Response to the consultation from the Nursing and Midwifery Council - Ensuring patient safety, enabling professionalism

June 2018

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
- Accredit registers of healthcare practitioners working in occupations not regulated by law through the Accredited Registers programme
- 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 from the Nursing and Midwifery Council (NMC) on changes to its fitness to practise function. In the absence of wider legislative reform, it is positive that the NMC is thinking about how they can improve their fitness to practise process within their current legislation. We note that the NMC has previously been able to adapt their fitness to practise process through the use of several Section 60 orders.

2.2 A number of the proposals in the consultation document echo elements of the approach which we outlined in our chapter *The future of fitness to practise* in *Right-touch reform* published in 2017.[1] In our response we have sought to support the direction of some proposals, where we agree with the intention, whilst highlighting any gaps in the evidence base, potential concerns about whether reforms will ensure sufficient public protection and whether proposals are in line with current legislation and existing case law.

2.3 The Professional Standards Authority ("The Authority") supports regulators innovating in fitness to practise and other areas of regulation, and thinking

[1] Professional Standards Authority 2017, *Right-touch reform.* [Online] Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_5 [Accessed: 15/05/2018]

creatively about how to fulfil their statutory duties. We know that the current system is not fit for purpose and are actively calling for it to be comprehensively reformed.

2.4 However, there are reasons why we might sometimes express reservations about innovations, even if we agree with them in principle:

- we may have concerns about how they are put into practice (for example when we have supported proposals at the consultation stage but subsequently identify issues with implementation)
- the proposals or practice may not be in line with the current legislation or established case law (even if we believe the current legislative framework is not fit for purpose)
- we may not be confident that they will protect the public, or enable transparent and accountable regulation (this is as important for individual changes as it is for comprehensive reforms).

2.5 This position stems from our over-arching objective to protect the public. We are empowered by our legislation to carry out a number of statutory functions, including:

- promoting the interests of patients and service users in relation to the performance of professional regulators
- promoting best practice in regulation, and
- formulating principles of good regulation and encouraging regulators to conform to them.

3. Key points

3.1 We are supportive of efforts by the NMC to think about how it can improve the fitness to practise (FtP) process and improve outcomes. However, we have concerns that some of the proposals outlined in the consultation document may not be consistent with the NMC's current legislation and existing case law.

3.2 The three limbs of the overarching objective of public protection (protecting the public, maintaining public confidence and upholding professional standards) are of equal importance in achieving public protection by means of the fitness to practise process. It is important that the NMC ensures that its proposals do not seek to impose a hierarchy of importance or narrow focus onto just the first of the three limbs.

3.3 The NMC's proposed definition of whether public confidence has been maintained, if members of the public are 'willing to see' members of that profession, is too simplistic a measure to capture the reasons why someone may need to use the services of a practitioner when they may not have a choice based on their individual situation. It also risks side-lining the importance of the regulator's role in upholding professional standards.

3.4 Covering up of errors or failure to comply with the duty of candour by professionals should be taken seriously by panels and we welcome the

emphasis placed on this issue in this consultation. However, the facts of each case are likely to be different and therefore an automatic assumption of strike off may not be appropriate and could lead to challenge by professionals subject to such a decision.

3.5 Early resolution of cases or disposal of cases outside a public hearing should not be at the expense of the regulator gaining a full and independent understanding of the facts of the case. Cases should only be resolved outside a panel hearing when there is agreement on the full facts of the case as established by the investigation and, in line with existing case law, where there is no public interest reason to hold a public tribunal. It is also important to ensure that consensual disposals are capable of fulfilling all the three limbs of public protection.

3.6 Further clarity is needed on how the NMC's proposed 'regulatory outcomes' fit with its overarching objective and the three limbs of public protection and what happens when there is a conflict with these.

3.7 Local resolution of concerns is preferable where appropriate. It is important however, for the NMC to take swift action, and in particular consider whether an interim order is needed, if the concern raises immediate public protection concerns.

3.8 We welcome the NMC's proposal to improve consistency in how context is taken into account in FtP cases, but it is important that this is not used as a way of negating individual responsibility for misconduct, particularly where registrants have responsibility due to seniority or managerial roles.

3.9 Where remediation is possible and is sufficient to protect the public then this is a preferable outcome. However, in order to ensure that cases are suitable for remediation it will be necessary for the NMC to be clear on the facts of the case and for the registrant to have demonstrated insight. We would therefore welcome further clarity about how early in the process the NMC is proposing to encourage resolving cases through remediation.

4. Detailed answers to questions

Q1 We think that fitness to practise should primarily be about managing the risk that a registrant poses to patients or members of the public in the future. Do you agree?

4.1 No.

4.2 All regulatory bodies, including the NMC are bound by the case law and the overarching duty of public protection which specifies a threefold purpose for fitness to practise:

- to protect, promote and maintain the health, safety and wellbeing of the public;
- to promote and maintain public confidence in the professions regulated under this Order; and

- to promote and maintain proper professional standards and conduct for members of those professions. [2]

4.3 We agree that managing the risk that a registrant poses to patients or the public is a core function of fitness to practise, however, the focus on risk to the public should be broader than just the risk posed by the individual registrant (first limb).

4.4 Promoting and maintaining public confidence is important to ensure that the public have faith in the honesty and competence of professionals and, as highlighted in Luthra v General Medical Council, should be viewed as 'an aspect of the need to protect the public'.[3]

4.5 Promoting and maintaining professional standards helps to highlight what constitutes unacceptable behaviour and therefore reduce harm occurring amongst other registrants. It is important that the NMC ensures that these proposals do not seek to impose a hierarchy of importance or narrow focus onto just the first of the three limbs.

