

NHS Resolution's response to the Professional Standards Authority's Consultation on good practice guidance documents in support of regulatory reform

Submitted: 8 April 2024

About NHS Resolution

NHS Resolution is an arm's length body of the Department of Health and Social Care. We provide expertise to the NHS on resolving concerns and disputes fairly, sharing learning for improvement and preserving resources for patient care.

Our main functions are:

- **Claims Management:** dealing with claims for compensation on behalf of the NHS in England. The bulk of our workload is handling negligence claims on behalf of the members of our indemnity schemes: NHS organisations and independent sector providers of NHS care in England and since April 2019, beneficiaries of state-backed indemnity for general practice;
- **Practitioner Performance Advice:** managing concerns raised about the performance of doctors, dentists and pharmacists. In addition, NHS Resolution's Advice function is responsible for the management of the Healthcare Professional Alert Notices (HPANs) system. This is a system where notices are issued by us to inform NHS bodies and others about health professionals who may pose a significant risk of harm to patients, staff or the public;
- **Primary Care Appeals:** dealing with appeals and disputes between primary care contractors and NHS England; and
- **Safety and Learning:** helping providers of NHS care to understand their own claims risk profiles to target safety activity and share learning across the health service nationwide.

Response to the consultation

1. NHS Resolution is supportive of this consultation on the Professional Standards Authority (PSA) two draft guidance documents:
 - Guidance on the use of Accepted Outcomes in Fitness to Practise¹
 - Guidance on Rulemaking²
2. Professional regulation helps to ensure that clinicians are qualified, capable and competent. Robust, yet flexible regulation to ensure high-quality, safe care and to allow safe healthcare professionals to return to work quicker is vital for patient care and important to ensure that harm, sometimes leading to claims, is minimised. It is, therefore, important that the PSA are releasing guidance documents to help the regulators use their new powers properly and effectively.
3. We appreciate that the Fitness to Practise guidance document emphasises that when using accepted outcomes regulators should be guided by principles such as fairness,

¹ PSA website, [Guidance on the use of Accepted Outcomes in Fitness to Practise](#), 2024

² PSA website, [Guidance on Rulemaking](#), 2024

consistency and transparency.³ We highlighted the importance of these principles in our 2021 response to the Department of Health and Social Care's Consultation on 'Regulating healthcare professionals, protecting the public'. As an organisation, we continue⁴ to highlight the need for a just and learning culture where there is a balance of fairness, justice, learning and taking responsibility for actions within the NHS.

4. Whilst being supportive of the PSA's guidance documents there are a few points that we suggest require further consideration ahead of publishing the finalised guidance document on Fitness to Practise.

The use of accepted outcomes in fitness to practise: Guidance for regulators

5. When providing guidance on factors to consider when determining the disposal route at paragraph 7.2, the PSA suggest the regulators should consider a variety of matters including 'would it be beneficial and proportionate to test insight at a hearing?'.⁵ In our experience, there is not an agreed measure of what amounts to 'insight' and so this could impact the fairness and consistency of this process. Regulators should provide guidance on how insight is assessed, including how this may be evidenced by practitioners. It would also be beneficial to have clarity around the factors that will be considered with emphasis on 'current impairment'.⁶

We have some reservation about there being a need for the registrant to accept the allegations. Whilst some clarity is provided in the currently proposed documents, it would accord with principles set out by the Administrative Court⁷ for there to be some analysis of the basis on which a registrant denies an allegation before dismissing the prospect of a consensual disposal.

6. Further thought should also be given to the sub-section titled '*The use of single decision-makers*' (paragraphs 7.24-7.29). We appreciate the acknowledgement that there may be cases 'which benefit from the involvement of more than one decision-maker' but think that there should be careful consideration of the risks in adopting such an approach to the first consideration of cases.⁸ Whilst there may be some benefit to there being a single decision-maker for review decisions (for example where outcome is not contested), there is a potential for unfairness to the registrant and an increased risk of bias in there being a single decision maker for initial decisions, particularly in relation to consensual disposal.
7. Careful thought should be given to the guidance set out at paragraph 7.37 '*Complainant voice in accepted outcomes*'. It is unclear how the complainant will 'make representations within the accepted outcomes process before a decision is made'. This is because it is unclear what information their submissions would be informed by. For a complainant to make informed representations, it would be fair and reasonable for them to have sight of all documentation gathered in an investigation together with the registrant's response. We consider that this may be unworkable and may dissuade registrants and witnesses from engaging in the process. Ultimately, decisions in relation to outcomes are a matter for the regulator applying the relevant standards. Whilst a

³ PSA website, [Guidance on the use of Accepted Outcomes in Fitness to Practise](#), 2024, paragraph 5.1

⁴ For example, NHS Resolution, [Saying Sorry](#) (2018), [Being Fair](#) (2019) and [Being Fair 2](#) (2023)

⁵ PSA website, [Guidance on the use of Accepted Outcomes in Fitness to Practise](#), 2024, paragraph 7.2

⁶ PSA website, [Guidance on the use of Accepted Outcomes in Fitness to Practise](#), 2024, paragraph 7.8

⁷ See for example *Nicholas-Pillai v General Medical Council* [2009] EWHC 1048 (Admin), *Amao v Nursing and Midwifery Council* [2014] EWHC 147 (Admin), *Motala v General Medical Council* [2017] EWHC 2923 (Admin), *Yusuff v General Medical Council* [2018] EWHC 13 (Admin), *General Medical Council v Khetyar* [2018] EWHC 813 (Admin), *General Medical Council v Awan* [2020] EWHC 1553 (Admin) and *Dhoorah v Nursing and Midwifery Council* [2020] EWHC 3356 (Admin)

⁸ PSA website, [Guidance on the use of Accepted Outcomes in Fitness to Practise](#), 2024, paragraph 11.16

Resolution

complainant should be informed of the outcome of a case, if they were to be afforded the opportunity to make representations they would need to be provided with information as to the standards applied, legislative principles and an explanation as to the tests applied.

Draft Rulemaking guidance

8. NHS Resolution do not have any comments on this draft guidance.

Inclusion of our response in the outcome report

9. Yes, we are content for our response to be published in the consultation outcome report. In addition, we are content for our comments to be attributed to us as an organisation rather than be anonymised.