
Fitness to Practise Committee – 25 February 2010

CHRE report – Handling complaints: Sharing the registrant’s response with the complainant

Executive summary and recommendations

In December 2009, the Council for Healthcare Regulatory Excellence (CHRE) published their report on ‘Handling complaints: Sharing the registrant’s response with the complainant.’ This report was commissioned following the 2008/2009 CHRE performance review where it was noted that there were variations between the regulators in a specific part of the fitness to practise process. It was noted that this variation was in relation to the approach the nine regulators take in relation to sharing the registrant’s response with the complainant at the “case to answer” or equivalent stage of its processes.

Attached as an appendix to this cover sheet is a discussion paper written by the Executive analysing the CHRE report with a number of recommendations and suggestions as to how the Committee may wish to take this work forward.

Decision

The Committee is asked to discuss the attached discussion paper around sharing the registrant’s response with the complainant and:

- (a) make recommendations as to whether HPC change its policy and routinely share the registrant’s response to the complainant; and (if the policy is changed)
- (b) that the Executive should produce clear guidance on what should and should not be disclosed to complainants and the number of exchanges of information that should be allowed; and
- (c) that this guidance should be approved by the Committee and the Council before the policy is changed.

Background information

It would be helpful for the Committee to read this paper in conjunction with the agenda items on length of time, standard of acceptance for allegations and expectations of complainants.

Date	Ver.	Dept/Cmte	Doc Type	Title	Status	Int. Aud.
2010-02-12	a	F2P	PPR	Sharing the registrants response_report	Final DD: None	Public RD: None

Furthermore, the HPC case to answer rate remains higher (at circa 60% of all cases considered by Investigating Committee) than all other regulators who routinely (or not) share the registrants response. Given this, it is difficult to assess how our policy not sharing the response, impact on number of cases considered at final hearing and any subsequent concerns about public protection.

Resource implications

To be considered if any recommendation is made to change existing policy. However, it is foreseeable that any change to policy would both increase the work load of the case management team and increase the length of time taken to conclude cases.

Financial implications

To be considered if any recommendation is made to change existing policy

Appendices

A - HPC analysis on sharing the registrant's response with the complainant.
B – CHRE report – Sharing the registrant's response

Date of paper

12 February 2010

Handling complaints: Sharing the registrant's response with the complainant

1.0 Introduction

- 1.1 In December 2009, the Council for Healthcare Regulatory Excellence (CHRE) published their report '*Handling complaints: Sharing the registrant's response with the complainant*'. This document sets out HPC's approach in this area, comments on the recommendations made by the CHRE and makes recommendations and suggestions as to how the Committee might wish to proceed in this area.

2.0 HPC approach

- 2.1 The Health Professions Order 2001 (the "2001 Order) and the Health Professions Council (Investigating Committee) (Procedure) Rules 2003 sets out the legislative framework of out how HPC investigates and manages allegations against the criteria of impairment of fitness to practise. that a registrant's fitness to practise is impaired. HPC has a range of practice notes, literature and operating guidance to provide support and guidance to registrants who have had an allegation made against them, panel members who make decisions about fitness to practise and HPC employees and legal Partners who manage case work. That literature includes:

- Practice Note – Standard of Acceptance for Allegations
- Practice Note – Case to Answer
- Brochure - 'What happens if a complaint is made against me'
- Guidance document – Confidentiality and Use of Information: Information for registrants
- Internal operating guidance – Investigations and Allegations.

- 2.2 Article 22(1)(a)(b) sets out the types of allegations the HPC can consider when dealing with allegations about fitness to practise and when an allegation is made to the effect that an entry to the register has been incorrectly made or fraudulently procured. It provides that;

22(1) This article applies where any allegation is made against a registrant to the effect that –

- (a) his fitness to practise is impaired by reason of –
- i. misconduct,
 - ii. lack of competence,

- iii. a conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence,
- iv. his physical or mental health,
- v. a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise is impaired, or a determination by a licensing body elsewhere to the same effect,
- vi. the Independent Barring Board including the person in a barred list (within the meaning of the Safeguarding Vulnerable Groups Act 2006 or the Safeguarding Vulnerable groups (Northern Ireland) Order 2007), or
- vii. the Scottish Ministers including the person in the children's list or the adults' list (within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007).

2.3 Article 22 (5) of the Order requires allegations against registrants to be received 'in the form required by Council'. The Practice Note 'Standard of Acceptance for Allegations' approved by Council in October 2009 provides that an allegation should be regarded as meeting the HPC's initial standard of acceptance if it

- is made in the form required by Council;
- concerns a current HPC registrant; and
- relates to the fitness to practise of that registrant.

2.4 On receipt of a complaint about a registrant, the case is initially assessed by a lead case manager of by the Head of Case Management to determine whether:

- it meets the Standard of Acceptance for Allegations;
- whether any further information is required about the case;
- whether an interim order should be applied for.

2.5 If a decision is made to apply for an interim order, this has to be authorised by either the Head of Case Management or by the Director of Fitness to Practise. The case is then allocated to a case manager who will undertake the further investigation and inquiry as appropriate. This may include (but is not limited to):

- asking the complainant to clarify aspect of the complaint they have made;
- asking the complainant to provide further information or details of third parties who can clarify or provide information;
- seeking information from third parties as to the complaint that has been made;
- seeking expert or clinical advice as appropriate.

- 2.6 Furthermore, Article 25(1) Order provides that ‘for the purpose of assisting them in carrying out functions in respect of fitness to practise, a person authorised by the Council may require any person (other than the person concerned) who in his opinion is able to supply information or produce any document which appears relevant to the discharge of any such function, to supply such information or produce such a document.’ The power to appoint individuals for this purpose has been delegated by the Council to the Director of Fitness to Practise.
- 2.7 On receipt of that further information, the case manager reviews that information and if necessary again follows the process that is set out above. The information is reviewed on an ongoing basis to determine whether any application should be made for an interim order.
- 2.8 If the Case Manager and Lead Case Manager feel that all possible, necessary and relevant information has been collected for an Investigating Committee to make a “case to answer” decision, the registrant is then invited in accordance with Article 26(1) of the Order to ‘submit written representations with a prescribed period’. Registrants are provided with a statutory 28 days to respond to the allegation that has been made against them although they can ask for an extension of time if that is required. If a response is made, the Case Manager will assess that response to consider whether any further information is required to clarify certain aspects of the response. This does arise occasionally but will vary significantly from case-to-case. It may range from requiring verification of a single date to answering a substantial list of questions.
- 2.9 In our response to CHRE we commented that our existing approach in this area aims to balance the need to gather all relevant information for the consideration of the investigating committee, the need to be fair to both registrant and complainant and the need to avoid unnecessary delay.
- 2.10 In respect of the role of the Investigating Committee in considering allegations, Article 26(2) of the Order provides that:
- (2) Where an allegation is referred to the Investigating Committee it shall –
 - (a) notify without delay the person concerned of the allegation and invite him to submit written representations within a prescribed period;
 - (b) where it sees fit, notify the person making the allegation of the representations mentioned in sub-paragraph (a) and invite him to deal within a specified period any points raised by the Committee in respect of those representations;
 - (c) take such other steps as are reasonably practicable to obtain as much information as possible about the case

