NMC response to the Professional Standards Authority's consultation on guidance on the use of accepted outcomes in fitness to practise and guidance for rulemaking

We welcome the opportunity to respond to the PSA's consultation. Both the accepted outcomes process in fitness to practise and increased flexibility around rulemaking are key elements of the wider legislative reforms that we consider to be necessary for the effective functioning of all health and care professional regulators, so we are grateful to the PSA for contributing to the wider discussion on how these new powers should be used.

We have included our response to the individual questions below, but in summary our observations are as follows.

We consider that the guidance on accepted outcomes is helpful insofar as it crystallises some of the relevant factors that case examiners will need to take into account when deciding whether a matter should be resolved by way of an accepted outcome. In particular, we welcome the PSA's acceptance that there are no categories of cases which should be referred to panels on public interest grounds alone. However, we note that the guidance includes factors that we consider less relevant, such as complexity and the testing of insight. Further, it does, at times, stray beyond its stated remit, in that it seeks to set out guidelines on operational issues, (such as the number and qualification of case examiners required to undertake accepted outcome decisions), which we consider are for the individual regulator themselves to decide depending upon their particular circumstances.

We consider that the guidance on rulemaking will be of some assistance in promoting good practice across the regulators, especially when it comes to considering what to consult on and how. However, it is worth recognising that the rules produced by individual regulators are likely to differ in form, and, at times, substance from one another. This will be due to a number of factors, not least the fact that the reforms will be rolled out to the various regulators over a number of years, and that each regulator will be starting from a different position as far as its existing regulatory practices are concerned. For the NMC, when we get our new rulemaking powers we will commit to working with other regulators to identify and understand divergence.

We note the PSA's reassurance that the guidance in both areas will not 'bind' regulators, or have any official status. Notwithstanding this, we will, of course, take account of both guidance documents in our work preparing for legislative reform as and when it arrives for the NMC.

Consultation questions (general)

Question 1 please describe your organisation or role [member of the public/health or care statutory regulator/Accredited Register/ other health or care body/patient representative body/registrant of a health

or care statutory body/Accredited Register practitioner/professional association/other]

Health and care statutory regulator.

We are the UK's independent, statutory regulator of around 808,000 nursing and midwifery professionals. Our vision is safe, effective and kind nursing and midwifery practice that improves everyone's health and wellbeing. Our core role is to regulate. First, we promote high education and professional standards for nurses and midwives across the UK, and nursing associates in England.

Second, we maintain the register of professionals eligible to practise. Third, we investigate concerns about nurses, midwives and nursing associates – something that affects less than one percent of professionals each year. We believe in giving professionals the chance to address concerns, but we'll always take action when needed.

To regulate well, we support our professionals and the public. We create resources and guidance that are useful throughout people's careers, helping them to deliver our standards in practice and address new challenges. We also support people involved in our investigations, and we're increasing our visibility so people feel engaged and empowered to shape our work.

Regulating and supporting our professions allows us to influence health and social care. We share intelligence from our regulatory activities and work with our partners to support workforce planning and sector-wide decision making. We use our voice to speak up for a healthy and inclusive working environment for our professions.

Question 2: Please give the name of your organisation, or your name if you are responding as an individual.

Nursing and Midwifery Council (NMC).

Question 3: A summary of responses received to this consultation will be published in a consultation outcome report. Any comments you make may be included but will be anonymised unless you give use permission to use your/your organisation's name. Are you happy for your name/your organisation's name to be included in any published reports?

Yes.

Consultation questions (draft FtP guidance)

Question 4: Do you think that our fitness to practise guidance will help regulators to make best use of accepted outcomes, and use them in a way that is fair, transparent and protects the public?

Partially.

Whilst we understand and acknowledge the positive intent behind the proposed guidance, we consider that it, as currently drafted, has potential to equally confuse participants and decision-makers as assist them.

We consider that it lacks clarity and precision, particularly in relation to:

- Registrants who 'fail to accept' the findings and/or impairment
- Insight
- The role of the referrer's voice in accepted outcomes

Question 5: Factor 1: 'Has the registrant failed to accept the findings and/or impairment?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]

Yes.

Question 6: Do you have any comments on this factor, or the bullet points listed in our guidance under this factor? [Free text box]

Whilst we agree with the general thrust of the guidance, we think this area of the guidance is confusing.

