

# Review of Social Work England's process for 'accepted outcomes' in fitness to practise cases

May 2021

## About the Professional Standards Authority

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

We oversee the work of 10 statutory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise.

We also set standards for organisations holding voluntary registers for people in unregulated health and care occupations and accredit those organisations that meet our standards.

To encourage improvement we share good practice and knowledge, conduct research and introduce new ideas including our concept of right-touch regulation.<sup>1</sup> We monitor policy developments in the UK and internationally and provide advice to governments and others on matters relating to people working in health and care. We also undertake some international commissions to extend our understanding of regulation and to promote safety in the mobility of the health and care workforce.

Our organisational values are: integrity, transparency, respect, fairness and teamwork. We strive to ensure that our values are at the core of our work. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

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<sup>1</sup> *Right-touch regulation revised (October 2015)*. Available at [www.professionalstandards.org.uk/policy-and-research/right-touch-regulation](http://www.professionalstandards.org.uk/policy-and-research/right-touch-regulation).

# Contents

1. Introduction .....	1
2. Our approach .....	3
3. SWE's process .....	3
4. Summary of cases reviewed.....	5
5. Cases where we identified serious concerns.....	7
6. Cases where we considered the process worked well.....	11
7. Concerns which could be addressed by improved process, guidance and training.....	12
8. Cases where we saw good or improving practice.....	16
9. Summary of learning identified.....	17

## About Social Work England and accepted outcomes

Social Work England (SWE) was established in December 2019 as the new regulator for social workers.

Its powers include a new process as part of its Fitness to Practise provisions. This process enables Case Examiners to propose sanctions to social workers where they consider that there is a reasonable prospect that adjudicators will find the facts of the concerns proved and that these will lead to findings of misconduct and impairment. If the social worker accepts the proposed sanction, that will close the case.

This process is new for the regulators that we oversee and we considered that it would be important for us to review how the process worked in practice since the Government is proposing to provide these powers to the other regulators as part of its plans for regulatory reform.

This work is undertaken as part of our performance review process for SWE and will inform our assessment of its performance in its first year.

# Review of Social Work England’s process for ‘accepted outcomes’ in fitness to practise cases

## 1.0 Introduction

- 1.1 This report sets out the Authority’s findings following a review of Social Work England’s (SWE) ‘accepted outcomes’ process.
- 1.2 SWE was established under the *Children and Social Work Act 2017* (‘the Act’) and took over the regulation of social workers in England from the Health and Care Professions Council (HCPC) on 2 December 2019. The *Social Workers Regulations 2018* (‘the Regulations’) set out the detail of how SWE is to operate. It is subject to the same Overarching Objective that covers the health care regulators, which is the protection of the public. This is defined as:
  - (a) to protect, promote and maintain the health, safety and wellbeing of the public;
  - (b) to promote and maintain public confidence in social workers in England;
  - (c) to promote and maintain proper professional standards for social workers in England.<sup>2</sup>
- 1.3 The Act and the Regulations give SWE significantly more flexible powers than are possessed currently by the other healthcare regulators. In particular, it is able to use a procedure to enable it to resolve fitness to practise cases by consent without a hearing. We refer to decisions taken through this procedure as ‘accepted outcomes’ or ‘case examiner decisions’. These decisions are published on the SWE website.
- 1.4 Under the rules applying to most regulators, serious allegations of professional misconduct or other matters affecting a registrant’s fitness to practise must be heard by an independent panel, usually comprising three people (with at least one registrant and one lay person) sitting in public (referred to in SWE’s legislation as ‘adjudicators’). The regulator acts as a prosecutor and presents evidence. The registrant may be present and represented. The panel decides whether the facts are proved, whether they amount to misconduct and, if so, whether the registrant’s fitness to practise is impaired either on public protection grounds (for example, because the registrant may repeat the conduct) or on public interest grounds (because a finding is necessary to uphold professional standards or maintain public confidence). If it decides that the registrant’s fitness to practise is impaired, the panel then considers what sanction should be imposed. The sanctions available vary from a warning, through conditions of practice, to suspension or expulsion from the register. The Authority can refer

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<sup>2</sup> Section 37, Children and Social Work Act 2017

such decisions to the court if it considers them to be insufficient to protect the public.<sup>3</sup>

- 1.5 The process for accepted outcomes is new. It aims to reduce the substantial delay and expense involved in fitness to practise hearings for cases which can be appropriately resolved on the papers and by agreement. The Authority had floated the proposal in its early work on regulatory reform<sup>4</sup> and the Government has indicated that it plans to provide a broadly similar process for the other health and social care regulators in its reforms to professional regulation.
- 1.6 There are a number of features of the process that are new (though some regulators, notably the Nursing and Midwifery Council (NMC) have powers to adopt some of them under their present rules). These include:
  - Cases at all levels of seriousness other than those which might lead to removal from the Register can be resolved through the process (the Government plans to extend this to allow removal to be agreed under the process)
  - The case examiners reach their decisions on the papers and do not have the opportunity to see witnesses or the registrant
  - The case examiners do not reach findings of fact: they decide that there is a *reasonable prospect* that a panel will find facts proved, that they amount to misconduct and that the registrant's fitness to practise is impaired and, on that basis, propose a sanction
  - The case examiners do not have legal advisers present when considering a case, though they can seek legal advice
  - The process is conducted in private
  - Unlike cases heard by fitness to practise panels, the Authority cannot refer such cases to the High Court if it considers that the decision is insufficient to protect the public and there is no action that can be taken to correct errors by the case examiners – in its reform proposals, the Government is suggesting a power for the Registrar to be able to review such decisions.
- 1.7 The Authority considered that it would be appropriate to look in detail at the cases resolved under this process in the first year of its operation to assess whether:
  - SWE's process works appropriately to protect the public
  - There is learning either for SWE or for the wider programme of reform.
- 1.8 Our findings will inform our review of SWE's performance in its first year.