4.6 As made clear by the overarching duty and the case law, the limbs of public protection are not intended as a hierarchy but are all equally important elements of ensuring public protection.

Q2 We don't think fitness to practise is about punishing people for past events. Do you agree?

4.7 We agree that the primary purpose of fitness to practise is to consider current impairment and protect the public, not to punish people for past events. A full and accurate assessment of whether a registrant has fully remediated is therefore an essential part of considering whether a registrant's fitness to practise is impaired.

4.8 Nevertheless, sanctions may have a punitive effect, particularly where the other two limbs of the wider public interest (maintaining public confidence and upholding professional standards) are engaged. Indeed, personal mitigation must yield to the public interest which may require a sanction that has a punitive effect. This is well supported by the case law, for example Marinovich v GMC which outlines the position that a panel is 'entitled to give greater weight to the public interest and to the need to maintain public confidence in

[2] Article 3(4) of the Nursing and Midwifery Order 2001 states:
'The over-arching objective of the Council in exercising its functions is the protection of the public.'
Article 3(4A) states:
'The pursuit by the Council of its over-arching objective involves the pursuit of the following objectives—
(a) to protect, promote and maintain the health, safety and wellbeing of the public;
(b) to promote and maintain public confidence in the professions regulated under this Order; and
(c) to promote and maintain proper professional standards and conduct for members of those professions.

[3] Luthra v General Medical Council. [Online] Available at: http://www.bailii.org/ew/cases/EWHC/Admin/2013/240.html [Accessed: 30/05/2018]

the profession than to the consequences to the appellant of the imposition of the penalty'. [4]

4.9 We note therefore, that there may be different views on which cases involve behaviour so serious that public confidence may be damaged if a finding of impairment is not made and where a sanction may be required to maintain public confidence. We would reiterate the point that all three limbs of public protection should be considered equally when assessing whether a registrant's fitness to practise is impaired and imposing the appropriate sanction and this must take precedence over any consideration of whether the sanction may appear punitive.

4.10 This is the situation at present in line with the overarching duty and case law and is different to the question of what fitness to practise should be for in the future, at which point it may be considered that a punitive effect is not a desirable outcome.

Q3 We propose that we will only take action to uphold public confidence when the conduct is so serious, that if we did not take action, the public wouldn't want to use the services of registrants. Do you agree?

4.11 No.

4.12 We recognise that there are different views on what kinds of conduct are likely to damage public confidence and that public attitudes to different behaviours can and do evolve. We agree that just because the public disapproves of the actions of a registrant this may not in itself be enough to warrant fitness to practise action. However, we do not agree with the NMC's attempt to link public confidence to whether misconduct would have 'a material impact on the likelihood of a member of the public using the services provided by registrants in the future'.

4.13 We also do not agree with the NMC's statement that there is a need to link public confidence to a direct risk to public safety in order to justify taking action. Research which we commissioned into attitudes to dishonesty by the public and professionals highlighted that participants were concerned about cases which demonstrated both a direct risk to public safety and also those with a significant risk to public confidence, and this covered dishonesty in both professional and personal spheres.[5]

4.14 As well as considering public protection and public confidence, the regulator must also promote and uphold standards of conduct and competence. This means that there will be times when a Panel will need to take action to demonstrate to the profession that certain behaviour is not in line with the standards and that a sanction will be imposed on registrants who breach them. This comes back to the key point – that fitness to practise should give equal weight to all three limbs of public protection and 'willingness to see' as a

[4] Marinovich v GMC. [Online] Available at: https://www.casemine.com/judgement/in/5779fbfee561096c931319a0 [Accessed: 20/052018]
[5] Policis 2016, *Research into attitudes to dishonest behaviour by health and care professionals. [Online]* Available at: https://www.professionalstandards.org.uk/publications/detail/research-dishonest-behaviour-by-professionals [Accessed: 29/05/2018]

concept may divert focus away from this principle which is well established in existing case law.[6]

4.15 There is little reference to the evidence base that the NMC is relying on to support their proposed interpretation of the public confidence test. There is also some evidence that 'willingness to see' may not be a good way of judging whether public confidence has been damaged (see paragraph 4.17 which references recent research we have published on sexual misconduct between colleagues working in health and care).

4.16 The proposal in the consultation document specifies that the risk to public confidence would occur where a case has 'a material impact on the likelihood of a member of public using the services provided by registrants in the future'. We are of the view that this test is likely to prove meaningless in practice, particularly with professions such as nurses and midwives. In accessing health and care services it is unlikely that members of the public would feel that they had a choice about whether or not to see members of these professions, regardless of whether they have had a bad experience before or heard about poor behaviour by a member of the profession. We therefore cannot see that this would prove useful in assessing whether public confidence has been damaged.

4.17 The narrower test would be whether behaviour has damaged willingness to see an individual practitioner. Recent research we have published on sexual misconduct between colleagues working in health and care highlights the view of participants that 'willingness to see' (in this case an individual practitioner) is only a small part of whether someone is fit to practise. Public and professional participants highlighted that 'willingness to see' is a situational judgement based on a number of other factors, such as the technical competence of the practitioner in question, how vulnerable the patient is and whether there is another practitioner they are able to see, which may not be the case. However, there was a general feeling that the regulator should have wider considerations than an individual patient and that this shouldn't therefore be used as a proxy for assessing whether public confidence has been damaged by the actions of a registrant. It was also suggested that patients seeing professionals are inherently vulnerable and professionals are in a position of relative power, therefore decisions on fitness to practise must be wider.[7] Even if the public are 'willing to see' professionals who have behaved badly it remains the regulator's role to promote and maintain standards alongside the other limbs of public protection.

