

# NHS Resolution's response to: DHSC's Regulating healthcare professionals, protecting the public consultation

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## 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. More information about HPAN can be found [here](#);
- **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

### Key points

1. NHS Resolution is very supportive of this consultation and its proposals to modernise the legislation of the healthcare professional regulators. We particularly welcome the introduction of a single legal framework which will provide greater regulatory consistency and the proposal for a single register, as well as the requirement to publish consistent data.
  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.
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3. The argument for reform has been made by many of our system partners, and we have largely agreed with their analysis: that the legislation that governs the nine UK healthcare regulatory bodies is outdated, bureaucratic, inflexible and confusing.<sup>1</sup>
4. Several important reports have highlighted the need for improved transparency, learning and openness and a workforce that is fit for practice to enhance patient care which include, but is not limited to: The Professional Standards Authority's (PSA) [Lessons Learned Review into the NMC's handling of concerns about midwives' fitness to practise at the Furness General Hospital](#) (2018), [The Gosport Independent Panel Report](#) (2018), [The Interim People Plan](#) (2019) and [First Do No Harm](#) (2020).
5. Whilst we have seen some recent improvement in the numbers of new clinical claims being reported to us (the number of new clinical claims has fallen by 2.19% from 11,945 in 2013-14 to 11,682 in 2019-20)<sup>2</sup>, the cost of these claims continues to increase demonstrating that the need for regulatory reform is vital in order to preserve patient resources and to, most importantly, increase the quality of care to prevent harm from unnecessarily occurring.
6. We therefore consider that the proposals in this consultation are an important and necessary step to improve the regulatory process and to make it responsive and adaptable as well as proportionate, and risk-based.
7. NHS Resolution's stated purpose<sup>3</sup> is to provide expertise to the NHS to resolve concerns fairly, share learning for improvement and preserve resources for patient care. Our [Practitioner Performance Advice](#) service manages concerns raised about the performance of doctors, dentists and pharmacists and, alongside our other services, helps to promote a just and learning culture.<sup>4</sup> Although NHS Resolution is not a safety regulator, our role in the system to promote best practice, to share learning with regulators and to provide training is important, alongside our management of the [Healthcare Professional Alert Notices \(HPANs\) system](#).
8. NHS Resolution welcomes the proposal that all regulators are provided with a consistent set of powers relating to interim measures. However, we strongly recommend that the Department of Health and Social Care (DHSC) considers these powers alongside the existing [HPAN](#) system that NHS Resolution currently manages.
9. The review of this legislation provides an important opportunity to give regulators the power to issue HPANs as a precursor to determining any interim measures. This is a significant step to ensuring that safety is maintained at all times and an opportunity that cannot be missed. Please see our response to 'Section 4 – Fitness to Practise' for more detail.
10. Finally, the consultation rightly notes that accountability, alongside operational autonomy and flexibility, is required for regulators to deliver the proposed changes. However, the

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<sup>1</sup> For example: NMC, [NMC response to publication of consultation on reform of professional regulation](#) (25 March 2021) and DHSC, [Promoting professionalism, reforming regulation: Government response to the consultation](#) (July 2019)

<sup>2</sup> NHS Resolution, [Annual report and accounts 2019/20](#) (2020)

<sup>3</sup> NHS Resolution, [About](#)

<sup>4</sup> NHS Resolution, [Being Fair](#)

independence of regulators needs consideration in this consultation document. To ensure public and professional confidence in the system, a balance between accountability and independence is required.

## Section 1. Governance and Operating Framework

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

11. NHS Resolution is broadly supportive of the 'Changes to the Governance and Operating Framework' section.
12. NHS Resolution shares the GMC's perspective that "*the introduction of a single legal framework will provide greater regulatory consistency while retaining operational flexibility across the different professions. A new 'duty of co-operation' should also support regulators to better co-ordinate their activity*".<sup>5</sup>
13. We strongly support the 'duty of co-operation' but it is very important that this extends to NHS Resolution. NHS Resolution compiles and collates data (from our claims, advice and appeals functions) that can be significant for patient safety and sharing information with the existing regulators is critical to the operation of the HPAN scheme. The current list of organisations identified in paragraphs 56 and 89 would not cover NHS Resolution and should be amended.

## Section 2. – Education and Training

14. NHS Resolution is supportive of the direction of travel set out in this section and have no additional comments.

## Section 3. – Registration

**Question 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?**

15. NHS Resolution is supportive of the changes to registration arrangements including the proposal for a single register with annotations and the requirement to publish consistent data.

**Question 29. Do you agree or disagree that all of the regulators should be given a permanent emergency registration power?**

16. We are supportive of the emergency registration powers being extended to all regulators but would highlight that this is of limited value in the absence of responsive and flexible deployment processes within the NHS.

**Question 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?**

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<sup>5</sup> GMC, [Briefing note on Regulating healthcare professionals, protecting the public](#) (2021)

17. NHS Resolution welcomes the proposal to “*retain protected titles and offences related to their misuse*”... and the suggestion “*that the same set of offences on protection of title and registration should apply to all*” (paragraph 175). This will help to ensure that all registered healthcare professions have the same level of protection and provide assurance to the public that someone holding that title is competent and safe to practise their profession.