- 2.11 Once the registrant has had an opportunity to comment on all of the information that has been gathered as part of the investigation, that material (including any response made by the registrant), will be provided to a panel of the Investigating Committee to determine whether there is a case to answer. The practice note 'Case to Answer' sets out in more detail what considerations should be given in determining whether there is a case to answer. The realistic prospect test provides that in deciding whether there is a case to answer, the test to be applied by a Panel is whether, based upon the evidence before it, there is a "realistic prospect" that the HPC will be able to establish at a hearing that the registrant's fitness to practise is impaired. The test applies to the whole of the allegation, that is:
1. the facts set out in the allegation;
 2. whether those facts amount to the "ground" of the allegation (e.g. misconduct or lack of competence); and
 3. in consequence, whether fitness to practise is impaired
- 2.12 It is also important to note here that Rule 4(3) of the Health Professions Council (Investigating Committee) Procedure Rules 2003 provides that
- 'In considering an allegation the Committee may seek such advice or assistance as it sees fit but may not
- (a) interview the health professional unless he consents; or
 - (b) take account of any document or other material which the health professional has not had the opportunity to comment upon
- 2.13 We also make it a requirement of HPC Case Managers in preparing their reports for Committees to confirm that the registrant has been given an opportunity to comment on the material before the Committee. The report includes the following statement: 'In making this report I confirm that, in accordance with Rule 4(3) (b) of the Health Professions Council (Investigating Committee) Procedure Rules 2003, [name of registrant] has been given the opportunity to comment upon the documents and other materials referred to above, other than those which were provided by him/her and/or his/her representative'
- 2.14 If the Committee does not feel it has enough information to make a "case to answer" decision, it may also ask for further information and again the same process that is outlined above is gone through.
- 2.15 When a decision is reached in a case, complainants and registrants are provided with the full reasons for that decision and the guidance the committee used when coming to their conclusions.

3.0 CHRE Recommendations

3.1 CHRE in putting together their report considered the responses from the professional regulators and a range of stakeholders and have recommended that:

- In cases where the regulator has requested a response from the registrant this ought to be shared with the complainant while deciding if a case should be referred to a fitness to practise committee
- When a registrant includes comments of a personal nature not relevant to the case, details that reveal the identity of a whistleblower, or reference to sensitive personal information about the registrant (e.g. their health or finances), this should not be shared
- Regulators ought to provide clear guidance to registrants on what is expected of them, and what should be included in their response, when a complaint is made against them
- Regulators ought to provide clear guidance to complainants on the purpose and potential outcomes of the fitness to practise process, and details of the independent advocacy services available to them.

3.2 Before looking at each of the recommendations in turn, there are a number of particular points within CHRE's report which perhaps warrant further comment. These are outlined in order to assist the Committee in its considerations and any subsequent recommendations it makes to the Council on the course of action that it should consider taking in this area.

3.3 Henshall v General Medical Council [2005] EWCA Civ 1520

3.3.1 CHRE in their report provide particular comments on the case of Henshall v GMC and state that

'The case of Henshall v General Medical Council was a Court of Appeal decision where the registrant had refused to consent to disclosure of his written response. The registrant believed that his response could be used for other, improper purposes. The judgement concluded that panels should generally not consider evidence where fairness dictates that complainants should have had the opportunity to respond but have not been provided with that opportunity.'

3.3.2 The HPC's interpretation is that in Henshall v General Medical Council, the registrant concerned had provided responses to the GMC on condition that they remained confidential and both the Screener and Professional Conduct Committee (PCC) complied with that requirement without conducting any objective assessment of whether or not it was appropriate to do so.

3.3.3 The Court of Appeal criticised that decision, on the basis that the registrant had no right to withhold consent to disclosure to the complainant - whether on the ground of confidentiality or otherwise – as this would effectively remove the PCC's discretion on whether or not to make disclosure in the interest of fairness to both parties.

3.3.4 The court made it clear that the decision on disclosure was one which should be addressed on a case by case basis; to consider in each case what the registrant had put in; to decide whether in fairness it was something the complainant should be able to respond to; and, if it was, to tell the registrant that unless he or she agreed to the disclosure of the material it would be ignored by PCC.

3.4 Data Protection and Freedom of Information

3.4.1 The report states at paragraph 3.8 and again refers to it at paragraph 5.5 that 'another avenue for complainants would be to make a request under the Data Protection Act (1998) and that *'The Act enables individuals to request any information that relates to them which is held by an organisation to which the Act applies.'* In a footnote to this comment, the report states that *'An example is case reference FS50169734 (Nursing and Midwifery Council), where statements provided by named nurses as part of the NMC's fitness to practise investigation were not disclosed to the complainant. The complaint was not upheld.'*

3.4.2 The reference to the Data Protection Act and the comment regarding the NMC case is somewhat confusing given that the complaint against the NMC in this case was not upheld. The reference here to the fact that complainants could make a request under the Data Protection Act 1998 for any information being held about them by an organisation to which the Act applies contains a number of technical inaccuracies. The Data Protection Act 1998 provided a right for an individual to obtain a copy of the personal data an organisation processes about them. This is not the same as personal information referred to in this paragraph. Furthermore, the Act does not give a right to access the documents in which personal data is contained

3.5 Recommendation 1: In cases where the regulator has requested a response from the registrant this ought to be shared with the complainant while deciding if a case should be referred to a fitness to practise committee

3.5.1 CHRE suggests here that where a regulator has requested a response from a registrant it should share that response (if received) to the complainant. CHRE argue that taking such an approach has a number of advantages including:

- Enhancing confidence in regulation;
- Achieving early resolution of complaints; and
- Improving decisions and helping to reduce the risk of challenge to a decision not to refer a complaint to a full fitness to practise hearing.

