Nursing and Midwifery Council (NMC) response to Social Work England's consultation on rules and standards

Background

1 We are the independent regulator for nurses, midwives and nursing associates. We hold a register of the 690,000 nurses, midwives and nursing associates who can practise in the UK. Better and safer care for people is at the heart of what we do, supporting the professionals on our register to deliver the highest standards of care.

2 We make sure nurses, midwives and nursing associates have the skills they need to care for people safely, with integrity, expertise, respect and compassion, from the moment they step into their first job.

3 Learning does not stop the day nurses, midwives and nursing associates qualify. To promote safety and public trust, we require professionals to demonstrate throughout their career that they are committed to learning and developing to keep their skills up to date and improve as practitioners.

4 We want to encourage openness and learning among health and care professions to improve care and keep the public safe. On the occasions when something goes wrong and people are at risk, we can step in to investigate and take action, giving people affected, patients and families a voice as we do so. As the largest professional regulator in the UK we are absolutely committed to supporting improvements in practice in equality, diversity and inclusion across the health and care sector.

Response to SWE consultations

5 We welcome the opportunity to respond to this consultation on new rules in respect of how Social Work England (SWE) will operate its education, registration and fitness to practise functions.

6 Our response to the Fitness to Practise Rules consultation is provided in annexe 1. As we are broadly supportive of the draft registration and education rules and we do not wish to comment in detail in response to the questions raised by the other consultations, we have instead set out our general observations below.

Health and Character requirements for safe and effective practice

7 We recently undertook a review of how we assess the health and character of people who apply to, or are on, our register. Following this review, in January 2019 we published our Guidance on Health and Character.

8 This guidance explains to applicants to our register when they need to tell us about any relevant health condition(s) and character issues and the information

which will be taken into account when deciding whether or not they meet our health and character requirements for new or ongoing registration.

9 We engaged with external stakeholders during the development of this guidance and believe it is consistent with modern thinking around health and disability, the Equality Act and our approach to regulation. We also outline the factors we will take into account when considering the seriousness of any character concerns.

10 This guidance focuses on the management of health conditions rather than the absence of health conditions. We require a declaration that an applicant is capable of safe and effective practice as a nurse, midwife or nursing associate either with or without reasonable adjustments and adjustments which their employer has made.

11 We are concerned that SWE's draft registration rules appear to require applicants to confirm the absence of a health condition which may give the impression that people with disabilities and health conditions are not able to practise with or without adjustments put in place by their employer to support them.

12 We do not prohibit applications from individuals with any criminal convictions, however we outline in the guidance how we will assess seriousness and that there is a presumption against registration in certain situations. This provides flexibility to consider an individual's circumstances whilst ensuring transparency and fairness in decision making.

Conditional registration

13 With regard to the circumstances where conditional registration may be used, we suggest that Rule 30(1) may lead to registrants relying on conditions. The use of conditions may not encourage the profession to ensure they meet the requirements for continuing professional development within the time period they are required to do so. A lack of access to continuing professional development (CPD) is one of the most common reasons given by registrants leaving nursing and midwifery.

14 In light of the comments made earlier regarding the management of health conditions, we would suggest that Rule 30(2) should only be used in exceptional cases so that conditions are not applied unnecessarily when management of a health condition could be undertaken by the applicant, and their employer if required, rather than with reliance on conditions. This information may be relevant to question 9 of the Registration Rules consultation.

Fraudulent entry

15 Under our rules, concerns regarding a fraudulent entry must be considered through our fitness to practise processes and have to be decided by the Investigating Committee. The ability to remove a registrant from the register set out in Part 2 of the Social Work England (Registration – Removal from the register and Registration Appeals) Rules 2019 will allow SWE to act efficiently when there is a risk to the integrity of the register due to fraudulent information being submitted by applicants for registration. This will provide a more efficient and more

proportionate process in terms of public protection compared with our own legislation.

Quality Assurance (QA) of Education and Standards

16 We published our new standards of education and training for education institutions and nursing programmes, as well as prescribing programmes, in May 2018 and for nursing associate programmes in October 2018. We are consulting on midwifery programme standards from February to May 2019 and it is expected these will be published in January 2020. Consequently, we are now in the process of re-approving over 80 institutions, and over 950 programmes, against these new standards.

17 Our QA Framework, which was published in September 2018, sets out our new outcome focused approach to quality assurance. Our QA Handbook, which provides education institutions with more practical information on the new approach, was published alongside this.

18 The new QA approach introduces several new elements, including:

18.1 An approval 'Gateway process' for all education providers. This ensures that education institutions are subject to scrutiny in advance of an approval visit.

18.2 Indefinite approval, which places greater importance on monitoring.

18.3 A data led approach to monitoring to support a more risk based and proportionate approach to QA, so as to allow us to target our regulatory activity where it is most required.

18.4 For new programmes, or where we identify significant concerns, we will place programmes on enhanced scrutiny, enabling us to monitor the quality of provision more closely.

