

# Improving Fitness to Practise decisions

## A review of weaknesses in reasoning and decision-making

September 2011

### 1. Introduction

- 1.1 Since April 2010 we have reviewed over 3,000 fitness to practise panel decisions. Only 15 of those decisions have required consideration at formal case meetings to determine whether or not the outcomes are 'unduly lenient' and CHRE should exercise its power of appeal. This is a very small number and indicates that the vast majority of panels make decisions that are clearly not 'unduly lenient'.
- 1.2 However, some panels do not always make well-reasoned decisions. There are a number of reasons that can contribute to this, including the quality of the regulator's investigation and presentation of the case. Since the errors they make are sometimes similar, we feel it appropriate to publish this paper to draw attention to them, in order to improve the quality of outcomes from the fitness to practise process across the various regulators.

### 2. Background

- 2.1 Ten of the 15 cases that we have considered at case meetings since April 2010 concerned decisions made by the Conduct and Competence Committee of the NMC, two concerned decisions made by the GMC's Fitness to Practise Panel, two concerned decisions made by HPC panels, and one concerned a decision made by the GDC's Professional Conduct Committee.<sup>1</sup> Following the case meetings, we appealed four of the cases (three relating to NMC panel decisions and the other to the GDC panel decision) to the High Court, using our power under section 29 of the National Health Service Reform and Health Care Professions Act 2002 (as amended). One of those appeals has already been decided by the High Court<sup>2</sup>. A further nine of the case meetings resulted in us feeding back specific 'learning points' to the relevant regulator. We summarise below some of the most serious issues that we identified from those case meetings. The full notes of our case meetings are available from our website.<sup>3</sup>

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<sup>1</sup> Most of the nine regulators have different names for their committees and panels; for simplicity, the term "panel" is used throughout this document.

<sup>2</sup> [CHRE v NMC and Paula Grant \[2011\] EWHC 927 \(Admin\)](#)

<sup>3</sup> We are not able to publish notes of case meetings concerning cases that were heard in private by the regulators' panels. Similarly, we are not yet able to publish our notes of the case meetings in the cases in which appeals are ongoing. This document therefore does not refer to the facts of any of those cases.

2.2 Decisions that are 'unduly lenient' (in the sense required for an appeal to succeed in court) are rare. However, decisions that may not meet the 'unduly lenient' threshold, but which are not well-reasoned can have a detrimental impact on:

- the safety or experience of patients
- the registrants' colleagues
- clarity about professional standards
- the reputation of the profession, and
- public confidence in regulation.

### **3. Weaknesses that contribute to poorly-reasoned or lenient panel decisions**

3.1 We summarise below some examples of the weaknesses in panel decisions that we have repeatedly identified at the case meetings we have held since April 2010, including weaknesses in:

- Preparation of the case by the regulator- failing to investigate/charge all relevant matters, or to put the relevant evidence before the panel at the hearing
- 'Testing' the evidence at the hearing
- The consistency of the panels' findings at different stages of the hearing process
- Providing reasons for decisions
- Drafting/interpretation of the regulators' indicative sanctions guidance and/or panels' inappropriate application of the guidance (including inappropriate interpretation of 'harm' or 'isolated incident')
- Assessing the weight to be given to some factors (including giving too much weight to the registrant's interests)
- The treatment of allegations involving dishonesty
- Considering remediation and/or the relevance of testimonials
- Considering the wider public interest

3.2 Some of these issues inevitably overlap with each other. Most of them have arisen mainly in connection with decisions made by (some) NMC panels, but nevertheless we think that alerting all the regulators to these issues will help to improve the quality of decision-making generally.

3.3 We have identified similar issues in relation to other decisions made by the regulators' panels - we fed back over 400 learning points to the regulators in 2010/2011.

- 3.4 We set out below examples of the situations in which each of these issues have arisen, by reference to case studies based on the outcomes from some of the case meetings that we have held since April 2010.

#### 4. Examples of weaknesses we have identified

##### ***Weaknesses in investigation/presentation of evidence by the regulator***

- 4.1 A failure by the regulator to present relevant allegations or evidence to the panel ('under-prosecution') or a failure by the panel to consider them can lead to the sanction imposed being potentially 'unduly lenient', and therefore capable of being overturned on appeal by CHRE to the courts.
- 4.2 In the *Ruscillo*<sup>4</sup> appeal the Court of Appeal said that the panel has a role to play in ensuring the quality of the case presented to it. The Court said
- 'The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it'.

