

# **NMC conclusions on proposed changes to the Fitness to Practise and Registration Rules following consultation**

**October 2014**

## Contents

Introduction and background .....	2
Stakeholder responses and our conclusions .....	3
Responses about registration fees .....	3
Case examiners / changes to the role of the Investigating Committee .....	3
Supportive responses .....	4
Unsupportive or other responses .....	4
Conclusion .....	5
Reviewing no case to answer decisions .....	6
Supportive responses .....	6
Unsupportive or other responses .....	6
Conclusion .....	7
Changes to the composition of a registration appeal panel .....	7
Supportive responses .....	8
Unsupportive or other responses .....	8
Conclusion .....	8
Requesting and verifying information .....	8
Supportive responses .....	9
Unsupportive or other responses .....	9
Our proposed legal drafting .....	10
Impacts of the proposed changes .....	10
Next steps .....	11

## Introduction and background

- 1 The Nursing and Midwifery Council (NMC) is the healthcare regulator for nursing and midwifery in the UK. We exist to safeguard the health and wellbeing of the public. We do this by setting standards of education, training, conduct and performance for nurses and midwives. We also hold the register of those who have qualified and meet those standards. If an allegation is made that a registered nurse or midwife is not fit to practise, we have a duty to investigate that allegation and, where necessary, take action to safeguard the health and wellbeing of the public.
- 2 Our roles, functions and many of our processes are set out in secondary legislation: the Nursing and Midwifery Order 2001 ('the Order'), and a series of Rules which sit underneath the Order. Between 17 April and 12 June 2014, we consulted on a number of changes to our Rules<sup>1</sup> aimed primarily at improving the efficiency and effectiveness of our processes. That consultation can be found [here](#) and sets out our full proposals. We consulted in parallel with the Department of Health; its consultation on proposed changes to the Order can be found [here](#).
- 3 We asked for views from stakeholders on our proposed changes in order to help finalise our approach. We received 183 responses to our consultation, 17 of these

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<sup>1</sup> The Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules 2004 (as amended), and The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended).

were from organisations and 166 were from individuals. 139 of the individual responses were declared as being from registered nurses and midwives. It should be noted that not all of the respondents answered all the questions.

- 4 We would like to thank all of those who responded to our consultation.
- 5 This document sets out the responses we have received to our proposals. It also sets out our assessment of those responses, and our conclusions having taken account of those responses. Finally, it sets out the next steps that we intend to take. The Department of Health has published the conclusions to its consultation separately; these can be found [here](#).

## **Stakeholder responses and our conclusions**

### **Responses about registration fees**

- 6 Concerns were raised within some of the consultation responses that the proposed changes would result in greater expense for the NMC, and that this was a contributory factor to the NMC separately consulting on a proposal to raise the registration fee. As part of our policy development, in conjunction with the Department of Health, we undertook a financial impact assessment on the proposals. This estimated that the collective financial impact of the proposed changes to the Order and the Rules would be annual efficiency savings of between £340,000 and £650,000 for the NMC.
- 7 The proposed changes represent part of our drive to improve efficiency and keep our costs under control as set out in our fee rise consultation<sup>2</sup>. We would like to take this opportunity to reassure nurses and midwives that the proposed changes to the Fitness to Practise and Registration Rules are designed to produce financial savings and not contribute towards the proposal for an increase in registration fees. We therefore consider this concern does not impact on the proposals upon which we have consulted.

### **Case examiners / changes to the role of the Investigating Committee**

- 8 We proposed that we should introduce case examiners into our fitness to practise process. A pair of case examiners (one lay and one registrant) would fulfil many of the functions currently carried out by the Investigating Committee (IC) in deciding whether a registrant had a case to answer against an allegation that their fitness to practise was impaired. The IC would reach a decision where case examiners failed to agree on a decision, and the IC would extend their role regarding interim orders (IOs)<sup>3</sup>. IOs could be made by the IC throughout the fitness to practise process until the commencement of a substantive hearing, and could be reviewed by the IC up until the final decision at the substantive hearing.

