Royal College of Nursing response to Nursing & Midwifery Council (NMC)'s consultation on Modernising Fitness to Practise - Changes to the Fitness to Practise Rules 2004

Introduction

With a membership of around 435,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.

Background

In November 2016 the NMC launched a consultation into on proposed changes to fitness to practise procedures.

The consultation sought views on:

- changes to undertakings
- warnings
- advice
- reviewing case examiner decisions

General Comments

The RCN welcomed the most significant proposed changes; the introduction of warnings and undertakings. This change offers a means for the NMC's case examiners to dispose of suitable cases at an early stage, whilst still being able to impose a sanction to address the regulatory concern without the disproportionate stress and expense of running a case all the way to a hearing. The RCN does have concerns about the processes involved in relation to Warnings, as there is a risk that in themselves they become a disproportionate response to allegations that should properly be treated as not requiring a case to be pursued at all.

Responses to specific questions

Question 1 – Do you agree with our approach as to when Case Examiners should recommend undertakings?

We agree that offering undertakings at the Case Examiner stage is a very sensible proposal that will allow a much quicker and more effective outcome to be put into place for suitable cases.

We are keen for undertakings to be used whenever appropriate, and we ask that there is strong guidance developed to encourage CEs to offer them in those situations. In particular, we have found that the concept of 'a real prospect of ' strike

off has at times been interpreted in other settings as merely a possible risk of strike off. We ask that the guidance is robust and insists that all factors are taken into consideration to ensure that undertakings are offered unless there is a realistic risk of strike off in a particular case.
We agree that the registrant should have to agree to undertakings. We would like there to be a clear understanding about how that agreement process is arrived at.
We are pleased that the rather short 28 day timescale for agreeing to an undertaking can be extended, but we think that the reason for agreeing extensions should be broadened beyond the workability of the undertaking to include all discussions that might enable the undertaking to be agreed, including the wording of the summary.
During the 28 day time period for agreeing undertakings, we would want there to be the opportunity for discussion about the areas of regulatory concern with the flexibility for agreement about particular factual issues (i.e. the incidents of concern) to be dropped if they stand in the way of agreement and do not add to the seriousness of the regulatory concern being dealt with. This would need to be reflected in the summary.
We want to know what sort of undertakings there could be and how they will compare with Conditions of Practice.

Question 2 – Do you agree that where a nurse or midwife fails to comply with undertakings, Case Examiners should be able to send the original allegation for a hearing?
Agreed, but we would be concerned if this was accompanied with additional charges that arise as a consequence of the breach of the undertakings

Question 3 – Do you agree with our approach to publishing undertakings?
If a summary is felt to be necessary then we consider that the registrant should be involved in the preparation of that summary, and that reasonable extensions of time should be given to the 28 day timetable if additional time is needed to reach agreement.

Question 4 – Do you agree with our proposals that warnings may be issued where the past concerns are serious, but the nurse or midwife has demonstrated full remediation and does not pose a current risk to patients?
In our view, disposing of cases with warnings for this category of concerns is potentially an excellent idea. It could contribute to the NMC's public protection role by removing cases that currently clog up the system from their caseload at an early stage, allowing the NMC to focus upon more serious cases. It could avoid subjecting registrants to an arduous and distressing process that is quite disproportionate to the concern in issue.

We are pleased to note that the NMC does not expect warnings to be given in cases that are currently leading to 'no case to answer' outcomes from the CEs, but we would ask that outcomes are monitored to check that the proportion of 'case to answer' decisions do not increase. There is an anxiety that Case Examiners (CEs) will be more likely to give a warning where once they would have found 'no case to answer'.

However, we strongly disagree that warnings should be imposed without the agreement of the registrant. We take the point that the registrant will have accepted that there has been a regulatory concern, but we still consider that there will be a great deal of damage that could be unfairly inflicted by the imposition of a warning, and it is wrong not to allow the registrant any part in the process.

A warning may cause someone to lose or fail to obtain employment. It appears that the intention is for the warning to always be placed upon the registrant's registration. It will be available upon a search by a member of the public against the individual nurse on the register. It will have been provoked by well remediated lower level mistakes, of the sort that most nurses will make during their career, so the potential effects upon that nurse need to be seen in that context. Employers and members of the public are unlikely to appreciate the distinction between a warning and other outcomes, so the potential for damage to the individual is very significant.