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<sup>3</sup> Section 29 of the National Health Service Reform and Health Care Professions Act 2002

<sup>4</sup> Right-touch reform, November 2017, available at:

<https://www.professionalstandards.org.uk/publications/detail/right-touch-reform-a-new-framework-for-assurance-of-professions>

- 1.9 We would like to thank colleagues at SWE for their assistance in this work. We have been impressed by their constructive approach to matters that we have raised with them and their willingness to address them.
- 1.10 We are conscious that this report will deal with a number of cases which are in the public domain. We did not consider that it was desirable for individual cases or registrants to be identifiable through this report, particularly where we are critical of the decision. We therefore do not include much detail about the facts of the cases that we considered. We have referred our concerns to SWE so that it can consider whether further training or other action is required.

## 2.0 Our Approach

- 2.1 Between 2 December 2019 and July 2020, the Authority reviewed 11 cases. It provided feedback on these to SWE in August 2020. SWE conducted its own review of cases and provided a response in October 2020. We continued to review all cases completed by SWE before the end of 2020 and, in total, reviewed 41 cases.
- 2.2 The cases were reviewed by the team at the Authority which considers fitness to practise decisions made by panels. The team looked at a range of matters in analysing the decisions, including:
- Whether the regulatory concerns identified for the Case Examiners to consider properly reflected the evidence
  - Whether harm/risk of harm had been properly identified and whether public confidence and/or standards in the profession had been addressed
  - The quality of SWE's investigation
  - Whether the findings as to realistic prospect of facts, grounds and impairment were supported by the evidence before the Case Examiners
  - The decision not to refer a case to an adjudication hearing and consideration of the public interest
  - Whether risk of repetition, remediation and insight had been adequately considered
  - Whether the proposed outcome addressed all the concerns, protected the public, upheld public confidence, and maintained standards in the profession
  - Whether a review hearing was ordered and if not, why not.
- 2.3 We provided feedback to SWE about cases where concerns or good practice were identified. We have taken account of SWE's response to our feedback in this report.

## 3.0 SWE's process

- 3.1 Under this process, SWE's Case Examiners work in pairs (one lay and one professional) to reach decisions on the cases. Although part of SWE's structure, their decisions are made independently and cannot be changed by SWE. However, SWE reviews their decisions using its internal quality assurance

process. SWE's *Guidance for Case Examiners*<sup>5</sup> seeks to ensure that Case Examiners offer clear and transparent reasons for their decisions so that they can be easily understood by social workers, those who refer the allegations to SWE, and the wider public.

- 3.2 The role of the Case Examiners is to determine whether a case ought to be considered at an adjudication hearing, whether it could be resolved by an accepted outcome (in which case they may propose a sanction to a social worker where they find a realistic prospect that their fitness to practise may be impaired on one of the statutory grounds<sup>6</sup>) or whether it can be closed. They consider whether there is a realistic prospect of:
- The facts being found proven by the adjudicators
  - The adjudicators finding that one of the statutory grounds for impairment is engaged
  - The adjudicators finding that the social worker's fitness to practise is currently impaired.
- 3.3 Case Examiners are provided with an investigation report by SWE which includes a summary of the regulatory concerns, evidence gathered as part of the investigation and any responses and material from the social worker concerned. Case Examiners consider the case on the papers only and are unable to make findings of fact as they do not hear and test live evidence.
- 3.4 Where they consider that the realistic prospect test is satisfied, Case Examiners must consider whether there is a public interest in the matter being referred to a hearing. If it is, then the case should be referred to the adjudicators.<sup>7</sup> In principle, all other cases are eligible for disposal by consent. However, it is clear that a case must be referred to adjudicators where the social worker disputes the facts or does not accept that their fitness to practise is impaired.<sup>8</sup>

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<sup>5</sup> <https://www.socialworkengland.org.uk/concerns/case-examiner-guidance/> - at part 4

<sup>6</sup> Pursuant to regulation 25 (2) of *The Social Work Regulations 2018* the grounds are:

(a) *misconduct,*

(b) *lack of competence or capability,*

(c) *a conviction or caution in the United Kingdom for a criminal offence,*

(d) *a conviction not falling within sub-paragraph (c) for an offence which, if committed in England and Wales, would constitute a criminal offence,*