- 3.5.2 It is perhaps necessary to highlight a number of points with regards to this recommendation and the approach the Committee and Council may wish to take in this area.
- 3.5.3 In all cases which have met the Standard of Acceptance for Allegations and have been passed to an Investigating Committee for consideration as to whether there is a case to answer, a registrant is always given the opportunity to respond accordingly.
- 3.5.4 Sharing a registrant's response with a complainant may be more appropriate for certain categories of complainant (i.e. members of the public, employers), than others. For example, HPC receive complaints from a wide range of sources including the police and through the use of Article 22(6) powers.
- 3.5.5 In relation to the particular advantages that the CHRE highlight in their report the Executive make the following comments:

3.6 Enhancing confidence in regulation and achieving early resolution

- 3.6.1 CHRE have suggested that *'sharing the registrant's response accords with the general principle of regulators conducting their functions openly and transparently.'* This principle clearly accords with the HPC values. It is HPC practice to provide the complainant (and registrant) with a copy of the decision made, the reasons for it and the guidance they considered in reaching that decision.
- 3.6.2 It is also possible to provide a counter argument to the suggestion that an early resolution to the complaint can be achieved by providing the complainant with a copy of the registrant's response to the allegation.
- 3.6.3 This is principally because once an allegation meets the Standard of acceptance for allegations and all relevant information has been gathered in order to allow the registrant to respond to the allegation, there is no provision to withdraw that allegation before an Investigating Committee determines that there is a case to answer.
- 3.6.4 The response that the registrant makes to the allegation is in relation to whether their fitness to practise is impaired as well whether the ground of the allegation (i.e. lack of competence, misconduct) and whether the facts as alleged occurred. Our research in this area (which is provided to the Committee as part of its February 2010 papers) indicates that there is lack of understanding about the meaning of fitness to practise and the purpose of a fitness to practise process compared to a complaints resolution process.
- 3.6.5 The fitness to practise process is about determining whether a registrant's fitness to practise is impaired, and then taking appropriate action (if any action is necessary) in order to protect members of the public. The process is not one designed to punish the registrant for mistakes they have made but to look at current and likely future fitness to practise,

having regard to past events. Undertaking such an assessment often requires the possession of information from the registrant and the Executive would be concerned that such information would be less forthcoming if it were to be shared beyond the HPC.

3.6.6 Our current policy provides that where the registrant disputes an evidential or factual point, further clarification on that point will be pursued. We do not ask for more general comments to aid us to determine whether the allegation amounts to one of the grounds set out in Article 22(1) (a) or whether the complainant feels that fitness to practise is impaired. This is a decision for a panel of the Investigating Committee to make in determining whether there is a realistic prospect. Where providing the response may assist is in avoiding referral to a final hearing panel where factual disputes have not been addressed. Panels should refer cases (as long as they have considered the entire test) where there are evidential disputes. However, our approach is to seek to resolve areas where further information or factual information is required before the Investigating Committee meets.

3.6.7 The purpose of the fitness to practise process is not to ensure resolution to complaint in the sense of how complaints resolution processes are usually understood but to make a decision as to whether a registrant is fit to practise and poses no risk to the public, the public interest or to themselves if they were allowed to remain unrestricted practice. The complainant expectation research indicates that this is an area where HPC should provide further clarity and the Executive has proposed to take action to address this recommendation in 2010-2011.

3.7 Improving decision making and seeking comments reducing the risk of challenge

3.7.1 The paper on length of time provides further detail for the Committee on what action is taken in relation to a case and the Executive would be concerned that providing the complainant with a general right to reply could delay the process of dealing with the case. Delays in the conclusion of cases are not in the interests of public protection, nor in the interests of the complainant or the registrant

3.7.2 If the complainant did respond to the registrant's response, the registrant should, arguably be given opportunity to respond to that response. It is difficult to assess how a number of exchanges could be applied and how the potentially number of exchanges between registrant and complainant should or could be time limited.. Such a process could add considerable delay when considering the extra 28 day period that would need to be provided to the registrant to respond to the new material.

3.8 Recommendation 2 - When a registrant includes comments of a personal nature not relevant to the case, details that reveal the identity of a whistleblower, or reference to sensitive personal information about the registrant (e.g. their health or finances), this should not be shared

3.8.1 This recommendation could create confusion for complainants who would normally expect the response to be shared with them. The Executive considers that the current approach taken in this area is fair and proportionate and the current process of asking for factual clarification accords with this general principal and reduces any confusion about what complainants should expect to receive. It is perhaps also necessary to consider the recommendation in the light of the work the Executive proposes to take forward in ensuring complainants understand the purpose of a fitness to practise process.

3.9 Recommendations 3 and 4

- **Regulators ought to provide clear guidance to registrants on what is expected of them, and what should be included in their response, when a complaint is made against them**
- **Regulators ought to provide clear guidance to complainants on the purpose and potential outcomes of the fitness to practise process, and details of the independent advocacy services available to them**

3.9.1 The Executive agree with both of these recommendations and propose to take this forward as part of the work plan for 2010-2011.

Handling complaints

Sharing the registrant's response with the complainant

December 2009

About CHRE

The Council for Healthcare Regulatory Excellence promotes the health and well-being of patients and the public in the regulation of health professionals. We scrutinise and oversee the work of the nine regulatory bodies¹ that set standards for training and conduct of health professionals.

We share good practice and knowledge with the regulatory bodies, conduct research and introduce new ideas about regulation to the sector. We monitor policy in the UK and Europe and advise the four UK government health departments on issues relating to the regulation of health professionals. We are an independent body accountable to the UK Parliament.

Our aims

CHRE aims to promote the health, safety and well-being of patients and other members of the public and to be a strong, independent voice for patients in the regulation of health professionals throughout the UK.

Our values and principles

Our values and principles act as a framework for our decision making. They are at the heart of who we are and how we would like to be seen by our stakeholders.

Our values are:

- Patient and public centred
- Independent
- Fair
- Transparent
- Proportionate
- Outcome focused

Our principles are:

- Proportionality
- Accountability
- Consistency
- Targeting
- Transparency
- Agility

Right-touch regulation

Right-touch regulation is based on a careful assessment of risk, which is targeted and proportionate, which provides a framework in which professionalism can flourish and organisational excellence can be achieved. Excellence is the consistent performance of good practice combined with continuous improvement.

