We recognise that the draft Order only applies to the regulation of anaesthesia associates and physician associates, and we do not have particular views on the regulation of these professions. Given that this draft legislation will act as a template for replacing the legislation of all healthcare professional regulators, our responses are informed by what we think should be in the common framework for all regulators and the impact these proposals would have on the Nursing and Midwifery Council (NMC).

The following responses relate to the commencement and interpretation sections of the draft Order.

1. Do you have any comments relating to Part 1 general?

We have no comments to make on the commencement dates for the associate professionals. When it comes to the NMC's legislation, we are working on the basis that we will need a period of at least six months between the Order being made and our regulatory rules going live.

We support the DHSC's decision to consolidate the grounds for action into two broad categories. We agree that these should address situations whereby a registrant is either unable to practise safely or that they have done something of such seriousness inside or outside of their professional life that regulatory action is required ('misconduct'). We think that the drafting achieves these aims and allows regulators to take proper account of health conditions without being compelled to take regulatory action as a result of them.

Questions 2-3 relate to Part 2 of the draft Order. Education and training – standards and approvals.

2. Do you agree or disagree that the powers outlined in Part 2 standards and approvals are sufficient to enable the GMC to fulfil its role safely and effectively in relation to the education and training of AAs and PAs? Please explain your answer.

Agree.

We consider that the powers are likely to be sufficient to enable the GMC to fulfil its role safely and effectively.

At the NMC, our current quality assurance process powers are limited, with our only recourse being to withdraw approval from an approved education institution if there are persistent concerns it is not meeting our standards. Given the level of disruption to student learning that such a move would cause, we think this should always be a power of last resort. We would welcome the enhanced powers under Article 4 to impose conditions. This would enable us to take a more flexible approach and address concerns in a more proportionate and risk-focused way, helping to maintain safe learning environments for students and drive improvements in nursing and midwifery education.

The proposed approach set out in Article 3 is a good example of where the draft Order strips back the sort of prescription that exists in our current legislation. This would enable us to adapt more swiftly to changing needs across the health and care sector. This flexibility would enable education institutions and their practice learning partners to innovate and respond to the evolving needs of people who use services.

3. Do you have any additional comments on Part 2 standards and approvals in relation to the drafting approach as it would apply to all regulated healthcare professionals?

We have no additional comments on Part 2. See our related comment on question 25.

Questions 4-11 relate to Part 3 of the order. Registration processes and the register.

4. Do you agree or disagree that the draft Order provides the GMC with the necessary powers to determine the standards and procedural requirements for registration? Please explain your answer.

Partially agree.

We broadly agree that the draft Order provides the regulator with the necessary powers to determine the standards and requirements for registration. This should enable regulators to develop streamlined processes and set proportionate requirements for applicants, taking account of the varying circumstances of different groups of people who are applying to join or rejoin the register.

We note that the draft Order sets out a wide range of standards an applicant must meet in order to be registered, including the regulator's standards for conduct, performance and ethics.[1] This would be problematic for the NMC as our standards for conduct, performance and ethics are designed for practising professionals and therefore cannot be met by an applicant who is not yet in practice. To reflect the purpose and scope of the standards specified in Article 6, we think it would be more appropriate to require the Registrar to be satisfied that the applicant meets, or is capable of meeting, the standards.

We think the draft Order should make it clearer that rules can impose specific requirements for that purpose, e.g. substantive requirements about the qualifications or experience which an applicant must have attained prior to the application process, alongside procedural requirements, such as the information that must be submitted in the course of the application process. It is essential that the regulator can create this range of requirements in rules to establish a robust but proportionate method of assessing that standards are met.[2]

[1] Standards of education, training, knowledge, skills, experience, conduct, performance, ethics and English language. Article 6(2)(c)(ii).

[2] We do not understand the suggestion that the requirements imposed in rules made under paragraph 3(1)(a) would fall "outside the standards". Some requirements may not relate to the regulator's assessment of whether standards are met, but the majority of requirements will be imposed to enable the Registrar to decide whether standards are met e.g., requirements to have an approved qualification, to undertake an assessment or to provide evidence relating to character.

Otherwise, the draft Order provides for a sufficiently broad range of standards and recognises that regulators are best placed to specify, in rules under Schedule 4, how the applicant can demonstrate those standards are met.

5. Do you agree or disagree that the draft Order provides the GMC with proportionate powers for restoring AAs and PAs to the register where they have previously been removed due to a Final Measure? Please explain your answer.

Disagree.

We agree with the policy intention the DHSC has set out that any decisions about restoring[3] professionals to the register need to ensure public protection is maintained and that concerns about fitness to practise are considered. However, we disagree that the draft Order provides proportionate powers for restoring professionals to the register following removal due to a final measure.

The provisions in Article 6 require that any applicant seeking restoration after a final measure must:

- satisfy a panel that their fitness to practise is not impaired; and
- satisfy the Registrar of the matters specified in Article 6.

We consider that the Registrar would be well placed to consider all matters relevant to the restoration application (including the circumstances that led to the decision to remove) when making their determination as to whether the standards are met. There is no need to bring a second decision-maker into the process and it would be highly undesirable to require both a panel and the Registrar to consider a very similar set of issues.

[3] Currently, if a person has been removed from the register following the FtP process and wishes to return to the nursing or midwifery professions, they must apply for **restoration** to the register. If a person has come off the register for any other reason, i.e., not as the result of an FtP measure, and wishes to return to the register, they must apply for **readmission** to the register. This draft legislation sets out a readmission process for all categories of individuals who are reapplying to the register; for clarity we have retained the word restoration in our answer in line with the terminology included in the question.