(e) *adverse physical or mental health,*

(f) *a determination by a regulatory body to the effect that the person's fitness to practise is impaired,*

(g) *being included—*

(i) *by the Disclosure and Barring Service in a barred list (within the meaning given in section 60(1) of the Safeguarding Vulnerable Groups Act 2006 F1 or article 2(2A) of the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 F2), or*

(ii) *by the Scottish Ministers in the children's list or the adults' list (within the meaning given in section 1(1) of the Protection of Vulnerable Groups (Scotland) Act 2007 F3), or*

(h) *not having the necessary knowledge of English,*

<sup>7</sup> See, *The Social Workers Regulations 2018*, Schedule 2, Part 2, Paragraph 7

<sup>8</sup> See, SWE Case Examiner Guidance - <https://www.socialworkengland.org.uk/concerns/case-examiner-guidance/> and SWE Fitness to Practise Guide - <https://www.socialworkengland.org.uk/concerns/fitness-to-practise-guide>

- 3.5 SWE's guidance for Case Examiners also advises that consideration should be given to:
- The factors that affect the seriousness of the concerns raised which the Case Examiners should address when considering if a social worker's fitness to practise is currently impaired
  - The elements to the public interest which Cases Examiners should consider
  - The fairness of decisions and sanctions imposed.
- 3.6 Case Examiners are also supported by SWE with additional guidance on drafting fitness to practise decisions<sup>9</sup> and the SWE Sanctions Guidance.<sup>10</sup>
- 3.7 The accepted disposal outcomes available to the Case Examiners are:
- A written warning or advice which is published for a maximum of five years
  - An order imposing conditions of practice on the registrant for a maximum of three years
  - A suspension order for a maximum of three years
  - No further action.

## 4.0 Summary of cases reviewed

- 4.1 SWE can decide that a social worker's practice is impaired on one or more of a number of grounds. These include:
- Misconduct – where there has been a breach of SWE's Code which is serious
  - Lack of competence or capability – where the social worker's standard of work is such that it suggests that they may lack competence to undertake the work
  - Health – where the social worker suffers from a health condition which affects their ability to practise safely
  - Conviction – where the social worker has been convicted of a criminal offence in the United Kingdom or abroad
  - A decision by another regulator that the social worker is not fit to practise
  - Being included on the list of the Disclosure and Barring Service (or its equivalent in Northern Ireland).
- 4.2 The Authority considered 41 cases decided between December 2019 and February 2021. Of these, 24 were misconduct cases, 12 involved convictions (all but one of which involved drink-driving or related convictions of varying levels of seriousness), three were health cases and two were mixed health/misconduct cases. In one case it was not clear whether the Case Examiners had identified a realistic prospect of a finding of misconduct or lack of competence. It has been counted as a misconduct case in the table below. That table sets out the

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<sup>9</sup> <https://www.socialworkengland.org.uk/concerns/drafting-fitness-to-practise-decisions-guidance/>

<sup>10</sup> <https://www.socialworkengland.org.uk/concerns/sanctions-guidance/>



numbers of cases that we looked at and identifies the numbers where we had serious concerns or identified what we considered to be good practice.

**Table summarising cases reviewed**

Type of case		Warning	CoP	Suspension	VRA	Cases where we identified learning	Cases where we identified serious concerns	Cases where we identified Good Practice	
Misconduct	24	11	7	1	5	18	8	3	
Conviction	12	9	3	0	0	9	0	3	
Health	3	0	3	0	0	1	0	1	
Health / misconduct	2	1	0	1	0	0	0	2	
<b>Total</b>	<b>41</b>	<b>21</b>	<b>13</b>	<b>2</b>	<b>5</b>	<b>28</b>	<b>8</b>	<b>9</b>	

4.2 As can be seen from the table, we identified serious concerns in eight cases. In four of these cases, the case examiners decided to take no action in order for the social worker to leave the Register voluntarily. We discuss these cases below and note that SWE is reviewing and amending its processes and guidance. In the remaining cases, we had doubts over whether they were suitable for an accepted outcome or were concerned that the Case Examiners had under-estimated the seriousness of the conduct.

4.3 We do not know whether we would have referred all of these cases to the relevant court. However, we had advice from external counsel in respect of three cases (two of which were voluntary removal cases) that the decision was likely to be insufficient to protect the public. The cases where we had serious concerns made up 19.5% of the total we reviewed and those where we had external advice to support our view made up 7.3% of the total.

4.3 This figure is high compared to the other regulators' panel hearings. In respect of the NMC, in 2019/20 we referred 10 cases out of 473 equivalent cases (i.e not including erasures or review hearings), which amounts to around 2% of cases and, in respect of the HCPC, nine cases out of 247 (3.6%). However, this needs to be caveated by noting that:

- This is a new process and it is likely that there would be more concerns in the early days
- The overall base is small and this may have distorted the percentages
- We did not follow our full procedure in reaching these views so we cannot definitely say that we would have referred them to the court or that we would have been successful.