4.18 It is also difficult to understand how panels and decision makers would go about assessing whether certain kinds of misconduct would affect the public's 'willingness to see' practitioners. In the absence of clearer evidence to demonstrate that this is a good way of interpreting public confidence it seems

[6] GMC v Chaudhary 2017, para 53. [Online] Available at: http://www.bailii.org/ew/cases/EWHC/Admin/2017/2561.html [Accessed: 30/05/2018]

[7] Dr Simon Christmas 2018, *Sexual behaviours between health and care practitioners: where does the boundary lie?* [Online] Available at: https://www.professionalstandards.org.uk/publications/detail/sexual-behaviours-between-health-and-care-practitioners-where-does-the-boundary-lie [Accessed: 15/05/2018]

likely to be very difficult to implement in practice, potentially leading to 'second guessing' the views of the public by decision makers.

4.19 This is an issue which affects all professional regulators, and may be linked to ongoing work to explore concepts of seriousness. We would suggest that the NMC may wish to be clearer on the evidence it holds in this area, in particular any work it has carried out with patients and members of the public, and potentially engage with other bodies to explore further before introducing a specific test of this nature.

Q4 Some clinical conduct, such as deliberately covering up when things go wrong, seriously damages public trust in the professions and undermines patient safety. Do you agree?

4.20 Yes.

4.21 We agree that deliberately covering up when things go wrong may seriously damage public confidence and undermine patient safety. We have seen from past events such as those at Mid Staffordshire NHS Trust that covering up when things go wrong can lead to a defensive culture where problems are not properly addressed and poor patient care is allowed to continue.[8]

4.22 However, we would suggest that care needs to be taken about how such cases are described and categorised. For example, we disagree that a breach of the duty of candour should be described as clinical conduct. Whilst the cover up may be related to clinical practice, the failure to be candid about it raises issues of dishonesty and integrity which go beyond clinical competence.

Q5 In those types of cases [as outlined in Q4][9], the registrant should be removed from the register. Do you agree?

4.23 No.

4.24 We agree that cases of deliberately covering up where things go wrong should be treated seriously by regulators and fitness to practise panels and we have previously highlighted concerns that we were not seeing charges relating to the duty of candour brought in many of the cases that we scrutinise through our Section 29 powers.[10] We are currently undertaking a review of the duty of candour to find out what progress has been made to embed candour and what more can be done to encourage professionals to be candid with patients.[11]

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[8] *The Mid Staffordshire NHS Foundation Trust Public Inquiry*, 2013. [Online] Available at: http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/ [Accessed: 30/05/2018]

[9] Our addition in brackets.

[10] Professional Standards Authority 2017, *Review of Professional Registration and Regulation 2016/17 (with annual report & accounts)*. p.21. [Online] Available at: https://www.professionalstandards.org.uk/publications/detail/review-of-professional-registration-and-regulation-2016-17-(with-annual-report-accounts) [Accessed: 24/05/2018]

[11] Professional Standards Authority, *Call for information: How can professional regulation encourage health and care practitioners to be more candid when care goes wrong?* https://www.professionalstandards.org.uk/news-and-blog/latest-news/detail/2018/04/26/how-can-professional-regulation-encourage-health-and-care-practitioners-to-be-more-candid-when-care-goes-wrong [Accessed: 07/06/2018]

4.25 We would however suggest that it may not be appropriate to take a one-size fits all approach to such cases and that it should be open to the panel (or other decision-makers) to consider the facts and any remediation carried out to determine the appropriate sanction. We note the recent case of Lusinga v NMC which suggests a more nuanced and graduated approach to dishonesty as an example where behaviour involving serious matters, such as dishonesty, may not always result in a strike off.[12] In the case of NMC v Watters, the indicative sanctions guidance relating to dishonesty was criticised for not differentiating between different types of dishonesty.[13]

4.26 In addition, there is growing focus on the issue of automatic strike-off arising from the Bawa-Garba case. It is difficult to establish where the threshold should lie and it is important to be aware that there will be a wide spectrum of different behaviours which may give rise to a case where automatic strike-off might be relevant. While it may be appropriate that strike-off should be considered, panels are in a unique position to consider any mitigating circumstances and insight demonstrated and remediation undertaken by the registrant. The NMC may also find itself vulnerable to challenge from registrants should it decide to implement such a blanket approach.

Q6 We propose that cases should be resolved at an early stage in the process if a registrant has fully remediated their clinical failings, even where those clinical failings have led to serious patient harm. Do you agree?

4.27 We support the drive for early resolution of non-contested cases and for the increased use of remediation. However, the consultation document does not explain what is meant by 'resolved at an early stage', which leaves us unsure as to what exactly is being proposed here.

4.28 It may be helpful to consider separately each of the following:

- when failings are remediable
- when they have been remediated, and
- when a case should be eligible for 'early resolution'.

4.29 Is the NMC suggesting with this question that clinical failings that are remediable and have been remediated before the issue was brought to the NMC's attention, should be closed without further action at an early stage, regardless of whether the actions led to serious patient harm? Or is it suggesting that the initial stages of the FtP process might be paused while the registrant took measures to remediate?