¹ General Chiropractic Council (GCC), General Dental Council (GDC), General Medical Council (GMC), General Optical Council (GOC), General Osteopathic Council (GOsC), Health Professions Council (HPC), Nursing and Midwifery Council (NMC), Pharmaceutical Society of Northern Ireland (PSNI), Royal Pharmaceutical Society of Great Britain (RPSGB)

Contents

1. Executive Summary	1
2. Introduction	3
3. Background and context	5
The regulators' legislation and rules	5
Case law	5
Wider legislation	6
Guiding principles	6
Examples from other sectors	7
What has our own work shown?	7
4. Views and analysis	9
What information should not be shared?	9
Should there be a limit to the number of exchanges?	9
What are the benefits of sharing the response?	9
Enhancing confidence in regulation.....	10
Achieving early resolution.....	10
Improving decision making	10
What are the perceived risks of sharing the response?	11
Level of candour from registrants	11
Delays to process.....	11
Managing expectations	12
Contaminating evidence	12
Improper use of information.....	13
5. Conclusions and recommendations	14
Appendix 1: Applicable legislation and rules	16
Appendix 2: Acknowledgements	17

1. Executive Summary

- 1.1 One of the regulators' core functions is to investigate concerns about health professionals when their fitness to practise has been called into question. The regulators each have their own fitness to practise processes for dealing with such concerns, but they follow the same overall approach. Once a complaint has been screened, an investigation will take place followed by a decision as to whether the allegation should be heard by a fitness to practise panel. It is during this stage that a regulator would seek a response from the registrant.
- 1.2 Our 2008/09 Performance Review identified some variation between the regulators in whether they shared the registrant's response with the complainant. Some shared it routinely, whilst others only did so in matters of dispute or not at all. We felt this was an area where it would be beneficial to complainants to harmonise the process.
- 1.3 There are several benefits to sharing the registrant's response. Seeking comments from the complainant can bring further information to light. It can help to establish an accurate record of events before an investigating committee decides whether a case should be referred to a full hearing. Sharing the response may lead to the early resolution of a case, by providing clarification to the complainant.
- 1.4 We believe that it is the professional responsibility of a registrant to provide an honest, objective account of events. We have seen no evidence that registrants will be less candid in their response to a complaint, knowing it will be shared with the complainant. We accept that in some cases, the time it takes to resolve a complaint may be extended. However the views we heard suggest that people who raise concerns welcome this level of involvement.
- 1.5 We note the regulators that currently share the registrant's response have successfully managed the risks identified above. Sharing the response accords with the general principle of regulators conducting their processes openly.
- 1.6 We believe that there should be a presumption that the response will be shared in full with the complainant, and registrants ought to be informed of this at the outset. This will help to mitigate the risk of registrants providing inappropriate information in their response. For the most serious cases that will almost certainly progress to a final hearing, or where there is no disagreement about the events, waiting for a response from the complainant should not be allowed to delay the process.
- 1.7 We have made the recommendations below from the perspective of fairness and transparency, rather than of statutory duty. The recommendations are intended to complement the good work that is already happening in this area, and we believe they will not require any legislative change:
 - In cases where the regulator has requested a response from the registrant, this ought to be shared with the complainant while deciding if a case should be referred to a fitness to practise committee
 - When a registrant includes comments of a personal nature not relevant to the case, details that reveal the identity of a whistleblower, or reference to sensitive personal information about the registrant (e.g. their health or finances), this should not be shared

- Regulators ought to provide clear guidance to registrants on what is expected of them, and what should be included in their response, when a complaint is made against them
- Regulators ought to provide clear guidance to complainants on the purpose and potential outcomes of the fitness to practise process, and details of the independent advocacy services available to them.

2. Introduction

- 2.1 This report is in response to a finding in the 2008/09 CHRE Performance Review, which highlighted variations between the regulators in a specific part of their fitness to practise processes. These processes are a key statutory function of the regulators, administered when a professional's fitness to practise has been called into question. The Performance Review stated:

Another area in which we consider it might benefit public protection to harmonise the regulators' processes is the disclosure of a registrant's response to a complainant prior to the decision on whether there is a case to answer. Currently there is some variation in how the regulators approach this matter.²

- 2.2 Table 1 below provides more detail on each regulator's current approach to sharing the registrant's response to a complainant while deciding if a case should be referred to a fitness to practise committee.

Table 1:

Regulator	Approach ³
GCC	Routinely discloses the registrant's response to the complainant.
GDC	Routinely discloses the registrant's response to the complainant.
GMC	Does not routinely disclose the registrant's response to the complainant. Will only disclose the response if the registrant's response is significantly different to that of the complainant's.
GOC	Routinely discloses the registrant's response to the complainant.
GOsC	No longer discloses the registrant's response to the complainant following a recommendation made in an external audit of its fitness to practise process. This decision is currently under review by the GOsC.
HPC	Does not routinely disclose the registrant's response to the complainant. Will disclose a summary of disputed parts of the evidence to the complainant.
NMC	Does not routinely disclose the registrant's response to the complainant. Will only do so if there is a significant discrepancy between the two statements.
PSNI	Routinely discloses the registrant's response to the complainant.
RPSGB	Disclosure of the registrant's response to the complainant is dealt with on a case by case basis. If the case is handled through the non-referral process ⁴ a registrant's response is routinely shared with the complainant.

2 Council for Healthcare Regulatory Excellence (2009). *Performance review of health professional regulatory bodies 2008/09*. London: The Stationery Office.

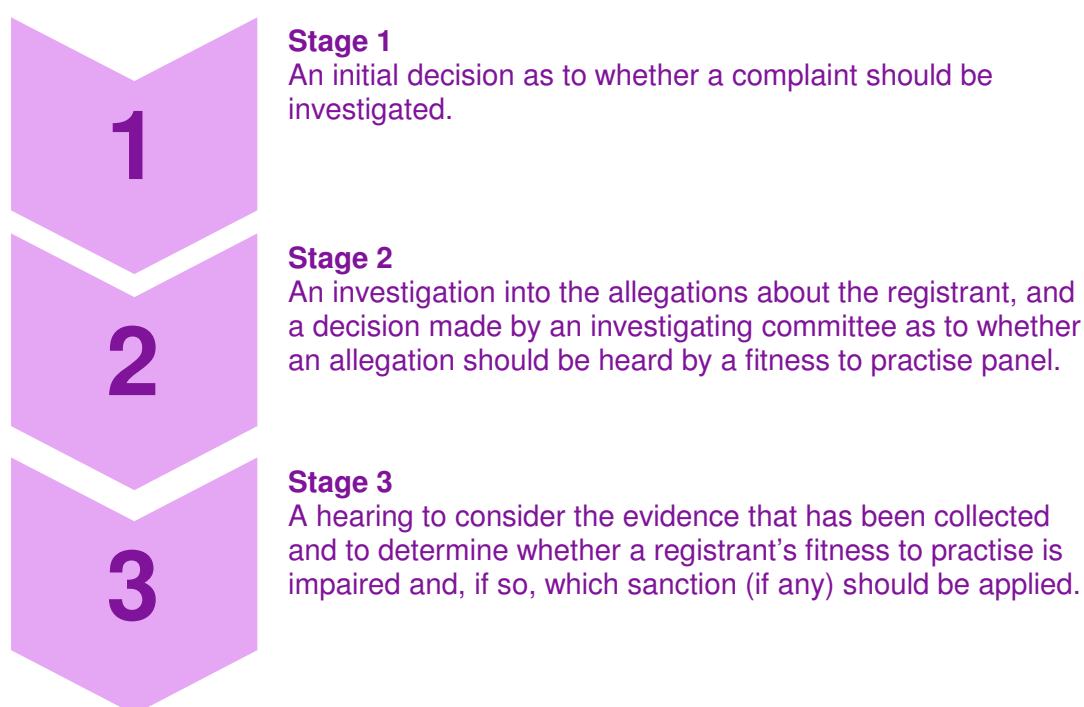
3 Approach correct as of November 2009.

