

Avma's response to the NMC's Consultation 'Improvements to our Fitness to Practice process'

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Proposal 1: Powers to appoint legally qualified chairs

The NMC has a duty to appoint legal assessors who provide advice to our Practice Committees, the Registrar or the Council.

Our rules state that a legal assessor must be present at every preliminary meeting and that our Committee panels must take advice "from the legal assessor" on several matters including the admissibility of evidence, postponements and adjournments, and whether to hold hearings in public or private.

We are proposing to follow the approach that other regulators have taken by introducing the ability to appoint legally qualified chairs, who can give legal advice in place of legal assessors. The rules will specify that legally qualified chairs will have the same qualification and experience requirements as our legal assessors. This is an opportunity for greater flexibility, which would also reduce costs. Where the panel does not include a legally qualified chair, it would still be required to obtain advice from a legal assessor.

To what extent do you agree or disagree with our proposal to introduce the power to appoint legally qualified chairs, who can provide legal advice to the panel which they chair?

*Strongly agree

Please give a reason for your answer.

Avma recognises the sense in following the approach of other regulators, to appoint legally qualified chairs. This does not materially change the process and ensures the same level of legal oversight, in a more cost-effective way. However, in making this change the NMC needs to acknowledge that the process will become more legalistic and such it is important that legally qualified chairs are trained in handling witnesses and defendants who are not used to such quasi-legal processes and that communication with all parties to make sure they understand the processes being adopted are clear and well-understood.

Proposal 2: Strengthened case management powers

Under our existing legislation, the Fitness to Practise Committee can give case management directions about the conduct of cases (how they are prepared and run) and for the consequences of failure to comply with these directions. Our Order also gives us the power to make rules which allow the Chair of the Fitness to Practise Committee to give these directions. However the current rules are limited, which impacts our ability to manage cases effectively and prevent delays.

We are proposing to broaden and strengthen our case management at the adjudications stage of our process by:

- ▶ Allowing a legally qualified chair (if introduced) to issue case management directions without having to arrange a preliminary meeting in the presence of the parties

- Confirming that a Committee panel conducting a preliminary meeting can determine arguments on points of law or on the admissibility of evidence in advance of the hearing
- Confirming that all case management directions are binding on all parties, including the NMC, at any subsequent hearing of the case, unless the Committee panel considers that there has been a material change of circumstances or it is not in the interests of justice for the party to be bound by the direction
- Extending the Committee panel's power to refuse to admit evidence not served in compliance with any direction (not just directions issued at preliminary meetings)
- Confirming that the Committee panel may also draw adverse inferences from non-compliance with any directions.

To what extent do you agree or disagree with our proposals to broaden and strengthen our case management powers?

*Strongly agree

Please give a reason for your answer.

Avma agrees with this proposal. All evidence should be delivered in compliance with directions and the power to exclude be available to exclude any evidence delivered late. Late evidence can be an attempt to "steal a march" on the person making the complaint and should be avoided. This brings the NMC rules in line with the Civil Procedure Rules used by the Court.

Proposal 3: Ability to send and share information via an online account or portal

We communicate with nurses, midwives and nursing associates in our fitness to practise process through different means, including post, email and by telephone.

We propose to amend the rules so that we can share information via an online account. However, the rules will be clear that this will only happen where the registrant gives their explicit agreement, which we think is an important safeguard.

The benefits of being able to disclose information online rather than by post or encrypted email include improved accessibility and clarity, as all relevant information will be available in a single place and security protected.

To what extent do you agree or disagree with our proposed change to allow us to share documents via an online account or portal where the registrant has agreed to this?

*Agree

Please give a reason for your answer.

Avma can see how these proposals can be beneficial to nurses, midwives and nursing associates involved in Fitness to Practice processes. Avma's focus is patient witnesses and the stress that Fitness to Practice processes can lay upon individuals and families who may be grieving or dealing with life-altering consequences of an avoidable healthcare harm. We would like to stress the importance of considering the needs of witnesses as carefully as the needs of healthcare professionals, including the means and methods used to communicate with them.

Proposal 4: Increased flexibility for inviting representations

Currently, once we have decided that regulatory action may be necessary, we are required to send:

- A formal notification to the registrant
- Any documents that we have not already shared
- An invitation for registrants to respond in 28 days.

After the investigation finishes, we must send all the evidence gathered in the investigation and give the registrant another 28 days to respond to that evidence (i.e. invite representations) before the Case Examiners can make a decision.

