Consultation on changes to our Registration and Fitness to Practise Rules and Decisions Guidance

The Scottish Social Services Council (SSSC) is the regulator for the social service workforce in Scotland. Our work means the people of Scotland can count on social services being provided by a trusted, skilled and confident workforce. We protect the public by registering social service workers, setting standards for their practice, conduct, training and education and by supporting their professional development. Where people fall below the standards of practice and conduct we can investigate and take action.

This consultation is the next stage in our move to a fitness to practise model of regulation. We are now consulting on changes to our rules and the guidance that set out what decisions and sanctions our hearing panels can make.

About this consultation

We are consulting on the SSSC Registration and Fitness to Practise Rules (the rules) and the Decisions Guidance: for Fitness to Practise Panels and SSSC staff (guidance). These are the key documents that direct the way:

– we manage the Register
– our hearing process works
– we make the appropriate decision.

This consultation is in three sections.
Section 1 summarises the key areas of change in the three documents and asks specific questions.
Section 2 gives you the option to comment in general on the whole consultation. This is because we understand the size of this exercise and that you may wish to make some general points.
Section 3 allows you to comment on the detail of the Registration Rules, Fitness to Practise Rules and Decisions Guidance.

The three documents are available as PDF's for you to download and refer to before you start.

SSSC Registration (No. 2) Rules 2016: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2615

SSSC Fitness to Practise Rules 2016: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2616

Decisions Guidance: for Fitness to Practise Panels and SSSC staff: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2617

We have not detailed the sections in Schedule 1 of both sets of rules that will set out how we will move from one system to another. These will be developed nearer the time.

The consultation is long because this is a complex subject and we appreciate you taking the time to complete it and give us your views and feedback.

If you would like a hard copy version of this consultation please email: ftpstrategic@sssc.uk.com

If you have a query about this consultation please email: susan.peart@sssc.uk.com

The consultation closes at 5.00pm on 31 July 2016.

We expect to start using the new fitness to practise model on 31 October 2016.

How do we currently work?

We investigate when we receive information about a registered worker that is an allegation of misconduct. We collect and review the evidence and decide whether we should take any action. This may include placing warnings or conditions on a worker's registration and in some cases suspending or removing a worker from our Register. Our work currently focuses on misconduct. When we look at competence allegations we describe these as misconduct. We cannot currently take action in a situation where a worker's ability to work is affected by their health.

The SSSC Conduct Rules (2013), the SSSC Registration Rules (2016) and the SSSC Indicative Sanctions Guidance Manual (2012) govern these processes.

What changes are we proposing?

We will replace the current rules with the SSSC Fitness to Practise Rules 2016, the SSSC Registration (No. 2) Rules 2016 and the Decisions Guidance: for Fitness to Practise Panels and SSSC staff.

These documents will put in place the new fitness to practise model. This means we will take action when a worker's fitness to practise is impaired due to a concern about their conduct, competence or health. There are also changes which will simplify our processes and make them more effective. We hope that these changes will continue to increase public confidence in our work and improve the experience for those affected by it.

We will shortly be running a separate consultation on when hearings will take place. We will propose that a decision could be made at officer level without holding a formal hearing, unless the worker wants one. The purpose of this is to streamline our process. We will advertise this consultation in our eBulletin, SSSC News Online and by email to all registrants and employers.

What is not included?

We are only consulting on the rules and guidance. We have already consulted on whether or not we should move to a fitness to practise model. You can read more about this on our website: http://www.sssc.uk.com/about-the-sssc/multimedia-library/publications?task=document.viewdoc&id=2561

How to take part

You can respond in three ways:

- give your comments on the key changes in section 1
- comment in general on the whole consultation in section 2
- comment on the detail in section 3.

You can respond to as little or as much as you wish.

How will we use your response?

When the consultation ends we will consider whether there are any changes we need to make to improve the drafts, for example:

- add in anything we have overlooked
- make the rules clearer
- implement suggestions and improvements
- make changes to prevent any unintended consequences if a rule change will have an impact on a stakeholder we have not considered.