4.30 If the consultation is proposing either of the two above options, we would want reassurance from the NMC that it had a clear understanding of what sorts of cases could be considered remediable, based on some form of evidence

[12] Lusinga v NMC [2017] EWHC 1458 (Admin). [Online] Available at: http://www.bailii.org/ew/cases/EWHC/Admin/2017/1458.html [Accessed: 07/06/2018]
[13] Blake Morgan, *Watters v NMC (QBD 2017) (unreported)*. [Online] Available at: https://www.blakemorgan.co.uk/training-knowledge/features-and-articles/watters-v-nmc-qbd-2017-unreported/ [Accessed: 07/06/2018]

base. We are not contesting the assertion that purely clinical failings are more likely to be remediable than conduct failings. However, as we explained in *Right-touch reform*, research in this area is scant and more work is needed to understand how and when remediation can be used effectively for both clinical competence and conduct issues.

4.31 It is also essential that the question of remediability should take into account whether remediation would be sufficient to maintain public confidence and declare and uphold professional standards, as well as whether it would address the risk presented by the individual. If the answer is no, then more serious action may need to be taken. This is what is missing from the NMC's proposal here, and it is also at odds with what is suggested elsewhere in the consultation about the public confidence test. The NMC would, even under its own proposals, have to consider whether the registrant's actions might have an impact on the public's willingness to seek out the services of any member of the profession before deciding how to dispose of the case.

4.32 In addition, we were clear in *Right-touch reform* that for remediation to be effective, it must be meaningful. We would want to be certain that the NMC was carrying out thorough assessments of the effectiveness of any remediation measures taken and whether they genuinely addressed any risks presented by the professional.

4.33 As for early resolution, we understand this term to mean that some form of regulatory action is taken, therefore with this question it seems the consultation document is also, or possibly alternatively, proposing greater use of non-hearing disposals. We note that the NMC currently has four different ways of closing cases without going to a public hearing:

- Case examiners disposing of cases consensually through undertakings
- Voluntary removal signed off by the registrar
- The consensual panel disposal (CPD) process (which may be dealt with at a hearing or a meeting)
- Meetings where final fitness to practise decisions are made on the papers.

4.34 As we understand it, all of these routes are consensual in some way but are currently used at different stages within the fitness to practise process, both before and after an assessment has been made on whether there is a realistic prospect of finding impairment. The question of whether they might be appropriate for any given case involves more considerations than simply that of remediation (for example, we have seen some CPDs where a strike-off has been agreed). It relates to the registrant's willingness to cooperate, as well as to whether, under the current case law, a public hearing would be necessary in the public interest. We note that under its' Order the NMC is required to refer any cases which meet the realistic prospect test to be dealt with in a public forum and to do otherwise is likely to require a change of legislation.

4.35 It is not clear how the NMC might be proposing to expand on its current use of these different processes or to develop new processes. We would urge the NMC to provide greater clarity to registrants, employers and the public about the status of these routes and the differences between them, and when they

can and cannot be used – particularly if more cases are to be disposed of through them. Some provide greater transparency than others – proposed changes to publication policies notwithstanding.

Investigations

4.36 The consultation document suggests that the NMC may not send all cases through to investigators if 'the registrant has already put any risk to patient safety right, and the concern isn't one which means they need to be removed from our register'. As we have noted, whilst there may be grounds to resolve cases consensually, the NMC needs to have taken steps to satisfy itself that it is aware of the full facts of the case and that it can rely on the remediation involved. As we have highlighted in our *Lessons Learned Review into the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital*, relying on an employer's assertion is not always appropriate and the NMC will need to take this into account in its assessment of cases.[14]

Categorisation of cases

4.37 As highlighted in our response to question 4, it is important that cases are categorised appropriately. In order to do this, it will be important that the NMC has taken steps to satisfy itself of the full facts of the case.

4.38 Our legal team have observed from their work reviewing the regulators' fitness to practise decisions, that cases are sometimes inappropriately classified as clinical e.g. record keeping, when in fact there are deep seated conduct issues such as dishonesty which are not adequately covered by the charges brought. This may affect decisions on whether such cases can be considered remediable.

Oversight of decisions made outside a tribunal

4.39 We have also raised concerns that decisions made by case examiners which are not signed off by an FtP panel currently fall outside of the Authority's Section 29 powers to review cases and refer to Court those which are insufficient to protect the public. Our Section 29 powers play an important role in ensuring public protection through the individual cases which we appeal and where corrective action is subsequently taken, as well as through the case law which is created. We also provide learning points to regulators on cases which we do not appeal but where we have concerns about how the case has been handled.

4.40 Currently, we believe there is a public protection gap in that decisions made in this way (the NMC, GMC and GDC currently have powers for case examiners to close cases with undertakings) do not receive any external scrutiny and there is no chance of any corrective action being taken in the event that such decisions are insufficient to protect the public. The recent case of Professional

[14] Professional Standards Authority 2018, *Lessons Learned Review into the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital.* [Online] Available at: https://www.professionalstandards.org.uk/publications/detail/nmc---lessons-learned-review-may-2018 [Accessed: 24/05/2018]

Standards Authority v Nursing and Midwifery Council and X[15] demonstrates the importance of external scrutiny of decisions made by a regulator about cases and the ability to appeal cases where there is a clear public interest. The Law Commissions also recommended that the Authority's power to refer fitness to practise decisions to the courts should be extended to include consensual disposals.[16]

Q7 We propose that every decision that relates to a restriction being placed on a registrant's practice (including voluntary removal) should be published. Do you agree?