4 The RPSGB's 'non-referral process' relates to allegations that it considers would be more effectively and proportionately dealt with outside of a Fitness to Practise Committee, subject to their published threshold criteria. Information can be found at:

<http://www.rpsgb.org/protectingthepublic/investigatingcommittee/#case> [accessed 3 November 2009]

2.3 Concerns about professionals can be raised by patients, members of the public, employers, colleagues and others. The regulators each have their own fitness to practise procedures for dealing with such concerns, the overall components of which are outlined below. This report focuses on sharing the response at Stage 2 of the process:⁵

Flowchart 1:



2.4 We have undertaken research and sought the views of the regulators, stakeholders and the public. This report is in three main sections:

- Background and context: establishing the legal and ethical framework within which regulators are operating, and identifying good practice examples and principles
- Views and analysis: understanding the benefits and risks of sharing the registrant's response
- Conclusions and recommendations

5 Council for Healthcare Regulatory Excellence (2008). *Harmonising sanctions, CHRE's position*. Available at <http://www.chre.org.uk/satellite/124/> [accessed 3 November 2009]

3. Background and context

- 3.1 There are a number of factors that guide and influence this aspect of the regulators' fitness to practise processes. These are the regulators' legislation and rules, case law, wider legislation, guiding principles and examples from other sectors. This section also summarises what our own work has shown in this area.

The regulators' legislation and rules

- 3.2 The regulators carry out their functions according to their own rules and legislation. Some of these legal instructions make direct reference to the regulators' responsibilities to sharing the registrant's response, while others do not refer to it. The two Orders that govern the NMC⁶ and the HPC⁷ state that they will 'where it sees fit, notify the person making the allegation of the representations'. For the GDC, GOC, GMC and RPSGB, reference is made only to making registrants aware that their written responses *may* be shared with the complainant.
- 3.3 An example is provided in the RPSGB Order:
Inform the registrant concerned that any representations, or extracts of any representations, received from him may be shown to the person making the allegation, if any, for comment⁸
- 3.4 Where reference is made to sharing the written response, the emphasis is on doing so if and when it is deemed appropriate by the investigating committee. For the GCC, GOsC and PSNI, there is no reference to sharing the registrant's response in their rules or legislation. For details of each regulator's applicable legislation, see Appendix 1.

Case law

- 3.5 The case of *Henshall v General Medical Council⁹* was a Court of Appeal decision where the registrant had refused to consent to disclosure of his written response. The registrant believed that his response could be used for other, improper purposes. The judgment concluded that panels should generally not consider evidence where fairness dictates that complainants should have had the opportunity to respond but have not been provided with that opportunity.¹⁰
- 3.6 It is anticipated that the *Henshall* judgment will be followed in deciding this question in future cases, as the decision was based less on the particulars of a fitness to practise process, and more on the general principles of procedural fairness derived from public law.¹¹

6 Section 26(2) of The Nursing and Midwifery Order 2001

7 Section 26(2) of The Health Professions Order 2001

8 Section 10(2) of The Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc Rules) Order of Council 2007

9 *Henshall v General Medical Council* [2005] EWCA Civ 1520

10 Legal advice provided to CHRE. There have been no cases since *Henshall* discussing this question, whether involving the General Medical Council or any other regulator

11 Legal advice provided to CHRE.

Wider legislation

- 3.7 In some cases where a regulator has refused to disclose the registrant's response, the complainant has sought to request the response through information access laws. We note that there have been a number of recent Information Commissioner decisions that have taken the view that this information should not be disclosed to the complainant under the Freedom of Information Act (2001). These decisions were taken on the basis that releasing the written response would involve releasing personal data.¹² However, releasing information to the general public is different from sharing the response only with the complainant as part of fitness to practise proceedings.
- 3.8 Another avenue for complainants would be to make a request under the Data Protection Act (1998). The Act enables individuals to request any information that relates to them which is held by an organisation to which the Act applies.¹³ Personal data relating to the complainant could then be shared, with the exception of information relating to the registrant or to any third parties.

Guiding principles

- 3.9 The regulators have all identified certain principles by which they will undertake their work. These principles often make reference to openness and transparency. The GDC, for instance, states that it will be 'open and accessible' in its work.¹⁴ The NMC, in its values, state that '[we] take responsibility for our actions and are open and transparent'.¹⁵
- 3.10 The Better Regulation Task Force identified 'transparency' as one of its principles of good regulation.¹⁶ It stated that 'regulators should be open, and regulations simple and user friendly'. Principles of openness are demonstrated in a number of examples within healthcare:
- The Parliamentary and Health Service Ombudsman, as its third principle of good complaints handling, highlights 'being open and accountable'.¹⁷
 - The Healthcare Commission (now the Care Quality Commission) outlined the importance of openness when NHS Trusts handle patient complaints, stating 'it is vital that trusts communicate openly with patients making a complaint and provide as much information as they can, in order to successfully resolve a complaint at local level'.¹⁸

12 An example is case reference FS50169734 (Nursing and Midwifery Council), where statements provided by named nurses as part of the NMC's fitness to practise investigation were not disclosed to the complainant. The complaint was not upheld.

13 "Relates to" can have a number of meanings. The primary meaning would be information "about that person" i.e. the complainant. But it may also be "about" the registrant's dealings with the complainant.

14 General Dental Council website. Available at <http://www.gdc-uk.org/About+us/Our+mission/> [accessed 3 November 2009].

15 Nursing and Midwifery Council website. Available at: <http://www.nmc-uk.org/aArticle.aspx?ArticleID=3586> [accessed 3 November 2009]

16 Better Regulation Task Force (2003). *Principles of Good Regulation Leaflet*. London: Cabinet Office

17 Parliamentary and Health Service Ombudsman (2009). *Principles of Good Complaint Handling*. London: PHSO

18 Healthcare Commission (2009). *Spotlight on complaints: A report on second-stage complaints about the NHS in England*. London: Healthcare Commission

- As part of the Bristol Inquiry into children’s heart surgery, witness statements were posted on the Inquiry’s website after those criticised were given the opportunity to respond. The responses were published simultaneously.¹⁹

Examples from other sectors

- 3.11 As part of this project, we have contacted regulators in other professions, to understand how they manage this part of the process for dealing with concerns raised about professionals. Two examples are provided below.