Section 1

This section summarises the main changes to the rules and the guidance. Please look at the draft documents to see the detailed changes:

SSSC Registration (No. 2) Rules 2016: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2615

SSSC Fitness to Practise Rules 2016: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2616

Decisions Guidance: for Fitness to Practise Panels and SSSC staff: http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2617

We have explained the changes and asked questions to get your views.

You must answer all of the questions in the ‘About you and your response’ section. You can then respond to as many, or as few of the questions that follow.

About you and your response

The Scottish Social Services Council is registered with the Information Commissioner and data supplied by you will be processed in accordance with the provisions of the Data Protection Act.

Freedom of Information

The SSSC abides by the Freedom of Information (Scotland) Act 2002 and must consider any request made under the Act for information relating to responses made to this consultation exercise.

Q1 Are you responding:

on behalf of an organisation

Please give the organisation's name: Thompsons Solicitors

Q2 Do you agree to your response being made available to the public (for example, on our website)?

Yes

Q3 Do you agree to your name and/or address being made available to the public (for example, on our website)?

Yes

Q4 The name and address of your organisation will be made available to the public (for example, on our website). Do you agree to your **response** being made available to the public?

Yes

Q5 We will share your response internally with other departments in the SSSC who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so.
Are you happy for the SSSC to contact you again in relation to this consultation?

Yes

Please provide contact information below:

Jillian Merchant
Thompsons Solicitors
285 Bath Street
Glasgow G2 4HQ
Tel: 0141 566 6864
Email: jillian.merchant@thompsons-scotland.co.uk

Q6 Are you responding from the perspective of: a

a union, or other representative body (ie solicitor)

Please specify:

Registration Rules

These rules set out how applicants can apply to be registered, how long they are on the Register for, qualifications, fees and PRTL (post registration training and learning) and how registration is brought to an end. It is a technical document and this draft replaces the SSSC (Registration) Rules 2016. The key principles as to how the Register operates are unchanged. We have shortened the Rules by removing the applications hearings process which is now in the Fitness to Practise Rules. We have also removed the list of approved courses for social workers and will publish these on our website.

In the questions we give you a brief description of the change and ask for your feedback.

Making the rules easier to understand

The rules set out the procedure we follow when carrying out our powers under the Regulation of Care (Scotland) Act 2001. The rules are formal because they must meet legal requirements. We have simplified the language and improved the layout. The new layout follows a chronological order starting with how we keep the Register, moving through applications, how we grant or refuse them, then on to how long registration lasts and how it ends. Fees and the continuous learning requirements are set out at the end. The fee section has been set out in a simple table format.

Q7 Can you suggest any other improvements we could make to the wording or layout?

No

Hearings

At the moment we have two sets of rules for hearings, one about registration hearings and the other about conduct hearings and the processes for each are slightly different. We are changing this so that the procedure for all hearings is in the Fitness to Practise Rules. Rules about temporary orders and applications to rejoin the Register will also be in this document. The Registration Rules will be much shorter and focus on the technical management of the Register.

Q8 Can you see any problems with this change?

No

Please tell us what these are:

This is a welcome change. Having the procedural rules for all hearings in one document will help all those involved in the hearing process, particularly those without the benefit of legal representation

Please provide any other comments:

Approval by employers (also known as endorsement)

Employers will endorse applications to register to say that the applicant is of good character, conduct and competence and is fit to practise. The SSSC must also now approve the person endorsing applications. This recognises the vital role that employers (and others such as higher education institutions) have in confirming or reassuring us about the suitability of people applying for registration and will improve public protection.

Q9 Do you think this will work? Yes

Please provide any other comments:

Please tell us why, and any improvements we could make:

We are concerned as to how this approach would work with small employers. If, as is usual practice, members of management act as the endorsers this may be difficult if that person or persons leave employment or are absent over a long period of time due to ill health. This may prevent employees requiring their applications being endorsed within the time limit required.

Similarly what would happen if the endorser themselves was facing proceeding before the SSSC? Is the power to endorse going to be formally linked to some category of registration (e.g. Manager in a Care Home for Adults)? Will the inappropriate exercise of that power lead to a removal of the power to endorse? And how will that decision be taken? Administratively or through a FTP panel?