4.4 SWE has suggested that it is inappropriate to compare Case Examiners' decisions with panel decisions in this way because we are not comparing like with like. It is true that the process that Case Examiners follow is different from that of panels because they do not see evidence or make findings of fact. They

have a reduced range of tools. However, Case Examiners in these cases reach final outcomes in respect of conduct which is often inherently serious, engaging sanctions such as suspension and which would otherwise be before panels. The decisions in these cases need to provide at least the same level of public protection as those of panels. The public needs to have the same level of confidence in them. Indeed, the absence of any appeal under the current process against these decisions might suggest that these decisions need to be even more robust than those of panels.

- 4.5 It is also true that the section 29 jurisdiction has established case law that applies to the particular circumstances of a panel hearing. We do not know how a court might approach the very different conditions applying to accepted outcome decisions. However, we considered that it was possible to identify aspects of decisions which were likely to lead to concerns that a decision might not be sufficient to protect the public. We discuss these in this report.
- 4.6 In 28 cases (68%) whilst the outcome appeared appropriate, we identified concerns of various levels of seriousness, most of which we communicated as learning points to SWE. We have identified themes from these cases which will be discussed in further detail in this report.
- 4.6 In nine cases (22%) we identified examples of good practice. In some cases, we identified examples of both good practice and concerns, which accounts for the discrepancy in the totals.
- 4.7 We had no concerns in five cases (12%).

## 5.0 Cases where we have identified serious concerns

### Taking no further action – voluntary removal cases

- 5.1 In four cases, the Case Examiners, having decided that there was a reasonable prospect of the facts being found proved and of the social worker's fitness to practise being found impaired, decided to take no action. This was to enable the social worker to take Voluntary Removal from the Register, so they were no longer able to practise as a social worker. We had two concerns about this. Firstly, we considered that such a process could be unlawful because it breached the prohibition in the *Social Workers Regulations 2018* on voluntary removal while social workers are subject to fitness to practise proceedings.
- 5.3 In addition to concerns about legality, we consider that such an arrangement may be insufficient to protect the public because:
- Leaving a register without a sanction may protect the public in the sense that the social worker can no longer practise. But it is unlikely to uphold professional standards because it does not send a signal to other registrants about the seriousness of the conduct, while public confidence in the regulation of the profession is likely to be undermined if the public perceives that a registrant can avoid sanctions simply by leaving the register

- Unlike cases where social workers are removed under the fitness to practise process, they can, in principle, return to the register very shortly afterwards. In the absence of clear findings about the original concerns, it is not clear whether or how SWE can ensure that they have addressed the concerns identified before re-admitting them
- The process does not enable future employers to understand the seriousness of the concerns.

- 5.4 We understand that SWE's reason for taking this approach was to address a lacuna in its Regulations which meant that it could not avoid what it perceives as injustice in a very limited number of cases. It ceased the process immediately on receiving our concerns and has produced some new guidance. We accept that there may be circumstances where voluntary removal from a register will be appropriate – for example, in cases of serious or terminal illness or where a sanction is being renewed and it is clear that the registrant is unlikely to return to practice – but these are exceptional. We understand that SWE itself shares this view.
- 5.5 However, although this process has been changed, we were concerned by some of the reasoning given by Case Examiners. Some of the cases that we saw were serious, involving allegations of dishonesty, collusion, safeguarding failures and breaches of confidentiality. While it is true that removal from the Register would protect the public in the sense that the social worker would no longer be able to practise as a social worker, we did not feel they gave adequate consideration as to whether a simple agreement by the registrant that their fitness to practise was impaired was sufficient to uphold standards or maintain public confidence.
- 5.6 In some, they appeared to equate voluntary removal with a removal order in stating '*a formal hearing could not impose any higher sanction than exclusion from the register*' or argued that the fact that the decision was published would demonstrate that action had been taken. We disagree with those views, which did not acknowledge that it is the imposition of a sanction which marks the gravity of the misconduct and that dealing with cases in this way could send the opposite message – that serious failings can be resolved without a sanction by asking for voluntary removal.
- 5.7 We raised these concerns with SWE in August 2020 and were pleased that SWE agreed to suspend this process pending a review. Since then it has taken legal advice and consulted representative bodies and the Authority about proposed changes to its guidance and practice. We consider that it would be good practice for SWE to consult more widely before implementing its proposals to ensure that users of social workers and other stakeholders are able to comment on the new guidance. We will, in any case, continue to monitor the process.

#### **Cases for which the process is unsuitable**

- 5.8 Case Examiners lack two tools that Adjudicators possess: they cannot call witnesses or determine disputed facts, and they cannot see the registrant and so gain a more concrete impression of insight and remediation than may be apparent on the papers. In a number of cases, the absence of these tools will not

prevent Case Examiners reaching appropriate decisions that protect the public. However, we saw cases where we considered that Case Examiners were offering accepted outcomes where there was a dispute of fact or where they had inadequate information about insight. These cases were at the serious end of the spectrum and there is no mechanism to address agreed outcomes which do not protect the public.