The **Bar Standards Board** is responsible for regulating barristers in England and Wales. When investigating complaints, they ‘copy the barrister’s response to the complainant for comment in order to facilitate a transparent process’. The barrister is informed that their response will be shared. The Board usually returns any information sent in confidence by either the barrister or the complainant ‘as we take the approach that it would not be fair to take decisions on complaints based on evidence that both sides have not seen’.²⁰

However, the Board recognises that there may be some circumstances where it is appropriate for barristers to provide confidential information separately, normally relating to their personal circumstances, such as their health or finances. The Board will decide whether the request to keep such information confidential is reasonable. If it is, they will not disclose the information to the complainant but will still take it into account when assessing the complaint. The Board told us that such requests for confidentiality are ‘relatively rare’.

The **Scottish Social Services Council** (SSSC) is responsible for registering professionals who work in social services in Scotland. As part of their process, a conduct case officer will usually write to the complainant, setting out specific information provided by a registrant, and seek comment or clarification on it. The SSSC has adopted this approach as it ‘helps to keep the focus on the matters in question and also avoids disclosure of any information provided by the registrant about third parties’.²¹

What has our own work shown?

- 3.12 One of our functions is to audit the initial stages of the regulators’ fitness to practise procedures. The purpose of the audit is to assess whether patient safety interests have been properly considered in fitness to practise cases. This is done by reviewing a sample of those cases that have not been referred to a full hearing.²² We are currently in the process of undertaking the first audit under this new process, and will report on the specific findings at a later date.

19 The Bristol Inquiry examined the management of the care of children receiving complex cardiac surgical services at the Bristol Royal Infirmary between 1984 and 1995 (taken from the final report)

20 Response received from the Bar Standards Board and their leaflet *Guidance for complainants and barristers on the Bar Standards Board’s complaints process*.

21 Response received from the Scottish Social Services Council.

22 Council for Healthcare Regulatory Excellence (2009). *Auditing the initial stages of the healthcare regulatory bodies’ fitness to practise procedures: Process and guidelines*.

However, initial findings have shown that sharing the response has, on occasion:

- Clarified certain issues, which provided better quality evidence to be considered by the investigating committee
- Resulted in further allegations being made in the complainant's response, which required additional comment from the registrant
- Led to complaints being resolved early as the complainant felt satisfied with the explanation and apology provided
- Led to a complainant seeing comments of a personal nature, not relevant to the complaint, which caused distress.

3.13 We are aware from complaints that we receive from members of the public about the regulators that not disclosing the response represents a matter of concern for complainants. This has been noted in some complaints about the NMC and the HPC.

4. Views and analysis

4.1 We have considered the views of the regulatory bodies, members of our public stakeholder network and other interested parties in this section. We invited written comments from those who attended our four public meetings held across the UK. Other organisations that have experience in this matter have provided their views. For a list of organisations we contacted as part of this work, see Appendix 2.

4.2 The regulators were each asked the following questions:

- When might it be unacceptable to share the response, and do you think there should be a limit to the number of exchanges?
- What do you perceive to be the risks and benefits of sharing registrant responses to complaints with complainants, and what is your experience of sharing such information?
- What information do you communicate to registrants when a complaint is received about them?

What information should not be shared?

4.3 There was general agreement that the following information should not be shared with the complainant:

- Any comments of a personal nature not relevant to the facts of the case
- Details that reveal the identity of a 'whistleblower' – someone who raises a concern about a particular practice at their work²³
- When there is reference to the physical or mental health of the registrant, or other sensitive personal information that should reasonably be kept confidential.

Should there be a limit to the number of exchanges?

4.4 We asked the regulators for their views on whether there should be a limit to the number of exchanges between the registrant and complainant. For those that currently share the response, we were told that comments are generally limited to one or two exchanges. The RPSGB commented that the number of exchanges should be appropriate to the investigation and therefore there should not be a numerical limit. The HPC were unsure as to how any limit to the number of exchanges could be applied.

What are the benefits of sharing the response?

4.5 Regulators and stakeholders have identified a number of potential benefits to sharing the registrant's response with the complainant, with respect to the interests of complainants, registrants and the general public.

²³ Defined by Public Concern at Work. Available at http://www.pcaaw.co.uk/faq/FAQ_individuals.htm#question1 [accessed 3 November 2009]

Enhancing confidence in regulation

- 4.6 The importance of enhancing confidence in professional regulation was underlined in research commissioned by the Joint UK Health and Social Care Regulators PPI Group in 2006. The report highlighted the public's lack of trust in some of the regulators' processes, that they 'operate behind closed doors' and 'are more likely to look after their own than the public'.²⁴ Sharing the registrant's response accords with the general principle of regulators conducting their functions openly and transparently.
- 4.7 The experience of some of the regulators has shown that both parties welcome this level of transparency and the opportunity to respond. This principle was supported by the Medical Protection Society (MPS) in their response to us, although it was recognised that there will be occasions when this is not appropriate. The MPS suggested that these principles could be further encouraged by sharing with registrants the letters sent to complainants and employers.

Achieving early resolution

- 4.8 The GCC cited several occasions where the registrant's response included information not previously known to the complainant, leading to early resolution of the complaint (the Investigating Committee having agreed there were no public interest issues to be pursued).²⁵ Sharing the registrant's response can facilitate an exchange of information between the registrant and complainant, which is particularly valuable when the source of the complaint is a misunderstanding or a breakdown of communication. We note from our understanding of the NHS and independent healthcare complaints processes that complaints are often resolved by providing an apology and acceptance of events as a first course of action.

Improving decision making

- 4.9 Asking for the complainant's comments on the registrant's response can bring further information to light, providing the investigating committee with the fullest picture upon which to base its decision on whether the case should be referred to a full hearing. It can also help to maintain the regulator's objectivity if it is not required to summarise or paraphrase the registrant's response. This process of corroboration can ensure that the facts relating to events have been agreed by both parties by the time a decision on how the case should proceed is taken. This view was supported by Action against Medical Accidents (AvMA) in their response to us.
- 4.10 Sharing the registrant's response provides an opportunity for the complainant to comment on any matters of substance *before* any decision is reached on the case. This is particularly relevant if the investigating committee relies on something raised in the registrant's response. Seeking comments from the complainant at this stage may help to reduce the risk of challenge of a decision not to refer a complaint to a full fitness to practise hearing.

