



Right-touch reform

A new framework for assurance of professions

A summary: Fitness to Practise

Read our
full report



WHO WE ARE

We are an independent body, accountable to the UK Parliament. We exist to protect the public by improving regulation and registration of health and care professionals.

HOW WE WORK

We ensure that our values are at the core of our work: they are at the heart of who we are and how we would like to be seen by our partners. We are committed to being:

- focused on public interest
- independent
- fair
- transparent
- proportionate.

At the heart of everything we do is a simple purpose:



To protect patients, service users and the public by improving the regulation and registration of health and care professionals and practitioners

There are **three main areas** to our work:

- Reviewing the work of the regulators of health and care professionals
- Accrediting organisations that register health and care practitioners in unregulated occupations
- Giving policy advice to Ministers and others and encouraging research to improve regulation.



Who we are

Modernising registers

Harm prevention

Education and training

Fitness to Practise

Read the full report

What is fitness to practise?

Each regulator has a 'fitness to practise' process for handling complaints about health and care professionals. The most serious cases are referred to formal hearings in front of fitness to practise committees.

Regulators can only proceed with a case where they have the powers to do so. This means that:

- 1 The concern must relate to a registrant who can be identified
- 2 The information must also be the kind of concern that the regulator can take forward.

This sounds fairly straightforward – however, what constitutes an '**allegation**' varies between regulators and this then affects where the investigation sits and even whether the allegation can be investigated in the first place.

THE CURRENT APPROACH TO FITNESS TO PRACTISE

Regulators' activity to ensure that their registrants remain fit to practise, and act accordingly when they are not, is probably the area of their work which is of the greatest interest to the public (and probably the media). However, the purpose of the fitness to practise process is easily misunderstood: members of the public may perceive it to be punitive, a process for assigning blame or about 'getting justice' when something has gone wrong with care.

Regulators will take action against professionals on their registers if they believe that it is necessary:

- to protect the public
- to maintain public confidence in the profession and/or
- to uphold proper standards of conduct and behaviour.

Currently, all nine of the regulators have different legislation underpinning their fitness to practise frameworks, resulting in different processes.

In a nutshell, the process usually involves investigating a complaint/concern raised about a registrant – what could be called the 'screening process'. If it is put through, the case will then proceed and be investigated/examined. Depending on what this part of the process reveals, the case could be closed, and for some regulators, closed with a warning/advice to the registrant. At this stage the registrant may be subject to an interim order – to stop them from practising – while the case is referred to a full hearing before a panel and a final decision is made about whether they are fit to practise.

The most severe outcome will be for the professional to be removed from the regulator's register (erasure/striking off) but they can be subject to other conditions/sanctions, including suspension from practising in their profession for an agreed period of time or agreement to undergo further training.

This is just a summary of the fitness to practise section in our special report **Right-touch reform**. Read the **full chapter** to get background and context about fitness to practise and proposals for future reform.



Find out more about fitness to practise



Read the full report



Watch this short video about why we appeal some fitness to practise decisions



Read the learning points we have sent through to the regulators

PROBLEMS WITH THE CURRENT APPROACH TO FITNESS TO PRACTISE

- ⦿ **Variations/inconsistent** across the regulators – some regulators can be considered more *modern* than others, in part because opportunities for piecemeal reform have not been equally distributed – so none of the processes are quite the same
- ⦿ **Sanctions imposed vary** between regulators which could cause issues with public protection but could also be seen to be **unfair**
- ⦿ Wording around fitness to practise can vary which can lead to it being **confusing**
- ⦿ **Adversarial/combative** – the process involves the regulator putting their case forward and the registrant and/or their legal representative defending it
- ⦿ **Stressful** – for both parties – registrants and witnesses
- ⦿ **Expensive**
- ⦿ **Delay** – some cases can take several years from the initial complaint to the final panel decision.

“Stories about damaging experiences of Fitness to Practise hearings may produce anxiety about regulation and consequent defensive practice in the wider osteopathic population”



£49 million

The GMC reported an expenditure of £49m for the year 2015 on fitness to practise activity excluding adjudication. This constituted nearly half of its overall expenditure for the year.

[Read the full report to find out more](#)

WE WANT TO SEE THE CURRENT SYSTEM:

INCONSISTENT PIECEMEAL CONFUSING ADVERSARIAL EXPENSIVE

REPLACED WITH SOMETHING MORE:

CONSISTENT COOPERATIVE FLEXIBLE QUICKER

A FUTURE APPROACH TO FITNESS TO PRACTISE

Fitness to practise outcomes should fulfil the three limbs of public protection by means of meaningful remediation where possible, and degrees of restrictions on practice where not.