19 Our new model of QA means that following approval, all programmes will be subject to monitoring. Monitoring at the NMC incorporates a range of activities including some existing processes such as managing concerns and annual self-reporting, alongside new processes such as enhanced scrutiny and the increased use of data and information. An ongoing element of our monitoring approach is our concerns and exceptional reporting process. Education providers are required to report any risks that may affect compliance with our standards. On receipt of any concern or exceptional report, our QA Team will review what has been raised and determine what appropriate regulatory intervention is required, if any. The regulatory interventions available to us include monitoring visits, an extraordinary review, and the withdrawal of approval.

20 We believe that data driven monitoring is the most proportionate and risk based approach and ensures that resources are used where required. This information may be relevant to questions 1-6 of the questions on the education and training rules.

Regulatory reform

21 Whilst drafting our responses we also identified issues that would have significant implications in respect of any future programme of wider reform for health and social care regulators. We recognise that some of these matters relate to the content of the Social Worker Regulations 2018 (the Regulations) and predate the involvement of SWE itself, however we have chosen to set out our observations below, not least because the Regulations were modified significantly following the public consultation in Spring 2018, and also because we understand that SWE may be used as a future regulatory model for others to follow.

Flexibility to make rules

22 Amending our legislation is a time-consuming process which takes approximately 18 months to 2 years and involves a lengthy period of collaboration between us and the Department of Health and Social Care and securing parliamentary and Privy Council time. The length of time that the process takes prevents us from responding in a timely fashion to the constantly evolving health and social care environment in which we operate.

23 For a number of years we have been advocating for more flexibility to make our own rules, so we are very supportive of the freedom that SWE has to set out its regulatory procedures within its own rules. Undoubtedly, over time, this will allow it to adapt and modernise, meaning that it can adopt more cost-effective and proportionate approaches to regulation as required.

Public interest test

24 The Regulations contain a public interest test at the case examiner (CE) stage. This arises in relation to the question of whether a case should be referred to a hearing even if there is agreement from a registrant as to a particular outcome.

25 We think this test is problematic. We do not understand the purpose of such a test in a situation where there is no dispute as to fact or sanction. We are unable to identify a justification for this if the CEs are independent decision-makers, the decision is published and there is no dispute to be resolved. In any event, it is unclear which element of the public interest is met by referring the concern on to another decision-maker.

26 We want to encourage openness and learning among health and care professions to improve care and keep the public safe. Our extensive research and engagement with registrants and members of the public suggests that an overly adversarial process may play a significant part in contributing to public protection issues given that it stifles reflection and acceptance of errors. Given that this test has the potential to result in ‘show trials’ in situations where there is acceptance and reflection we have concerns that the net result will be negative for public protection as a whole.

27 We note from paragraph 9 of the Fitness to Practise Rules consultation that SWE has interpreted this test to mean that removal decisions cannot be made by CEs and must be referred to adjudication panels for ultimate disposal. This demonstrates the difficulty with having the test itself given that making sense of it

and applying it consistently necessarily excludes one form of outcome which is expressly provided for by the overarching legislation.

Internal review power

28 We strongly support the overall value of a more consensual fitness to practise model which allows for earlier disposals in the process. However, we also recognise that this may lead to increased challenges from referrers who, by virtue of the case not going to a hearing, have less contact with proceedings and may therefore be less able to understand why a particular outcome short of removal has been deemed appropriate.

29 The absence of any internal power of review is likely to exacerbate this situation as it may leave those who raised the original concern, or those who are otherwise connected to it, feeling as though they are without a voice in the process.

30 Since 2015, we have had a power to review decisions made at the case examiner stage of the process. As an effective and proportionate mechanism for addressing flaws within decisions or taking account of new information, this has been invaluable and it has ensured that referrers have confidence that closure decisions can be properly scrutinised if required.

31 We understand that, in due course, legislation will be laid to enable the Professional Standards Authority to have an effective right of appeal in respect of all SWE case examiner decisions resulting in consensual outcomes. We think this may be the opportunity to address this notable omission.

Annexe 1: NMC response to SWE's Fitness to Practise rules

Rule 3: Triage.

Question 1. To what extent do you agree with our criteria to accept a case?

1 We are broadly supportive of the proposed criteria for accepting cases. We currently adopt a similarly staged approach (our 'Screening' stage) when assessing whether to investigate a case further. However, we think that there may potentially be more room for manoeuvre in terms of the role of employers or other relevant organisations as we believe they should manage concerns first, unless there is a serious risk to service-users or the public. We also think that SWE may be assisted by producing seriousness guidance. This would limit the risk of subjective and inconsistent decisions being made.

Rules 10-11: Obtaining further information

Question 2. To what extent do you agree that a social worker and a complainant should be given further opportunity to comment on a case prior to referral to the case examiners in circumstances where an investigation reveals new evidence?