We agree that regulators must consider whether or not the registrant accepts the findings and/or impairment before imposing a final measure, as part of the accepted outcome model, but we are not entirely clear what is being asked here.

It is not clear what 'fails to accept' means in this section or when the factors are to be taken into account (see paras 7.5 to 7.10 of the draft guidance). The guidance suggests that these factors should be taken into account *before* the case examiner proposes an outcome because it says these are factors to take into account before deciding whether to use the accepted outcome model.

From our reading of the relevant legislative provisions, if the registrant has rejected the case examiner's findings and/or impairment, then the case examiner is obliged to refer the matter to a panel. The legislation already requires the case examiner to consider whether the registrant has agreed to the final measure on the basis that fitness to practise is impaired and that they have accepted the case examiner's findings. As such we question whether the guidance adds anything to what is provided in the legislation.

If 'fails to accept' refers to the registrant who has not engaged with the process and/or has not returned a reasoned response, then, again, the legislation permits the case examiner to impose a final measure. However, we understand (as stated at para. 6.6) that this guidance is not directed at 'imposed outcomes' on non-responding registrants.

If this section refers to a registrant who has disputed facts and or impairment during the investigation stage, then we consider that the case examiner is still capable of reaching

a determination and proposing an outcome in such cases. We don't accept that there would need to be 'good reasons why they [the case examiner] still consider that the case is best dealt with by means of an accepted outcome'. We do agree with the guidance that not every single finding has to be accepted, as minor discrepancies may not be material if the proposed outcome and impairment have been accepted.

The professional will retain the ability to reject a proposal that they do not agree with through a reasoned response to that proposal. This allows the professional to respond to the case examiner's reasons for their decision and will allow better engagement between the professional and the regulator to clarify what the issues raised at a hearing will be.

Question 7: Factor 2: 'is there a dispute of fact/conflict of evidence that can only be fairly tested at a hearing?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]

Yes.

Question 8: Do you have any comments on the bullet points listed in the guidance under this under this factor? [Free text box]

We agree that there may be some limited instances where the case examiners consider that neither version of events is more probable than the other. In these situations, we recognise that referral to a panel will potentially be appropriate. However, the guidance (paragraph 7.12) doesn't acknowledge that case examiners will have the ability to conduct further exploration where necessary, by requiring further evidence if it might resolve any uncertainty before reaching their decision.

Where there is uncertainty about the background to, or the seriousness of the conduct, we consider that this should be resolved by further investigation, which case examiners will have the power to direct. Referral to a panel for this reason alone is not proportionate or fair when case examiners can direct the gathering of additional information themselves. There may be cases where case examiners attempt to obtain further information and still cannot make a finding; in these cases it may be appropriate to refer to a panel, but these cases are likely to be rare.

Many of the points highlighted in the guidance, such as the concern that without cross examination regulators may fail to ascertain the truth (paragraph 10.13), appear to relate to the current adversarial model and not the future setup, which is intended to promote meaningful engagement earlier in the process.

Question 9: Factor 3: 'does the complexity of the case suggest that a hearing may be beneficial?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know].

No.

Question 10: Do you have any comments on this factor, or the bullet points listed in our guidance under this factor? [Free text box]

We disagree that complexity of a case should be a reason in itself for a case to be referred to a panel. Case examiners will be able to make decisions on complex cases. It is unclear why panel members would be better placed to have a greater understanding of complex cases than case examiners. As stated above, case examiners will be able to require further information on anything which requires more clarity.

Question 11: Factor 4: 'Would it be beneficial and proportionate to test insight at a hearing?' Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome? [Yes/no/don't know]

No.

Question 12: Do you have any comments on this factor, or the bullet points listed in our guidance under this factor? [Free text box]

In most cases, it will not be beneficial or proportionate to test insight at a hearing. Even in hearings where professionals fail to appear, the panel must determine insight on the basis of the information before them.

Case examiners are already experienced at taking insight into account when making decisions under the current legislation. They use a range of factors in the case to help determine insight, including correspondence from the professional, testimonials and the circumstances of the concern. They weigh up this information to support a determination on the level of insight.

In the future, following the reforms, case examiners will have the power to require information from the professional at an early stage and throughout the process. This includes comprehensive written evidence of insight and strengthened practice. We expect that earlier engagement with the professional on insight and strengthened practice will help case examiners to carry out a robust assessment. If the professional does not comply with requests for information, then this may contribute to a finding of impairment by the case examiners.