We also do not understand the requirement for a panel to make this decision, given case examiners may well have made the decision to remove the professional in the first place. Introducing two decision makers imposes an overly complicated and protracted process, with two separate appeal routes and we remain concerned about the overlap between the panel's determination on impairment with the Registrar's determination of whether standards are met.

We further note that there is no specific provision dealing with the restoration of associates who were automatically removed following conviction for a specified offence, which leaves the policy position unclear.[4]

6. Do you agree or disagree that the draft Order provides the GMC with proportionate powers for restoring AAs and PAs to the register where the regulator identifies in rules that it is necessary for the applicant to satisfy the regulator that their fitness to practise is not impaired? Please explain your answer.

Disagree.

As above, we agree that any decisions about restoring professionals to the register need to ensure public protection is maintained. We aren't clear on the rationale for prescribing a 'person' to make the determination that fitness to practise is not impaired. For the reasons set out above, a single decision maker would be clearer and the Registrar is best placed to make this decision.

[4] Article 6(1)(a) makes provision for the restoration of applicants who are "not registered by reason of a final measure". The term "final measure" is defined in Article 2(1) to include "a requirement that an associate's entry be removed…". However, it is not clear whether this is intended to cover all the requirements to remove as set out in Article 8(1), which includes removal where the associate has died and where they have committed a specified offence. We assume it is only intended to refer to final measures as a result of fitness to practise proceedings.

7. **Do you agree or disagree that the powers in the draft Order relating to the content of the register and its publication will enable the GMC to effectively maintain a register of the AAs and PAs who meet the standards required to practise in the UK? Please explain your answer.**

Agree.

We consider that regulators should be required to keep an up to date register of professionals that meet the criteria for registration. We agree in principle that the register should be divided into parts for each profession.

We also agree in principle that there is information which regulators have a duty to include on the register relating to a professional and their practice. We welcome regulators having a duty to assess what additional information should be added to the register for the purposes of public protection. This supports an approach to registration that is flexible, consistent, and fit for the future. This would allow us to update our register on an ongoing basis in line with the evolving nature of practice. This would also ensure our register is transparent and accessible to the public and is reflective of professional practice.

We note the power to make rules as to the addition, amendment and removal of information from the register. This would be essential to ensure our register is up to date and that information published from the register serves public protection effectively, including reflecting each professional's current scope of practice.

8. **Do you agree or disagree that the draft Order provides the GMC with the necessary and proportionate powers to reflect different categories of registration and any conditions that apply to the registration of people in those categories? Please explain your answer.**

Partially agree.

The consultation document states that Article 7 gives the GMC powers to set and impose "conditions on the scope of registration" of individuals or groups of associates, and that the powers will enable regulators to set conditions that apply to registration of professionals who meet pre-determined criteria, as set out in the rules. We support this as it would provide regulators with an important tool for public protection. For example, where professionals don't comply with the regulator's evaluation process while they're subject to fitness to practise proceedings. If the

Registrar considers it's in the public interest to keep that professional on the register until the conclusion of the proceedings, the Registrar should be able to impose conditions that the professional should not be able to continue practising where they have not complied with the regulator's evaluation process.

However, it's not clear whether Article 7 is enabling the Registrar to choose the conditions which may be applied to associates who fall within a prescribed description. At the NMC, we currently have the power to impose conditions of practice orders when restoring a professional to our register after they were removed following fitness to practise proceedings. The ability to choose conditions which address the particular needs and circumstances of that individual enables regulators to support professionals back to safe and effective practice.

We believe the drafting in Article 7 should clarify the scope of this important power. For example, the term "conditional registration" implies restriction. It's not clear how a power to grant "conditional" registration could "enhance scope of practice" as suggested in the consultation document.[5]

The drafting also suggests that this power can only be exercised when registering someone under Article 6, which doesn't reflect the policy intention that this power should be exercisable when someone attains a further qualification after registration.

9. Do you agree or disagree that the draft Order provides the GMC with proportionate and necessary powers in relation to the removal of AA and PA entries from the register which would enable it to operate a safe and fair system of regulation that protects the public? Please explain your answer.

Agree.

However, we believe that the powers need to be more comprehensive in the following areas:

Firstly, the power to remove for failure to provide information in accordance with a requirement under the Order should also make it clear that it extends to failing to provide information in accordance with rules made under the Order.

[5] Page 28 of the consultation document states that conditional registration "may include temporary overseas registration or provisional registration that in turn will be capable of restricting or enhancing an associate's scope of practice."

Secondly, we query why the power to remove following conviction or sentence for offences specified under Schedule 2 should apply only to offences committed after the date the legislation comes into force, which will delay the effectiveness of this important power.

Thirdly, we think that the power to remove a professional for failure to comply with rules for the process of evaluating whether standards are met may not go far enough in the context of some revalidation models. At the NMC, a professional can comply with all our requirements for revalidation but where the resulting evaluation is that the professional no longer meets the standards, the Registrar can decide not to renew registration. We believe this approach should be retained in the future legislation to ensure the Registrar can take immediate action where it's necessary to do so for public protection.

Finally, we also support the Registrar having the power to remove someone from the register where they are satisfied that the entry was procured fraudulently or made incorrectly. This decision is purely about whether someone is entitled to be on the register, not about whether their fitness to practise is impaired. Therefore, giving the Registrar this power presents a significant improvement on our current system, where we're required to investigate and determine these matters within the structure of our fitness to practise process. However, we are concerned that there is no clearly defined process for imposing interim measures in incorrect/fraudulent entry cases. We understand that the DHSC's intention is that in those circumstances it will be possible for regulators to treat the matter as a question about the professional's fitness to practise. We believe this is unnecessarily convoluted and may present unintended barriers to ensuring appropriate interim measures are in place while regulators investigate a potential incorrect or fraudulent entry.