2 We are supportive of any proposals that allow people involved in what went wrong to have a greater voice in regulatory proceedings. This will allow case examiners to make better-informed decisions. We agree that further opportunities to comment on a case should be given at the discretion of the case examiners. This approach preserves fairness but recognises that investigations by employers will usually have taken place already and that registrants will be expected to have provided a full account at the start of an investigation. Early investigations and comments are likely to support the regulator's later investigation by providing more information about the context and possible systems failings.

Rule 13: Interim orders

Question 3. To what extent do you agree that interim order applications may be agreed in a meeting rather than in a hearing, where the social worker does not request a hearing?

3 We think that hearings best protect the public by resolving central aspects of a case that the regulator and the registrant don't agree on. If there are no disputes to resolve, we do not see the value of holding a public hearing, provided that the relevant information relating to the decision is made publicly available soon after the decision has been made.

Rules 14-15: Notice of fitness to practise hearing

Question 4. To what extent do you agree that there should be different timeframes for issuing notices of hearings, with cases involving criminal convictions or straightforward concerns being given a shorter timeframe?

4 We agree that cases about criminal convictions, or where the central aspects of the case are not in dispute, should have as swift a process as possible. We think fitness to practise best protects the public by making decisions quickly and publishing the reasons openly.

Rules 16 and 32-35: Procedure at hearings or meetings

Questions 5-8.

5 We think that panels are best-placed to regulate their own procedure and to decide to take different approaches that may be needed. In general, we are very supportive of a less prescriptive approach in order to allow each hearing to be handled in the most appropriate and effective way to resolve the issues in dispute, whilst safeguarding the rights and interests of all the participants.

Rules 38-39: Attendance of the public at hearings

Question 9. To what extent do you agree that hearings should be held in public unless there is an accepted reason for all or part of a hearing to be held in private (e.g. to consider a health or family matter)?

6 We think that transparency is crucial to an effective fitness to practise process. Experience has shown us that we best protect the public by making decisions swiftly and publishing the reasons openly. We don't see the need for all fitness to practise decisions after case examiners to take place at a public hearing, because we think that public hearings are only required to decide central aspects of a case that the regulator and the professional don't agree on.

7 We recognise that hearings sometimes need to be held in private because of the possible further effects on the people affected by what went wrong, and health and family concerns are good examples of this.

Rule 48: Eligibility to act as an investigator, case examiner or adjudicator

Question 10. To what extent do you agree that Social Work England should be able to replace an adjudicator during a hearing if one of the original adjudicators is unable to continue, rather than restart the hearing with a fresh panel?

8 We welcome this proposal. Our own guidance on constitution of panels explains the circumstances in which this should happen, and sets out a decision-making process the panel can adopt when considering whether to substitute a panel member. We hope this guidance, which follows existing case-law, may be a helpful starting point in exploring how Social Work England will exercise this power in the future.

Rules 49-51: Period for which information must remain on the register

Question 11. To what extent do you agree with the timescales proposed for maintaining annotations on Social Work England's online register after the sanction has expired?

9 We are unable to support the timescales themselves because we cannot support the principle that information about past fitness to practise concerns should remain on the register after a final order has expired. We would encourage Social Work England to consider publication periods through the lens of what is truly necessary (and not merely desirable) to support their functions of public protection, including promoting and maintaining public confidence in social workers.

10 If details of the final order, and the reasons for it, were visible to the public during the time the order was in effect, we would question what further public interest is served by continuing to publish details about concerns that either caused no risk to patients in the first place (such as those that could be addressed by a warning), or that have now been remedied by the professional such that no risk now exists.

Question 12. Do you have any other comments?

11 In general, we welcome the proposed rules and guidance and we strongly agree with Social Work England's aim of having a range of options to deal with most concerns about fitness to practise without a hearing, where the social worker accepts the concern and demonstrates that they have taken measures to improve their practice. We think that fitness to practise should be about managing the risk that a professional currently poses, and not about punishing people for past events.

12 We think that the question of whether a hearing is required in the public interest should be a broader consideration, which explicitly takes account of the CE powers to use agreed disposals. The public interest question should take account of the registrant's level of insight and what steps they have taken to improve their practice and minimise risks. In our fitness to practise process, if the registrant has fully remedied the problem in their practice that led to the concern, and already poses no further risk, we wouldn't usually need to take regulatory action solely to uphold public confidence or professional standards (unless the concerns raise fundamental questions about the registrant's trustworthiness as a registered professional, or were so serious that they couldn't be remedied).

13 We recognise this can be a difficult balance to strike, but we strongly believe that regulators should aim to assure professionals that they won't be punished if they admit to, and show they have learned from, past mistakes. This will support them in positively engaging with their professional duty of candour and help promote, rather than discourage, the kind of professional culture that's been shown to keep people safe.

14 Finally, in relation to the lack of internal review powers for Social Work England at CE stage, as we have noted in our overarching response, we believe that this may lead to referrers feeling that they are without a voice in the process. However, this could be addressed through legislation to expand Professional Standards Authority powers to appeal.