In addition, we are concerned about how the process of endorsement will work when there is a difficult relationship between the employer and the person endorsing the application. We have seen occasions where endorsement has been refused or delayed on account of a breakdown in working relationships. This is more likely to happen where there is an existing long term employment relationship and the role is coming onto the register for the first time. Employers may withhold SSSC endorsement as a tool to avoid following due process in terminating the employment relationship. The SSSC must be conscious of placing too much power in the hands of employers to endorse registrations and thereby potentially frustrate strained employment contracts. There must be a right of appeal to a FTP panel against a refusal to endorse.

Courses not listed in the rules

We have taken out the list of approved courses for social workers. These courses will be listed publicly on our website. This helps us to provide information in the best way possible, to update the list more easily and to simplify the rules.

Q10 Do you agree with this approach?

Yes

Please provide any other comments:

Please tell us why, and any improvements we could make:

Those who do not have access to the internet require to be considered. Perhaps it would be possible for the SSSC to have an easily accessible paper-based method by which requests could be made for a copy of the list of courses to be sent out by post.

Fitness to Practise Rules

The rules set out what we do when we receive a complaint about a worker and what our powers are. We have made substantial changes to the arrangements for hearings. The current sub-committee structure will be replaced by a fitness to practise panel and it will hear all types of hearings including those about applications. We have defined what we mean by fitness to practise and impairment. We have also introduced new processes for managing cases and the case papers. Another area of change concerns temporary orders. We have extended them so that staff can remove temporary orders where these are no longer needed; staff can impose suspension orders at the end of a case where the worker agrees to this and to allow temporary suspension orders to be extended for more than two years in certain situations.

Definition of fitness to practise and impairment

At Part 1 we have defined what we mean by fitness to practise and impairment. We have taken into account how other regulators define these terms and the feedback we received during the engagement and consultation that has taken place over the last 12 months. The definitions will be supported by guidance that we will issue before and during the roll out of the new model. This guidance will include flow charts and examples and will be written from the perspectives of different stakeholders.

Q11 Do you have any comments or suggestions about these definitions?

1. We consider that section 2(a) misconduct ought to read serious “serious professional misconduct”. This would be in line with other health care regulators and in accordance with established UK case law. Any such failure in the Rules would be judicially reviewable. In the leading case of *Roylance v General Medical Council (No. 2) [2000] 1 AC 311* Lord Clyde stated:

   “Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances. The misconduct is qualified in two respects. First, it is qualified by the word "professional" which links the misconduct to the profession of medicine. Secondly, the misconduct is qualified by the word "serious." It is not any professional misconduct which will qualify. The professional misconduct must be serious. The whole matter was summarised in the context of serious professional misconduct on the part of a registered dentist by Lord Mackay of Clashfern in Doughty v. General Dental Council [1988] A.C. 164 , 173:

   > *"In the light of these considerations in their Lordships' view what is now required is that the General Dental Council should establish conduct connected with his profession in which the dentist concerned has fallen short, by omission or commission, of the standards of conduct expected among dentists and that such falling short as is established should be serious. On an appeal to this Board, the Board has the responsibility of deciding whether the committee were entitled to take the view that the evidence established that there had been a falling short of these standards and also entitled to take the view that such falling short as was established was serious."*

2. We therefore consider that it should be made explicit in the rules that the gravamen of the misconduct is more accurately quantified as “serious professional misconduct”.

3. This feeds into our concern relating to the definition of misconduct under section 3 which states that misconduct means behaviour which does not meet the standards set out in the codes. This requires to be caveated with the fact that a simple, technical breach of the code is not, in and of itself, necessarily, misconduct. Each case will require to be considered on its own merits and by considering all the circumstances involved. It cannot simply be the case that the code is breached and this automatically results in a finding of misconduct. That would have the consequence of lowering thresholds and greatly increasing the volume of unnecessary referrals to the SSSC.

4. Additionally, following the case law set out above, consideration must be given at section 3 to the fact that the misconduct must be "serious" and must relate to "professional" responsibilities.