##### ***Case study 1: the Mallari case***

In this case the NMC panel were asked to consider a nurse's criminal conviction for perverting the course of justice. Knowing that her husband was facing prosecution for sexual offences against Ms A, the nurse had:

- Purchased a one-way ticket for Ms A to leave the UK
- Forged a letter from Ms A stating that the allegations she had made against the registrant's husband were untrue; and
- Tried to persuade Ms A to withdraw the allegations

The NMC had not asked the panel to consider evidence that the registrant had also:

- Assaulted a police officer (during a struggle in which the registrant was trying to destroy the forged letter); and
- Been dishonest in trying to conceal evidence from the police and lying to them at interview.<sup>1</sup>

We considered that this was a potentially serious failing, but that it did not affect whether or not the sanction imposed was 'unduly lenient' in this particular case. We fed back learning points about these issues to the NMC.

<sup>4</sup> *Ruscillo v CRHP & Another* (2004) EWCA Civ 1356, paragraph 80

### ***Weaknesses in testing the evidence at the hearing***

- 4.3 The Shipman Inquiry Report<sup>5</sup> referred to panels' 'inquisitorial' function (this is a similar comment to that made by the Court of Appeal in the *Ruscillo* appeal – referred to above) and recommended that panellists should be trained to ask questions if they feel that any issue is not being adequately explored during a hearing.<sup>6</sup>
- 4.4 All the health professions regulators now require panels to decide on disputed factual allegations 'on the balance of probabilities'. Panels are therefore used to applying this test to the allegations presented to them by the regulator and carefully assessing the evidence. If the registrant also makes factual claims, the panel will need to decide whether or not to believe them. For example, the registrant might make claims about exceptional circumstances that 'mitigate' their responsibility for what happened (i.e. reduce the blame to be attached to them personally); or about what they have done to 'remediate' (put right) their failings.
- 4.5 The panel will need to assess the evidence that supports those claims before they decide whether or not to accept the registrant's account.

#### ***Case study 2: the Grant appeal (CHRE v NMC and Paula Grant [2011] EWHC 927 (Admin))***

Mrs Grant was an adult lead midwife. The allegations against her concerned her conduct towards junior colleagues (including bullying/harassing one colleague, and failing to provide appropriate support and assistance to them) as well as her rude and insensitive conduct towards two patients.

Mrs Grant told the NMC panel at her hearing that she had been unable to take any steps to remediate her failings between November 2007 and June 2009 because she had been seriously unwell. She did not produce any medical evidence to substantiate that claim (for example, she did not provide her medical records or any evidence from her doctor).

When we appealed the NMC panel's decision, the High Court described the panel's '*uncritical acceptance*' of Mrs Grant's uncorroborated claim about her ill-health as '*unsatisfactory*', particularly because the panel had said earlier in the hearing that it did not believe other aspects of her account of events. The High Court granted our appeal (based on its view on this issue, amongst others).

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<sup>5</sup> The Shipman Inquiry - Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future; Published 9 December 2004; Command Paper Cm 6394

<sup>6</sup> See footnote 5 - at paragraph 27.255

### ***Inconsistencies in the panel's findings***

- 4.6 The written decision that each panel issues at the end of the case is the public record of how it has reached its conclusions. Panels' written decisions therefore play a vital role in declaring and upholding professional standards, and maintaining public confidence in the profession and its regulation. In order to fulfil this purpose it is therefore important that each written decision clearly sets out the panel's reasoning and does not contain inconsistencies.
- 4.7 Inconsistencies in the reasoning within a panel's written decision may suggest that the panel has followed a flawed decision-making process, and even that the panel's ultimate decision is wrong.

#### ***Case study 2: the Grant appeal (see above)***

In the NMC panel hearing in the *Grant* case, the panel decided that Mrs Grant's evidence denying the allegations against her was not to be believed. However, at a later stage of the hearing the panel decided to accept Mrs Grant's claim that she had remediated her misconduct. The High Court judgment in the CHRE appeal was critical of this, commenting that:

' In marked contrast to the Committee's observations and findings at the fact-finding hearing, they appear at this stage uncritically to accept the Registrant's assertions as to her insight and rehabilitation, and to accept her evidence as entirely credible. On analysis no proper basis for their doing so appears from their reasons.'

