

Royal College of Nursing response to Professional Standards Authority review into the learning from COVID-19.

1.0. OVERVIEW

- 1.1. The RCN welcomes the opportunity to share our views on our experiences of working with professional regulators during the COVID-19 pandemic so far. The RCN works closely with the Nursing and Midwifery Council (NMC) and we provide legal support for our members during NMC cases. We do not regularly work with other professional regulators.
- 1.2. We have been engaged in the introduction of the emergency legislation and have regularly given feedback on the new powers which have now become permanent. During the emergency period we have met weekly with representatives from the NMC and feel confident that they take our input into account when making decisions. The NMC have recently been consulting on their new permanent powers and we have welcomed the opportunity to formally communicate our areas of concern and highlight where we support the changes.

2.0. RCN RESPONSE TO SPECIFIC QUESTIONS

- 2.1. Q1. Which measures, new policies, new approaches or key decisions implemented by regulators during the period do you assess to have been most effective in responding to the pandemic, and why?
- 2.2. **Temporary register:** Before the pandemic hit in the UK, the nursing workforce was already short of tens of thousands of staff. This put the health and care service on the backfoot when preparing and responding to the crisis. The NMC temporary register created the mechanism to bring additional staff into the workforce to aid with the responses.
- 2.3. Implementation of the temporary register was quick and effective. International staff who were in the midst of their registration processes were enabled to work. Where appropriate, nursing students were also able to undertake paid placements, guided by a set of NMC emergency standards which facilitated flexibility in the delivering of nursing and midwifery programmes during the pandemic. This allowed students who chose to, to be deployed and supported during the pandemic. We were supportive of this approach. NMC was very clear this mustn't undermine the supernumerary status which is in place to ensure a quality learning experience to ensure students

- are ready for registration on completion. We also note that this register should only be utilised for this emergency period.
- 2.4. **Virtual hearings:** The NMC introduced the option for registrants and panel members to attend meetings or hearings virtually. We believe that there are benefits to virtual hearings and think that they should continue once the emergency period ends. Previously participants may have been faced with significant travel or accommodation requirements which can now be avoided. Virtual hearings also offer the opportunity to clear the backlog of case work. We appreciate how the NMC worked with us to resolve logistical issues. This allowed them to be in place in a short period of time to process interim order hearings.
- 2.5. **Communication via email:** We are supportive of the changes which allow registrants to receive communications via email. We ask that alternative hard copy delivery of papers is still made available if a registrant has connection problems or where a paper bundle should be supplied in the interests of providing fair access to the documentation. We have heard of some registrants attempting to access hearings on a mobile phone, and having to access the documents on the same device.
- 2.6. **Pausing the process for low risk cases:** This initiative offered relief for registrants and witnesses involved in low risk cases which will have reduced the pressure during the busy clinical period.
- 2.7. **Pausing the revalidation process:** The NMC paused the revalidation process by granting extensions to those whose revalidation documentation was due. This will have reduced the pressure on registrants and lessened their administrative burden during the busy clinical period.
- 2.8. Q2. *Should any measures implemented by regulators during the first phase of the crisis become the new normal?*
- 2.9. **Communication via email:** We believe that this is an effective change of approach and has many benefits for registrants. It should continue following the emergency period. We think there should be some safeguards in place to ensure that registrants receive the communication; for example sending a follow up via recorded delivery if a response is not received to the email.

