Introduction

Crucible is a barristers' chambers with a team of barristers specialising in the field of professional discipline, with particular experience in the area of healthcare regulation. Our barristers regularly represent Registrants and Regulators in proceedings brought by the General Medical Council, General Dental Council, General Pharmaceutical Council, Nursing and Midwifery Council, Health and Care Professions Council and Social Work England.

We welcome the reform of healthcare regulation and the opportunity to respond to the consultation. We have a wealth of experience and expertise in Fitness to Practise proceedings, but less in other areas the consultation discusses. As such, we have only responded where we believe our knowledge and experience allows us to meaningfully do so.

Governance and Operating Framework

1. Do you agree or disagree that regulators should be under a duty to co-operate with the organisations set out above?

We broadly agree with proposals to encourage cooperation and consistency between the healthcare regulators.

2. Do you agree or disagree that regulators should have an objective to be transparent when carrying out their functions and should have these related duties?

We agree that transparency and accountability are fundamental to regulation, in order to retain public trust and confidence.

Education and Training

19. Do you agree or disagree that all regulators should have the power to set and administer exams or other assessments for applications to join the register or to have annotations on the register? Please provide a reason for your answer.
20. Do you agree or disagree that this power to set and administer exams or other assessments should not apply to approved courses or programmes of training which lead to registration or annotation of the register?

The ability to set standards in education could allow for a more flexible system for regulators to target specific training and assessment in a number of more complex areas of practice. For example, a recurring issue in midwifery and obstetrics has been the lack of high-quality training and assessment in the interpretation of cardiotocograph traces (CTGs). We have heard expert evidence that CTG training in the UK is not fit for purpose. The current proposals could allow for

the GMC and NMC to set minimum standards for pre- and post-qualification CTG interpretation education and assessment, to raise national standards.

Registration

24. Do you agree or disagree that the regulators should hold a single register which can be divided into parts for each profession they regulate? Please give a reason for your answer.
25. Do you agree or disagree that all regulators should be required to publish the following information about their registrants:
• Name
• Profession
• Qualification (this will only be published if the regulator holds this information. For historical reasons not all regulators hold this information about all of their registrants)
• Registration number or personal identification number (PIN)
• Registration status (any measures in relation to fitness to practise on a registrant's registration should be published in accordance with the rules/policy made by a regulator)
• Registration history

We have some concerns about a Registrant's full registration history being included on the Register. Information should only be published if it is considered necessary and proportionate and after a Registrant has been given an opportunity to provide representations. There must also be some mechanism for a review of this decision.

We are also concerned about the proposal to administratively remove a Registrant from the Register for failure to provide information. This seems a disproportionate response. The very serious decision to remove a Registrant should only be taken by a case examiner or panel, after full consideration of the facts.

28. Do you agree or disagree that all regulators should be able to annotate their register and that annotations should only be made where they are necessary for the purpose of public protection?

As above, any annotation should be made after a Registrant has been given an opportunity to provide representations. There must also be some mechanism for a review of this decision.

30. Do you agree or disagree that all regulators should have the same offences in relation to protection of title and registration within their governing legislation?

31. Do you agree or disagree that the protection of title offences should be intent offences or do you think some offences should be non-intent offences (these are offences where an intent to commit the offence does not have to be proven or demonstrated)? Please give a reason for your answer.

The only matters that should be the subject of a criminal charge are falsely using a protected title and falsely claiming to be registered as a professional. It would be oppressive to create criminal offences covering the remaining conduct. We are particularly concerned that fraudulent entry could become a criminal offence. There are already appropriate measures available to the Regulators, namely removal from the Register and, potentially, refusal to register in the future.

Protection of title offences should be intent offences only. It would be disproportionate to allow allegations of this nature to be proved without any regard to the Registrant's explanation.

Regulators should be compelled to send a cease and desist letter to a Registrant before bringing a prosecution. We agree they should be summary only offences.

36. Do you agree or disagree that in specific circumstances regulators should be able to suspend registrants from their registers rather than remove them?

We can see the merit in administrative suspension, but suggest that there is an internal review or appeal mechanism, rather than appeal to the High Court. We consider removal, temporary or otherwise, for failure to provide information is disproportionate. This decision should be for a case examiner or panel to make, after a Registrant has been given an opportunity to make representations.

38. Do you think any additional appealable decisions should be included within legislation?

We disagree that there should be a separate removal process for Registrants on the grounds of health or English language concerns. This should be dealt with under the Fitness to Practise processes. If the threshold for Fitness to Practise is not met, no action should follow.

Fitness to Practise

43. Do you agree or disagree with our proposal that regulators should be given powers to operate a three-step fitness to practise process, covering:

- 1: initial assessment

• 2: case examiner stage
• 3: fitness to practise panel stage? Please give a reason for your answer.