### ***Weaknesses in providing reasons for decisions***

- 4.8 The Learning Points bulletin that we published in 2009 (which is also available from our website) sets out good practice in writing fitness to practise determinations, including the importance of providing adequate reasons. There are also various relevant court decisions on this topic.

#### ***Case study 3: the Ismael case***

In this case the NMC panel considered a nurse's criminal conviction relating to his:

- Deceiving his employer about his previous convictions; and
- Working for a second employer while on sick leave from his main employer.

The NMC panel decided that the nurse's behaviour was not 'fundamentally incompatible' with his continuing to be a nurse (which meant that the nurse did not have to be struck off the NMC's register) but did not explain why. Nor did the panel explain which factors they had treated as mitigating or aggravating the nurse's misconduct, and how they had weighed those factors up in reaching their decision.

We considered that these were flaws in the panel's decision-making. We fed back learning points to the NMC about the panel's reasoning.

### ***Weaknesses in the drafting/interpretation of Indicative Sanctions Guidance***

- 4.9 All the health professions regulators provide guidance to their panels to help them to reach decisions about which (if any) sanction to impose in each case. This guidance is generally known as 'Indicative Sanctions Guidance'.
- 4.10 This guidance helps to ensure the transparency of the fitness to practise process, and if it is drafted and used effectively, it can help to ensure that panels' decisions are well-reasoned and consistent. Panels should refer to the relevant Indicative Sanctions Guidance in their decisions, and in particular should explain their reasons if they decide not to impose the sanction that the guidance indicates is appropriate.

#### ***Case study 4: the O'Reilly case***

In this case a nurse who was working in a hospital intensive care unit had been physically violent to a vulnerable elderly patient, as well as shouting abuse at them.

The NMC panel imposed a caution on the nurse, having first considered the factors that are listed in the NMC's Indicative Sanctions Guidance as relevant to a caution - including whether or not the nurse's behaviour could have caused 'direct or indirect patient harm'. The NMC panel in this case interpreted 'harm' as being limited to *physical* harm, and, as a result, decided that no harm had been caused. In fact it appeared that the patient had suffered psychological harm (she was distressed and scared after the incident).

We concluded that the NMC panel had misinterpreted this part of the Indicative Sanctions Guidance. We fed back learning points to the NMC about this.

#### ***Case study 3 (see above): the Ismael case***

In this case (described above) the NMC panel decided that the nurse's dishonest behaviour was not 'fundamentally incompatible' with his continuing to be a nurse (without explaining why).

We noted that the NMC's Indicative Sanctions Guidance does not explain what *does* amount to conduct that is 'fundamentally incompatible with continued registration'. In contrast, the GMC's Indicative Sanctions Guidance explicitly says that dishonesty is particularly serious because it can undermine public trust in the profession, and that it is likely to result in striking-off, 'especially where persistent and/or covered up'. We fed back learning points to the NMC about this.

The GMC's approach is in-line with that taken by the courts to dishonesty allegations found proved against health professionals, and we consider that it is appropriate for all regulators' Indicative Sanctions Guidance to contain statements explaining the seriousness of dishonesty.

### **Case study 5: the Kamel case**

In this case, a doctor had exhibited sexualised behaviour towards several vulnerable female patients, including sending them inappropriate text messages, inviting them to go out with him, visiting them at their homes and touching them inappropriately (including kissing two patients). The GMC panel found that his fitness to practise was impaired. As there were significant mitigating factors in the case the sanction imposed was suspension for the maximum period, with a review hearing to be held at the end of that period.

As a result of our case meeting, we suggested to the GMC that it might wish to expand its Indicative Sanctions Guidance to include a statement about the types of sexual misconduct that are fundamentally incompatible with ongoing registration as a doctor.

### **Weaknesses in assessing the weight to be given to some factors**

- 4.11 As explained above, panels should refer to Indicative Sanctions Guidance when reaching a decision about which sanction to impose. Indicative Sanctions Guidance documents usually identify the factors that indicate whether or not a particular sanction is likely to be appropriate. They also sometimes set out factors that may 'mitigate' or 'aggravate' the blame to be attached to the registrant. Assessing which sanction is appropriate requires the panel to consider the weight to be given to each factor that is present in the particular case (potentially including factors that are not listed in the Indicative Sanctions Guidance).