5. Further, in relation to the definition at section 3 (a) we are concerned by the inclusion of the Employment Tribunal in Schedule 3 (17-19). The Employment Tribunal is not a Regulatory Body unlike all the others which are listed. The Employment Tribunal is a party v party forum much like the civil court. We note that the Sheriff or County Court; the Court of Session, the High Court or the Supreme Court are quite rightly not listed. The Employment Tribunal does not have the power to impose conditions on emlpoyees or restrict their behaviour in any way . It has no place amongst the list of regulatory bodies listed here.

6. We are concerned regarding the mention of disability in section 2(c) health condition. "Disability" means different things in different statutory contexts and we envisage unhelpful debate as to whether a health condition is or is not a disability. More fundamentally, it is potentially discriminatory for the Rules to simply assume that because someone is disabled, their fitness to practice is automatically called into question on grounds of health. It is only if concerns are firstly expressed about someone's practice that any question should ever be asked about whether their health contributed to that. By mentioning disability in this context in the Rules, there is a risk that that test will be reversed: it will be assumed that because someone has a health condition, questions should be asked about that person's practice. That approach would be unlawful and put the SSSC in breach of the Equality Act 2010. We consider that this should be removed from the definition.

7. It is fundamental that the SSSC Rules must reflect that many registrants' will have disabilities which have no impact upon their ability to practice safely.

8. The definition as it stands may also allow employers to argue that an employee's fitness to practice is *a priori* impaired by reason of their disability. This has potential implications for registrant's employment and is potentially contrary to the Equality Act 2010 which places obligations on employers to make reasonable adjustments and eliminate discrimination.

9. Further, we are concerned in relation to section 2(e) which, in its current form, states that fitness to practice may be impaired by behaviour which has led to a criminal charge. We consider that this could result in a matter progressing where a weak criminal charge has been brought but is then dropped due to lack of evidence or witnesses retracting their statements. The employees thereafter subject to SSSC proceedings relating to the same, false complaint .

10. This is grossly unfair on the employee. Employees ought only be subject to SSSC proceedings if a criminal charge is found proven in a court of law. Charges which are found not guilty, not proven or which do not proceed to trial or result in a sanction ought not to form the basis of potential impairment of fitness to practice.

11. In most cases an issue which is subject to a criminal charge will fall under the definition of misconduct, in any event. We consider that section 2(e) in its current form unnecessarily muddies the water and leads to questions around an individual right to a fair trial and the principle of presumed innocence

12. There is no definition of “impairment” within the section entitled *“Meaning of fitness to practice and impairment”.* We consider that the rules must make clear that there is a two stage process when considering the reason for impairment (misconduct, competence, health) and the then whether fitness to practice is impaired. The rules ought to make clear that the decision on impairment is a forward looking decision, taking into account what has happened since the incident and the registrant’s fitness to practice going forward.

13. We do consider that this two stage process is captured at all in the rules. In the case of *Cheatle v General Medical Council [2009] EWHC 654 (Admin)* the court found that a finding by a panel that a medical practitioner's fitness to practise was impaired **required the application of a two-stage process**: **there had firstly to be a finding of serious misconduct, and secondly the panel had to conclude that, as a result of its finding, the medical practitioner's fitness to practise was impaired**. **In coming to a conclusion on impairment, the panel had to look forward**,. It had to consider whether, in the light of what had happened, and of evidence as to the medical practitioner's conduct and ability demonstrated both before and after the misconduct, the medical practitioner's fitness to practise was impaired.

Hearings

Our hearings are currently heard by sub-committees. There are a number of types of sub-committees:

- registration sub-committee
- preliminary proceedings sub-committee
- conduct sub-committee
- restoration sub-committee.

A single Fitness to Practise Panel will replace all sub-committees. A Fitness to Practise Panel will now consider and decide referrals and applications on: - registration or renewal of registration
- temporary orders
- a registrant's fitness to practise and sanction
- a former registrant's fitness to practise where they have applied to rejoin our register after they have been formally removed.

Q12 Do you think that people will find this easier to understand?