24 Opinion Leader Research, 2006. *Joint UK Health and Social Care Regulators PPI Group: Making registers more usable*. London: OLR

25 It should remain open to the regulator to continue with a particular investigation if it is in the public interest, even where the complainant wishes to withdraw their complaint.

What are the perceived risks of sharing the response?

- 4.11 A number of possible risks of sharing the registrant's response have been identified by regulators and stakeholders. These risks are described below, together with our response.

Level of candour from registrants

- 4.12 Some regulators suggested that registrants may not be as full and frank in their written responses if they know that they will be routinely shared with the complainant. They felt that this could have a detrimental impact on how the case might progress through subsequent stages of the fitness to practise process.
- 4.13 Health professionals have a responsibility to provide a full account of the events subject to the complaint. Some regulators, in their codes of conduct, include reference to a duty of candour for registrants when a complaint is received about them. *Good Medical Practice*,²⁶ for instance, states:

You must co-operate fully with any formal inquiry into the treatment of a patient and with any complaints procedure that applies to your work. You must disclose to anyone entitled to ask for it any information relevant to an investigation into your own or a colleague's conduct, performance or health.

- 4.14 We have seen no evidence to support the assertion that registrants, knowing their statement will be disclosed, would be any less candid in their written response. This issue was considered at an Information Tribunal hearing in March 2008. The tribunal resulted from a HPC appeal against an information notice from the Information Commissioner. This notice requested that the HPC disclose to the Information Commissioner information which they had received from a registrant in relation to a complaint:

It was accepted by the Tribunal that disclosure to the Information Commissioner might cause a degree of future reticence on the part of registrants in providing information. On testing the evidence, the Tribunal concluded, however, that the damage to the Process anticipated by the HPC would not be as significant as feared. Registrants had a self-interest in disclosing a broad range of information at the early stage – this was, after all, the best way to keep the matter out of the public domain (i.e. by virtue of a no case to answer finding).²⁷

Delays to process

- 4.15 Providing time for a complainant to respond to the registrant's response may extend the time it takes for some cases to progress. It was expressed to us that this period of comment seeking could lead to the complainant changing the nature of their complaint, or lead to a 'tit for tat' exchange. In the case of the HPC, approximately half of its cases go to a full hearing (i.e. from Stage 2 to Stage 3), where the statements from each party will be heard anyway. The HPC questioned whether it was a good use of resources to exchange information in the initial stages for those cases that progress to a full hearing. The GMC told us there was no

26 General Medical Council (2006). *Good Medical Practice*. London: GMC

27 Information Tribunal Appeal Number EA/2007/0116 available at: <http://www.informationtribunal.gov.uk/Documents/decisions/HealthProfessionsCouncil.pdf> [accessed 3 November 2009]

added value in seeking comments on the registrant's response where there are no significant differences between the parties.

- 4.16 Whilst the exchange of correspondence may lengthen the initial process in some cases, in others it may lead to early resolution of the case. Evidence provided by some of the regulators is testament to this. Further to this, views received from members of our public stakeholder network make clear that the public would welcome this level of involvement in the initial stages. The GDC told us that they advise complainants of the free independent advocacy services which are available to them when drafting their response.
- 4.17 AvMA informed us that it is a common cause for concern that responses are not shared with complainants. This can then make any decision to close a case at the investigating committee a disempowering and closed experience, with the public perception that the process is unfair and slanted towards the professional.

Managing expectations

- 4.18 A view expressed to us was that an exchange of correspondence may lead to unrealistic expectations about what the complainant will receive at the end of the process. It should be remembered that the primary purpose of the fitness to practise function is to ensure that health professionals are safe and competent to treat patients. It is not to find in favour of one party or another, nor is it to punish a health professional. The purpose of commenting on the registrant's statement is primarily to correct matters of fact.
- 4.19 It is important at the beginning of the process that people who raise concerns are made aware of the role and potential outcomes of the fitness to practise process. The GOC has recently revised its information leaflet *How to complain about an optician: Information for you*,²⁸ which clearly identifies each stage of the process, and what the process will *not* be able to provide. This includes, as an example, making a registrant apologise to a patient.

Contaminating evidence

- 4.20 The GOsC told us that an external audit of its fitness to practise process identified a small risk associated with sharing the registrant's response with the complainant. The advice from the external solicitors was that their interpretation of the complainant's role in the proceedings was that of a witness. There would, therefore, be a risk that their evidence may be contaminated by having notice of the registrant's case. This formed the basis of the GOsC's decision to stop sharing the registrant's response with the complainant. The GOsC are currently reviewing this decision.
- 4.21 The advice received by the GOsC is not consistent with the outcome of *Henshall* (see paragraph 2.5 above). The issue of contamination should be considered by the regulators on a case by case basis, and would not be an issue in every case. For instance, if the NHS complaints procedure has already been followed, then a complainant is already likely to have seen the registrant's response to the complaint. Furthermore, there is a danger that this argument puts the interests of

28 General Optical Council (2009). *How to complain about an optician: Information for you*. London: GOC.

registrants above those of complainants, when neither approach is conducive to fair decision-making.²⁹

- 4.22 Our view is that the role of the complainant is more akin to that of a party to the fitness to practise process, until a decision is made on whether to take the case to a final hearing. The status of ‘witness’ may be a more suitable description from this point forward. The role of complainant would then, in effect, be assumed by the regulator with the aim of protecting patients and maintaining confidence in the profession.

Improper use of information

- 4.23 The effective conduct of the regulators’ fitness to practise processes relies on all parties handling information sensitively. This could be achieved by encouraging good practice from those involved in the process. First, the registrant’s response should not be written in a way that heightens emotions or personalises the issues. Secondly, the regulator should not disclose any information identified in Section 4.3 which would compromise the investigation or be prejudicial to the registrant. Thirdly, there is a responsibility on the complainant not to use any information provided in the registrant’s response improperly. This can be encouraged by making clear that complainants are provided with the registrant’s response in confidence.

- 4.24 As identified in Section 4.13, it is the responsibility of a registrant to provide a written account in a professional manner. This concurs with the *Common Values Statement*, agreed by the chief executives of the regulators, which states that professionals must:

*Be open with patients and clients and show respect for their dignity, individuality and privacy...Justify public trust and confidence by being honest and trustworthy.*³⁰

- 4.25 The Bar Standards Board, in its *Guidance for complainants and barristers on the Bar Standards Board’s complaints process*, provides guidance on how complaints should be responded to, though it makes clear that it is not a prescribed format. The guidance states that it is helpful to include:

- A chronological summary of the main facts and principal issues related to the case and/or complaint
- A response on each aspect of the complaint
- Any supporting documents that are thought relevant to the complaint, such as opinions or copies of instructions.