10. Do you have any additional comments on Part 3 The Register in relation to the drafting approach as it would apply to all regulated healthcare professionals?

We note the absence of provisions for international registration requirements and have been engaging separately with the DHSC on this issue. Although we understand that certain international arrangements will require a level of detail on the face of the Order our position remains that we would like to see a general approach that is as permissive and flexible as possible. This will allow us to place the detail on routes to the register and process requirements in our rules, including how we assess overseas applications. Where we need to directly assess competence, we believe our test of competence is the best and fairest option to ensure

that individuals possess the required skills and knowledge to join our register.

This approach will provide us with the flexibility we need to ensure our standards, requirements and processes remain up to date and will support the changing health and social care workforce by ensuring routes to international registration allow professionals who meet our standards to come onto the register.

11. **Do you agree or disagree that the draft Order provides the necessary powers to enable the GMC to implement an efficient and safe system of temporary registration for AAs and PAs during a period of emergency as declared by the Secretary of State? Please explain your answer.**

Agree.

These provisions allow regulators to register every person who falls into a specified group without identifying their individual details. It is difficult to understand how we could actually register every person in a group without first specifying which individuals make up that group.

Questions 12-16 relate to Part 4 of the draft Order, Fitness to Practise.

12. **Do you agree or disagree that the powers in the draft Order enable the GMC to implement a 3-stage fitness to practise process for AAs and PAs proportionately and sufficiently? Please explain your answer.**

Disagree.

We support the DHSC's policy intention that there will be a three-stage fitness to practise process, and that regulators will have sufficient flexibility to determine which cases should be closed in the first stage without taking any further action. We need to ensure that the new framework enables regulators to take the right decisions at the earliest opportunity, including at the first stage.

However, we do not think that the draft Order provides sufficient clarity about the nature and scope of the first stage. In its 2021 consultation, the DHSC said that "we propose that regulators should be provided with a consistent set of powers concerning the initial assessment stage. Regulators will have a duty to consider any concern that is received about

one of their registrants and to determine whether or not there is a basis for onward referral in the fitness to practise process".[6]

The DHSC also said that there would be "a new power for regulators to decide, if appropriate.... to close a case at this stage." [7] The drafting does not state this sufficiently clearly. We consider that there needs to be an explicit power in the Order for the regulator (rather than case examiners) to conclude a case at the first stage.

The Order specifies the actions which a case examiner or panel may take in response to a question as to whether a person's fitness to practise is impaired. It is silent on the fact that a regulator may investigate and assess a question about impairment and, where appropriate, decide to take no further action at the conclusion of that first stage.
The Order also prevents the regulator from seeking an interim measure during the first stage of the process (by only permitting a case examiner to refer the case to a panel for that purpose).

The first stage of the process should enable regulators to gather the information they need to make an informed decision about whether further regulatory action is required and where it is not, to close the proceedings as soon as possible. This is a crucial stage of the process, and it should be stated clearly in the Order. We think this is an important point that is central to achieving a more streamlined, kinder and less adversarial approach to fitness to practise that allows regulators to focus on serious cases that require regulatory action to protect the public.

A further point is that the regulator's decision at the conclusion of the first stage should also be included in the power to revise a decision under Article 11.

[6] Paragraph 291 of the 2021 DHSC consultation "Regulating healthcare professionals, protecting the public."
[7] Paragraph 292 of the 2021 DHSC consultation "Regulating healthcare professionals, protecting the public."

13. Do you agree or disagree that the powers in the draft Order enable case examiners to carry out their roles appropriately and that the powers help to ensure the safe and effective regulation of AAs and PAs? Please explain your answer.

Partially agree.

We support the proposed powers for case examiners to resolve cases where professionals accept the outcome.

However, we think these provisions are unnecessarily prescriptive about what the professional must agree before the case can be resolved.[8] This over-prescription could result in panel hearings even where the professional accepts the proposed final measure. The only matters for the panel to resolve in these circumstances could potentially be academic disputes around specific factual matters and whether the registrant was 'impaired', notwithstanding that there is an acceptance as to the restriction that needs to be in place.

We think the drafting in Article 9(2)(b), which creates the power to impose a final measure where the professional does not respond to a notification, should more clearly reflect the policy intention that this is only available where a case examiner has concluded that fitness to practise is impaired.

14. Do you agree or disagree that the powers in the draft Order enable panels to carry out their roles appropriately and that the powers help to ensure the safe and effective regulation of AAs and PAs? Please explain your answer.

Agree.

The draft Order should state the panel's broad powers while permitting the rules to prescribe the process by which the panel will reach a decision on how to exercise those powers. The draft Order does this appropriately in respect of the panel's power to impose a Final Measure where it is "satisfied that the person's fitness to practise is impaired".

However, we are unclear as to why there is no reference to the grounds on which a panel can impose an interim measure. For example, the Order

[8] A professional will have to agree three different things in order to 'accept' the case examiner proposal (1) agree the proposed measure; (2) accept that their FtP is impaired; (3) accept all of the case examiner findings.

does not specify that the panel must be satisfied that the interim measure is necessary for public protection.

Given the critical importance of interim measures for public protection and their significant impact on professionals as a minimum, we think that the Order should state that an interim measure 'should be imposed where it is necessary to address a public protection risk'.[9]

15. Do you agree or disagree that the powers in the draft Order on reviewing Interim Measures are proportionate and sufficient for the safe and effective regulation of AAs and PAs? Please explain your answer.