- 2.10. **Virtual hearings:** As stated, we are supportive of the continued use of virtual hearings following the emergency period. We do however have concerns about public access to these hearings which need to be resolved (see below).
- 2.11. **Stakeholder engagement:** The NMC has worked closely with ourselves and other stakeholders during the emergency period. This had led to better decision making and outcomes. We believe this should be the approach used going forwards.
- 2.12. Q3. Are there areas where further work is needed before innovations become adopted in the longer term?
- 2.13. **Virtual hearings:** At this stage, there have been insufficient numbers of virtual hearings to determine whether they are fair, and whether there might be any disadvantage to particular groups. We urge the NMC to undertake evaluation to assess this impact and put measures in place to protect registrants from any potential disadvantage.
- 2.14. We feel that registrants should be able to 'opt-out' of a virtual hearing if they have concerns about fairness, security or complexity of the case and should not be penalised for doing so.
- 2.15. If the outcome of this consultation does not produce a system in which registrants can 'opt-out' of virtual hearings, we request an independent process to determine the most appropriate venue. There should be no limitations from the NMC on the factors which the registrant is able to raise within this process, for independent consideration.
- 2.16. **Public access to virtual hearings:** Our view is that members of the public should only have access to virtual hearings in a supervised hearing centre. We have concerns about public access to virtual hearings, including access by members of the media or parties involved in the case. Our concerns include:
- The possibility of screenshots or recordings of proceedings that then appear on social media
 - The possibility of observers sharing evidence with witnesses prior to them giving evidence
- 2.17. These concerns would lead to avoidable distress being caused for the registrant, and any potential witnesses, and could impact the outcome of the case. We anticipate that witnesses would be less willing to participate if they are exposed to

the risk of uncontrolled public access. In criminal proceedings there is a 'contempt of court' process which would allow for sanctions against members of the public who act in this way. This is not available in regulatory proceedings.

- 2.18. In response to these concerns, the NMC implemented a system where the general public be offered virtual audio access, and now proposes that they also allow virtual visual access. We are concerned that this is not in alignment with the approach taken by the regulator of Doctors, and this could lead to unequal treatment for nursing staff. The Medical Practitioners Tribunal Service (MPTS) for the GMC have set up viewing galleries. These only allow public access at a physical site and all the current safeguards against misuse apply. Members of the public who prefer not to travel can be provided with a transcript of every word spoken during the hearing.
- 2.19. We are particularly keen that doctors and nurses involved in the same case or incident (especially where there is heightened public interest) should receive equal protections from unfair treatment from public observers.
- 2.20. NMC registrants should not be exposed to the risks attached to giving direct access to virtual hearings, when the duty to be open can be met in other ways and other healthcare practitioners will be spared such risks.
- 2.21. Our position is that members of the public should not be given remote audio or visual access to hearings, but if they choose to watch they should be able to access a supervised hearings centre at which safeguards are in place to prevent filming or recording. If this is not possible, virtual audio only should be maintained and virtual visual access should not be given.
- 2.22. **Variation in approach for different types of healthcare worker:** We have observed that different regulators have taken different approaches to responding to the pandemic. This may lead to unequal treatment or experiences for staff from different professions who are involved in the same case. We think that trust in the regulatory process would be increased if processes were consistent across different professional groups. Further divergence is unwelcome.
- 2.23. Q4. Are there areas where you feel regulatory innovations or actions during this period have been particularly impactful?

- 2.24. As described above, we are particularly supportive of the temporary register for nursing staff, the use of email communication for hearing documentation and the practical implementation of virtual hearings. These were delivered swiftly and were impactful to the pandemic response.
- 2.25. We are also pleased with the increased collaboration with the NMC on casework and policy work. The NMC has encouraged engagement from registrants and their representatives so that cases progress more effectively in the early stages, to achieve sensible, proportionate outcomes that also protect the public. Further work in this area is planned by them, which will assist in embedding this collaboration for the future.
- 2.26. Q5. Have there been any unintended consequences of measures, new policies, new approaches, or key decisions?
- 2.27. **Differing treatment of healthcare workers by professional regulators:** The introduction of differing approaches to registrant choice about virtual hearings and public access to them has led to further inconsistency between the treatment of regulated healthcare workers, when the drive should be towards greater consistency. Differences in treatment can lead to speculation that such workers are more or less valued, and on this occasion, it will not be possible to place the blame on historic differences in the rules.
- 2.28. **Backlog of cases:** The caseload backlog at the NMC creates immense distress for registrants involved in cases whose careers may be on hold. The delay also reduces nursing workforce capacity.
- 2.29. There are also practical implications for the RCN and others representing registrants when increased activity to clear the backlog puts pressure on capacity and budgets.
- 2.30. All reasonable steps should be taken to resolve cases at the earliest stage. The NMC should be supported by the PSA in this endeavour, as it has been our perception that NMC anxiety about criticism from the PSA has led to NMC lawyers adding unnecessary charges, which can stand in the way of early resolution.
- 2.31. Q6. Are there areas where the full impact of measures taken is not yet fully understood?