4.41 Yes.

4.42 Transparency is essential so that members of the public and potential employers are aware of any restrictions that have been placed on a registrant's practice.

Q8 We propose that fitness to practise should support a professional culture that values equality, diversity and inclusion and prioritises openness and learning in the interests of patient safety. Do you think this is the right regulatory outcome?

4.43 The regulatory outcome outlined in the question appears to highlight three separate concepts and we are unsure what changes the NMC is proposing in practice. We agree with the consultation that a support for a professional culture, valuing equality, diversity and inclusion, and openness and learning are all important. However, we are unclear how this regulatory objective interacts with the NMC's overarching objective and the three limbs of public protection and what happens if there is a conflict between these.

4.44 As highlighted by the NMC in this consultation, there are a number of problems with the current regulatory system. The Authority recognises this and has been an active advocate for reform, however we would also emphasise that in the absence of reform, both the regulators and the Authority must work within the existing system and ensure that public protection remains their key concern. If the concepts outlined in the question can be encouraged and promoted at the same time then this is positive but, where there is a conflict, public protection should come first.

Supporting a professional culture

4.45 We agree that supporting a professional culture is important. We have previously highlighted the key role that registrants play as one of the agents of

[15] Professional Standards Authority, *Authority wins appeal in Nursing and Midwifery Council case on non-accidental injury to baby*. [Online] Available at: https://www.professionalstandards.org.uk/news-and-blog/latest-news/detail/2018/01/23/authority-wins-appeal-in-nursing-and-midwifery-council-case-on-non-accidental-injury-to-baby [Accessed: 15/05/2018]

[16] Law Commissions' Report 2014, *Regulation of Health Care Professionals Regulation of Social Care Professionals in England*. [Online] Available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf [Accessed: 20/05/2018]

patient safety. Regulators have a role to play in this through setting and maintaining standards of conduct and competence and through their role overseeing education and training programmes which provide students with the competences and embed the values they will require to practice as a registered member of the profession.

4.46 Fitness to practise plays a role in this through upholding standards of conduct and competence as one of the limbs of the overarching objective, however we are unclear what changes, if any are proposed. We would suggest that alongside supporting a professional culture there is a need to continue to consider the three limbs of public protection equally when considering cases.

Valuing equality, diversity and inclusion

4.47 In relation to valuing equality, diversity and inclusion, this is also an important issue. The NMC along with other regulators is bound by the Equalities Act 2010 and the public-sector equality duty and we welcome efforts to understand how this issue is dealt with within the fitness to practise process. This however covers a number of areas:

- Interactions with patients and service users by registrants
- Interactions between registrants
- The way that the fitness to practise process may affect registrants and members of the public with protected characteristics.

4.48 It is right that behaviour by registrants towards patients and service users or colleagues which may contravene professional standards is dealt with appropriately through the fitness to practise process. We also recognise that current FtP processes may have a disproportionate impact on certain groups.

4.49 We would welcome further clarity on any specific changes the NMC may be proposing. In relation to complaints referral, it is important that the NMC is clear in communications to employers and stakeholders that any cases which pose a public protection risk should be referred to the regulator. Concerns around overrepresentation of certain groups should not portrayed as a reason to raise the threshold for FtP referrals (see our answer to question 18).

4.50 We recognise that this is a difficult issue to address and we welcome the fact that the NMC is exploring it and has commissioned research in this area. We are also aware this is an area that a number of the other regulators are exploring. There are unlikely to be easy solutions and efforts to address the disparity which lack a complete evidence base may have unintended consequences. Further analysis of the data that the NMC holds from the FtP process may be a way of understanding why certain groups are overrepresented within the FtP process and enable the causes of harm to be targeted more effectively and better support to be provided to certain groups as necessary.

Prioritising openness and learning

4.51 We are very supportive of a culture in healthcare where professionals can openly discuss issues that have arisen and ways to improve patient care. We

have consistently argued for reform of professional regulation, in part to support a greater focus on learning. However, whilst we are supportive of efforts to consider this issue it would be useful to understand what practical changes the NMC is proposing to their process to further promote openness and learning.

4.52 There can be perceived to be a tension between early admissions and a registrant's fear of sanctions. We support a system that regards early admissions and openness as significantly mitigating any errors. It is reasonable to take this into account in assessing whether hearings are necessary and in looking at questions of impairment and sanction. However, it is important that all limbs of public protection are given equal weight and that where a sanction is required to uphold professional standards or maintain public confidence this is given.

4.53 It is also crucial that a drive for openness and learning does not obstruct the objective of public protection. The recent proposals to give the Healthcare Safety Investigation Branch powers to conduct 'safe space' investigations have raised concerns about the ability of the professional regulators to gain access to the information they need to carry out fitness to practise investigations and the conflict with the duty of candour. Information provided by professionals as part of HSIB investigations will not be disclosed to external bodies including the police and regulators unless it meets a threshold or through application to the Courts. This may prove onerous and time consuming and may hamper efforts to deal with immediate risks to public protection, for example through the use of interim orders and conditions. This is a related example of where a desire to promote a learning culture may run counter to public protection objectives.

4.54 We agree that as far as possible the regulatory system should encourage professionalism, avoid any disproportionate impacts on any groups with protected characteristics, and ensure that openness and learning are encouraged. We are supportive of changes to the system of professional regulation to better support these objectives in the long run but the NMC needs to ensure that it continues to keep fitness to practise focussed on its overarching objective.