Disagree.

It is essential for public protection and for fair treatment of professionals who are subject to an interim measure, that the Order provides flexible but clear powers with regards to how regulators and courts can manage a measure after it has been imposed. We welcome the intention to give a range of flexible powers. However, there are several different provisions in the Order which don't appear to function as a coherent whole:

- the Order confirms the time limit for an interim measure (18 months) but states that this doesn't prevent a "subsequent measure being imposed by a court based on the same evidence".[10] We presume this is a reference to the court's power, under Article 10(4), to impose an interim measure but it's unclear whether the court is confined to imposing a measure "on the same evidence";

- the language of imposing a subsequent measure conflicts with the policy intention which refers to the court "extending" an interim measure.[11] It's imperative that the Order clarifies the court's jurisdiction, which should be to decide whether to extend an existing measure, rather than to impose a subsequent measure; and

- the Order imposes a duty on case examiners to review an interim measure at specified intervals without stating the intended outcome of that review. For example, do the case examiners have powers which are distinct from the regulator's powers to revise an interim measure under Article 11 (where there is a material change of circumstances since it was imposed)? Are the rules which regulators

[9] This was included in the DHSC's 2021 consultation at paragraph 321.
[10] Article 9(3).
[11] Page 29 of the DHSC's consultation on Regulating Anaesthesia Associates and Physician Associates.

must make for non-compliance with a measure intended to form part of the review process?[12]

The Order fails to clarify how these different powers and duties operate alongside one another.

The consultation document confirms the intention to limit the court's power to extend to 12 months and suggests that no investigation should last more than 30 months.[13]

Firstly, we don't think that the drafting provides for this (as Article 10 doesn't prevent the regulator from making a further application for an extension on the measure imposed by the court). Secondly, we have concerns about such a time restriction. While we consider that the reforms will enable regulators to conclude matters more swiftly, there will still be a number of cases where an interim measure is required for longer than 30 months due to the duration of external investigations and proceedings. For example, the most serious criminal allegations will often take longer than 30 months for investigation and trial. Regulators must be able to continue to protect the public while other agencies conclude their proceedings.

16. Do you have any additional comments on Part 4 fitness to practise in relation to the drafting approach as it would apply to all regulated healthcare professionals?

We do not have any additional comments.

Questions 17-19 relate to Part 5 of the draft Order, revisions and appeals.

17. Do you agree or disagree that the powers in the draft Order provide the GMC with proportionate and sufficient powers in relation to the revision of decisions concerning the regulation of AAs and PAs? Please explain your answer.

Disagree.

We welcome the policy intention to give regulators a broad power to revise decisions. This should enable the regulator to take corrective action where necessary without protracted appeals or judicial review of

[12] Paragraph 6(1), Schedule 4 imposes a duty to make rules for non-compliance with an Interim Measure.
[13] Page 29 of the DHSC's consultation on Regulating Anaesthesia Associates and Physician Associates.

decisions. Regulators also need the power to keep interim measures and final measures under review and to revise or vary them as necessary for public protection.

We don't agree that the Order gives the regulator sufficiently clear powers to do these things. Article 11 conflates decisions (e.g., that a person meets the standards or that fitness to practise is impaired) with measures which are imposed as a result of those determinations (e.g., interim and final measures, conditions imposed in relation to an education and training approval). As a result, the regulator's powers are confused, creating:

- an overly complicated process for professionals and others who want to challenge the regulator's decisions; and

- a risk to public protection, due to the lack of clarity around the regulator's powers to change a measure.

We think the Order needs to give regulators the flexibility to determine when it is appropriate to use this power, which decisions the power should apply to, and which grounds will be appropriate to consider in different categories of cases. This would enable the regulator to design a revision process which takes account of the nature of the decision and the other options for correcting the decision or bringing it up to date with changing circumstances e.g., submitting a new application for registration/approval where circumstances have changed since the regulator's refusal, or using a right of appeal where the affected person believes the decision was wrong.

Revising a decision

The Order gives some flexibility to the regulator, by permitting rules where it can "prescribe the cases or circumstances in which a revision may not be made".[14] However, that's undermined by references to a right to request a revision.[15] Where a person wishes to challenge a decision (e.g. that a final measure should be imposed due to their fitness to practise being impaired) they have a right to appeal that decision. Regulators should have the discretion to revise a decision where they consider that they may have made an error.

[14] Paragraph 11, schedule 4.

[15] "Anyone will be able to make a result to the GMC for it to revise a case examiner's decision" page 35 Consultation on draft legislation; Schedule 3, paragraph 2, duty to notify the affected person, "where applicable, that they may apply for revision…"

Framing this as a right to request a revision is also inappropriate for a number of decisions covered by Article 11. For example, we think that where a regulator refuses an application to approve an education programme or refuses to register an individual, a material change of circumstances should prompt a new application and a new decision, rather than a revision of the previous one.

Where a professional affected by a decision has a right of appeal, we do not think they should also have the right to request a revision. Having two separate ways to challenge the same decision is likely to lead to duplication of effort and confusion for all concerned without any clear benefit.

Revising a measure

The power to revise a measure involves different considerations. Where a person is subject to a measure we understand the need for a process by which they can request a revision, so that the regulator can review whether the measure can be relaxed or removed because of a material change of circumstances. We welcome the fact that the Order gives regulators the flexibility to revise a measure without requiring it go before a panel. Where the professional doesn't agree with the regulator's decision they'll have a right of appeal to an internal appeal panel. This would enable much swifter revisions where the regulator becomes aware of information that indicates that the measure should be changed.