### ***Disputes of fact***

- 5.9 Case Examiners do not make findings of fact, misconduct (or the other statutory grounds) or impairment. They simply decide that there is a reasonable prospect of Adjudicators finding the facts proved, that these will amount to misconduct and a finding of impairment is likely to follow. If the social worker accepts that their fitness to practise is impaired, they can accept the sanction proposed by the Case Examiners.
- 5.10 We think that the fact that the social worker only needs to accept that their fitness to practise is impaired causes unhelpful uncertainty where there is doubt about the facts on which that acceptance is based.
- 5.11 Certainty about the factual basis on which a finding of impairment is reached is important. If a sanction is to be reviewed, the social worker and the reviewing body both need to be clear about the basis for the original sanction and what the registrant needs to address. Moreover, acceptance of the facts is an important indicator in assessing the social worker's insight and, therefore, the likelihood of repetition and the appropriate level of sanction. Failure to show insight suggests that a restrictive sanction is likely to be appropriate.
- 5.12 The state of the factual evidence before the Case Examiners will vary. At one end of the scale, clear documentary evidence may support the facts; at the other, findings of fact will depend on an assessment of the credibility of individual witnesses. In some cases, the extent and seriousness of the incident may be disputed – a social worker may accept some parts of the allegations but not others. Since Case Examiners, quite rightly, cannot determine disputed facts, such cases should generally be considered by Adjudicators.
- 5.13 We saw one case where it was clear that the social worker, while admitting that they were present at an incident, denied the matters that made the concerns serious and which the Case Examiners thought had a realistic prospect of being proved. The non-restrictive sanction in that case was not, in our view, sufficient to protect the public, because the social worker seemed to have no remorse or insight into what appeared to be the gravity of the matter and meant that there was a risk of repetition and of harm to service users.
- 5.14 We do not argue that every single allegation has to be accepted by the social worker. In some cases, discrepancies may not matter (for example as to the date on which the conduct took place). In others, disputed facts may not add anything to the gravity of the admitted ones. However, it appears to us that where the social worker does not accept facts that are the basis of the regulatory concerns which the Case Examiners consider have a reasonable prospect of being proved,

the Case Examiners need to explain why they still consider that the case is suitable for an accepted outcome.

### ***Assessment of insight***

- 5.15 Assessment of insight can be difficult where the social worker is not present. While insight can be demonstrated on paper through reflective pieces, the clarity with which it comes across may vary with the social worker's ability to express themselves on paper or the advice that they receive. We have seen, in a number of cases from other regulators, panels finding themselves better able to get a picture of a registrant's insight by seeing the registrant in person and being satisfied that, for example, a non-restrictive sanction may be appropriate.
- 5.16 We saw a number of cases where it was not clear to us that the level of insight demonstrated by the social worker supported the Case Examiners' assessment of it. In some, the insight and remediation shown on the papers appeared low, involving blaming others for failures, not providing assurance that the conduct had in fact been remediated or not accepting their conduct was dishonest. One case led to a non-restrictive sanction where we felt that the Case Examiners' assessment of insight was optimistic. In another, we considered that the insight needed greater probing to satisfy the regulator that conditions of practice were in fact appropriate.
- 5.17 SWE agreed with our concerns in some, but not all, cases, and has been considering how to address them through training. We welcome this. However, it is unlikely to avoid cases where, through human error or some other reason, Case Examiners underestimate the disputes of facts of the level of insight and, as a result, reach an outcome that does not protect the public. It would be helpful if SWE could consider further guidance about:
- The sorts of disputes of fact which need not prevent an accepted outcome
  - The areas where doubts about insight might require Adjudicators to assess the registrant directly
  - The need to provide clear statements of the facts which form the basis of the finding of impairment.

### **Concerns about registrants**

- 5.18 In some cases, we were concerned that social workers accepted outcomes that were potentially disproportionately harsh. In one case, a registrant admitted to an event even though, on examining what they in fact said, it was unclear that they could remember it and there was no other independent evidence. Had the registrant been represented that admission might not have been made and it is doubtful that a panel could have found it proved.
- 5.19 In others, we considered that registrants might well have been able to demonstrate a greater level of insight in front of a panel which could probe further and ask questions. These led to Conditions of Practice orders for cases where, with the social worker present, a panel might have considered an unrestrictive sanction appropriate.

- 5.20 We saw this demonstrated in one case where the social worker, having rejected a proposed outcome from the Case Examiners, was indeed able to persuade a panel that their insight and remediation were such that a finding of impairment was not necessary. This is significant because the case was directly comparable to a number of others which were resolved at the Case Examiner stage with Warnings or Conditions.
- 5.21 This must affect perceptions of fairness of and, therefore, confidence in, the system. While we cannot criticise social workers who decide to accept a relatively severe sanction in order to avoid a hearing, it would be better if they had had proper advice before doing so. It will also be damaging if it becomes apparent that a sanction can be avoided by having the matter determined by a panel and being able to demonstrate to that panel that concerns identified by the Case Examiners have been addressed.
- 5.22 We consider that SWE should consider whether it can provide further advice to social workers and their representative bodies about the options available to them and, in particular, what they should consider when providing reflective statements.
- 5.23 We suggest that these points need to be carefully thought through in the context of regulatory reform to consider how they can be addressed.

