

Nursing and Midwifery Council (NMC) response to Department of Health consultation 'Providing a 'safe space' in healthcare safety investigations - November 2016

Introduction

- 1 The Nursing and Midwifery Council (NMC) is the professional regulator for nurses and midwives in the UK. We exist to protect the public. We do this by holding and controlling access to the register of qualified nurses and midwives and setting standards of education, training, conduct and performance. If an allegation is made that a registered nurse or midwife is not fit to practise, we also have a duty to investigate and, where necessary, take action to protect the public.
- 2 We fully support the policy intention behind the proposals, namely the 'creation of the right conditions for staff, patients and their families, friends and carers to be able to discuss errors and problems in care explicitly and thoughtfully', as we recognise that there are clear patient safety benefits from cultivating an environment where learning from errors is encouraged.
- 3 We think that this issue should be considered alongside other initiatives to encourage openness and remediation, rather than blame and punishment amongst healthcare staff and their employers. In this regard, we have been introducing our own measures to encourage early engagement, recognise candour, increase learning and remedial action and allow a wider and more proportionate range of regulatory interventions and sanctions.
- 4 We believe that the 'safe space' proposals may have the unintended consequence of undermining the role of healthcare regulators and thus negatively impacting on patient safety. In particular, we consider that our ability to protect the public could be weakened because the proposals would affect our capacity to fully assess a nurse or midwife's fitness to practise.
- 5 We agree that conclusions of the 2015 'Freedom to Speak Up report' are important in informing the proposals. We also believe that those conclusions should be viewed in conjunction with the 2013 report (by the same author) in respect of the Mid Staffordshire NHS Foundation Trust Public Inquiry which made numerous recommendations in relation to increased information-sharing between healthcare bodies and regulators. We consider that these proposals may have the unintentional effect of restricting the flow of information between these organisations, rather than increasing it.

NMC comments – our response

6 Below we have responded to the consultation questions which we feel are most relevant to our remit.

Question 1 - Do you consider that the proposed prohibition on disclosure of investigatory material should apply both to investigations carried out by HSIB, and to investigations conducted by or on behalf of NHS Trusts, NHS Foundation Trusts and other providers of NHS-funded health care?

7 No.

8 As set out above, we have serious concerns about how this prohibition would impact on the information we receive about fitness to practise concerns relating to registered nurses and midwives. In light of this, we think that extending the general prohibition on disclosure from just HSIB investigations to all NHS investigations is likely to compound the issue and significantly undermine our ability to protect the public.

Question 2 - for those investigations undertaken by or on behalf of providers and commissioners of NHS-funded care, should the proposed prohibition on disclosure apply only in relation to investigations into maternity services in the first instance or should it apply to all investigations undertaken by or on behalf of such bodies?

9 No.

10 As set out above in our response to question 1, we have serious concerns about extending the general prohibition on disclosure from just HSIB investigations to all NHS investigations per se. Applying this to maternity services in any context would be ignoring issues that contributed to the events at Morecambe Bay, identified in the Kirkup Inquiry (2015) - one of which being a 'failure to share information'. We reiterate that any prohibition on disclosure of investigatory material in or across any health investigations will significantly undermine our ability to protect the public.

Question 3 - Do you have any comments about the type of information that it is proposed will be protected from disclosure during healthcare investigations?

11 Yes.

12 From the consultation document we understand that the protected material will amount to all of the information generated during the course of an investigation (for example transcripts, witness statements and recordings). It should be noted that we currently request and rely on this type of information both in assessing whether to investigate a fitness to practise concern and as part of any subsequent investigation. This is particularly important when a member of the public makes a referral about a nurse or midwife and we want to know what has happened at a local level, so that we can decide whether to take the matter further. If such information is not made available to us, it is likely that we will have

to expend further resource on conducting our own investigations, leading to duplication of effort and fitness to practise cases remaining open longer than necessary.

Question 4 - Do you agree that the statutory requirement to preserve the confidentiality of investigatory material should be subject to such disclosure as may be required by High Court order?

- 13 In part.
- 14 In the event that there are prohibitions on disclosure, we recognise the value in having an independent arbiter to decide on those cases where the non-disclosure of material is contested. However, we have some reservations as to the suitability of the High Court in performing this role, given that assessing whether the material should be disclosed is likely to be a time-consuming task. We are concerned that restrictions on court time and the associated expense may mean that the appeal process does not provide the necessary safeguard, given that it is likely to be neither accessible nor timely. This is particularly important for the NMC, as performance of our various statutory functions is directly funded by registrant subscriptions.
- 15 A fundamental question which remains unanswered by this proposal is how those parties who may wish to contest the non-disclosure will actually be made aware of what case material is being held by the HSIB or NHS investigation? Will a schedule of information be provided by the HSIB / NHS investigator? We foresee it will be problematic to submit a disclosure request without first knowing what investigatory material exists.

Question 5 - Do you agree with the proposed elements of the test to be applied by the High Court in considering an application for disclosure?

- 16 Yes.
- 17 We think that 'necessity' is probably the appropriate threshold for the High Court when considering disclosure applications provided that this is read in conjunction with the points raised below in response to question 6.

Question 6 - Do you have any views on the proposed exceptions that would apply to the prohibition on disclosure of material obtained during investigations by the HSIB and by or on behalf of providers and commissioners of NHS service?