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<sup>2</sup> Pages 8 & 12 –

<http://www.nmc-uk.org/Documents/Consultations/2014/Fee%20Rise%20Consultation.pdf>

<sup>3</sup> A temporary measure (suspension from practice or conditions of practice) that the NMC is able to place on a nurse or midwife whilst considering a fitness to practise allegation against them. The measures available are set out in Article 31 of the Nursing and Midwifery Order 2001 (as amended) and Rules 2 & 8 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended).

- 9 65% of all respondents agreed with the introduction of case examiners, 21% did not agree and the remainder were unsure or had no view. 60% of all respondents agreed with a pair of case examiners (one lay and one registrant) making a decision on whether there was a case to answer, 23% disagreed and the remainder were unsure or had no opinion. 78% of all respondents agreed a case should be referred to the IC if a pair of case examiners could not agree, 14% disagreed and the remainder were unsure or had no opinion. 65% of all respondents agreed with proposals around the IC making IO's, 21% did not agree and the remainder were unsure or had no opinion. 70% of all respondents agreed with proposals around the IC reviewing IOs, 20% did not agree and the remainder were unsure or had no opinion.

### **Supportive responses**

- 10 We received a number of supportive responses for our proposals to introduce case examiners and the expanded ability of the IC to make and review IOs. The supportive themes, with which we agree, are set out below:
- 11 Respondents generally believed the changes proposed would be a means of improving efficiency, swiftness and consistency in decision making and would result in a welcome streamlining of processes. They considered that it would also be simpler to understand, more proportionate, improve robustness and produce cost savings, boosting public protection and public confidence as a result.
- 12 Respondents observed that the proposals broadly mirror changes made by the General Medical Council (GMC) and General Optical Council (GOC) so would bring consistency in regulation. The introduction of case examiners at the GMC and GOC is reported to have made a positive impact on the swiftness, robustness and consistency of decision making.
- 13 There was strong support for the IC retaining its case to answer decision-making function in situations where case examiners could not agree, as a safeguarding mechanism.
- 14 Respondents stated that the expansion of the existing ability of the IC to make and review IOs would improve public protection and free up the time of the Health Committee (HC) and Conduct and Competence Committee (CCC) to focus on substantive hearings. The IC would also develop greater specialism in IOs which would potentially be beneficial for all involved. Respondents believed there would be an increase in the swiftness of decision making to the point of referral which was not always the case with the current approach.

### **Unsupportive or other responses**

- 15 There were a number of responses regarding our proposals to introduce case examiners and the expanded ability of the IC to make and review IOs which were unsupportive or suggestive that further clarity was required. These are set out below.
- 16 The two main questions asked about case examiners related to their independence (given that they would be employees of the NMC) and the ability of

lay persons to make sound decisions in areas where they had no professional experience.

- 17 The NMC is the independent regulator of nurses and midwives in the UK, therefore decisions by case examiners employed directly by us or making a decision on our behalf will be independent and objective of the profession. We do not exist as a representation body. This model is widely used to good effect throughout regulatory approaches in the UK. Furthermore, within the NMC itself the role of case examiners is a distinct one and they will make their decisions impartially and independently. They will not be involved in undertaking the investigation itself nor in presenting cases at any final hearing.
- 18 Furthermore, the role of lay people in professional regulation and in the governance of health and care institutions is well established. For the case examiner role, the NMC is seeking to appoint people with sufficient skills and experience to make robust decisions.
- 19 One respondent questioned why a case could not be reviewed by another pair of case examiners in the event that the first pair could not agree, instead of referring it to the IC. We do not believe that this would be a fair or proportionate way to resolve a case. We think that the IC is the best place for resolving such a case as it (the IC) has the required expertise and experience to perform such a function. A case should also be escalated to be resolved if one level of decision maker cannot decide on the case in the first instance. This approach is also consistent with the model used by other regulators.
- 20 Finally, it appears that there was some confusion amongst respondents over our proposal to extend the IC's ability to make and review IOs and whether this was an existing power, or whether it was a new power to be introduced. For clarity, the use of IOs is a key element of our existing fitness to practise process. They enable us to suspend a registrant's practice, or put conditions on their practice, during the period of time between allegations, investigations and final substantive hearing. The consultation proposal only related to which committee could make such orders at which stage of the process. It was proposed that IOs could be made by the IC at any point prior to a final hearing commencing rather than its power to make an IO ending where a referral to the HC or CCC had been made by the case examiners or IC. At present the power to make an IO rests with the CCC or HC after the referral to them, but under our proposal the IC would also be able to make or review an order after referral to the CCC or HC.