## **6.0 Cases where we considered that the process worked well**

- 6.1 The process appeared to work particularly well for health cases, for convictions (subject to comments that we make below) and for cases where there were full admissions from the registrant and there was clear evidence before the panel of insight and remediation. We did not find that there was anything inherently unsuitable about the process for deciding the cases for which it was intended: i.e. where there was little dispute and the sanction was clearly appropriate.
- 6.2 We also found that the format for decisions was appropriate and supported the Case Examiners to provide structured written decisions and the opportunity to explain detailed reasons. The guidance for Case Examiners (subject to what we say below) appeared appropriate.
- 6.3 The process enabled a swift resolution of cases and we noted that some cases had been dealt with in a matter of months since referral and more swiftly than if they had been referred to a panel. This is an important advantage.

## **7.0 Concerns which could be addressed by improved process, guidance and training**

- 7.1 The accepted outcomes process is new and began when SWE itself was a new organisation. It is inevitable that there will be learning from the first group of

cases. In this part, we discuss some points which, in our view, could be resolved by revised guidance or training for Case Examiners.

### **Investigation**

- 7.2 Case Examiners can only make robust decisions if the initial investigation into the facts has been thorough and so we looked at the evidence before the case examiners. SWE inherited an initial caseload from the HCPC in which the investigation had already largely been completed. While these were all reviewed by SWE, we found some cases where further or different investigation might have assisted the Case Examiners or where they, themselves could have sought more information.
- 7.3 These included convictions for drink-driving where the Case Examiners do not appear to have considered whether the offence arose from a health condition or there was further information (such as the police MG5 document) which ought to have been obtained as part of the investigation. This information is important because Case Examiners need to have regard to the nature and gravity of the criminal offence in question and the extent to which it is likely undermine public confidence in the profession. SWE may wish to examine its processes for obtaining the police MG5 and any other contextually significant material which may aid the case examiners in this assessment.
- 7.4 Allied to this, SWE may also wish to consider its policy on seeking health assessments. Poor health can be a background to a number of cases but, in the absence of medical evidence it can be difficult for a sanction which addresses these concerns to be imposed. In one such case, we were pleased that the Case Examiners felt able impose Conditions of Practice, despite an absence of medical evidence, but this may not always be the case.
- 7.5 It is also important that SWE should not rely exclusively on the investigation conducted by the employer: an employer's investigation is often aimed at deciding whether a social worker should remain in employment. A regulator's investigation should address whether they are fit to practise and ensure that other matters that might not have been included in the employer's investigation are considered. In one case, the SWE investigation relied almost exclusively on the employer's investigation. This was concerning because there was information before the Case Examiners which gave rise to additional concerns (breach of statutory duty to safeguard and failure to undertake mandatory training) which were not reflected in the matters alleged. Whilst we considered that the conditions of practice agreed between SWE and the social worker addressed the regulatory concerns as put before the Case Examiners, we did not feel confident that the full extent of the conduct had been examined.
- 7.6 In another case, we were concerned that the explanation provided by the social worker for a breach of confidentiality was not adequately investigated by SWE. That explanation was crucial to the level of sanction imposed and SWE needed to be satisfied that it was reliable. This could have pointed towards a panel hearing rather than an accepted outcome.

### **Regulatory concerns and the adequacy of charges**

- 7.7 When cases are referred to Case Examiners, SWE's investigators identify 'regulatory concerns' for the Case Examiners to consider. Although it is open to Case Examiners to amend these, these should set out the full extent of the conduct giving rise to the concerns. In some cases, we considered that the regulatory concerns should have been set out in more detail. In one case the concern was identified as being about record-keeping failings, whereas the facts suggested wider concerns in respect of breaches of statutory duty to safeguard and failure to undertake mandatory training. Helpfully, these matters were in fact considered by the Case Examiners, who were hampered by the fact that there was limited evidence to support them - raising concerns about both the investigation and the safety of the overall outcome. In a further case, the concerns, which were around confidentiality, did not appear to us to cover the full extent of the conduct. SWE agreed with our assessment.

### **Analysis of the facts**

- 7.8 We have discussed in Part 5 our concerns about the difficulties that arise where facts are disputed. More training on these points may assist Case Examiners to identify cases which need to go before panels.

### **Understanding of the public interest**

- 7.9 Two elements of the Overarching Objective address the public interest: the duty to uphold professional standards and the duty to maintain public confidence in the profession. Case Examiners have to consider the concept at three points in these cases:
- In considering whether the public interest is likely to require a finding of impairment
  - In considering whether the public interest requires a public hearing
  - In considering the appropriate sanction.
- 7.10 The concept can appear nebulous and it may be more difficult to assess public interest considerations than assessing a risk of repetition. The case law does not always provide clear guidance. However, we feel that consideration of the concept may be helped by considering Sir Thomas Bingham MR's statement in *Bolton v Law Society* [1994] WLR 512 where he states, in respect of solicitors, that it is essential to '*maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness... The reputation of the profession is more important than the fortunes of any individual member.*' That statement was made in the context of a solicitor who had been dishonest but had, it was argued, learned his lesson and would not repeat the misconduct. We consider that this principle applies to the health and social care professions just as much as to lawyers and this approach has been adopted by the courts in a number of cases.
- 7.11 Public interest considerations are less likely to be engaged in cases involving single, minor human errors or poor practice. However, in our view and as the courts have made clear, where conduct is serious and suggests a breach of



fundamental requirements of the profession, then the public interest must be engaged and Case Examiners (and, indeed, panels) should demonstrate that they have considered whether this needs to be reflected in their findings.