Use fitness to practise measures only when necessary: issues should be resolved in the place where they occur or by other bodies who are best placed to deal with them, unless they meet the regulator's threshold for referral.

Link thresholds for accepting concerns to the professional code: it should be clear to registrants, employers, patients and service users when a concern needs to be referred to the regulator. This should be based on the code that sets out what is expected of a registrant.

Seek early resolution and remediation where appropriate: the purpose of fitness to practise is not to punish. This has implications for the way in which cases are disposed of, and for the design of the fitness to practise process, for example the role of formal adjudication would be diminished.

Separate investigation and decision-making, including adjudication: the current structures limit the extent to which this is possible for all the regulators, but it remains an important basic principle.

Ensure accountability, transparency, and consistency: this applies both to policy and to practice; there should be external scrutiny of all decisions to take action on registration; there should be options to review decisions to close cases at the major decision-making points in the process. There are good reasons why outcomes may be different, but any reforms should strive for greater consistency of processes and thresholds where possible.

We would like to add to the above a more radical principle that would not be applicable under the current system because it challenges the case law:

Use formal adjudication only when the registrant disputes the case: only when there is a dispute between the regulator and the registrant (on material facts, the decision that regulatory action is needed, or the specific action recommended by the regulator) is it necessary to use an independent means of adjudicating.

What is meaningful remediation?

Where a professional has been found to be unfit to practise, their failings can sometimes be addressed by means of remediation, to try to make them fit to practise again in the future.

Therefore, when we talk about meaningful remediation measures, we mean that:

- ◆ there is evidence of sincere insight and remorse
- ◆ remediation measures have a realistic prospect of addressing the failings
- ◆ remediation as an outcome fulfils all three aims of public protection as appropriate
- ◆ review and objective assessment of whether remediation has been effective, including an assessment of the likelihood of repetition, are undertaken systematically.

TOWARDS A NEW MODEL FOR DEALING WITH CONCERNS IN THE LONG-TERM ABOUT HEALTHCARE PROFESSIONALS

We have already set out our arguments around reform in our earlier publications *Rethinking regulation* and *Regulation rethought*. In *Right-touch reform* we put forward more detailed proposals for reform and also take account of the regulators' views on how fitness to practise processes can be improved.

This is a complicated topic but we have tried to boil it down to the essentials, developing a simple model that would reduce the friction between regulator and registrant, and move away from the legalistic, adversarial system we have today. It is designed to encourage full cooperation from the registrant from the outset, and to deploy the minimum regulatory force to achieve the desired result.

This approach is compatible with, but not dependent on, the creation of a single register and a licensing system for healthcare professionals, which we proposed in *Regulation rethought*. This approach would not necessitate structural change, but would require some legislative reform, and greater collaboration between regulators.

We understand from the regulators' responses to the questionnaire we circulated that, for the most part, regulators would like their legislation to give them greater flexibility to evolve and modernise. We would support this, provided that collaboration and consistency of approach could – and would – be achieved through other means.

Fitness to Practise: basic concept for reform

The broad lines of our proposed approach:

- a distinction between remediable and non-remediable cases
- early agreed outcomes (including remediation) would be encouraged for all cases, except where the registrant did not accept the facts, the decision to take action, or the outcome proposed by the regulator, and only cases where there was such a dispute would be dealt with through formal adjudication
- all decisions relating to cases that were pursued by the regulator post-investigation to be subject to scrutiny by the Authority, which could appeal if it felt a decision did not protect the public.

This approach centres on the decision that is made at the end of the investigation. After the investigation, the fitness to practise function would therefore operate two distinct processes:

- ① **Accepted outcome, including remediation:** for cases where the facts, decision to take action, and proposed outcome were accepted by the registrant
- ② **Referral to adjudication:** for cases where the findings and outcome were not accepted by the registrant.

A case would default to the adjudication route at any point where the registrant either did not comply with the process, or chose to dispute any aspects of the regulator's case.

Powers for the Professional Standards Authority to review and appeal both accepted and imposed outcomes.

TOWARDS A NEW MODEL FOR DEALING WITH CONCERNS IN THE SHORT-TERM ABOUT HEALTHCARE PROFESSIONALS

Other possible changes to the current fitness to practise system

AUTOMATIC ERASURE OFFENCES

Currently none of the regulators have powers to remove registrants automatically for a particular criminal conviction. The GMC consulted on this question in 2011, and found there was strong support in principle (83%) for the proposal that certain criminal convictions are so serious that they are incompatible with continued registration as a doctor and that there should be a presumption that the doctor be erased. Robust action in the most serious cases could well boost public confidence in the regulatory process. For the most serious offences, it is in the public interest to remove registrants as quickly as possible – not only does it provide swifter public protection, it also removes the unnecessary costs of a hearing. We therefore support this view, provided the process is compliant with article 6 of the European Convention of Human Rights.