Q9 We propose that fitness to practise should ensure that registrants are fit to practise safely and professionally. Do you think this is the right regulatory outcome?

4.55 We are broadly supportive of this regulatory outcome, however as in the previous question we are unclear how it is intended to interact with the NMC's overarching objective and the three limbs of public protection.

4.56 Whilst ensuring that registrants are fit to practise safely and professionally is clearly directly relevant to the NMC's overarching objective, we would suggest that it indicates a narrowing of the NMC's focus onto just the first of the three limbs of public protection (to protect, promote and maintain the health, safety and wellbeing of the public) rather than the other two. As we have noted in previous answers, the three limbs of public protection are not intended to be a

hierarchy but are all equally important in ensuring the overarching objective is met.

Q10 Please tell us your views on our regulatory outcomes as we've set them out in this consultation.

4.57 As explained in our answers to questions 8 and 9 we are broadly supportive of the concepts outlined in the two regulatory outcomes. However, as noted, we are unclear how the proposed regulatory outcomes interact with the NMC's overarching objective and the three limbs of public protection and what happens where there is a conflict between these. It would be helpful for the NMC to clarify this and provide further detail on how these proposed regulatory outcomes will influence the approach they intend to take.

4.58 We are supportive of the NMC's efforts to reduce the negative impact of the regulatory process on all involved. As previously highlighted, we recognise that the current system needs reform to ensure it works better for all who are affected by it including complainants and registrants. However, when seeking to innovate, regulators must ensure public protection is maintained in accordance with the existing legislative framework.

Q11 We think that employers are usually in the best position to resolve concerns immediately, and we should only take regulatory action if the concern has already been raised with and investigated by the employer (where there is one), unless there is an immediate risk to patient safety that we have to deal with. Do you agree?

4.59 We are supportive of local resolution where possible and agree that employers are often in the best position to resolve concerns. However, it is important that the NMC monitors the risks and takes immediate action if necessary to ensure public protection, for example through use of interim orders or interim conditions of practice. As highlighted in the Lessons Learned Review of the NMC's handling of the Morecambe Bay midwives' cases, there may be immediate concerns relating to public protection which should be addressed in parallel with or ahead of any employer or criminal proceedings through use of an interim order.[17]

4.60 It is also important that, where concerns have been referred to the NMC and there is a local investigation ongoing, the NMC is able to assure themselves both that the investigation is progressing in a timely manner and, once it is concluded, that the quality of the investigation reports from the relevant trust is detailed enough to be relied upon or whether additional investigation and evidence gathering is required. There may be cases where a complainant has already lost trust in the employing organisation. There could also be a negative impact on public confidence if the NMC is seen as being over-reliant on employer investigations, rather than carrying out its own independent investigations where required. We suggest that the NMC may wish to use its

[17] Professional Standards Authority 2018, *Lessons Learned Review into the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital.* [Online] Available at: https://www.professionalstandards.org.uk/publications/detail/nmc---lessons-learned-review-may-2018 [Accessed: 24/05/2018]

recently established Risk and Intelligence Unit and Employer Link Service to ensure that it is able to identify any concerns about an employer and take action where necessary. Effective information sharing with other bodies is also important, particularly where intelligence is needed from others or where other investigations may be ongoing.

4.61 It is also important that the NMC provides clear guidance to employers that they can and should refer a case to the NMC if they have *any* concerns about risks to the public, including information about thresholds for referral.

Q12 Do you agree that we should always take the context in which a patient safety incident occurs into account when deciding what regulatory action is appropriate?

4.62 We have consistently highlighted the difficulties of separating regulation of professionals from the context in which they work and the need for a more joined up approach and effective data sharing to ensure that concerns about the system are addressed alongside concerns about individual practice. Recent events, for example the case of Dr Bawa Garba, have highlighted the challenges of considering individual failings against a context where there may be wider failings or pressures within the workplace.

4.63 However, we think it is important that the process should identify whether (a) the registrant is actually fit to practise and (b) the misconduct was so great as to engage the other limbs of the overarching objective. Context may mitigate particular errors in certain circumstances but it should not distract from looking at the individual actions of the registrant. For example, we consider that those professionals with management responsibility should be held to account for their failings in allowing a context where patient safety incidents can occur.

4.64 Whilst we note that elements of context of practice, for example level of support in the workplace, is already highlighted as a potential mitigating factor in the NMC's guidance to FtP panels[18], we are supportive of the efforts to ensure that context is taken into account in a more consistent manner. It is however important for the NMC to ensure that the focus on individual responsibility remains and that even where a registrant has been working in challenging circumstances, their fitness to practise may still be impaired and may require appropriate action.

4.65 It would be helpful to understand more about the proposed tool to standardise the way that context is assessed and how this can be balanced against the need to ensure that any cases which engage any of the limbs of public protection are appropriately dealt with. There will also be a need to ensure full transparency in relation to how context is taken into account in such cases.

Q13 Do you agree that we should be exploring other ways to enable registrants to remediate at the earliest opportunity?