Initial assessment
We disagree that Health should be considered as part of an assessment of competence and suggest that Health should remain an independent ground of impairment. We are concerned about the proposal to impose interim measures without a hearing or participation from a legally represented Registrant. Who would be making the decision about whether or not an allegation gave rise to the immediate public protection risk? A number of cases referred by Regulators to panels for interim orders are refused. There is no indication of how long the interim measures will last before the case is listed for an inter partes hearing?

Case Examiners Stage
We believe that agreement must be a precondition of the accepted outcomes. There must be safety measures. There is a real risk that Registrants may be induced to accept charges or impairment. There ought to be a measure of negotiation with Registrants or their representatives on the outcomes. If it is anticipated that this is going to be an alternative to "consensual panel determinations" there may be advantages to a Registrant, but there must be the safeguards of discussion with representatives within a reasonable timeframe. If the outcomes are not accepted, they should not be admissible at the final hearing. We have grave concerns about the imposition of findings and outcomes. If the case examiners proposed decision is not explicitly agreed, the matter should be sent to a panel.

Fitness to Practise stage
We agree that panels should be empowered to issue a warning where fitness to practise is not found to be impaired, but only in very limited circumstances. It would only be appropriate where a panel has found misconduct or in a conviction case. A warning is unlikely to be appropriate where a case relates to a Registrant's health or lack of competence. There ought to be clear and careful guidance provided to panels on circumstances where a warning may be appropriate. Otherwise a warning would act as a punitive measure in circumstances where no serious wrongdoing has been found.

We agree that consistency across the regulators is to be encouraged. We agree that the public/private nature of the hearing needs to be preserved. Private hearings should also be considered where the unproven allegations are of a particularly serious and sensitive nature, or where a Registrant or witness' health, private or family life are raised.

We agree with a uniform list of sanctions across the regulators, however we do not agree that a Caution Order should be removed (discussed below).

44. Do you agree or disagree that:

- All regulators should be provided with two grounds for action – lack of competence, and misconduct?
- Lack of competence and misconduct are the most appropriate terminology for these grounds for action?
- Any separate grounds for action relating to health and English language should be removed from the legislation, and concerns of this kind investigated under the ground of lack of competence?

"Grounds for action" sounds pre-judged and will be unfamiliar to Registrants. "Grounds of impairment" is a well-established concept. There is no need to rename or rebrand impairment. If the desire is to simplify the term, we suggest "grounds of impairment" or "heads of impairment" should be uniformly used across the regulators.

We strongly disagree that Health should be removed as a ground for action/head of impairment. In our view it is likely to have the effect of discriminating against Registrants. Health conditions may amount to protected characteristics under the Equality Act 2010 and must be dealt with sensitively and compassionately. To suggest that Registrants suffering from health conditions may lack competence is potentially offensive and stigmatising. A number of Registrants are perfectly competent to perform their role, for example with reasonable adjustments, or despite the health condition they suffer. Registrants who are unwell require support and understanding from their Regulators. A number of health cases engage public interest, rather than public protection concerns. The public interest must be in ensuring that Registrants are well and working safely and effectively.

Given the health concerns arising from the pandemic in the healthcare workforce, including Long-Covid and Post Traumatic Stress Disorder, it is anticipated that there may be an increase in referrals on health grounds.

We agree that conviction could be included under "misconduct". We agree that lack of English could be considered under "lack of competence". We agree that it would be a positive outcome of the reforms that the Regulators provide further support to Registrants referred for lack of English language skills or health reasons, but who do not meet the threshold for fitness to practise intervention. We would be interested to know what measures are suggested to achieve this.

- This proposal provides sufficient scope for regulators to investigate concerns about registrants and ensure public protection?

We disagree. Please see our answers above in relation to the head of impairment by reason of health.

45. Do you agree or disagree that:

- all measures (warnings, conditions, suspension orders and removal orders) should be made available to both Case Examiners and Fitness to Practise panels;

- automatic removal orders should be made available to a regulator following conviction for a listed offence?

We agree that both Case Examiners and Fitness to Practise panels should have the same sanction powers, provided sufficient safeguards (discussed at answer 43 above) are also available.

There should be a pre-requisite of a finding of misconduct for a warning to be available in a misconduct case. We believe there should be flexibility about the time the warning should be in force. A case examiner/panel could be empowered to decide the length of the warning. We suggest that the maximum period should be one year. A Caution Order at the NMC, for example, can be imposed for as little as one year.

We note with concern that the proposals do not include the ability for case examiners/panels to take no further action, impose a Caution Order/warning, currently available at a number of Regulators, following a finding of impairment. This removes the decision maker's ability to impose a sanction short of suspension, where conditions are not appropriate or necessary, eg to mark the seriousness of the misconduct. This is likely to particularly affect cases where impairment has been found on public interest grounds alone. It could lead to a situation where a Registrant who poses no public protection risk, is subject to an unnecessarily restrictive sanction. We are concerned that the proposal will lead to disproportionate sanctions being imposed.