## **Conclusion**

- 21 We have decided to implement our case examiner and IC proposals as set out in our consultation. These proposals have been well supported through the consultation process, with no material objections being raised. No evidence has been submitted to us that would suggest another course of action is required. The expected outcome is swifter and more efficient and robust decision making.

## **Reviewing no case to answer decisions**

- 22 We proposed that where case examiners or a panel of the IC decides there is no case to answer, the Registrar would be able to carry out a review of that decision if the Registrar:
- a. had reason to believe the decision was materially flawed in whole or in part, and it would be in the public interest to review the decision; or
  - b. had reason to believe that new information may have led to a different decision in whole or in part, and it would be in the public interest to review the decision.
- 23 We proposed the inclusion of an additional safeguard so that any such review must start within one year of the original decision, save in exceptional circumstances.
- 24 The Registrar would have the ability to carry out appropriate investigations and could decide to uphold the original decision, may substitute all or part of the decision or refer the case to the case examiners for reconsideration.
- 25 55% of all respondents agreed with our proposals to introduce a power to review no case to answer decisions, 31% disagreed and the remainder were unsure or had no opinion. 48% of all respondents agreed that a 1 year time limit for review (except in exceptional circumstances) was appropriate, 34% disagreed and the remainder were unsure or had no opinion. 51% of all respondents agreed that the grounds for review were appropriate, 17% disagreed and the remainder were unsure or had no opinion.

### **Supportive responses**

- 26 We received a number of supportive responses for our proposals to review no case to answer decisions. The supportive themes, with which we agree, are set out below.
- 27 Respondents agreed that reviewing materially flawed decisions or decisions where new information has come to light is an important safeguard for public protection. Respondents commented that this power would assist accountability and agreed that the trigger points for a review were appropriate.

### **Unsupportive or other responses**

- 28 A number of responses received about our proposals for reviewing no case to answer decisions were unsupportive or sought clarity on our proposals. These are set out below.
- 29 We received numerous differing views on the one year time limit for review. Views we received ranged from having no time limit for review, to a 28 day, six month, 12 month, 18 month, two year, three year or five year time limit for review. Other respondents believed that no review should be allowed as a no case to answer decision should be final to provide certainty for the registrant. Overall, the public and some registrants favoured 12 months or a longer time limit, with other

registrants and professional bodies favouring no review power at all or a much shorter time limit.

- 30 It is plainly not possible to arrive at a time limit that will be welcomed by all parties. The main objective in arriving at an appropriate time limit must be to afford the regulator an ability to review a decision in the public interest whilst giving the registrant certainty by not allowing a review to be brought a long period of time after the event. We therefore feel on balance that a one year time limit, to be applied unless there are exceptional circumstances, is reasonable. The power to undertake a review outside this normal time limit in exceptional circumstances addresses the concerns of those seeking a longer time limit for reasons of public protection. For the reasons set out in our consultation, we believe that having no option to review a no case to answer decision represents a fundamental flaw in regulatory arrangements and is not conducive to public protection.
- 31 Other significant comments were that a review power could be detrimental to the health of those involved and that any power of review could also undermine the credibility of the NMC's decision making.
- 32 We disagree with these points, and note that no supporting evidence has been provided to substantiate either comment. The key reason for a power to review a no case to answer decision is to ensure that those who may represent a danger to the public and patients can be held to account.

### **Conclusion**

- 33 We have decided to implement our reviewing no case to answer decisions proposals as set out in our consultation. There have been no material objections to them, nor has any evidence been submitted to us that would suggest another course of action is required. The expected outcome is a more robust regulatory regime that will be better able to hold nurses or midwives to account.