4.66 We refer you to our response to question 6. As outlined in *Right-touch reform*, we believe that where remediation is possible and is sufficient to protect the

[18] Nursing and Midwifery Council, *Sanctions Guidance: Decision making factors*. [Online] Available at: https://www.nmc.org.uk/ftp-library/sanctions/decision-making-factors/ [Accessed: 07/06/2018]

public, then enabling and encouraging remediation to take place as an alternative to a hearing is a preferable outcome. We therefore welcome the NMC exploring this issue. However, in looking at this issue, the NMC needs to ensure that remediation is meaningful and that all three limbs of public protection are fully satisfied – protecting the public, maintaining public confidence and upholding professional standards.[19]

4.67 There is also a difference between whether cases are remediable (i.e. it is possible to satisfy the limbs of public protection by requiring re-training etc) and whether a registrant has successfully remediated. Cases where remediation is not possible or less relevant include if the actions of the registrant are fundamentally incompatible with continued registration, demonstrate deep-seated attitudinal failings and, more generally, if remediation would fail to maintain public confidence and declare and uphold professional standards.

4.68 In relation to the NMC's proposals to encourage remediation 'at the earliest opportunity', it will be important that this does not come before the NMC has gained its own independent understanding of the facts so that it can ensure that such a course of action will fully protect the public.

4.69 Remediation will also only be a suitable option if the registrant has insight into what they have done wrong and agrees with the facts of the case and that their fitness to practise is impaired. It is more difficult to assess insight at the early stages of a case without hearing directly from the registrant and when the facts are not yet established. Care also needs to be taken over what assistance/guidance the registrant is given to remediate and how far this goes. Steps independently taken by a registrant to remediate go some way to demonstrating a genuinely insightful and reflective approach and carry particular weight.

4.70 Furthermore, as we have highlighted there is still further research needed about how remediation, particularly in cases involving attitudinal failings, such as dishonesty, can be demonstrated. It will be important for the NMC to engage with other regulators to ensure they can build knowledge of what constitutes effective and meaningful remediation.

Q14 We propose that unless there is a serious dispute about the facts or disposal of a case, or a registrant has requested a hearing, all cases should be dealt with at a meeting. Do you agree?

4.71 We refer you to our response to question 6. As highlighted in *Right-touch reform* we believe that the current fitness to practise system is unnecessarily adversarial and we support cases being dealt with consensually, provided that the facts are clear and agreed.

4.72 In relation to the NMC's proposals we are unclear what a 'serious dispute about the facts' might mean. While we accept that there may be minor disputes about facts which are not relevant to the seriousness of the conduct

[19] Professional Standards Authority 2017, *Right-touch reform.* p.44 [Online] Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_5 [Accessed: 15/05/2018]

or do not add anything significant to the picture, it is important that the regulator has reached its own independent view of the facts of the case. There are dangers in reaching agreements where this is not the case as this can risk dilution of the facts, particularly if, in doing so, the sanction is reduced and there is a risk to public protection.

4.73 However, we would highlight that the current case law suggests that in certain cases a hearing may be necessary to maintain public confidence, for example where there is a strong public interest element. Therefore, the NMC may wish to consider how this is incorporated into thinking around these proposals and guidance for decision makers.

4.74 For certain cases it may be more difficult to assess insight outside a panel hearing and therefore it may be important to ensure that there are opportunities through the investigation to assess insight, for example through face-to-face discussions with the registrant. This applies particularly where there are attitudinal concerns, such as dishonesty. This will be an important consideration when assessing whether the misconduct is remediable and what the appropriate sanction is to ensure public protection. It will however be important to ensure that the status of any such discussions with registrants is clear and the outcome recorded in a clear and transparent way to maintain public confidence in the process.

4.75 As we have highlighted in the recent *Lessons Learned Review* and in our 2009 policy advice on handling complaints, it is very important to ensure that complainants are provided with a copy of the charges accepted by the registrant so that they can respond fully.[20] We have also highlighted that if cases are dealt with outside a panel hearing then there would be merit in ensuring that the complainant is able to have clear and specific input, for example by including a statement about the impact of the registrant's actions in the bundle presented to decision makers.[21]

4.76 It is important that, since more regulators are moving towards resolving cases consensually, for example through undertakings, there is a level of consistency is how such powers are exercised and how particular types of cases are dealt with. We have previously raised our concerns about risks which are inherent in some consensual disposal approaches including the blurring of the boundary between investigation and adjudication and the risk of inadequate weight being given to public protection and the broader public interest.[22] We have proposed in *Right-touch reform* the need for a cross-regulator audit and research project in this area. Such an evidence-base

[20] Professional Standards Authority (2009). *Handling complaints: sharing the registrant's response with the complainant*. Available at: www.professionalstandards.org.uk/publications/detail/handling-complaints-sharing-the-registrant-s-response-with-the-complainant [Accessed: 14/05/2018]
[21] Professional Standards Authority 2017, *Right-touch reform.* p.107 [Online] Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017.pdf?sfvrsn=2e517320_5 [Accessed: 15/05/2018]
[22] Written evidence submitted by Professional Standards Authority to 2015 Health Select Committee Accountability hearing with the Nursing and Midwifery Council. [Online] Available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-and-social-care-committee/2015-accountability-hearing-with-the-nursing-and-midwifery-council/written/16047.html [Accessed: 30/05/2018]

would build a picture of what sorts of cases are being disposed of in this way, whether these approaches present any risks, and how they could be improved.

4.77 We have also proposed further research into the psychology of fitness to practise decision making and the impact, if any, of such decisions being made behind closed doors rather than in a public forum.

Q15 Please tell us what you think about our proposals and if there are any other approaches we could take.