²⁹ Legal advice received by CHRE.

³⁰ *Common Values Statement by the Chief Executives Group of the Health Care Regulators on Professional Values* (2004). Available on the CHRE website.

5. Conclusions and recommendations

- 5.1 This project arose from variations in practice between the regulators in whether they share the registrant's response with the complainant, during the initial stages of handling a complaint. The project has been undertaken from the principle of enhancing public confidence in professional regulation by promoting transparency in its processes. Our advice is in line with the values that underpin the work of CHRE and the regulators. The recommendations that follow are made from the perspective of fairness rather than of statutory duty, and aim to complement the good work already happening in this area. We believe the recommendations will not require any legislative change.
- 5.2 CHRE understands that the regulators' fitness to practise processes are not established as a complaints process. However there are certain principles common in complaints processes that the public would expect a fitness to practise process to follow. Health professionals, and the regulators that oversee them, have a duty to act openly and transparently in their dealings with patients and the public. It seems only right, therefore, that there should be an opportunity to exchange correspondence between the registrant and complainant, facilitated by the regulator, to establish an accurate record of events. These facts form the basis for decisions made by investigating committees. We agree with the *Henshall* judgment, that panels should not consider a registrant's statement which the complainant has not had the opportunity to comment on.
- 5.3 We have been told that sharing the registrant's response can enable the early resolution of some complaints where information not previously known is brought to light and there are no apparent public protection issues. We recognise that this may lengthen the timescale for resolution of some cases, where sharing prompts further correspondence. However the experience of some of the regulators and our own experience shows that the public would welcome this level of involvement. Any concerns about lack of candour from registrants in the knowledge that their response will be shared, are outweighed by the registrant's professional responsibilities. We note that the potential risks identified in Section 4 have been successfully managed by those regulators that currently share the registrant's response.
- 5.4 We believe that any complainant who is refused the right to see the registrant's response is entitled to request any personal information that applies to them under the Data Protection Act. This will not enable complainants to request information relating to the registrant or to any third party. We consider it appropriate that the registrant's response is not disclosed under the Freedom of Information Act as it would involve releasing personal information to the general public.
- 5.5 There should be a presumption that the registrant's response will be shared in full with the complainant, and registrants ought to be informed of this at the outset. We believe that this will help to mitigate the risk of registrants providing inappropriate information in their response. For the most serious cases that will almost certainly progress to a final hearing, or where there is no disagreement about the events, waiting for a response from the complainant should not be allowed to delay the process. Otherwise, we recommend that there should be one opportunity for complainants to comment on matters of fact in the registrant's response in order to

improve decision making by the investigating committee (information exempt from this is listed in Section 4.3).

Recommendation: In cases where the regulator has requested a response from the registrant, this ought to be shared with the complainant while deciding if a case should be referred to a fitness to practise committee.

- 5.6 Requests from regulators for a response should remind registrants of their professional responsibilities, and that any written response should be comprehensive and a statement of fact. A simple chronology of events to complement the statement can help to provide the most accurate record of events. Regulators may wish to follow the example of the Bar Standards Board, asking registrants to send any information they wish to keep confidential in a separate submission, together with an explanation as to why they believe it should remain confidential. The regulator can then decide, in cases where it is not to be shared with the complainant, whether it should be considered at all.

Recommendation: Regulators ought to provide clear guidance to registrants on what is expected of them, and what should be included in their response, when a complaint is made against them.

- 5.7 It is important that complainants are fully aware of what outcomes the fitness to practise process can and cannot provide. There is a public perception that the fitness to practise process is currently slanted towards the professional, and concerns were raised to us that complainants do not have access to the same level of support that a registrant does. We believe that complainants play an active role in raising concerns about health professionals, rather than simply being a witness to events.

Recommendation: Regulators ought to provide clear guidance to complainants on the purpose and potential outcomes of the fitness to practise process, and details of the independent advocacy services available to them.

Appendix 1: Applicable legislation and rules

Regulator	Legislation or rules
GCC	Not specifically mentioned in the legislation.
GDC	“(d) where the allegation has been made by a person, inform the respondent that representations received from him may be disclosed to that person for comment” ³¹
GOC	“The notification under paragraph (1)(a) shall - (a) invite the registrant to respond to the allegation with written representations, together with copies of any other documents which the registrant wishes the Investigation Committee to consider; and inform him that representations received from him will be disclosed, where appropriate, to the person making the allegation (if any).” ³²
GOsC	Not specifically mentioned in the legislation.
GMC	“7... (1) As soon as is reasonably practicable after referral of an allegation for consideration under rule 8, the Registrar shall write to the practitioner-informing him that representations received from him will be disclosed, where appropriate, to the maker of the allegation (if any) for comment” ³³
HPC	“(2) Where an allegation is referred to the Investigating Committee, it shall - ... (b) where it sees fit, notify the person making the allegation of the representations mentioned in sub-paragraph (a) and invite him to deal within a specified period with any points raised by the Committee in respect of those representations” ³⁴
NMC	“(2) Where an allegation is referred to the Investigating Committee, it shall - ... (b) where it sees fit, notify the person making the allegation of the representations mentioned in sub-paragraph (a) and invite him to deal within a specified period with any points raised by the Committee in respect of those representations” ³⁵
PSNI	Not specifically mentioned in the legislation.
RPSGB	“(h) inform the registrant concerned that any representations, or extracts of any representations, received from him may be shown to the person making the allegation, if any, for comment” ³⁶

31 Section 4(2) of The General Dental Council (Fitness to Practise) Rules Order of Council 2006

32 Section 4(2) of The General Optical Council (Fitness to Practise) Rules 2005

33 Section 7(1) of The General Medical Council (Fitness to Practise) Rules Order of Council 2004

34 Section 26(2) of The Health Professions Order 2001

35 Section 26(2) of The Nursing and Midwifery Order 2001

36 Section 10(2) of The Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc Rules) Order of Council 2007

Appendix 2: Acknowledgements

We are grateful to the health professional regulators and the following organisations and stakeholders for their contributions to this work:

Action against Medical Accidents

Bar Standards Board

Board of Community Health Councils in Wales

Complementary and Natural Healthcare Council

General Teaching Council for England

Independent Healthcare Advisory Services

Individual members of our public stakeholder network

Medical Protection Society

Parliamentary and Health Service Ombudsman

Patient Concern

Scottish Social Services Council

Council for Healthcare Regulatory Excellence

11 Strand
London
WC2N 5HR

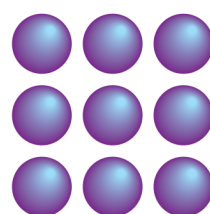
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