Yes

Please provide any other comments:

Please tell us why not, and any alternatives we can consider:

Arrangements for Panels

An area for development that we are considering is the arrangement of panels. There are different ways of organising this to the one we have described in the draft rules. We have proposed a system where all panel members can sit on any type of hearing, An alternative is having pools of specialist members who hear only specific types of hearing and therefore develop expertise and hence promote consistency.

Q13 Please tell us your views on this alternative suggestion:

We agree that all panellists should be trained to sit on any type of hearing (Competence, Misconduct or Health).

However, we consider that there ought to be a “Due Regard” Panel member *from the section of the register to which the registrant belongs* on the Panel hearing the case. The experience of a social worker is very different to that of a care worker and that requires to be reflected on the Panel.

For example, in a case at the NMC where the Registrant is a midwife there is always a midwife on the Panel. This is because the NMC recognise that midwifery is a skill set of its own and is different from nursing. We consider that this ought to be reflected in the SSSC processes. It is unfair for a manager of social care workers to be sitting in judgment of a social care worker. It is inevitable that their experiences and expectations will be different.

The most important issue in these cases is that the reality of the registrant’s working life is properly and adequately understood and reflected by the Panel. One of the ways of the SSSC can ensure that this is the case, and their processes are fit for purpose, would be by ensuring that there is a panel member on each panel from the section of the register in which the registrant is registered.

Application hearings

We have proposed a system where a decision is made about whether an applicant is fit to practise or not. An alternative is to decide if the applicant's fitness to practise is impaired or not. This would help align the processes for applicant and impairment cases and better promote consistency.

Q14 Please tell us your views on this alternative arrangement:

With great respect, it is not entirely clear what question is being asked here. Our position is that all Application hearings should proceed with the starting point being that the Registrant is, as a result of already being employed in the role and being formally endorsed by their employer, already Fit to Practice. The SSSC should then, if they wish, lead evidence to establish that this existing fitness is impaired. The hearings should not be conducted the other way around (i.e. requiring the Registrant to prove that they are fit to practise from a starting point that they are not)

Disclosure pack

At a hearing, we call the papers containing the written evidence ‘the bundle’. This is now the disclosure pack. At the moment we issue the whole ‘bundle’ more than once at each stage of the hearing process. This is to make sure the worker has seen all of the documents and to provide numbered bundles that are easy to refer to. However, we have had feedback that this is overwhelming because a worker will receive the same document several times. The new rules will be much simpler and say that when we first make a decision or send a case to a hearing we send the disclosure pack to the worker to give them notice of the evidence we are relying on. We will then only send out any new documents that come in before the hearing, and a final numbered pack before each hearing. This means that there will be several smaller packs of documents at each hearing.

Q15 Do you have any views on this arrangement?

Yes

No

Please provide any other comments:

We consider that sending the bundle out fewer times is a positive development. It is hoped that this will lead to less confusion and ensure that all parties are working from the same bundle at the hearing.

Information for employers and universities

At the moment, the rules about the information that employers and universities providing social work courses receive throughout the process are inconsistent. The decision of a panel can affect staffing resources for an employer or course arrangements for a university, so we need to keep them informed. We will now let all current employers and universities know when we refer a worker to a Fitness to Practise Panel and the outcome of that hearing. This will include when the hearing is about a worker applying for registration.

We will also tell any current employer and university when we start an investigation.

Q16 Do you think this will be helpful for employers and universities?

Yes

Please provide any other comments:

Please tell us about any problems you see with this:

Hearings about applications for registration: burden of proof

Hearings to decide whether to grant an application for registration currently require the worker to prove that they should be registered and they present their case first. The new process is that the SSSC must prove to the panel the facts that support the information the SSSC holds. If we prove these facts, then the worker must show why they are fit to practise. This is to allow the worker to hear the evidence that we have about the facts before they respond.

Q17 Do you think this is a fairer arrangement?

Yes

Please provide any other comments:

Please tell us how you think we should arrange these hearings:

Under the previous procedure it was very difficult for employees to be able to establish the facts require to meet the test for registration, particularly if the allegations were complex. It was, in effect, a reverse proof, meaning the employee had to pre-empt what evidence the Council may have against them.