We do not accept that if a case involves a professional with serious attitudinal issues, that this is, of itself, a reason to refer a case to a hearing. These issues can potentially be addressed by a proposed outcome to the professional which they can reject. There is nothing preventing case examiners from determining a serious attitudinal issue, including their view on insight, on the basis of the information in the papers.

Some people may also express their insight better in writing than in the forum of a hearing. We are also not convinced that "seeing the registrant in person" should be relied on as a benefit. This also fails to account for the fact that some decision makers may be vision or hearing impaired.

We would query whether a panel hearing is a safeguard against concerns with the use of artificial intelligence. Case examiners will be able to request that investigators conduct a further interview to assess depth of insight if they are concerned that a document from the professional does not accurately reflect the professional's level of insight.

Question 13: Factor 5: Lay representation in decision-making. Do you agree that regulators should continue to ensure lay representation at some point in the fitness to practise decision-making process? [Yes/no/don't know]

Don't know.

We note that this question goes beyond the stated remit of the accepted outcomes guidance and into the terrain of operational areas, given its focus on the identity of decision-makers rather than the agreed outcome decision itself.

That said, our current thinking is that post-reforms we would retain a two case examiner model with a combination of lay and registrant decision-makers. However, we will keep this under review as we can see the benefits of a more flexible model in the future.

Question 14: Factor 6: the use of single decision-makers. Do you agree that some fitness to practise cases may benefit from more than one decision-maker? [Yes/no/don't know]

Don't know.

Again, we note that this question goes beyond the remit of the accepted outcomes guidance and into the realm of operational decisions.

Our current position is set out above in the response to question 13.

Question 15: Do you have any comments on the bullet points listed in the guidance relating to the composition of decision makers? [Free text box]

We consider that none of the features cited in the guidance (paper heavy, significant ambiguity, cultural considerations or a high-profile case) would necessarily mean that two or more decision-makers are needed.

All case examiners will have the appropriate skills, knowledge and training to make decisions. This is particularly important to highlight because the legislation allows for single case examiner decision making.

Question 16: Factor 7: publishing case examiner decisions. Do you agree that the bullet points in the guidance under this factor are the right ones? [Yes/no/don't know]

Yes.

Question 17: Do you have any comments on the bullet points listed in the guidance under this factor? [Free text box]

We agree with the need for transparency in decision making and consider that this will be achieved through the publication of clearly reasoned decisions.

It is important that these decisions are accessible and are sufficiently detailed to allow readers to understand what the question about a person's fitness to practise is, what decision has been made and why.

In relation to interested parties, such as the person who referred the question to us, it is important that they are kept updated throughout the process as appropriate. We think these are essential factors in maintaining public confidence in the fitness to practise process.

Question 18: Factor 8: Promoting a fair and effective accepted outcomes process. Do you agree that the bullet points listed under this factor in the guidance are the right ones? [Yes/no/don't know]

Yes.

Question 19: Do you have any comments on the bullet points listed in the guidance under this factor? [Free text box]

The proposed model will only work if the process is fair and transparent. We would want to ensure that all of our decisions are mindful of our duties towards the public, people who use services and the professionals on our register. The factors listed are important ones, which we have considered (and will continue to) when undertaking our preparatory work for legislative reform.

We agree with everything in paragraphs 13.3 and 13.4 to the effect that referrers should be kept informed of the progress of the matter and the critical importance of ensuring their concerns are properly understood before we reach a decision. That may include seeking further information from them in the course of the investigation. This is not the same as seeking their representations or views before we reach a decision. This is also not the same as "giving them an opportunity to respond to evidence".

We agree that the public and people who use services must be treated with dignity and respect and that they should feel heard throughout the process. We want to achieve a thorough understanding of any concerns, and gather all relevant evidence.

Question 20: Please set out any impacts that the guidance would be likely to have on you and/or your organisation, or considerations that we should have when assessing the impact of our proposals. [Free text box]

We are concerned that some aspects of this guidance will create confusion and have misconstrued the aims for regulatory reform or misrepresented how the legislation is expected to operate. These areas have been highlighted in our comments when discussing the relevant factors throughout. This should be taken into account when considering the impact of these proposals.

Question 21: Are there any aspects of our proposals that you feel could result in different treatment of, or an impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010 [Yes/no/don't know]:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation
- Other (please specify)

Yes

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this. [Free text box].