There is a real risk that this proposal would have the consequence of bringing factors relevant only to sanction into the decision that the panel's make on impairment. Decision makers may not, at the sanction stage, be satisfied that the misconduct or lack of competence is so serious that a Conditions of Practice Order or temporary or permanent removal from the Register is justified. The sanction stage would then become chaotic and unworkable without sanctions available below Conditions of Practice.

We agree in principle with an automatic removal process for grave crimes but disagree that this should include all offences under Schedule 3 of the The Social Workers Regulations 2018.

Offences listed under 1-5 of that schedule should lead to automatic removals. However, the offences under 6-13 include potentially lower-level offending, which may not attract a custodial sentence, and some discretion is therefore required. We suggest either removing those offences from the automatic removal provisions, or creating a second class of automatic removal, where representations are allowed before the decision is made. In this second class, we suggest the decision should be susceptible to review or decision by a panel. We agree that an appeal from an automatic removal for a grave crime should be to the High Court.

46. Do you agree or disagree with the proposed powers for reviewing measures?

We agree with the proposals for review as an appropriate measure. We agree it is important that a Registrant is able to request an early review.

47. Do you agree or disagree with our proposal on notification provisions, including the duty to keep the person(s) who raised the concern informed at key points during the fitness to practise process?
We agree it is appropriate to keep both the Registrant and referrer informed about the progress of a case at relevant times.

48. Do you agree or disagree with our proposal that regulators should have discretion to decide whether to investigate, and if so, how best to investigate a fitness to practise concern?

We have concerns about the proposal to require information from a Registrant at the initial assessment stage. Registrants are usually required to comply with investigations under their professional Code of Conduct. A Registrant should not be otherwise compelled to provide evidence in a case, at a very early stage, when the nature and seriousness of the allegations are unlikely to be fully appreciated and evidence is unlikely to be available. The proposal is too widely drawn.

If the referral relates to health, a request for an assessment may be appropriate. If the referral relates to lack of English language skill, a language assessment may be appropriate. It is unclear what other types of assessment is envisaged. Other assessments could be offered, but Registrant's ought not to be compelled. There should not be a blanket power to direct assessments.

We believe that Registrants should be made aware, as a matter of routine, that an initial assessment is being undertaken and be given the opportunity to make representations.

We agree that Regulators should be able to close a case at the initial assessment stage. The consultation is unclear about what thresholds would apply at this stage. We suggest that a "case to answer" threshold would be appropriate at the initial assessment stage.

49. Do you agree or disagree that the current restrictions on regulators being able to consider concerns more than five years after they came to light should be removed?

We agree that a blanket rule on limitation is not appropriate and should be removed. However, there should be a public interest consideration, and guidance provided on both the type of allegations it may be appropriate to pursue, and the public interest in pursuing allegations which are more than five years old in light of the difficulties inherent in presenting and defending historic allegations.

50. Do you think that regulators should be provided with a separate power to address non-compliance, or should non-compliance be managed using existing powers such as “adverse inferences”?

Non-compliance could be considered to be misconduct as most Regulators have an express provision requiring compliance within their Code of Conduct. Adverse inferences have developed through common law. It is unclear that there is a need for further powers to deal with non-compliance.

51. Do you agree or disagree with our proposed approach for onward referral of a case at the end of the initial assessment stage?

We agree in principle, however remain unclear about the threshold test to be applied. Our concerns remain about the detail of the imposition of interim measures. We remain of the view that interim restrictions should only be imposed by panels and with the Registrant being given the opportunity to make representations.

52. Do you agree or disagree with our proposal that regulators should be given a new power to automatically remove a registrant from the Register, if they have been convicted of a listed offence, in line with the powers set out in the Social Workers Regulations?

Please see our submissions on automatic removal in answer to question 45, above.

53. Do you agree or disagree with our proposals that case examiners should:
• have the full suite of measures available to them, including removal from the register?
• make final decisions on impairment if they have sufficient written evidence and the registrant has had the opportunity to make representations?
• be able to conclude such a case through an accepted outcome, where the registrant must accept both the finding of impairment and the proposed measure?
• be able to impose a decision if a registrant does not respond to an accepted outcomes proposal within 28 days?

It is assumed that case examiners will be considering final charges. It is vitally important that Registrants understand the case against them. Case examiners ought to have the power to find no case to answer in relation to charges or misconduct and impairment. We propose that case examiners should have relevant Registrant experience. Otherwise, the valuable knowledge and experience of a Registrant panel member will be lost in the decision-making process. Decisions made without this expertise are likely to be less well-informed.

