks associated with social work and an outcome rather than input focussed approach.

Specific comments

Content of the register

- 4.4 We are broadly in agreement with the information that SWE proposes to include on the register which should provide sufficient information to ensure a register entry which helps protect the public. We refer SWE to *Right-touch reform* where we highlighted the range of practice across the regulators we oversee and made a number of recommendations about the content and use of registers.²³ In this report and in our previous report *Maximising the contribution of registers to public protection*²⁴ we made the case for a pared down approach to registers, including only the information needed ensure public safety.
- 4.5 Regarding publication of warnings, we refer to our comments at 2.37-2.38 on the potential for confusion under SWE's legislation in allowing use of both published and unpublished warnings and advice. We are of the view that publication of warnings is transparent and can help to raise awareness among other registrants, employers and patients of the boundaries of acceptable behaviour. We also know that employers and the public are often confused about the status of warnings and therefore it is important to be clear on the basis for a warning and on the circumstances in which they would be used. As previously stated SWE will need to provide clear guidance for decision makers and clear information for registrants and the public on the basis for and status of published and unpublished warnings and advice.

²³ Professional Standards Authority 2017, *Right-touch reform*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

²⁴ Professional Standards Authority 2010, *Maximising the contribution of regulatory bodies' registers to public protection*. Available at: www.professionalstandards.org.uk/publications/detail/maximising-the-contribution-of-regulatory-bodies-registers-to-public-protection

Conditional registration

- 4.6 We support the intention to publish details of conditional registration and we welcome the clarity provided in rule 30 on the circumstances in which conditional registration would be used. However, we have some concerns about the third circumstance outlined and more generally how SWE will ensure that there are consistent outcomes for registrants who are subject to conditional registration and those who receive conditions of practice through the fitness to practise process.
- 4.7 We recognise Government's intention to make Social Work England a modern regulator with a broad range of powers which could potentially be used to manage situations such as when a registrant does not meet continuing fitness to practise requirements or as a transitional arrangement when grandparenting a group onto the register or introducing new registration or annotation requirements. However, in our response to the consultation on the regulations for Social Work England we highlighted that such powers should be used sparingly if at all and noted the potential detriment to service users of having significant numbers of social workers in practice who are not fully competent.²⁵ We note the potential for public and employer confusion between conditional registration and conditions of practice imposed as a sanction as part of the FtP process.
- 4.8 Under registration rule 30(3) it states: 'Where an applicant or registered social worker makes a declaration that they are subject to ongoing or completed fitness to practise or other disciplinary proceedings by another regulatory body, the Regulator may set conditions relating to those ongoing or completed proceedings.' Generally, registrants should either be fit to practise or not and we are of the view that allowing use of conditional registration when they may be subject to FtP proceedings by another regulator may exacerbate this confusion.
- 4.9 If there are public protection concerns arising from another regulators' FtP investigation, or an investigation by another authority then these should generally be addressed through SWE's FtP processes which should be sufficiently flexible to manage such issues appropriately, for example through use of an interim order. We suggest SWE may wish to review allowing the use of conditional registration in this circumstance.
- 4.10 We further note that it is currently unclear how the proposals on conditional registration are intended to fit with SWE's fitness to practise powers, in particular how decision makers will ensure consistency of outcomes for similar cases dealt with via conditional registration or through the fitness to practise process. Although our understanding is that conditional registration would generally be used at registration, renewal or restoration and fitness to practise would generally relate to a specific concern, it appears that there may be a risk of very similar cases, for example health cases, being dealt with through different channels with potentially different outcomes. We would welcome further clarity from SWE on how they will ensure that this doesn't occur and how

²⁵ Our responses to previous consultations are available at: www.professionalstandards.org.uk/docs/default-source/publications/consultation-response/others-consultations/2018/180323-swe-regs-consultation-final.pdf?sfvrsn=9acc7220_2

to avoid the perception that either route constitutes an easier way to retain registration.

Annotation of entries in the register

- 4.11 Our only comment is that an annotation should only be put on the register if it serves a public protection purpose. It should only remain on the register for as long as it serves that purpose.