- 18 Yes.
- 19 We are reassured by the acknowledgement within the consultation document that certain organisations such as healthcare regulators would be considered to be exceptions given the focus on public protection. However, we consider that the proposed threshold of a 'serious and continuing risk to patient safety' is too restrictive. This does not correspond with our threshold for commencing fitness to practise investigations.

20 We consider that the exception may need to be broadened in order to ensure that healthcare regulators are able to continue to effectively perform their statutory function.

21 We say this for two reasons:

21.1 The proposed threshold ('clear immediate risk to patient safety') differs significantly from our existing threshold for opening a fitness to practise investigation into a nurse or midwife, and thereby could lead to the creation of a regulatory gap. Some of our investigations relate to matters where there is damage to public confidence in the profession, because of the seriousness of the allegation, notwithstanding that the ongoing public protection risk is less apparent.

21.2 It appears that the person who decides whether to share the information with the healthcare regulator will be making this decision in a void as they will not be in a position to assess the impact of the incident on the healthcare professional's overall fitness to practise. A large number of our referrals are based not on single incidents, but on multiple examples of poor practice (which would not on their own meet the 'immediate risk to patient safety' threshold). These multiple examples imply that there are concerns with the healthcare professional's ability to practise safely and effectively. If some of this intelligence came to light within a 'safe space' it appears that we would not be informed, meaning that we would not be able to perform our role effectively.

Question 7 - Do you have any views on where the bar should be set on passing on concerns to other organisations whose functions involve or have a direct impact on patient safety?

22 See above response to question 6.

Question 8 - Do you consider that the exceptions proposed could undermine the principle of 'safe space' from the point of view of those giving evidence to investigations?

23 We do not have a view on this matter.

Question 9 - Do you support the principle of a 'Just Culture' (that would make a distinction between human error and more serious failures) in order that healthcare professionals might come forward more readily to report and learn from their mistakes without fear of punitive action in circumstances that fall short of gross negligence or recklessness?

24 As stated above, we support the principle. However, we think that the way in which this policy aim is being advanced requires further consideration.

Question 10 - If you consider that the prohibition on disclosure should be subject to an exception allowing for the disclosure of certain information to patients and their families, what kind of information do you consider should be able to be disclosed in that context? And when would be a sensible, workable point for patients/families to have access to information - e.g., should they see a pre-publication draft report for comment?

25 We do not have a view on this matter.

Question 11 - Do you see any problems in a requirement that investigatory bodies (such as professional regulators, coroners and the police) must apply to the High Court if they wish to gain access to information obtained during investigations by the HSIB or by or on behalf of providers or commissioners of NHS-funded care?

26 Yes.

27 See responses to questions 4 and 6.

Question 12 - Do you have any concerns about the use of the phrase “safe space” in relation to this policy; and, if so, do you have an alternative preference?

28 Yes.

29 We consider that the phrase ‘safe space’ has the potential to provide a false reassurance to healthcare professionals that there will be no negative consequence to them, arising from anything said by them, within the said ‘space.’ We can foresee the issue of whether something was said in a ‘safe space’ becoming an unwelcome distraction from the real matter in hand, which is preventing harm to patients.

Question 13 - Do you see any problems in exempting information obtained during healthcare investigations from access under the Freedom of Information and Data Protection regimes?

30 Yes.

31 In principle we do not perceive problems in exempting information obtained during healthcare investigations from being disclosed, if disclosure could inadvertently prejudice the administration of justice, or if the requested information falls under section 38 of the Freedom of Information Act 2000 (FOIA) (preventing information being disclosed that may have an adverse effect on public health or safety). It would be important to apply the ‘public interest test’ to all FOI and DPA requests, on a case by case basis.

32 However, our concern as a healthcare regulator is that by exempting all information held by HSIB or NHS investigations per se from disclosure, it creates an uneven playing field, as information we hold would not be exempt from disclosure even though we are also performing an essential public protection function.

Question 14 - Do you agree that guidance, or an alternative source of support, should be developed?

- 33 Yes.
- 34 We think that detailed guidance in this area is likely to be helpful for all concerned.

Question 15 - Do you think it would be helpful for NHS staff to be supported by a set of agreed national principles around how they would be treated if involved in a local safety incident investigation; and, if so, do you have any suggestions for the areas that such a set of principles should cover?

- 35 We do not have a view on this matter

Question 16 - Do you have any concerns about the impact of any of the proposals on people sharing protected characteristics as listed in the Equality Act 2010?

- 36 We receive a proportionately higher number of employer referrals to the NMC about BME nurses and midwives, which do not result in the most serious sanctions administered at the end of the fitness to practise process. This suggests that the 'safe space proposals' may benefit people with protected characteristics, who may otherwise feel more vulnerable and hence more reluctant to report their concerns outside of a protected environment. However, we believe the proposals do not replace the wider need to address the general lack of workplace support available to vulnerable groups within the NHS, or tackle systemic issues of discrimination and bullying, and promote a culture of inclusion across the health sector.

Question 17 - Do you have any concerns about the impact of any of the proposals on families? If you envisage negative impacts, please explain.

- 37 We have no strong views on this matter, however we do recognise the importance of assuring families that failings in care have been candidly reviewed, and learning subsequently undertaken.