We assume the policy intention is that regulators should have flexible powers to manage an interim or final measure after it is imposed. However, by making several different, disjointed references to how a measure might be changed or substituted, the Order could create ambiguity rather than flexibility about the regulator's ability to vary or lift an interim measure after it is imposed, or to vary, lift or extend a final measure.

Interim measures - Article 9(3) and (4) define the length of interim and final measures. We think the reference to imposing a subsequent measure "on the same evidence" is unhelpful and should be removed. We also think that Articles 9(3) and 10(4) should state clearly that the court has the power to extend an interim measure for a period up to 12 months.[16]

[16] We note page 34 of the consultation document describes Article 10(4) interchangeably as a power to extend and a power to impose. To preserve its current jurisdiction over interim restrictions, the court should have a power to extend rather than to impose a new measure.

Final measures – The Order refers to a subsequent measure being imposed on the same evidence[17] and allows the regulator to make rules which provide a power to substitute a different final measure as a consequence of non-compliance. However, the power to revise a final measure on the basis of a material change of circumstances expressly prevents the regulator from extending the measure.[18] As identified in our answer to question 15, the various provisions don't appear to operate together as a coherent whole. Regulators need a broad discretion to vary or extend a final measure in light of all the available evidence.

We think these issues could be resolved if the Order:

- gave the regulator the power to make rules which specify which decisions fall under the power to revise and the circumstances in which the regulator must or may consider a revision (e.g. who can request a revision, timescales for requests, the grounds upon which a revision can be requested); and

- made a clearer distinction between revision of decisions and revision of measures, clarifying the regulator's and the court's respective powers to alter them where appropriate.

18. Do you agree or disagree that the powers in the draft Order provide individuals with proportionate and sufficient appeals rights in respect of decisions made by the GMC and its independent panels relating to the regulation of AAs and PAs? Please explain your answer.

Disagree.

Firstly, we think the drafting is very difficult to navigate. These provisions relate to the rights of individuals, and it is imperative that they are clear to professionals, key stakeholders, members of the public and people who use services.

On our interpretation of the draft provisions, we have the following concerns:

[17] Article 9(4)
[18] Article 11(2)(a)

Education and training

We disagree that the appellant must have a right to attend and call live evidence to the appeal panel. Decisions not to approve or to impose conditions on an approved course or provider are typically taken at the conclusion of a lengthy dialogue between the regulator and the education provider. We think that providing for a live hearing rather than a paper-based appeal would be wholly disproportionate in these circumstances.

Registrations

The approach to appeals against registration decisions seems internally inconsistent. We query whether it is the DHSC's policy intention to create two different appeal pathways for registration decisions under Article 6. We also query the policy intentions for external appeal routes for decisions under Article 7 (conditional registration) and revised Article 6 decisions, both of which appear to be appealable to the High Court or Court of Sessions rather than the County Court.[19]

Fitness to Practise

We do not support the proposal that all case examiner outcomes must have a right to an internal appeal.

We're particularly concerned by the inclusion of a right of appeal against a warning. Given that warnings follow on from a decision that the professional is not impaired we'd query the proportionality of creating a right of appeal to a panel in addition to a right to request a review (which we support). It's also unclear how the internal appeal panel or court would be expected to approach their consideration of an appeal against a warning.

We're also concerned about the professional's right of appeal against a case examiner outcome, given that the outcome can only be imposed where the professional has accepted the outcome or failed to respond within a specified timeframe. We don't understand the justification for giving professionals a right of appeal against an outcome to which they have already expressly agreed. Giving professionals a specific right of appeal against an outcome which is imposed because of a failure to respond also appears illogical. The professional who rejects the proposal within the specified time will have a panel hearing under Article 9, where the panel will make its own assessment on whether the professional is

[19] Article 12(2)(b) appears to give a right of appeal against every internal panel decision not specifically referred to in Article 12(2)(a).

impaired, and if so, what measure to impose. The professional who does not respond within the specified time but then appeals the outcome, will have a panel hearing under Article 12, where the panel will be determining an appeal against the case examiner outcome.

It is unclear whether or how a panel which is considering an appeal against a case examiner decision is distinguishable from a panel considering impairment under Article 9. For example, is the appeal panel considering the question of impairment afresh or is it concerned solely with the professional's reasons for not responding within the specified time? If it's the former, there is no incentive for a professional to engage with the case examiner and reject the proposal within the specified time.

Regulators need the flexibility to create appropriate internal appeal rights against certain revision decisions but not all revision decisions. We note that the regulator is permitted to make rules which will specify when members of the public will have a right of appeal. However, the Order gives the professional who is the subject of the decision a right of appeal against all revision decisions. We agree that the professional who is subject to the decision in question should have a right to an internal appeal against a regulator's decision on whether to revise a final measure. However, where the regulator is revising a case examiner decision under Article 9, we think it would be much clearer and more logical to give the professional the opportunity to reject the revised proposal, which would result in a hearing under Article 9, rather than giving a right of appeal against the revision.

In terms of clarity, we also believe the professional's right to an appeal to a court against a case examiner or panel's decision to impose a final measure should be articulated more clearly in Article 12(2)(b)(ii) and Article 12(6).[20]

19. Do you have any additional comments on Part 5 revision and appeals in relation to the drafting approach as it would apply to all regulated healthcare professionals?