Continuing professional development

- 4.12 We have no particular concerns arising from the Continuing Professional Development (CPD) rules. However, we would like to have seen more information on how the indicators under Standard 6 of the professional standards, against which social workers' mandatory CPD will be evaluated have been developed and further clarity on how SWE will select the sample of CPD for audit on an annual basis.
- 4.13 We have previously highlighted the need for an approach to continuing fitness to practise that is proportionate to the risks of the profession and focussed on outcomes rather than inputs. Requirements for continuing fitness to practise, specifically the elements which are mandatory, and which will be audited should be based on a clear assessment of the risks associated with social work practice.
- 4.14 We also note the importance of SWE being clear with registrants and employers on the difference between wider continuing professional development and the specific elements which must be completed to ensure that registrants remain fit to practise. When developing its CPD requirements further SWE may find it helpful to consider our paper on this topic, *An approach to assuring continuing fitness to practise based on right-touch regulation principles*.²⁶

Other comments

- 4.15 On page 27 we suggest that there could be improved clarity in relation to paragraph 32 on alternative conditions. We suggest that it would be useful to clarify who will be responsible for deciding whether the alternative condition offered by registrant is acceptable.
- 4.16 We note that it is sometimes unclear within the registration appeal rules, whether cross-references to rules relate to other rules within the same set of rules or within other related sets of rules e.g. the registration rules. There is also ambiguity at rule 26 (2) regarding closure of registration applications which states 14 days for the registrant to respond but doesn't state whether this is calendar or working days. It may be helpful for SWE to review for clarity.

²⁶ Professional Standards Authority 2012, *An approach to assuring continuing fitness to practise based on right-touch regulation principles*. Available at: www.professionalstandards.org.uk/publications/detail/an-approach-to-assuring-continuing-fitness-to-practise-based-on-right-touch-regulation-principles

5. Comments on education and training standards and rules

General comments

- 5.1 We welcome the opportunity to comment on SWE's education and training rules and standards. In *Right-touch reform* we laid out some principles to guide regulators in how they exercise their regulatory function in relation to undergraduate education.²⁷ These were intended to cover both changes to regulator processes in the short term and also underpin more long-term legislative change in this area. These principles are outlined below and whilst we recognise that some of these are outside of SWE's control, in our view the majority remain relevant across health and care regulators.
- 5.2 The approach [to quality assurance of education and training]:
- is underpinned by a legislative framework which is based on the duty to protect the public and is sufficiently flexible to allow a risk-based approach to assuring different professional groups and to meet future challenges
 - Builds on other quality assurance activities and seeks to actively review and, where appropriate, withdraw activity where other agencies can provide sufficient assurance
 - Promotes the benefits of Interprofessional education and supports the development of shared values across professional groups to ensure a consistent approach to patient safety
 - Actively involves and seeks perspectives of students, patients and other members of the public in quality assurance processes and the development of training courses
 - Ensures processes, criteria and procedures are consistently applied and, along with outcomes and rationale, are publicly available and clearly explained
 - Actively encourages the sharing and use of data to ensure that education and training programmes are fit for purpose
 - Supports flexibility in training and allows development of new roles where required to address wider workforce challenges.
- 5.3 We recognise that social work differs from the health professions in certain key ways and that one of SWE's key aims from its inception has been to raise the standards and improve consistency of social work education and training. However, we note that social workers generally work alongside or as part of multi-professional teams and therefore alignment with education and training programmes for other professionals is beneficial. There are also a number of core values and requirements which should be central to the practise of all health and care professionals in ensuring a consistent approach to patient and service user safety.