### **Changes to the composition of a registration appeal panel**

- 34 We proposed that Council members should no longer chair registration appeal panels and that this function would instead be performed by existing practice committee<sup>4</sup> Chairs. We also proposed that where the health of a registrant is in issue, there would no longer be a requirement for the registration appeal panel to have a registered medical professional (RMP) on the panel. Instead, medical opinion would only be provided by expert witnesses called by either party (which may also be done at present) ensuring it is provided to all parties involved and was open to cross examination. This would make the Registration Rules consistent with the Fitness to Practise Rules, and bring the NMC in line with general legal principles.
- 35 57% of all respondents agreed with removing Council members from the panel, 18% disagreed and the remainder were unsure or had no opinion. 49% of all respondents agreed with the removal of RMP's from the registration appeals panel, 39% disagreed and the remainder were unsure or had no opinion.

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<sup>4</sup> i.e. an existing Chair of the Investigating Committee, Health Committee or Conduct and Competence Committee.

## **Supportive responses**

- 36 We received a number of supportive responses for our proposals to change the composition of a registration appeal panel. The supportive themes, with which we agree, are set out below.
- 37 There was strong support for the removal of Council members from the Panel, with respondents commenting that it would improve public confidence by removing any suggestion that the panel was not impartial. This would bring clear lines of demarcation between the operational and governance function of the NMC and remove any perceived or potential conflicts of interest.
- 38 Many respondents also commented that it is preferable that medical opinion is provided from an expert witness rather than a RMP panel member. This will improve public confidence in the transparency of the panel's decision-making.

## **Unsupportive or other responses**

- 39 Almost all unsupportive or other comments received were around concerns that removing an RMP would result in no medical opinion being able to be offered at a registration appeal panel hearing where health is in question. This was considered to be unacceptable.
- 40 We believe this objection is a misunderstanding. For clarity, we would like to confirm that expert medical opinions would still be available in cases where the nurse or midwife's health is in issue. However, this would come from an expert witness instead of a panel member. Panel members would be making their decisions on registration based on expert medical opinion which can be considered and challenged in the correct forum.

## **Conclusion**

- 41 We have decided to implement our proposals to change the composition of registration appeals panels as set out in our consultation. The removal of Council members has been widely supported, and objections on proposals to remove RMP's were, we believe, based on a misunderstanding. There have been no material objections to our proposals, nor has any evidence been submitted to us that would suggest another course of action is required. The expected outcome is more open and independent panels.

## **Requesting and verifying information**

- 42 We proposed that in order to meaningfully comply with EU legislation requiring nurses and midwives to hold professional indemnity insurance (PII) appropriate to their role, the NMC should be able to request and verify the following in registration applications<sup>5</sup>:
- a. evidence that they have, or will have when they are practising, appropriate cover in place under an indemnity arrangement;

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<sup>5</sup> Meaning during an initial registration application, an application for re-admission, or an application for renewal of registration.



- b. details of the nature and scope of the nurse or midwife's practice;
- c. the name and address of any person or organisation by whom the nurse or midwife is employed or intends to be employed, or for whom the nurse or midwife provides services, or intends to provide services; and,
- d. other documents and information that the Registrar may reasonably require for the purpose of verifying the information in and determining renewal applications, including whether the nurse or midwife has, or will have when they are practising, appropriate cover in place under an indemnity arrangement.

- 43 There was broad support for the proposal that the NMC should be able to request certain PII information. The proposed power to disclose that information to a third party was supported by the majority of respondents, but support was not as clear cut as for the power to request information. There was also a difference in support of disclosure between organisations and individuals.
- 44 64% of all respondents agreed with our proposals to be able to request certain information in relation to PII arrangements, 17% disagreed and the remainder were unsure or had no opinion. 49% of all respondents agreed with our proposals to have the ability to disclose PII information to a third party in order to verify it, 31% disagreed and the remainder were unsure or had no opinion.