We agree in principle that case examiners should have the power to suggest accepted outcomes. This power should however include a non-restrictive sanction, such as a Caution Order or Warning. In order for this proposal to be workable, there must be some element of negotiation or discussion with a Registrant on the accepted outcome. There is often discussion between the Regulator and Registrant around the current Consensual Panel Determination process. These often involve practical discussions about the workability of Conditions of Practice, for example. It would be a wasted opportunity to close these discussions, which may in turn lead to cases being sent to panels for a minor amendment to the decision or sanction.

We have grave concerns about accepted outcomes coming into force after 28 days if no response has been received from a Registrant. There are a large number of legitimate reasons why a Registrant may not respond within 28 days, for example sickness, travel, accessing legal advice, to name a few. There are currently strict criteria to be met across the Regulators for cases to be heard in the absence of a Registrant. These necessary safeguards would not apply to acceptable outcomes/proposed measures. If no response from the Registrant is received to the proposed measures, the case should be referred to a panel for a final decision.

We are also concerned about a number of proposals to publish all decisions, including those where fitness to practise is not found to be impaired. In those situations, it would be disproportionate to publish a determination. Publication could lead to stigma and real difficulties for Registrants, who pose no risk to the public and have not offended the public interest. The obvious injustice is even more acute where there has been no finding of misconduct. Decisions concerning health cases ought not to be published, in order to protect the privacy of a Registrant.

54. Do you agree or disagree with our proposed powers for Interim Measures, set out above?

We broadly agree with the proposals for Interim Measures. We agree that interim measures should be imposed only by a panel or by agreement. Registrants should be entitled to a review of any interim order at their request. If this is to be a matter for the Regulator's judgment, clear guidance ought to be provided. Registrants should have proper notice of any hearing and be given an opportunity to participate in that hearing.

55. Do you agree or disagree that regulators should be able to determine in rules the details of how the Fitness to Practise panel stage operates?

Although not explicitly clear, it is assumed that the proposals are that Registrants will have the right to appear and be represented at a Fitness to Practise panel hearing. We suggest that the three stage process adopted by most Regulators (facts, misconduct and impairment, sanction) should be committed to statute, along with some basic protections for Registrants (burden and standard of proof). We would encourage more thought be given to a formal disclosure regime.

We repeat our concerns about publication of decisions where the sanction stage is not reached.

56. Do you agree or disagree that a registrant should have a right of appeal against a decision by a case examiner, Fitness to Practise panel or Interim Measures panel?
57. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland?

We agree that a right of appeal should exist against all final decisions and it should remain in relation to interim measures. An appeal against an imposed measure by the case examiners should lie with a Fitness to Practise panel at first instance. The High Court is experienced in hearing Fitness to Practise appeals however appeals are often prohibitively costly and involve significant delay. It would not be acceptable for a Registrant subjected to an imposed case examiners measure, potentially for health reasons, to have to endure the inevitable expense and delay involved in a High Court appeal.

58. Do you agree or disagree that regulators should be able to set out in Rules their own restoration to the register processes in relation to fitness to practise cases? Please give a reason for your answer.

59. Do you agree or disagree that a registrant should have a further onward right of appeal against a decision not to permit restoration to the register? Please give a reason for your answer.
60. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland?

We agree that a Registrant should have an onward right of appeal to the High Court against decisions not to restore their registration. We suggest that the internal appeal is to a panel, rather than to a Registrar or Assistant Registrar.

61. Do you agree or disagree that the proposed Registrar Review power provides sufficient oversight of decisions made by case examiners (including accepted outcome decisions) to protect the public?
62. Under our proposals, the PSA will not have a right to refer decisions made by case examiners (including accepted outcome decisions) to court, but they will have the right to request a registrar review. Do you agree or disagree with this proposed mechanism?

We welcome the ability to review final decisions in order to prevent injustice to Registrants. We have long been concerned that the Professional Standards Authority reviews only decisions it considers have insufficiently protected the public. As discussed above, appeals to the High Court are prohibitively costly to a large number of Registrants, many of whom are in receipt of low wages. Defence Unions can be cautious about appealing due to the risk of costs implications. The result is that there is not equality of arms on appeal. The Registrar's Review would allow for proper scrutiny of decisions. We are concerned however that it may not be likely that Regulators would be as ready to review such cases.

We are also concerned that "anyone" would have the right to request a review. There must be a minimum requirement, akin to standing, to trigger a review. A person requesting a review must have a sufficient interest in the outcome for them to be able to request a review.

Any review should be strictly time limited to allow for finality for Registrants.

63. Do you have any further comments on our proposed model for fitness to practise?

In conclusion, we welcome further cooperation and consistency between Regulators, to create a more modern and fair healthcare regulatory landscape. We support Regulators having increased powers to request information from third parties, including the police. We would welcome guidance for Regulators on undertaking due diligence, to potentially include police national computer or other background checks on witnesses of fact.