4.78 See our general comments and our answers to the previous questions. We welcome the NMC's efforts to improve its fitness to practise process, however we have some reservations about some of the specific proposals and whether what the NMC is proposing is possible within their current legislation and existing case law.

4.79 We would like to see further reference to the evidence base that the NMC has relied on to develop these proposals. It would also be helpful to have a clearer description of the proposed next steps and what further research and consultation the NMC intends to do before proceeding with implementing any changes outlined.

Q16 Tell us what you think about our proposals to improve our processes. Are there any other ways we could give more support to members of the public, or improve how we work with other organisations, including other regulators?

4.80 We welcome the work that the NMC has done to improve its processes, in particular to improve the support provided to members of the public and witnesses attending hearings, although as some of these mechanisms are new it may take a while to assess their effectiveness.

4.81 We agree that clarity over what the fitness to practise process can and can't achieve is important. However, it is also important that the NMC treats input from patient and their families seriously and takes action where concerns are raised or where information is received that could help build understanding of a case and what the relevant issues may be. It is also important that processes are in place to support meaningful involvement by complainants through the different stages of the process.

4.82 Finally, as we have found in the *Lessons Learned Review into the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital*, it is also crucial that the culture at the NMC supports and values input and engagement by those raising concerns or providing information. There are a number of recommendations arising from the review which the NMC may wish to address as a priority.[23]

[23] Professional Standards Authority 2018, *Lessons Learned Review into the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital.* [Online] Available at: https://www.professionalstandards.org.uk/publications/detail/nmc---lessons-learned-review-may-2018 [Accessed: 24/05/2018]

Q17 Do you agree that having a fitness to practise process that values equality, diversity and inclusion could result in fairer outcomes?

4.83 Equality, diversity and inclusion are very important considerations and we welcome efforts by the NMC to increase understanding of this issue. We acknowledge that the current regulatory framework is not fit for purpose and may lead to unnecessary negative impacts for patients and professionals. We also recognise that certain groups are overrepresented within the system, the reasons for which are not yet clear.

4.84 We are very supportive of measures which assist vulnerable patients, witnesses and registrants to participate in hearings and that panels are aware of particular issues which affect specific groups. This should not affect the decision about whether an individual is fit to practise but it may provide a better environment and information to achieve this.

4.85 Alongside its efforts to understand these issues better and ensure compliance with equalities legislation the NMC must retain a clear focus on the overarching objective of protecting the public. If further improvements can be made to the process which also support equality, diversity and inclusion then this is positive. The most effective way of addressing this objective may be for the NMC to analyse the data that it holds from the fitness to practise process to identify why some groups are over-represented within the process and address the reasons behind this or provide additional support and guidance as appropriate.

Q18 Do you agree that we should support employers to incorporate the principles of equality, diversity and inclusion when considering making referrals?

4.86 Whilst employers will also already be covered by equalities legislation we are unclear from this question what changes the NMC would like to see in relation to referrals from employers.

4.87 Although research has demonstrated that certain groups are overrepresented in referrals and in the FtP process, the NMC should also be cautious of mixed messaging in this area. At the point of referral, misconduct or poor performance has already occurred and the registrant may therefore pose a risk to the public. It is very important that employers are not discouraged from making a referral which may be necessary for public protection. The NMC should provide clear guidance to employers that they can and should refer a case to the NMC if they have *any* concerns about risks to the public, including information about thresholds for referral. However, if there are concerns about the basis on which employers are making referrals then this may be an issue for consideration by other bodies, for example the CQC.

4.88 We acknowledge that this is a challenging issue. Whilst we welcome efforts by the NMC and other regulators to explore it, we would caution against any unintended consequences of changes, e.g. changes to the threshold for referrals, without an appropriate evidence base.

4.89 As mentioned, the NMC may be able to make better use of the data that it holds from the fitness to practise process to identify why some groups are

overrepresented within the process. This may be useful in addressing the reasons behind this or to share with employers who may be able to take action at an earlier stage to avoid individuals needing to be referred in the first place.

Q19 The protected characteristics are:

- **age**
- **disability**
- **gender reassignment**
- **marriage and civil partnership**
- **race**
- **religion or belief**
- **sex**
- **sexual orientation**
- **pregnancy and maternity.**

Will any of these proposals have a particular impact on people who share these protected characteristics (including nurses, midwives, patients and the public)?

- **Mainly positive impacts anticipated**
- **Mainly negative impacts anticipated**
- **No impacts anticipated**
- **I don't know**

Please give a reason for your answer.

4.90 In our view there is not enough detail provided in the proposals to highlight what the impact will be on those with protected characteristics. We would suggest that, when the NMC consults in more detail on specific changes to parts of their process, they should address this issue with reference to available data and ensure that the impact of any changes is fully evaluated to.

Q20 How can we amend our proposals to advance equality of opportunity and foster good relations between groups?

Please give a reason for your answer

4.91 The NMC should ensure that it complies with the law and avoids discriminating directly against specific groups. We agree that the regulatory framework is not fit for purpose and needs reform which may help to address some of the potential impacts identified, for example the overrepresentation of certain groups within the fitness to practise process. However, it must comply with its own overarching objective and legislation to protect the public.

4.92 As highlighted in our answers to previous questions, the best way for the NMC to address equality issues may be to analyse the data it holds from fitness to

practise proceedings and use this to strengthen support for certain groups and tailor revalidation requirements where required and to work with other bodies to address the reasons for overrepresentation of certain groups and to prevent harm occurring where possible.

5. Further information

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

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