In our view the drafting for Articles 11 and 12, when read alongside other parts of the Order highlighted above, imposes an inflexible system of revision and appeals rather than delivering the policy intention to deliver a flexible "internal mechanism which allows the revision of decisions by a regulator, providing a means to resolve cases in a timely manner in a less

[20] On our reading of Article 12(6), the professional would need to be prescribed as an appellant in rules. We think their appeal right against a finding of impairment and a final measure should be secured in the Order.

adversarial way which benefits both registrations and those who raise concerns".[21]

We had understood that the draft Order would provide regulators to specify further internal appeal rights, as originally proposed by the DHSC. This would enable the regulator to ensure that other important decisions such as a requirement to undertake a specific assessment or a decision to remove information from the register, could be challenged via an internal appeal panel, rather than requiring a judicial review.

20. Do you agree or disagree that the offences set out in the draft Order are sufficient to ensure public protection and to maintain public confidence in the integrity of the AA and PA professions? Please explain your answer.

Agree.

At present, we have no further comments on the offences relating to associates. At the NMC, we regulate several professions and are likely to have unique needs regarding offences, including the use of titles associated with our professions.

21. Do you have any additional comments on Part 6 miscellaneous in relation to the drafting approach as it would apply to any regulated healthcare professionals?

We're concerned about the lack of clarity in Article 13, particularly as to what the right to make oral submissions entails, how the regulator can manage the process of hearing oral submissions, and how that process can and should be distinguished from a right to a hearing where the regulator is required to hear live evidence.

There is no rationale for the distinction between decisions which must allow for oral representations and those where written representations are sufficient.[22]

There is nothing in the consultation document to explain how the exception "where practicable" is intended to operate where a panel is

[21] DHSC response to 'Regulating Healthcare Professionals, Protecting the Public, page 168.
[22] Article 13 imposes a duty to give an opportunity to make written representations before a regulator revises an Interim Measure or before a case examiner imposes a Final Measure. However, the regulator must give an opportunity to make written or oral representations before the Registrar makes specified removal decisions, before an Interim Measure or Final Measure is imposed and before a regulator revises a decision other than an Interim Measure decision.

imposing an interim measure. It is unclear how this will be determined, and how this will be balanced with the need to ensure measures are imposed swiftly in order to protect the public.

It's also unclear from the drafting whether the opportunity to make representations under Article 13(1)(a) is confined to written representations.

22. Do you agree or disagree with the proposed powers and duties included in Schedule 1 the regulator in relation to AAs and PAs? Please explain your answer.

Partially agree.

Delegation

We agree with the policy intention to give regulators the power, subject to provisos in the Health Act 1999, to delegate its functions to an external person. The Order provides adequate powers to delegate functions to external parties.

However, by giving the regulator a restricted power to delegate functions to its members or staff, the Order is conflating two different concepts:

- the power to delegate statutory functions to external parties; and
- the principle of agency i.e., that the regulator will need to rely on its members and staff to act as its agents, to carry out the numerous functions assigned to the regulator in legislation.[23]

By making express provision for the regulator to delegate to its members of staff, the Order restricts the operation of the general principle of agency. It is imperative that the Registrar can delegate their functions as necessary and this links to many functions across the draft Order. We can understand a requirement that the function of making rules under Schedule 4 should be restricted to the Council but we do not agree that the Council's power to delegate cannot be delegated further and think this qualification should be removed.[24]

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[23] "The general principle is that when a statute gives someone the right to invoke some legal procedure…. Or taking some other formal step, he may either do so in person or authorise someone else to do it on his behalf." *General Legal Council ex part Whitter v Frankson [2006] UKPC 42*

[24] e.g., the Registrar should be able to delegate their functions to their Assistant Registrar or to other staff, taking proper account of the significance of the decision.

The consultation document references the proviso in the Health Act 1999 that certain functions may only be delegated to another regulatory body or Social Work England.[25] For accessibility purposes we think this proviso should be referenced in the Order.

Incidental powers

Given that the Order provides the regulator with an express power to pay its members, its staff and its panel members, we consider that it should also provide a clear power to pay for services which it has contracted out under the power to delegate its functions.

23. Do you have any additional comments on Schedule 1 the regulator in relation to the drafting approach as it would apply to all regulated healthcare professionals?

We do not have any additional comments.

24. Do you have any comments on Schedule 2 listed offences?

We do not have any additional comments.

25. Do you agree or disagree that the powers in the draft Order enabling the GMC to gather, hold, process, disclose and assure information in relation to the regulation of AAs and PAs are necessary and proportionate for meeting its overarching objective of protecting the public? Please explain your answer.

Partially agree.

It is important that other bodies with which information is shared as part of regulatory functions are subject to reciprocal powers and duties, including the timely sharing of data and information that allows us to discharge our duties effectively. We agree with the overarching objectives and stated intentions for the draft Order, but do not agree that the drafting achieves these objectives in several areas:

Power to publish

The ability to issue and publish warnings in the course of the regulator's monitoring of education providers is an important regulatory tool. However, the power is described in very narrow terms i.e., a warning "given in consequence of the findings" of "any investigation". The

[25] Page 41 of the consultation document

monitoring duty and powers provided for in Schedule 3 are broad and they are defined as an evaluation rather than an investigation. The Order should make it clear that the regulator can issue and publish a warning as a result of any monitoring activity, rather than solely as a result of findings of an investigation. This will enable us to work collaboratively with providers to address concerns about the quality of education provision and continuity and quality of training environments.

For transparency and consistency, Schedule 3 should expressly permit the regulator to publish a refusal to approve under Article 4.

Evidence gathering

We understand that regulators should be under a duty to take steps as they consider necessary to carry out their functions and we welcome clear powers to require information (including from the professional concerned) where the regulator deems it relevant for those purposes.

