Response to the GPhC discussion paper on the draft hearings and outcomes guidance

January 2023

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 ten 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 are grateful for the opportunity to comment on the proposed amendments to guidance for fitness to practise (FtP) panels, with a focus on Equality, Diversity and Inclusion (EDI). We commend the General Pharmaceutical Council (GPhC) for their swift response to the recommendation in *Safer care for all*, that regulators should '*review how their fitness to practise processes, including their indicative sanctions guidance and other fitness to practise guidance address allegations of racist and other discriminatory behaviour*'.

2.2 We also recognise the complexity and sensitivity of the two issues covered by the proposed changes – discriminatory behaviour by registrants, and cultural considerations in FtP decision-making. We have some suggestions for ways in which the guidance could be improved, and have provided more detail on this under the relevant sub-headings below.

2.3 An additional broader point is that we would have liked to see the theme of registrants who are victims of racism and other forms of discrimination considered alongside these changes, as this can be an important contextual factor in a case. This was a prominent topic at the GPhC Racism in Pharmacy roundtable in November last year, and has been discussed in relation to

recent controversial FtP decisions, such as that of Dr Arora. Panels should be in a position to assess the extent to which the registrant's actions and behaviour were affected by their being the victims of this kind of mistreatment by colleagues, while being aware that the original referral to the regulator might itself form part of this unfair treatment. The earlier parts of the FtP process should also be sensitive to these factors.

2.4 We suggest that even with improvements, the text that is intended to be added to the core guidance for FtP panellists may not be sufficient to support good decision-making. The commentary in the discussion document seems, a least in part, essential to understanding the additions in purple boxes, which suggests that some supporting guidance may be needed to supplement the core guidance. In addition, as these are complex and nuanced matters of judgement, the job of the regulator will also be to recruit and train panellists (and other decision-makers) to have the skills, knowledge, and acuity to make fair, consistent, and sound decisions on cases the guidance applies to.

2.5 Finally, we would have liked to see more of the evidence base for the proposals and some of the statements contained in the call for views. The Authority has recently commissioned some research to explore public attitudes to discriminatory behaviour by healthcare professionals and its impact on public confidence, which will be relevant to your guidance on discrimination. We hope to publish the final report in the Spring.

2.6 We would also recommend testing the guidance with panel members if possible.

3. Supporting decision making in hearings where discrimination is a factor

3.1 We welcome the GPhC's work to strengthen the guidance for FtP panellists, for cases where discrimination is a factor. We felt however that the suggested additions could do more to draw out the complexity of the issue, and to support fair and consistent decision-making.

3.2 It would be helpful to understand the GPhC's reasoning as to *why* the conduct referred to both in the purple box on p12 and in the examples on p13 should sit at the upper end of the scale, with reference to the impairment and sanction stages, and the three limbs of public protection. We are concerned that the suggestion that such conduct should generally be considered to be at the upper end of the scale, combined with the presumption that it is unlikely to be remediable, may not in fact equip panel members to make decisions about each case on its merits.[1]

3.3 Instead, the guidance could stress the inherent seriousness of such behaviours, which are very likely to engage the public interest aspects of the

[1] We note, for example, the case of Roberts (*Professional Standards Authority for Health and Social Care v Health and Care Professions Council, Andrew Roberts. [2020] EWHC 1906 (Admin)*). This case was exceptional, and it should be noted that the hearing pre-dated the murder of George Floyd. Nonetheless, the Courts ruled that although misconduct involving a racial slur should always be taken seriously by regulators, it could be – and in this case had been – remediated. The Judge found that the original FtP panel was not wrong to find that the registrant was not impaired.

over-arching objective. This type of misconduct is often associated with serious attitudinal failings, which are difficult to remediate but not impossible.

3.4 We recognise the challenges of offering guidance on these issues where judgement is required to assess each case on its merits. In our view, these nuances and complexities should be brought to the fore, to provide the panel with the tools to guide their judgement through the stages of decision-making (facts, impairment, and sanction).

3.5 More generally, we suggest this could be done by giving more detail about:

- what different types of discrimination look like
- how and why this conduct might engage the limbs of public protection
- factors that might aggravate or mitigate the conduct
- what good remediation looks like, and
- where conduct is more likely to be considered incompatible with professional registration.

3.6 We have two further, related, comments on this section. We note that the examples given in the text in the purple box on p12 are limited to discrimination involving protected characteristics, while the text above this, refers more generally to 'discriminatory behaviour and attitudes'. It was not clear to us whether the guidance was intended to apply only where there are protected characteristics or to other forms of discrimination as well.

3.7 Related to this, we note that the examples on p13 do not all involve protected characteristics, and the second example refers not to discrimination but to 'bullying and harassment'. It would be helpful to understand how the concepts of 'bullying and harassment', and 'discrimination' relate to each other, given that they may overlap, but are also distinct in law. Some definition of these terms is needed to understand which behaviours the guidance is intended to cover.

4. Taking account of cultural factors when panels are deciding on an outcome

4.1 We welcome the inclusion of additional guidance for panellists to support more accurate assessments of a registrant's attitude. We felt however that the focus on cultural factors and health could obscure what we see as the more pertinent fact that all individuals express themselves differently, and that this is a result of myriad factors in each person's life and background – of which cultural factors and health conditions are a part and certainly worth mentioning. The example given of eye contact on page 15 is not helpful as it suggests that panel members should otherwise place significance on whether or not the registrant has made eye contact. The Courts have found that demeanour should not be relied upon to assess credibility.[2]

[2] R (on the application of) Dutta v General Medical Council [2020] EWHC 1974 (Admin)

4.2 Instead, we suggest that the guidance could place more of an emphasis on the need for panels to be curious, inquiring, and ask questions of the registrant, rather than taking things at face value.

4.3 To help with this, panellists should be encouraged to think about their own biases, and they, as well as regulators, should be looking for ways to mitigate them. This point was highlighted in the advice we commissioned on cognitive bias in FtP decisions.[3]

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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[3] https://www.professionalstandards.org.uk/news-and-blog/blog/detail/blog/2021/06/10/cognitive-biases-in-fitness-to-practise-decision-making-from-understanding-to-mitigation