We propose amending the rules, so the invitation for representations is no longer required at the end of the process when the Case Examiners are satisfied that they have enough information to decide no further regulatory action is necessary.

We will still be required to invite representations if the Case Examiners think further regulatory action is necessary (e.g. to give advice, issue a warning, recommend undertakings or refer the case to a panel).

To what extent do you agree or disagree with our proposal to amend the rules so that it is no longer a requirement to invite representations at the end of the process if no further regulatory action is necessary?

The registrant will continue to have an opportunity to view the material and make representations in response, before the case examiners can refer the case to the Fitness to Practise Committee, recommend an undertaking, issue a warning or give advice.

*Agree

Please give a reason for your answer.

This is a sensible approach to make the Fitness to Practice process more efficient, where further regulatory action is not necessary.

Proposal 5: Increased flexibility for timescales for representations

At the moment, there is a fixed 28-day response period for registrants to respond.

We propose to replace the fixed 28-day response period with a requirement to give a minimum of 28 days. This approach offers greater flexibility and responsiveness for individual case needs, taking into account the complexity of the case, the volume of material, urgency, and reasonable adjustments.

To what extent do you agree or disagree with our proposal to replace the fixed requirement to respond in 28 days with a more flexible timeframe of at least 28 days?

*Neither agree nor disagree

Please give a reason for your answer.

Avma represents the views of avoidably harmed patients. It is for registrants to determine whether they are content with a more flexible timeframe.

Proposal 6: Increased flexibility for minimum notice of meetings or hearings.

Currently, we are obliged to give a minimum of 28 days' notice of a fitness to practise hearing or meeting. This is regardless of whether or not the registrant has any objections to an earlier hearing or meeting to conclude the proceedings. It is also irrespective of whether they have disengaged from the process, for example where they are serving a custodial sentence.

We propose to retain a standard requirement to give 28 days' notice but introduce flexibility to shorten this in certain circumstances. This would be where the registrant consents to a shorter period, or where a shorter period is justified in the public interest.

To what extent do you agree or disagree with our proposal to provide flexibility to shorten the 28-day notice period for fitness to practise meetings or hearings in certain circumstances?

*Disagree

Please give a reason for your answer.

Avma has concerns about this proposal. It might be easier for the nurse/midwife/nursing associate to agree to a hearing at short notice, but what about the person making the complaint? Looking at the part of the NMC website dedicated to individuals who may have to give evidence (whether the complainant or a witness), the hearings are held in London, Cardiff, Edinburgh and Belfast (although they can also be held remotely). It might take some considerable effort for witnesses to get to these cities, particularly if they are unwell and will need help to attend.

We would be happier with this provision if it provided for any shorter timeframe for hearing to be agreed by the registrant and any complainant or witness.

Proposal 7: Supporting vulnerable witnesses to provide evidence

Our current rules permit the Fitness to Practise Committee to adopt measures it considers necessary to enable it to receive evidence from a "vulnerable witness". However, the rules define a vulnerable witness in narrow terms and using dated language (for example referring to those with a "mental disorder").

This is not the language we would wish to use, and it does not accurately reflect or define vulnerabilities that people may have when giving evidence. We propose to amend the rules to reflect the practice in criminal, family and employment jurisdictions, ensuring we can support the participation of a wider range of people than are covered by the current wording:

- Allow the Committee to adopt adjustments it considers necessary to enable it to receive evidence from vulnerable witnesses, while maintaining the duty to ensure proceedings are fair and just.
- Remove the narrow definition of vulnerable witnesses and replace with a power to make a holistic and person-centred assessment, which proactively considers the wellbeing and welfare of witnesses and all the circumstances of the case.

To what extent do you agree or disagree with the proposed change to allow our Committees to better support vulnerable witnesses?

*Strongly agree

Please give a reason for your answer.

Avma fully supports these proposals to better support witnesses and commends to desire to update the language and approach to vulnerability and witness welfare.

When thinking about the proposed changes to Fitness to Practise rules, can you identify any potential impacts – positive or negative – on some individuals more than others based on their protected characteristics?

By protected characteristics we mean age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

*No

When thinking about the proposed changes to the Fitness to Practise rules, can you identify any potential impacts – positive or negative – on either the promotion of the Welsh language or on Welsh speakers?

*Don't know / unsure

Could the proposals be revised in any way to increase opportunities for people to use the Welsh language and to help treat it no less favourably than English?

*Don't know / unsure