### **Supportive responses**

- 45 We received a number of supportive responses for our proposals around requesting and verifying information. The supportive themes, with which we agree, are set out below.
- 46 The majority of respondents agreed that the ability to request and then verify certain information was required to be able to meaningfully comply with EU legislation. Most agreed it would bring a robust approach to compliance and therefore help to protect the public and patients in the event of a failure in care. Without the ability to disclose in order to verify information, respondents agreed the powers would be an administrative and toothless exercise. Organisations in particular were strong in their support of this.

### **Unsupportive or other responses**

- 47 A number of responses received about our proposals around requesting and verifying information were unsupportive or sought clarity on our proposals. These are set out below.
- 48 Some respondents objected to the principle of PII, stating it would reduce the choice for women by ending the ability for midwives to practise independently. This issue is out of scope for this consultation and has previously been addressed and concluded on by the Department of Health<sup>6</sup>. Furthermore, the requirement is now in both EU and UK law. Please see the [guidance on our website](#) for further information.

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<sup>6</sup> Indemnity or Insurance for Regulated Healthcare Professionals – Department of Health - <https://www.gov.uk/government/consultations/protecting-patients-from-negligence>

- 49 Some respondents asked for clarity on exactly what information would be requested and who it would be disclosed to. The information proposed to be requested is set out in paragraph 42 above. In order to verify such information, we may disclose it to any third party in a position to verify it which may include employers, agencies or insurance providers.

### **Conclusion**

- 50 We have decided to implement our proposals to request and verify information as set out in our consultation. The proposals have received a good level of support. There has not been any evidence submitted to us that would suggest another course of action is required. The expected outcome is to ensure we can meaningfully comply with EU and UK law in order to protect the public in the event of a failure in care.

### **Our proposed legal drafting**

- 51 We proposed that we would give effect to our proposals by the legal drafting that was contained within Annex A of our consultation. This is available [here](#).
- 52 The majority of respondents had no comments on our legal drafting. Some respondents who supported the consultation proposals stated the legal drafting would give effect to the proposals. Some respondents who did not support proposals opposed the legal drafting on the basis that it would give effect to the proposals they did not support.
- 53 We therefore do not consider that any of the responses raise matters which would cause us to change the amendments we seek to the Registration or Fitness to Practise Rules. Subject to any minor drafting amendments after further review by the Department of Health's legal team, we propose to implement the legal drafting as consulted upon to give effect to the approaches set out in our consultation.

### **Impacts of the proposed changes**

- 54 In our consultation, we asked a further question on what impacts, financial or otherwise, the introduction of the proposed changes would have. The majority of respondents indicated there would be no direct impact. Others believed the impact would be positive by increasing speed and efficiency whilst maintaining robustness.
- 55 One trade union body noted that there could be financial impacts on them due to retaining case information for longer (in relation to the one year review period) and a possible increased demand for union representation of registrants.
- 56 In terms of the administrative impact on a trade union body, like us they are bound by the requirements of the Data Protection Act as a public body holding personal data. They are required to have a data retention schedule which sets out retention for a period appropriate to the information. Whilst it is up to any public body to define their data retention periods, we consider it would be unlikely that a significant change to any document storage policy would be required as a result of this proposal.

- 57 In terms of any impact on demand for trade union representation, this will depend on the individual being a member of that trade union and the frequency of such reviews being undertaken, which we are not in a position to accurately estimate at present. The proposed approach is, however, significantly cheaper and more aligned with the principles of better regulation than a Judicial Review. Furthermore, as the review power is being sought to improve our ability to protect the public, we do not consider that a potential and unquantified impact on a representative body would be sufficient evidence of a negative impact to change our proposals.

## **Next steps**

- 58 We have concluded that we will proceed with the implementation of our proposals as presented in our consultation document. Our Council has approved these conclusions on 1 October 2014.
- 59 We will lay the legal drafting amending our Registration Rules and Fitness to Practise Rules before parliament for approval. We will be able to do this once the amendments to the Nursing and Midwifery Order being progressed by the Department of Health have successfully completed their parliamentary process and taken effect. We anticipate that we will be able to lay the legal drafting in parliament in early 2015. Subject to this and a successful parliamentary process we anticipate that these amendments to our Rules will take effect before the dissolution of parliament for the general election in May 2015.