²⁷ Professional Standards Authority 2017, *Right-touch reform*. Available at: www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_7

- 5.4 In addition, many institutions will provide training for different professions alongside social workers. Therefore, consideration of the nature and scale of requirements placed on institutions is important in line with considerations about taking a risk based and proportionate approach. This is in line with principles we have laid out in *Right-touch regulation*.²⁸

Detailed comments

Rules

- 5.5 Overall in our view the SWE rules for approval of education and training courses appear comprehensive, outlining clearly the process for approval and re-approval of courses and the monitoring process.
- 5.6 One area where further clarity may be beneficial is in relation for timescales for SWE to inform a training provider of the need to supply relevant information ahead of a quality assurance (QA) inspection.
- 5.7 Another area where it may be useful to provide further detail in the involvement of service users in the QA process. The reference to regional engagement leads who will work with employers, service users, providers and social workers is welcome, however it would be useful to have further clarity over practically what role people will play in the process.
- 5.8 In *Right-touch reform* we highlighted that inconsistent and sometimes duplicating quality assurance processes between regulators can place a burden on education and training providers, particularly when seen alongside the quality assurance processes of the institution and any other relevant bodies. Whilst this may not be a specific consideration for the rules we suggest that SWE keeps this in mind when developing its QA process and looks for opportunities to work closely with other bodies with an interest in social worker education and training. This includes other professional regulators. We note that in the past the Health and Care Professions Council (HCPC) and the Nursing and Midwifery Council (NMC) have carried out joint approval visits for courses leading to joint qualification as a nurse and a social worker.
- 5.9 Finally, a point regarding language around timescales within the education rules. We note that there is variability as to whether references are to weeks, calendar days or working days. This would be made clearer if the language used was standardised.

Standards

- 5.10 We recognise that SWE have put significant effort into engaging with the profession and wider stakeholders in relation to the content and presentation of both the professional standards and the standards for education and training and we welcome this. We further note that SWE have sought to align as far as possible with the approach taken by the other social care regulators in the other three countries of the UK. This seems sensible in order to promote a consistent

²⁸ Professional Standards Authority 2015, *Right-touch regulation*. Available at: www.professionalstandards.org.uk/what-we-do/improving-regulation/right-touch-regulation

approach and reduce barriers to movement of social work professionals across the UK.

- 5.11 As previously noted however, social workers often work closely with other health and care professionals in multi-disciplinary teams and there is growing awareness of and action being taken across the UK to support greater alignment between health and social care, to ensure a seamless care pathway for patients and service users whichever service they are being treated by. Whilst standards for education and training will necessarily differ depending on the particular requirements for the profession in question, there are still a number of a key components that we would expect to see across the regulators we oversee. This includes core values and considerations for professionals to promote a consistent approach to patient and service user safety across professions.
- 5.12 We welcome the strong link with the professional standards in the education and training standards. This is important to ensure that the professional standards become embedded for social workers at an early stage and become the core of their practise.
- 5.13 We have noted the current focus on multi-disciplinary working and this is reflected in the importance of embedding an approach to multi-professional learning as part of educational programmes. We therefore welcome the requirement for this under Standard 5 of the education standards but would have liked to see this mirrored in the professional standards.
- 5.14 We welcome the references in the standards to gaining input from service users both as part of the admissions process and in shaping the curriculum. It is also positive to see a requirement for providers to keep up to date with research, government policy and to involve employers in the planning of courses to ensure value and practical application.
- 5.15 We would have liked to see a more explicit reference to the duty of candour in the standards. We welcome the references to having whistleblowing procedures in place for students to report concerns. However, it is important that providers are taking clear steps to embed a focus on the duty of candour to ensure that this is retained when social workers enter the workplace. It is also important to differentiate between whistleblowing, which is raising concerns within or outside of an organisation when something has not been dealt with properly and candour which should be a regular if not everyday occurrence for health and care professionals of being open and honest with service users about when things go wrong with their care.
- 5.16 We have noted in our recent report on progress embedding the duty of candour that awareness of what candour is and when it should apply, including the difference between the organisational (statutory) and professional duty remains inconsistent. It is important that regulators provide a strong and consistent steer to professionals on their responsibilities in this area and guidance on how and when candour is relevant and its' importance to patients and service users.²⁹

²⁹ Professional Standards Authority 2019, *Telling patients the truth when something has gone wrong – how have professional regulators encouraged professionals to be candid to patients?* Available at:

5.17 It may be useful to SWE to include a further requirement for education and training providers to consider the consistency of programme content. Whilst we recognise that this is in part a role for the regulator through its' quality assurance processes, it may be beneficial to encourage providers to learn from best practise and ensure parity with other equivalent courses as far as possible.

6. Further information

6.1 For further information about this response please contact:

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