### **Case study 1 (see above): the Mallari case**

In this case the NMC panel (in our view) gave too much weight to the factors set out below:

- *The nurse did not pose a direct risk to the public* – we thought that the panel had not properly taken into account the wider public interest
- *The misconduct was an 'isolated incident'* – we noted that the Indicative Sanctions Guidance says this factor is relevant only where the behaviour was 'not deliberate' – which was not true in this case
- *The nurse had undergone 'rehabilitative' counselling* – we noted that this counselling related to bereavement and was not directly relevant to the nurse's misconduct
- *Testimonials demonstrated that the nurse was highly respected in her clinical practice* - we were concerned that the nurse's clinical competence was of limited relevance, given that the allegations related to her integrity
- *The nurse was the 'sole breadwinner' for her family* – this factor is not set out in the NMC's Indicative Sanctions Guidance (although the document states that the list of factors is not 'exhaustive') and we were concerned that the panel had given too much weight to the nurse's personal circumstances, in light of the seriousness of her misconduct.

We fed back learning points to the NMC about these issues.

### ***Case study 6: the Marshall case***

Mrs Marshall (alongside a colleague) had cashed a number of substantial cheques from an elderly resident at a care home where they worked over a period of two years. The NMC panel found both registrants' fitness to practise was impaired, and imposed caution orders on them.

The NMC's Indicative Sanctions Guidance says that caution orders 'may be appropriate where most of the following [ten] factors are present. This list is not exhaustive'. In reality only a minority of the ten listed factors were present in relation to Mrs Marshall, but nevertheless the NMC panel decided it was appropriate to impose a caution order. We thought that the NMC panel gave too much weight to:

- the fact that the incidents had occurred more than 10 years ago (this had not prevented the panel from finding that Mrs Marshall's fitness to practise remained currently impaired - due to a lack of remorse or remedial action)
- the lack of any repetition (although Mrs Marshall had not provided any recent references or testimonials)
- its conclusion that Mrs Marshall had not been dishonest (which we thought was wrong, as she had behaved in a way that most people would regard as dishonest)
- its conclusion that no 'harm' had been suffered by a patient (the panel wrongly interpreted the Indicative Sanctions Guidance as referring only to physical harm).

We fed back learning points to the NMC about this case.

### ***Case study 2 (see above): the Grant appeal***

In this CHRE appeal the High Court provided some guidance about weighing up factors that are relevant to impairment of fitness to practise. The High Court said:

- The level of insight that a registrant has shown is central to deciding whether or not their fitness to practise is currently impaired.
- The more serious a registrant's misconduct, the more difficult it will be to justify finding that their fitness to practise is not impaired.
- Panels should be cautious about relying on a registrant's 'demeanour' as a sure indicator of their truth or reliability. The panel should consider the whole picture, taking account of all the evidence, in reaching its decision about impairment of fitness to practise.

### ***Weaknesses in the treatment of allegations involving dishonesty***

- 4.12 Any allegation of dishonesty is likely to be particularly serious for a health professional, because honesty and integrity are fundamental values of the health professions. Dishonesty is also something that the registrant may have difficulty in showing that they have 'remediated' (put right).

- 4.13 If dishonesty is proved, it is likely to have a significant impact on the sanction imposed. There have been a number of court decisions which have made it clear that dishonesty is likely to result in striking-off or suspension from the regulator's register.<sup>7</sup>

***Case study 3 (see above): the Ismael case***

We were particularly concerned about the NMC panel's decision in the *Ismael* case because there was no evidence that the nurse had shown any insight into his misconduct or any remorse for what he had done. In fact, in his police interview the nurse had said that he had decided not to declare his previous convictions to his employer *because* he knew that doing so would mean he would not get the job, and that he did not take the convictions too seriously because they had not resulted in a prison sentence.

We were concerned that the panel's decision in this case (to suspend the nurse for a year) sent out the wrong message about the consequences of repeated, serious and deliberate dishonesty, and that it could undermine public confidence in the standards of the nursing profession and in the NMC's regulation of it.

We fed back learning points to the NMC about this case.

***Weaknesses in considering remediation/testimonials***

- 4.14 In deciding whether or not a registrant's fitness to practise is currently impaired, the panel must take various factors into account, including whether their failings are capable of being remediated, whether they have in fact been remediated, and any risk of future repetition. The panel will need to assess the weight to be given to any evidence the registrant puts before the panel about this (including for example testimonials from colleagues/patients or evidence of relevant study or improvements to the registrant's performance or behaviour).