There are 2 types of unfair outcomes that could ensue.

The first is the imposition of a warning that is disproportionate to the severity of the allegation, and should properly have been dealt with as a 'no case to answer' outcome.

The second is that the 'short summary of the facts which the nurse has accepted' can have a vastly different effect depending on how those 'facts' are described. There may be a failure to set the facts in context, or other aspects of the nurse's remediation or insight, or whatever. A caution, that should signify a more serious issue, may appear to the lay eye less serious because it will only note the fact of the caution, without the additional narrative. There needs to be an opportunity for a discussion and if the summary is so potentially damaging, then the registrant should be allowed the option of seeking a hearing rather than see it imposed upon their record.

We also note that the Law commission, in its wide ranging consultation about Healthcare Regulation in 2014, having consulted with a variety of stakeholders, formed the following view about this issue in its well-received response (Paragraph 8.65):

Some concern was expressed that a warning can be imposed by a regulator, without the agreement of the registrant or the safeguard of a panel hearing, even though this could impact on the person's right to practise their profession. As noted above, article 6 does not require a hearing in such cases. But we accept the broader point being made about the lack of appropriate safeguards. We have therefore concluded that where a warning is the regulator's preferred option, the registrant should have a right to request a formal hearing. It would be left to the regulators to decide if this should be undertaken by an investigation committee, fitness to practise panel or some other bespoke panel of three members constituted for this purpose. The procedure for such a hearing would be left to the regulators to determine in rules, but the constitution of the panel must be the same as a fitness to practise panel. Law Com No 345 / Scot Law Com No 237 / NILC 18 (2014)

We are aware that the NMC has opted for non-consensual warnings because they fear that without imposition, registrants might elect to have a hearing in a case that might otherwise have been destined for a no case to answer outcome.

In our view, most registrants who have accepted that there has been a regulatory concern are unlikely to opt to undergo a hearing with the risk of a harsher outcome unless they are very sure that the warning and form of words in the summary on offer contains such a measure of unfairness that they cannot accept it. Accordingly, we are of the view that few registrants would choose this route, and the argument that to allow choice will place too much pressure upon the hearings timetable is unsustainable. If the real reason for not offering choice is that there will be more work required to reach an acceptable outcome to both sides, then this seems to us inadequate to justify the complete removal of any of the normal safeguards against the unchecked use of a power of adjudication.

The proposed means of challenging warnings is limited to seeking a review of the Case Examiner decision by the Registrar. It is our experience of Registrar decision-making (through registration issues and R.7A reviews around Case Examiner decisions) that the Registrar procedure is very slow, there is no clear process and very little communication. Attempts to even understand simple decisions (for example, the reason that a case is being re-investigated) are met with refusals to give any information at all, even when delays of many months then ensue. We have been disappointed with the levels of secrecy and the lack of an appearance of even-handedness in the Registrar process. We are aware that in R.7A cases, the Registrar meets with NMC lawyers to discuss the potential merits of arguments about whether decisions have been 'materially flawed,' without the registrant having been given an opportunity to make submissions at that stage. Those submissions are only sought subsequently. The process has a lack of clear processes and an appearance of taking place 'behind closed doors.'

What is more, it is proposed that even if a registrant takes the opportunity to pursue the Registrar route, and the Registrar then decides that there is evidence that might alter the outcome, the registrant's warning remains in place with the addition of a note to say that the warning is under review. So, in a case that is in dispute, where it is agreed that there is no current fitness to practise concern, there would be a record against the registrant that is just as damaging as the warning in dispute. If our current experience of Registrar decision-making were to reflect timescales in the future, we find it improbable that there would be a resolution within the 1 year life span of the warning.

There is a further difficulty with the Registrar approach. If a registrant was dissatisfied with the decision of the Registrar, we consider that the only recourse would be a Judicial Review. However, if our previous experiences with the Registrar process are indicative of the sorts of delays that we might expect, we cannot envisage a scenario that would enable the court to deal with a JR before the Warning had long expired. However, the duty to exhaust all other avenues (i.e. the Registrar process) would impede a registrant's access to a JR decision at an earlier point.