- 7.12 These fundamental requirements will vary according to professions but, in our view, conduct which involves such matters as dishonesty, sexual misconduct, abusive behaviour (particularly if aggravated by breaching the Equalities Act 2010), exploitation of vulnerable service users, breaches of confidentiality, failures to safeguard, placing service users at a risk of harm and so forth must engage the public interest.
- 7.13 We should stress that there will be cases involving this sort of conduct where Case Examiners may legitimately take a view that action to uphold the public interest is not required. These might include cases where the social worker's employment context was dysfunctional, where the conduct was isolated, or involved poor health and there is strong insight and remediation. However, the Case Examiners should demonstrate that they have considered these points to reach a proper evaluative decision. The fact that there may be a low risk of repetition will not lessen the public interest that a sanction should mark serious misconduct.
- 7.14 In the cases we saw, we were concerned that at times the Case Examiners did not appear to grapple with the inherent seriousness of the conduct and where, for example, leaving private court decisions which described intimate details of individuals' family lives in public places did not appear to be given the weight we would have expected. In two cases, the reasoning in the sanctions decision did not seem to address the public interest at all.
- 7.15 We also saw some statements which suggested that the Case Examiners considered that restrictive sanctions might not be required in cases which did not engage patient protection concerns. While this may be true in some cases, there will be other serious cases outside practice where the public interest may well require a restrictive sanction.
- 7.16 These concerns applied particularly to some of the Voluntary Removal cases, which we have discussed above.
- 7.17 Case Examiners must also consider whether there is a public interest in holding a hearing. We noted that many had some difficulty articulating what they needed to consider in making that decision. In our view, a hearing is in the public interest where the case can only be fairly and safely resolved in that way – usually because facts need to be proved in order for a proper assessment of the gravity of the conduct to be made or the social worker's insight needs to be assessed in person. There may also be a declaratory role in ensuring that the public is able to see that a serious case has been handled by the regulator.
- 7.18 The approach to public interest considerations is something that we have noted other regulators' panels find difficult. Professor Sir Norman Williams's *Report on Gross negligence manslaughter in health care* recommended that further work be

done on this. The Authority has done some research on the question and we are aware of work being undertaken by other regulators. We will monitor this work and consider whether further work is needed on this to assist panels.

### **Quality of the decisions**

- 7.19 The fact that these decisions are made in private makes it particularly important that decisions are clear and accessible to the public. This is set out very clearly in SWE's guidance for case examiners on *Drafting Fitness to Practise Decisions*<sup>11</sup> which states:

*'Any decision could be subject to scrutiny as a result of legal challenge or internal review, for example. It's therefore very important that, whether or not a decision is being published, it should be written so that a person with no connection to the case can fully understand the issues and why the particular outcome was reached. It's also very important that the decision should include every relevant factor. A good decision is one to which nothing can be added later.'*<sup>12</sup>

The Case Examiner checklist included in the guidance also states:

*'Would a third party with no prior knowledge of the concern be able to fully understand both the basis of the concern and the rationale for the case examiner decision from the reasons?'*

- 7.20 This is particularly important where sanctions are to be reviewed so that the social worker knows what has to be addressed and the reviewer has a clear picture of the concerns.
- 7.21 Not all decisions fulfilled these requirements. Some could have provided greater background information so that the reader could better understand the reasons for the conclusions. These were often apparent from the papers the Authority reviewed, but we felt that the decisions in those cases could have been more detailed and explicit.
- 7.22 In other cases, the basis on which Case Examiners reached their views was not always clear. In some, the basis on which the Case Examiners found a prospect of impairment was not well set out in the decision.
- 7.23 We also saw cases where the Case Examiners found that there was a risk of repetition of the conduct but imposed a non-restrictive Warning rather than a more restrictive sanction (Conditions or Suspension) but did not explain how the Warning addressed the risk of repetition identified.
- 7.24 These points suggest a need for feedback and, possibly, further guidance and training rather than an inherent flaw in the system. SWE has responded very positively to our feedback and we understand that further training is planned.

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<sup>11</sup> <https://www.socialworkengland.org.uk/concerns/drafting-fitness-to-practise-decisions-guidance/>

<sup>12</sup> Ibid, under heading '*About this Guidance*'

### **Application of the Sanctions Guidance**

- 7.25 SWE has published Sanctions Guidance<sup>13</sup> for use by Case Examiners and Adjudicators. The guidance is publicly available and sets out the types of concern that may require SWE to restrict or remove a social worker's right to work, and the factors that should be considered when making these decisions. While this guidance is not mandatory, it is important that the Case Examiners should have regard to it and explain why they may be departing from it.
- 7.26 One feature mentioned in the guidance is that where a decision-maker has identified a risk of repetition of the conduct, a sanction should be imposed which reduces the risk of repetition and which can be reviewed (usually conditions of practice or a suspension) so that the regulator can supervise the conduct of the social worker and assess when the risk has been reduced. We would expect decision-makers to provide reasons when they depart from this principle. We identified three cases where a warning, an unrestrictive sanction, was imposed despite Case Examiners identifying a risk of repetition. In two of these cases we considered that this may have meant that the decision was not sufficient to protect the public.
- 7.27 In a further case, which involved failure to protect a vulnerable child who had to be taken away from his mother, we were not clear that a year's Warning adequately addressed the seriousness of the conduct and the impact on the child.