***Case study 2 (see above): the Grant appeal***

The NMC panel took into account various courses that the midwife had undertaken to remedy her failings. The High Court noted that only one of the courses actually appeared to be directly relevant to the misconduct concerned.

The judge also criticised the NMC panel for accepting 'uncritically' the midwife's claim that a counselling course had 'enabled her to reflect upon her ability to deal with others', and said that the panel had placed too much weight upon that claim in concluding that the midwife's fitness to practise was not currently impaired.

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<sup>7</sup> E.g. [Parkinson v Nursing and Midwifery Council](#) 2010] EWHC 1898 (Admin)

### **Case study 1 (see above): the Mallari case**

In this case we had concerns that the panel had not properly weighed up the relevance of testimonials about the nurse's clinical competence, given that the allegations concerned misconduct. We also noted that the panel had not explored why one testimonial appeared to have been written by someone who was not aware of the full scale of the allegations against the nurse, or taken that into account in considering what weight that testimonial should be given. We fed back these learning points to the NMC.

### **Weaknesses in considering the wider public interest**

- 4.15 Giving proper consideration to the public interest is without doubt one of the most important factors in any fitness to practise panel's decision-making. We have identified concerns about whether some panels have properly taken the public interest into account in their decisions about impairment and sanction in various cases that we have reviewed at case meetings this year.
- 4.16 In the *Grant* appeal the High Court re-stated the importance of fitness to practise panels considering the three elements of the public interest when reaching decisions about whether or not a registrant's fitness to practise is impaired. Those three elements are:
- the protection of the public
  - the upholding of proper standards of conduct and behaviour; and
  - the maintenance of public confidence in the profession
- 4.17 Previous court decisions have made it clear that (subject to due consideration of the registrant's rights under the European Convention on Human Rights) the public interest is more important than the individual registrant's interests. The 'classic' statement about this comes from the Court of Appeal's decision in the case of *Bolton v the Law Society* which explains that, because regulatory sanctions are imposed in the public interest rather than in order to punish the registrant, mitigating factors, remorse, remediation and testimonials are of less relevance than they would be in criminal proceedings as 'none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence' in the integrity and trustworthiness of every member of the profession because 'The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.'<sup>8</sup>

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<sup>8</sup> Paragraph 16, *Bolton v the Law Society* [1993] EWCA Civ 32

### ***Case study 2 (see above): the Grant appeal***

This was the first High Court judgment overturning a panel's finding that a registrant's fitness to practise was not impaired on appeal by CHRE. The High Court judgment criticised the NMC's panel's approach to considering impairment of fitness to practise on the basis that the panel had:

- Considered only whether the registrant's failings were remediable, whether they had been remedied and the risk of future repetition, without having due regard to wider public interest considerations
- Failed to consider whether the protection of the public, the maintenance of public confidence in the profession, and the upholding of proper standards of conduct and behaviour required a finding of impairment to be made in the circumstances of the case

The High Court's judgment in this case therefore represents an important re-statement of some key principles that panels need to consider when reaching their decisions about impairment of fitness to practise.

### ***Case study 4 (see above): the O'Reilly case***

In this case we were concerned that the panel had not given adequate weight to the need to declare and uphold professional standards and to maintain the reputation of and public confidence in the profession.

The panel had stated that it could not be satisfied that the nurse's misconduct (which involved physically and verbally abusing a vulnerable elderly patient) would not happen again, but had not explained why, in those circumstances, a caution was the appropriate sanction (particularly as a caution would not usually result in the nurse being subject to any ongoing monitoring).

We fed back learning points on these issues to the NMC.

## **5. Conclusions**

- 5.1 We expect each of the nine regulators that we oversee to provide relevant training, guidance and feedback to their panels (as well as to their staff) and we check their processes for doing so as part of our annual performance review of the regulators' work.

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- 5.2 There are a number of factors that contribute to a good quality outcome from fitness to practise processes, including the investigation/preparation work that is done by the regulator before a hearing takes place, as well as the panel's approach at the hearing itself. We have highlighted in this paper some of the issues which, in our view, have contributed to unsatisfactory outcomes in some of the cases that we have reviewed at recent case meetings.
- 5.3 We hope that all the regulators will find this summary of the learning that we have identified from the cases that we have reviewed recently helpful in improving their handling of fitness to practise cases. As most of the issues highlighted in this paper arose in the context of NMC cases, we hope that this paper will be particularly useful to the NMC in its ongoing work to improve the quality of the outcomes from its fitness to practise process.