The provisions for evidence gathering are essential and fundamental to our ability to protect the public. It is critical that they encapsulate all the different enquires that we need to make and assessments that we may require a person to undertake. The power to require information which appears relevant for the purposes of the regulator's functions is helpfully broad and will allow the regulator to investigate other issues beyond whether standards are met or fitness to practise is impaired e.g., whether an entry was procured fraudulently or whether a professional has appropriate indemnity arrangements in place. However, we're concerned by:

- the inconsistent approach to rules for investigation purposes. The Order imposes very specific duties on regulators to make rules requiring information for the purposes of an evaluation of whether our standards are met.[26] This appears to overlap with discretionary powers to make rules for the same evaluation.[27] We think the broad power to carry out investigations which are relevant to any of the regulator's functions could be better underpinned by a broad rule making power, rather than a mixture of duties which overlap with discretionary powers; and

- the duties and powers to investigate/evaluate whether standards are met or fitness to practise is impaired should include a clearer

[26] Paragraph 7(2) of Schedule 3.
[27] Paragraph 3(2) of Schedule 3 gives a discretion to make rules for the procedure of evaluation under paragraph 7 of Schedule 3.

reference to the fact that these investigations may include requiring someone to undertake a health assessment.[28]

26. Do you have any additional comments on Schedule 3 evidence gathering, notifications, publication and data, in relation to the drafting approach as it would apply to any regulated healthcare professionals?

We don't agree with the use of the term "complainant" in the notification duties. The term is not used elsewhere in the Order and it's not the appropriate term for someone who raises a question with us. We suggest regulators should be under a duty to notify "the person who raised the concern with the regulator (if any)".

However, that duty needs to be qualified to allow those individuals to opt out of updates if that is their preference.

27. Do you agree or disagree that the draft Order provides the GMC with sufficient and proportionate rule making powers to enable it to effectively maintain a register of AAs and PAs who are safe to practise? Please explain your answer.

Partially agree.

We welcome the principle of increased autonomy in making rules, and see this as one of the essential benefits of regulatory reform. However, a number of the rule-making powers could more clearly convey the intended scope of these rules. In particular:

- The regulator will need to add specific requirements in rules to enable the Registrar to be satisfied that standards are met (e.g., that the applicant must provide evidence of being awarded an approved qualification, passing an assessment of their competence, carrying out specified learning activities etc.) The power to make rules for the purposes of the Registrar making a decision to register (Article 6) or the evaluation of whether the professional continues to meet standards (paragraph 7 of Schedule 3) should clarify that the rules are able to add requirements of that nature.

[28] The only reference to this important power is within the power to make rules for the procedure for the assessment.

- There is a lack of clarity on the scope and purpose of a number of rule- making powers. For example, the regulator is given a power to make rules which "prescribe … a description of associate" who may be subject to conditional registration.[29] However it's not clear whether those rules can or must prescribe the conditions which are attached to professionals who fall within that description.

28. Do you agree or disagree that the draft Order provides the GMC with proportionate and sufficient rule making powers to address non-compliance of AAs and PAs? Please explain your answer.

Disagree.

We agree with the intention to ensure that rules can specify the consequences of non-compliance but disagree that this is achieved by the provisions. This is another area where the overlap with other provisions makes the scope of our powers unclear. We have provided some detailed examples below.

Paragraph (4)(a)(i) of Schedule 4 permits the regulator to make rules which prescribe consequences of non-compliance with the rules on our procedure for assessing whether standards are met/ fitness to practise is impaired. It is not clear how this relates to or overlaps with:

- rules for the procedure for removal of entries under Article 8(2) which includes the power to remove for failure to comply with the same rules; and

- rules for the procedure of applying a condition to or withdrawing an approval from an approved education provider.

We believe the regulator's rules should always specify the consequences (if any) for non-compliance with the requirements set out in rules to ensure clarity and transparency to everyone involved in the regulatory process. The power to make rules for non-compliance with rules is drawn too narrowly drawn e.g., it applies to non-compliance with rules made for the specific purpose of an evaluation of whether standards are met or fitness to practise is impaired. Given the amount of overlap between rules under that power and rules made under other powers in schedule 4, we believe the power to make rules for non-compliance need to be broadened and clarified.

[29] Paragraph 2(2)(d) of Schedule 4

We'd like clarification on the DHSC's intentions for the power to make rules for non-compliance with a direction under paragraph 10(4) (the procedural directions that may be given in fitness to practise proceedings). We believe the regulator's power to make rules for procedural directions should not be confined to fitness to practise proceedings.[30]

The power to make rules which provide for a panel to draw adverse inferences in circumstances prescribed in rules should clarify that this power is not limited to circumstances of "non-compliance". It might be appropriate for adverse inferences to be drawn for reasons other than non-compliance with rules or directions.

29. Do you agree or disagree with the provisions set out in the draft Order for the setting and charging of fees in relation to the regulation of AAs and PAs? Please explain your answer.

Disagree.

As an independent regulator, it is essential we are able to retain control over our ability to budget to meet changing short-term needs and longer-term strategic priorities. We are very conscious of the current financial climate, the pressures on incomes and the cost of regulation and its impact on professionals, and our financial strategy commits us to keeping our registration fee to registrants at £120 for as long as possible.

While we welcome the autonomy to make rules on fees and the power to charge for services, we are very concerned about the requirement to ensure that fees income does not exceed expenditure, taking one year with another. We think that this could have negative ongoing consequences and constrain our operational independence.