MORE CONSISTENCY AND TRANSPARENCY

Threshold criteria and processes at the early stages: Decisions to close or progress complaints that are made at any point up to, but excluding, the investigating committee or case examiner decision. There are major inconsistencies in legislation, but also policy and implementation across the regulators. There is a concerning lack of clarity and transparency, and the possibility of cases being closed where there is a risk to the public. We are recommending a review of the regulators' practices in this area.

Consensual disposal (undertakings): Increasingly, cases that meet the threshold for onward referral at the end of an investigation can be disposed of consensually through undertakings. We have noted piecemeal development of these processes, with differences between the regulators that currently have these powers, and further variations proposed for those who do not. There is a need for transparency and accountability because these decisions, unlike hearings, are made 'behind closed doors' by members of staff, rather than independent panels. There is also little understanding of what works and where the risks are in these processes. We are proposing a review of how undertakings work in practice so that we can understand how effective they are as a form of remediation, and identify risks to the public.

The Law Commissions were supportive of this policy:

“We are persuaded that the draft Bill should introduce a new provision for automatic removal for certain serious criminal convictions. From the regulators' perspective, being able to act quickly against registrants convicted of serious offences will have benefits in terms of public confidence and costs. We also agree that some criminal convictions are so serious they are incompatible with continued registration. We think that automatic removal should apply in cases of murder, trafficking people for exploitation, blackmail (where a custodial sentence is imposed), rape and sexual assault (where a custodial sentence is imposed), and certain sexual offences against children.”

OTHER POSSIBLE AREAS FOR REFORM

- **Powers to make cost orders:** Reasonable and appropriate use of cost orders could provide an important disincentive to registrants and their defence bodies to obstruct the smooth running of proceedings. This could provide an incentive to all parties to engage in proper and timely case management.
- **Terminology:** 'Fitness to Practise' can be misunderstood and cause confusion. Any significant reforms should consider adapting the associated terminology to make it more easily understandable, and to help disassociate the new approaches from the current adversarial model.

A FUTURE APPROACH TO FITNESS TO PRACTISE: CONCLUDING THOUGHTS

Our aim in publishing *Right-touch reform* and its chapter on *fitness to practise* is to stimulate debate and discussion, and help to bring about a consensus on the future of fitness to practise.

New ways of working, such as greater use of multi-disciplinary teams and the development of technology to support the delivery of healthcare, as well as increased burdens on the NHS all suggest that a change of approach to fitness to practise is needed. In *Right-touch reform*, we have examined fitness to practise in both its current context (including its role and how it works in practice), but also looked to the future (looking at what incremental changes might improve it, as well as what more radical reform would look like).

The three limbs of public protection must remain the core purpose of fitness to practise but we also need to see a more flexible model that enables regulation to keep pace with, and adapt to, these external developments.

We would like to see regulators employ remediation and consensual disposal for suitable cases meaning they rely less on expensive and legalistic hearings. We do need a process which allows regulators to distinguish early on in the process between allegations that are capable of amounting

to a breach of their standards, and those that are not. We realise that there are risks associated with giving the regulators more powers to close cases at the initial stages so we would want to see greater transparency and accountability, especially if the number, and use, of hearings were to reduce. There also needs to be a more developed evidence-base to ensure that decisions to dispose of cases are protecting the public as far as possible.

We would like to see a process which is less adversarial, eliciting greater cooperation from the registrant, including taking account of the patient/service user's view.

We would want to retain our powers of scrutiny and appeal of all final decisions – whether made consensually or in a hearing. The reforms would incorporate new ways of putting proceedings and decisions into the public domain. We believe that these proposals could ultimately help to deal with the increasing costs of fitness to practise and the toll that the current ways of working take on both registrants and complainants.

We have highlighted the variations in fitness to practise processes/legislation across the regulators and the need for a more consistent approach. There are ways in which greater consistency could be achieved – and this is something we would like to see, for example, in thresholds and criteria for closing cases before the investigating committee/case examiner stage. A common code of conduct across professions would support this consistency. We recognise that the regulators have made efforts to work together on specific cases and share intelligence, but more could be done.

We hope that the proposals we set out in *Right-touch reform* can be used as the basis for meaningful discussions about future reform of fitness to practise processes, as well as wider reform of professional regulation. We timed its publication to help inform responses to the Department of Health's consultation on *Promoting professionalism, reforming regulation*. The deadline for responding to this consultation was 23 January 2018. Read our [response to the consultation](#).