### **Minor Concerns**

- 7.30 We saw some cases where it was not clear from the decision whether there was to be a review of the case and also noted that there were a higher number of typographical errors than we would typically see from other regulators. We have seen the latter in some panel decisions. SWE may want to review its quality assurance processes in the light of this.

## **8. Cases where we saw good or improving practice**

- 8.1 A very encouraging feature of this review has been the constructive and positive engagement by SWE. We were clear that there is a genuine desire to learn, reflect and develop good practice. The points we have raised have been carefully considered and SWE has taken steps to address them.
- 8.2 In particular, following our initial comments in August, we noted improvements in the quality of the decisions that we saw. These included:
- Regulatory concerns have been amended to better fit the evidence before the Case Examiners
  - Cases involving health matters have been paused to allow further investigation to take place

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<sup>13</sup> <https://www.socialworkengland.org.uk/concerns/sanctions-guidance/>

- Reasoning has been fuller and taken greater account of public interest matters
- There has been clearer engagement with the sanctions guidance and with detailed consideration of the alternative sanctions
- Case Examiners have dealt robustly with a number of cases where this was required. This has included one health/misconduct case which resulted in a five-year warning, where SWE had recommended that the case be closed. They have also properly rejected requests from social workers for reduced sanctions
- Some cases have been dealt with very speedily from the receipt of the initial concern.

8.3 These decisions gave us considerable comfort that, with additional guidance and training, many of the concerns that we have identified can be addressed and that, assuming that our serious concerns about ensuring that facts are agreed and the public interest properly addressed, this will prove a valuable tool for SWE.

## 9.0 Summary of the learning identified

9.1 Our review, albeit based on a relatively small number of cases, has shown that, subject to important caveats, the Accepted Outcome process is capable of dealing with many fitness to practise cases swiftly and fairly in a manner that protects the public, particularly where the facts of those cases are simple and uncontroversial.

9.2 However, there are cases which, on the evidence we saw here, are likely to be less suitable for summary assessments based on the papers only. These are cases where:

- There are disputes about the material facts
- There is uncertainty around the background to and seriousness of the conduct – for example, if the registrant interprets the facts in a way which contradicts the impression of other witnesses or where there may be concerns about the evidence of those witnesses
- There are doubts about the extent of the social worker's insight, for example because they are blaming others.

9.3 In these cases, Case Examiners are at a major disadvantage compared with Adjudicators in that they do not have the opportunity to interrogate the evidence directly. In many cases, it will be in the social worker's interests to accept outcomes which do not deal properly with the facts, either because they do not wish to risk a more severe sanction or because they want the process over. There are, therefore, real incentives which might lead to decisions which are either insufficient to protect the public, or unfair to registrants.

9.4 It is notable that all the cases where we considered that the decision might be insufficient to protect the public, were ones which in our view ought to have been

heard by panels. Since Case Examiners are the gate-keepers deciding whether a matter should reach a panel, it is essential that their training and guidance should stress these considerations. Their decisions, if accepted by the social worker cannot be over-turned.

- 9.5 SWE is considering further its training and guidance in this area. However, we suggest that Government and other regulators should consider how these disadvantages can be addressed in the context of regulatory reform. While the system has substantial advantages in terms of speed and avoiding the costs and other impacts of the hearing, this should not be at the expense of public protection.
- 9.6 The other concerns involve:
- The investigation and identification of concerns
  - The clarity of the some of the decisions in respect of facts and impairment so that the readers and reviewers have a clear picture of the conduct involved
  - The quality of reasoning and engagement with guidance
  - The approach to the public interest.
- 9.7 We have identified these concerns to a greater or lesser extent in the panel decisions of the other regulators that we oversee. They can all be addressed through training and guidance and we are satisfied that SWE has mechanisms to do so. Once the limitations set out above are taken into account, there appears to be nothing inherent in the role of Case Examiners which makes their decisions of higher or lower quality than those of panels. The good decisions that we saw were reasoned to a similar level to good panel decisions and the poor ones we saw were not markedly worse than poor panel decisions. Our concern is that if Case Examiners fail to identify cases which are unsuitable for an accepted outcome (as happened in some cases that we saw), the public may not be protected and registrants may suffer injustice.
- 9.9 This was a new process and it was likely that there would be lessons to be learned from some cases. We congratulate SWE on the way in which it has addressed the concerns that we have raised so far and are confident that it will continue to respond to feedback and review its processes. These decisions play an important role in protecting the public and we will continue to review and monitor them through our performance review process.

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