We think that this requirement would make it difficult for us to continue to manage day to day expenditure for activities which are subject to ongoing fluctuation (in volume and therefore cost), alongside our continued funding for multi-year capital projects and improvements, whilst minimising volatility in fees for registrants over a given period. The timing and treatment of our fee income also makes it impractical to have a balanced budget in the manner proposed because the effects of any fee

[30] For example, the rules must be able to provide for procedural directions for internal appeal hearings. Also, the consultation document describe a direction under rules under paragraph 10(4) of the draft order as "relating to an interim measure" which appears to be an error, as paragraph 10(4) permits directions in relation to fitness to practise proceedings as a whole.

changes made in one year may not be felt until subsequent years over a prolonged period.

Finally, though the consultation does make it clear that it is not the intention of the DHSC to remove the ability of regulators to maintain reserves, we think that more needs to be done within the drafting to strengthen this. We are required to hold reserves sufficient to enable a certain period of operating expenditure, in order to meet charity law obligations, and are required to have a reserves policy.

We believe that the current drafting does not provide a sufficiently permissive approach to take into account the above points, and so should therefore be redrafted along the lines of the following:

"The rules must require the level of any fees to be set with a view to ensuring that, so far as ***reasonably*** *practicable, the Regulator's fee income does not exceed its expenses,* ***including amounts reasonably required to be set aside as reserves****."*

30. Do you agree or disagree that the rule making powers set out in the draft Order will enable the GMC to deliver the safe and effective regulation of AAs and PAs? Please explain your answer.

Disagree.

We welcome the intention to permit a regulator to set its own requirements and design its processes for deciding who should be added to the register, who should be removed and how we maintain a clear record of their information on our register.

However, there is a confusing overlap across a number of rule-making provisions, for example:

- the regulator has a duty to make rules for the appointment and constitution of panels and a separate duty to make very specific rules for the constitution of panels convened for fitness to practise proceedings;[31]

- the regulator has a discretionary power to make rules for the purposes of evaluating whether standards are met but they must make rules which prescribe persons, information, intervals etc. for the same purpose;[32]

[31] Paragraphs 9 and 10 of Schedule 4
[32] Paragraph 3(2)(b) and paragraph 13

- the regulator has the power to make rules for the procedure of registering and removing a professional which should extend to rules as to the dates on when those decisions take effect, but elsewhere the Order gives a specific power to make rules for that purpose, in relation to some but not all decisions;[33] and

- rule-making powers for case management, admissibility of evidence etc. are cited under the heading of "rules as to fitness to practise", whereas these rules will extend to proceedings which don't relate to fitness to practise.

We're also concerned about over-specification about what rules must include in certain areas, for example:

- the regulator is obliged to make rules prescribing the time scales in which "any step" must be taken in certain processes. We understand that the rules must include time scales for key steps e.g., to submit an appeal or respond to a notice, but the rules cannot feasibly apply a timescale to every step in every process. For some steps, it will be more appropriate to require that it must be taken as soon as practicable or that when it is sent, there must be a minimum number of days until the next step is to be undertaken e.g., notices to be sent as soon as practicable after the regulator reaches a decision and a minimum number of days in advance of a hearing; and

- the Order requires the regulator to state a fixed period in which to provide a response to a case examiner proposal. The regulator should be able to make rules which specify a minimum period, but which allow it to apply some discretion to take account of special circumstances which might justify a longer period.

The tendency to over-specify in certain parts of the rule making provisions can leave unintentional gaps in others. For example:

- The Order expressly permits the rules to make provision for the case management of cases, admissibility of evidence etc. but doesn't provide for the essential power to add interested persons to proceedings.

[33] Paragraph 3 and 12 of Schedule 4.

- The Order expressly permits rules for the description of associates for the purposes of conditional registration, but makes no provision for rules for the process of operating the system of conditional registration e.g. how to determine the conditions, how to deal with non-compliance and how the period of conditional registration will come to an end.

31. Do you have any additional comments on Schedule 4 rules in relation to the drafting approach as it would apply to all regulated healthcare professionals?

We do not have any additional comments.

32. In relation to Schedule 5 consequential amendments, do you have any comments on how the draft legislation delivers the policy intention in relation to AAs and PAs?

We do not have any additional comments.

33. Would you like to provide any further comments on the draft Order?

We do not have any additional comments.

34. Do you think there are any further impacts (including on protected characteristics covered by the public sector equality duty as set out in the Equality Act 2010 or by section 75 of the Northern Ireland Act 1998) from the legislation as currently drafted?

Based on our initial equality impact assessments (EQIAs), we think that these reforms would provide benefits to individuals with protected characteristics. The draft Order would remove a great deal of specification and over prescription around decisions and in terms of the information required to evidence them. Giving the regulators more flexibility and autonomy to set these details in rules ensures they can respond proportionately to any evidence of adverse consequences. This autonomy would allow us to make changes to our rules in response to changing needs and would be balanced by the accountability of proper public engagement and consultation. We will consult on our rules and use the feedback from that consultation to influence how we draft our rules.

We will be undertaking an equality impact assessment alongside the development of our own rules. Our own Ambitious for Change research shows that people with certain protected characteristics experience significant inequalities.[34] The professionals on our register may also experience inequalities. We're committed to equality, diversity and inclusion in health and social care and the increased flexibility provided by regulatory reform will allow us to be more responsive to evidence on equality and diversity from our wider work, such as our Ambitious for Change programme. Our current legislation contains outdated concepts, for example what constitutes 'good' health. Removal of these concepts at Order level would mean regulators are able to make changes that are more adaptive and flexible so we can better meet the diverse needs of the professionals on our register and the people who use services.

[34] Ambitious for change: research into NMC processes and people's diversity characteristics - The Nursing and Midwifery Council