**Question 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)?**

18. NHS Resolution agrees that the protection of title offences should be intent offences. As stated in the consultation document: “*these offences should require some intent to deceive others*” (paragraph 176). This approach would be consistent with the criteria used to determine whether to issue a Health Professional Alert Notice for individuals falsely claiming to be a healthcare professional, where it is also necessary for there to be evidence that they:

- a. poses a significant risk of harm to patients, staff or the public and
- b. may continue to work or seek additional or other work in the NHS as a healthcare professional.<sup>6</sup>

## Section 4. – Fitness to Practise

**Question 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?**

19. NHS Resolution is supportive of the proposed changes to the Fitness to Practise processes which we believe are likely to lead to more local resolution of concerns and a more proportionate response from regulators. This is aligned with our own strategic approach to operate further upstream, to avoid disputes from escalating into formal processes where appropriate and to help to ensure that healthcare professional who are safe to work, can do so, thereby preserving resources for patient care.

20. Given our experience and positioning as system leaders in the managing of concerns raised with regards to the performance of doctors, dentists and pharmacists, NHS Resolution has an important role to play and would like to work in partnership with regulators as they develop their support to improve the professionalism of all their registrants. NHS Resolution’s role alongside the regulator should be recognised in this document.

21. We welcome the three stage process, and particularly the ‘initial assessment’ which aims to “*determine whether a concern received about a registrant meets the criteria for onward*

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<sup>6</sup> NHS Resolution, [Requests to issue a HPAN](#)

*referral in the fitness to practise process*”, will likely to lead to more local resolution of concerns and, in some cases, a more proportionate response from regulators. This will help to ensure that those clinicians who are safe to practice, can return to work as quickly as possible.

22. The introduction of a more robust initial stage is also likely to have a significant impact upon the number of cases referred to the case examiners, thereby helping them to manage their workload and increase the quality of the assessment. In turn, it should allow for greater scrutiny of evidence referred and the appropriate closure of cases at an earlier stage.<sup>7</sup> Early engagement by Registrants in this process is welcomed.
23. A key principle of the second stage, is that case examiners “*are only able to conclude a case through an accepted outcome, where the registrant accepts both the findings (including impairment) and the proposed measure. If the registrant does not accept the findings and/or the proposed measure, the case will proceed to the Fitness to Practise panel stage.*”
24. Further safeguards are required here to ensure that registrants do not inappropriately agree to the findings and the proposed measure. The fitness to practice process can be extremely upsetting for the healthcare professional involved and therefore they could, especially if suffering from mental health problems, unduly accept the findings and related measures. The ‘Case Examiner Stage’ should aim to protect the clinician, alongside patients.

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

25. We support the intention to bring consistency to the grounds for actions across professional health regulation, as outlined in paragraphs 258-266, but have concerns that the proposal will reduce the current grounds for action to just two elements: misconduct and lack of competence.
26. Whilst understanding the logic of restricting the grounds for action, careful thought needs to be given to those cases where ill health is the reason for lack of competence to ensure these cases are treated sensitively in a just and learning culture, without breaching confidentiality. NHS Resolution recommends that health is embedded more clearly throughout these proposals, or potentially included as a separate category altogether.

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<sup>7</sup> L. Bayley, Crucible insights, [DHSC Consultation: Regulating healthcare professionals, protecting the public](#) (Match 2021)

**Question 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? And question 54. Do you agree or disagree with our proposed powers for Interim Measures?**

27. NHS Resolution agrees with the proposals in this document relating to a consistent set of powers in relating to interim measures.
28. These powers need to be considered alongside the existing HPAN system. As noted above, this is a system where notices are issued by NHS Resolution to inform NHS bodies and others about health professionals who may pose a significant risk of harm to patients, staff or the public. HPANs are usually used whilst the regulator is considering the concerns and provide an additional safeguard during the pre-employment checking process. The process is set out in our [Directions of 2019](#), as set out by the DHSC, and more information can be found on our website [here](#).
29. The scope of the HPAN system is limited to England, despite the free flow of professionals across the devolved nations. The lack of alignment of the HPAN system with other professional checks is a risk that could lead to the failure to alert the system to a concern in a timely manner. This could increase possible safety risks for patients.
30. The review of this legislation provides an opportunity to mitigate this risk by giving regulators the power to impose an HPAN as a precursor to determining any interim measures.

## Section 9. – Impact Assessment and Equalities Impact Assessment

**Question 70. Do you think any of the proposals in this consultation could impact (positively or negatively) on any persons with protected characteristics covered by the general equality duty that is set out in the Equality Act 2010, or by Section 75 of the Northern Ireland Act 1998?**

31. The principles in the proposals should enable regulators to be more responsive and proportionate. However, there is a risk that with this staged process, with decisions being taken outside of the context of formal panels, any pre-existing structural biases could lead to widening inequalities or perpetuated inequalities. This would need to be carefully monitored.