We maintain that the burden of proof on establishing the facts should be with the SSSC but the Registrant's fitness to practice should be a rebuttable presumption.

Order of hearings

At the moment the hearing considers findings of fact and misconduct together and then, if there is misconduct they consider the sanction. The new decision-making process about the fitness to practise of registered workers will be a three-stage process:

- first the panel decides on findings in fact (what facts have been proved)
- secondly on whether these facts amount to impairment
- finally what sanction if any should be placed on the worker.

There will be a separate disclosure pack with information relevant to impairment and sanction that we will only give to the panel after the findings in fact stage. This is so the panel's decision on the facts is not influenced by knowing the outcome of any previous case.

Q18 Do you think that this process will be practical for workers and their representatives?

No

Please provide any other comments:

No. Firstly, we repeat our concerns set out at question 11.

We consider that a three stage process is necessary. However the impairment stage must be a two stage process within that. The process would therefore be:

1. Facts
2. (a) Whether the facts proved amount to misconduct/lack of competence/health
   (b) Whether that misconduct/lack of competence/health means that fitness to practice is impaired
3. Sanction

This would allow for cases where misconduct/lack of competence/health is found proven but that impairment is not. It would also allow for cases where misconduct/lack of competence/health is not found to end at that stage, without the need for impairment to be considered.

We consider that this is in the line with the current case law in this area. It is also in line with other healthcare regulators.

We are happy with the proposals regarding two bundles. We do however consider that there will be occasions where documents will require to be placed in both bundles. For example: a statement from a colleague which may comment on the factual allegations at issue and the registrant’s practice since the incident.

Health

These questions look at the arrangements for sanctions, restoring people to the Register and medical advice in health cases.

The same sanctions (removal, suspension, conditions, warning and combinations of them) will be available to the panel in health cases as in conduct and competence cases.

Q19 Do you have any comment on the available sanctions?

Yes

Please comment here:

We are concerned that a registrant could be removed by reason of their lack of competence or health. This is not in keeping with other healthcare regulators. We consider that the SSSC should operate under the same rules as other regulators by ensuring that Registrant's cannot be struck off due to health or lack of competence until they have been subject to a suspension order for a period of 2 years or more.

Unlike misconduct, health and lack of competence, are rarely, if ever, deliberate acts. A suspension from the register can act as an opportunity for a registrant to rectify any health concerns or practice failings before the period of the suspension is ended. This means that a registered practitioner is still engaged in the process and is much more likely to return to practice.

We consider that it should be an overall policy aim of the Council to retain as many social service workers in practice as possible. The care industry is ever increasing, both in terms of the need for individuals to carry out this work and the need for the services to be provided. We therefore consider that it is a responsibility of the regulator, amongst others, to promote retention of trained workers within the profession. There is little point in the state and employers investing time and money in training professionals if, at the first sign of difficulties, they are likely to be exited from the profession.

If we remove a worker because their fitness to practise is impaired due to their health they can apply to rejoin the Register at any time, if they can show that their circumstances have changed. This recognises the fact that a person's health changes over time. If workers are removed due to conduct or competence, they cannot reapply for three years.

Q20 Do you think this is a good approach?

No

Please provide any other comments:

Please tell us any improvements we could make:

We do not consider that removing people from the register due to their health is progressive and we again underline our comments in response to question 19.

We consider that this proposal puts unnecessary barriers in the way of their return to the profession.

Even if, in these circumstances, it is easier to return to the register than it would be if there were conduct or competence issues we still consider that this places a huge and unnecessary burden on the registrant.

Before other Regulators, when a suspension order is imposed, this is always reviewed before it comes to an end. This means that a reviewing panel can then make the decision at that point as to whether or not the registrant's fitness to practice remains impaired and, if so, what sanction is required. If a registrant is returning to work after ill health this provides them with an opportunity to return to work, gradually and safely, and allows the regulator to ensure that there is no public protection risk or risk to service users in their return to work.