If strictly followed, then these proposals may result in more cases being referred to a panel hearing process than necessary, for example due to complexity. As stated above, we do not agree with some of these factors or that it will always be appropriate to refer a case to a panel where one of the above factors is present.

Separately, we have considered the equality, diversity and inclusion impacts of the accepted outcome model as part of our policy development. In general, our assessment indicates that there are benefits for all protected groups – professionals and witnesses – from not having to attend a panel hearing.

Our engagement with EDI stakeholders suggests that the potential benefits are increased for those living with stress, anxiety and mental health conditions. Our assessment also shows that the new powers should help to reduce the

disproportionately high number of Black or minority ethnic professionals who are referred to a panel.

The accepted outcome model allows us to reach a determination in their cases earlier, at the case examiner stage. We consider this is a benefit. However, there is a risk that some of the above factors may result in more referrals to panels with a higher proportion of certain protected groups within that cohort.

We recognise that decision-making on the papers is central to the accepted outcomes model and that there are concerns that this has the potential to disadvantage some protected groups, for example those with some neurodiverse conditions and those for whom English is not their first language – both professionals and witnesses.

We will consider reasonable adjustments for disabled persons and also whether any proportionate measures are needed to meet the special needs of individuals, where the need arises from a protected characteristic. This is in accordance with our obligations under the Equality Act 2010. More broadly, we'll consider how we make the process accessible and easy to follow including using technology to receive representations in different formats (e.g. video evidence).

We will also draft rules which are, as far as possible, easy to read and in plain English. We'll also ensure that rules are accompanied by guides which will help explain our processes in accessible terms.

Question 22: Do you think our guidance will help regulators exercise their rulemaking powers effectively? [Free text box]

We welcome powers to set and amend our processes and requirements in rules, which will be approved by us, following public consultation, stakeholder engagement, and robust evidence-based policy development. Having powers to approve our own rules represents a fundamental improvement, allowing us to achieve our goal of becoming a more modern, independent, fit for the future regulator.

We consider that the PSA's guidance on rulemaking will be of some assistance in promoting good practice across the regulators, especially when it comes to considering what to consult on and how. However, it is worth recognising that the rules produced by individual regulators are likely to differ in form, and, at times, substance from one another. This will be due to a number of factors, not least the fact that the reforms will be rolled out to the various regulators over a number of years, and that each regulator will be starting from a different position as far as its existing regulatory practices are concerned. For the NMC, when we get our new rulemaking powers we will commit to working with other regulators to identify and understand divergence.

Question 23: Do you think that the principles outlined are the right ones? [Yes/no/don't know]:

Yes

Question 24: Do you have any comments to make on the principles listed or any additional principles to suggest? [Free text box]

No.

Question 25: Do you think that the guidance on consistency between regulators (avoiding unjustifiable difference) is helpful? [Yes/no/don't know]

No.

Question 26: Do you have any comments to make on this section of the guidance? [Free text box]

See above answer to question 22.

Question 27: Do you think that the guidance on consultation is helpful? [Yes/no/don't know]

Yes.

Question 28: Do you have any comments to make on this section of the guidance? [Free text box]

We think the guidance on consultation set out at paragraphs 7.8 to 7.12 is helpful. We consider that it is important to clarify what is meant by 'formal' and 'informal' consultation and how this guidance is envisaged to support regulators in enacting these types of wider engagement activities.

Question 29: Do you think that the guidance on governance is helpful? [Yes/no/don't know]

Yes.

Question 30: Do you have any comments to make on this section of the guidance? [Free text box]

No.

Question 31: Please set out any impacts that our guidance would be likely to have on you and/or your organisation when assessing the impact of the proposals. [Free text box]

See answer to question 22.

Question 32: Are there any aspects of these proposals that you feel could result in different treatment of, or an impact on, groups or

individuals based on the following characteristics as defined under the Equality Act 2010 [Yes/no/don't know]:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation
- Other (please specify)

We will be undertaking an equality impact assessment alongside the development of our own rules. Our own Ambitious for Change research shows us that people with certain protected characteristics experience inequalities. The professionals on our register may also experience inequalities. We're committed to equality, diversity and inclusion in health and social care and the increased flexibility provided by regulatory reform will allow us to be more responsive to evidence based on equality and diversity from our wider work. This will mean we are able to make changes that are more adaptive and flexible so we can better meet the diverse needs of the professionals on our register and the people who use services.

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this. [Free text box].

N/A.