Question 5 – Do you agree with our approach to publishing the content of warnings?

Our objection to the NMC's plans for publishing Warnings is linked to our disagreement with the non-consensual nature of warnings.
The 'short summary of the facts which the nurse has accepted' can have a vastly different effect depending on how those 'facts' are described. There may be a failure to set the facts in context, or other aspects of the nurse's remediation or insight, or whatever. A caution, that should signify a more serious issue, may appear to the lay eye less serious because it will only note the fact of the caution, without the additional narrative. There needs to be an opportunity for a discussion and if the summary is so potentially damaging, then the registrant should be allowed the option of seeking a hearing rather than see it imposed upon their record.

Question 6 – Do you agree with our proposals on when Case Examiners may give advice?

Agreed

Question 7 – Do you agree that the Registrar should also be able to review decisions to give advice, issue warnings, and recommend or lift undertakings, using these principles?

We do agree that the Registrar should be able to review the decisions listed apart from warnings, where we would want to see an alternate route for warnings that have not been agreed.

We do have concerns that the Registrar route has not proven to be open and transparent and has been slow.

If the Registrar was to be utilised for these reviews, then we would ask that there is guidance produced that requires the same level of transparency as exists in other areas of the Fitness to Practise processes. We would ask that there are clear time frames and mechanisms for externally auditing those time frames, as exist for other aspects of FtP processes.

Question 8 – Where a Case Examiner decision is materially flawed, or new information which could change the decision has become available, do you agree that in addition to a new decision being in the public interest, 'preventing injustice to a nurse or midwife' should become a new factor which would point towards a new decision being made?

If this process is adopted, then we would prefer that there are additional grounds to clarify the meaning of 'materially flawed', particularly when they may protect registrants who may be having an outcome imposed upon them.

Question 9 – Will any of these proposals have a particular impact on people who share these protected characteristics (including nurses, midwives,

patients and the public)? If yes, would this impact have a positive or negative effect?

The Health Committees have certain safeguards for registrants who are in the vulnerable state of suffering serious ill health, and we are concerned that consideration of conduct matters alongside health concerns will lose those protections. We set this out in more detail in question 12 in relation to the new rules themselves.

There should also be taken into consideration that BME nurses, older nurses and men are disproportionately represented among registrants referred to the NMC, so if there are any unfair outcomes as a result of the rule changes, then these will impact disproportionately upon those groups among the nursing workforce.

Question 10 – Do you have any comments on the draft Rules?

Although apparently outside the remit of this consultation, the new rules enable the introduction of the single 'Fitness to Practise' committee in place of the Health and Conduct Committees. They also appear to envisage a situation in which a case entirely involving the health of a registrant might not be heard in private.
The Health Committees have certain safeguards for registrants who are in the vulnerable state of suffering serious ill health, and we are concerned that consideration of conduct matters alongside health concerns will lose those protections.
When a matter is considered by the Health Committee, the focus of the panel is on whether the registrant is in sufficiently poor health for their registration to be restricted. It is frequently the case that a person before the health committee disputes matters of fact that might have contributed to their referral to the NMC in the first place, but those differences can be left unresolved, because the panel is only making a decision about the registrant's health. This means that Health Committee hearings are shorter (usually a day). They are conducted in a less adversarial manner than Conduct cases, where aggressive cross examination of the witnesses on both sides is not uncommon. RCN representatives who regularly support RCN members in health cases are worried that it will be difficult to persuade those suffering with a mental health problem to attend a hearing at which conduct issues will also be a focus. In encouraging them to attend hearings, it is important to be able to reassure them that they will not be facing a hostile environment. We also consider that such hearings would be longer, causing additional cost and creating more challenge to the unwell to attend.
The other major concern is that registrants who are unwell can attend the Health Committee hearing knowing that they cannot be struck off. The prospect of defending their registration and whole livelihood whilst struggling with an illness can be overwhelming, and it is an important safeguard that the hearing takes place without that particular pressure.
We consider that there is an important equalities issue at stake around this proposal, and the different approach of the Health Committee has been a reasonable adjustment for the unwell.

Legal
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