- 2.32. **Lack of evidence relating to virtual hearings:** There have not been enough virtual substantive hearings so far to establish whether they adversely or unfairly impact some groups of registrants compared to others. We do not think enough evidence has been collected to understand the trends in experience or outcomes for individuals.
- 2.33. **Lack of evidence about public access to virtual hearings:** It is too early to know whether members of the public will illicitly record virtual hearings. This will however cause a great deal of anxiety for registrants. We have concerns that witnesses may be less willing to engage in the hearing process. In particular, we have not yet experienced a virtual hearing for a case which attracts significant media attention, therefore we do not know whether the safeguards currently in place will be sufficient to protect participants.
- 2.34. Q7. Do you think that any regulatory gaps have been disclosed by the pandemic?
- 2.35. We would like to reiterate the points made above relating to inconsistent treatment of professional groups by different regulators; particularly in relation to access and choice about virtual hearings and protection from abuses of public access to virtual hearings.
- 2.36. The pandemic has also shown how quickly a backlog of cases can emerge, and this is an indication that existing processes are not flexible. The NMC has informed us that they plan to improve their ability to resolve cases at the early stages, where appropriate. Their pre-pandemic Fitness to Practice strategy requires them to reduce the number of cases requiring a final substantive hearing. Current and new methods of early disposal should be examined and promoted.
- 2.37. **Limitations of the NMC Code:** we have observed that the NMC Code is designed for 'normal times' when the best interests of the patient can be prioritised. During the pandemic practitioners face new challenges like shortages of resources and staff, redeployment into unfamiliar roles, inappropriate care settings, and risks to their safety which all impact their decision-making. Registrants have had to make difficult decisions without clear assurance that they are acting within the scope of the Code.
- 2.38. In practice, an example is when the Government was unable to provide sufficient PPE to frontline workers; it was unclear as to whether those workers could refuse to treat patients. Our guidance and subsequent guidance from the NMC did then

support registrants to refuse care when all other options had been pursued, as registrants were unsure whether this was acceptable.

- 2.39. Our view is that it is vital that the NMC and other regulators make it known that they will make every effort to ensure that the context of any situation is taken into account within their decision making. The NMC identified context as a priority within their strategy, and we support this.
- 2.40. Q8. What are the main learning points for further waves of the virus, other future crises, and future business as usual?
- 2.41. **Taking into account context when making decisions:** As stated above, we think it is critical for professional regulators to take context into account when making decisions given that registrants are not operating in 'normal' circumstances. Regulators need to give reassurance now that context will be paramount, and that practitioners who are doing their best in such previously unthinkable circumstances, such as rationing lifesaving care, should have nothing to fear from regulatory processes.
- 2.42. As well as assisting staff on the front line to work with greater confidence at this point in the crisis, this will enable a shift away from a culture of individual blame towards one of learning.
- 2.43. The PSA has a role to play in considering whether appeals against decisions it considers are unduly lenient are likely to improve patient safety, and should take evidence of good remediation into account and should consider the impact of initiating an appeal upon the practitioner.
- 2.44. **Resolving cases at the earliest possible opportunity:** There is an extensive backlog which causes significant stress for individual registrants and capacity issues with the organisations who support registrants. All reasonable steps should be taken to ensure that cases which can be resolved at an early stage are identified to reduce the overall backlog.
- 2.45. **Consistency between professional regulators:** The PSA should review the approaches taken by different regulators and identify situations in which unwarranted variation has developed during the pandemic. Steps should be taken to remove this variation and joint approaches should be developed where possible.

About the Royal College of Nursing

The RCN is the voice of nursing across the UK and the largest professional union of nursing staff in the world.

For further information, please contact:

Rosalind Hooper, Head of Legal (Regulatory) (Rosalind.Hooper@rcn.org.uk).

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