During an investigation, if we want to understand the health issue better we can ask the worker to attend a consultation with a medical practitioner who can provide a report that both we and the worker can see. If the worker does not wish to do this, the Fitness to Practise Panel can remove the worker from the Register on public protection grounds. This is to make sure that the public are protected in cases where a worker is not willing to co-operate and there is evidence that they are not fit to practise.

Q21 Do you have any comments about this arrangement?

Yes

Please comment here:

This proposal is strongly rejected.

We do not consider that a Fitness to Practice Panel considering a health complaint should, or could, have the power to remove a worker from the Register on public protection grounds. The SSSC should always have to make a positive case that FTP is impaired due to health.

If, as in the example given, a registrant is unwilling to undergo a medical examination, it is likely that there will be evidence which led to the SSSC looking at health in the first place. It would be a matter for the SSSC to demonstrate that the registrant's fitness to practice was impaired due to health, whether this is with or without a medical report. Similarly, the registrant must have the opportunity to be heard on why they do not consider their fitness to practice to be impaired by health.

There should be no "default" position that removal should be granted due to a failure to cooperate with an investigation.

In our experience, many registrants with mental health problems find it extremely distressing to be assessed by an external consultant as part of a health committee process. It can set back their recovery. There are therefore often good medical reasons why it may not be in the interests of the registrant to be subject to a medical assessment.

These cases should simply proceed to a determination by the panel based on the best medical evidence available to the panel. No adverse inference should ever be drawn by a legitimate refusal to be subject to medical assessment.

The Fitness to Practise Panel will not include a medical adviser. This is because of the cost, the potential delay and the difficulty in finding an expert with the correct skills to comment on particular health issues. Instead both the worker and the SSSC can bring their own evidence either in a report or by bringing an expert to the hearing.

Q22 Do you have any comments about this arrangement?

Yes

No

Please comment here:

We do not consider that it would be appropriate for a medical adviser to be a member of the Panel.

We consider that if the SSSC were to bring a case against a registrant on health grounds then they would likely need to request that the registrant agree to a medical report and expert evidence from a medical practitioner in support of same.

A registrant would also be permitted to bring evidence for any health practitioners that they are engaged with. The difficulty is that if a registrant disagrees with the conclusions of the SSSC instructed expert they may face financial barriers in securing a medical report to support their position. This is something that the SSSC will require to consider in terms of their duty under article 6 of the ECHR to ensure the right to a fair trial and equality of arms between the parties. Consideration should be given to the SSSC funding independent medical experts where their own expert's evidence is disputed.

Temporary orders

We can place interim or temporary orders on workers before the final hearing takes place. These orders can suspend the worker from the Register or place conditions on their registration. This makes sure the public is protected while an investigation takes place. The maximum time for suspension is two years. The draft rules allow the order to be for a longer period in cases where:

- a hearing date has been fixed and the two year period ends before that date
- we are waiting for third party investigations to finish. This might be criminal matters, an employer's investigation or a tribunal hearing, where it is appropriate to wait for the outcome before we hold a hearing.

Q23 Do you have any comments about this arrangement?

Yes

No

Please comment here:

We are concerned by this provision.

To be suspended for two years is a huge imposition on a registrant's right to practice their profession. In cases where an individual is subject to an interim order, the investigations should be carried out by the SSSC are quickly and as efficiently as possible. They should be given priority.

The registrant will undoubtedly be de-skilled during this period of time and will therefore find it difficult to argue that their fitness to practice is not impaired at the eventual hearing. This will be because of the length of time they have been suspended for and the advances in practice during this time. Also, a registrant will have had no opportunity to demonstrate that they have remedied the issues which were subject of the charge.

Another concern is that over a period of two years memories fade and evidence is less reliable than it would be closer to the events. It is not in the interests of any party involved in the proceedings for this to be the case.

We do not consider that there are any good reasons as to why an investigation should take longer than two years. We are also concerned by the lack of scrutiny in relation to this proposal. Other healthcare regulators are unable to extend an interim order past 18 months – 6 months less than what is proposed here. In addition, when the other regulators wish to extend the interim order at this stage they require to apply to the Court of Session (in Scotland) for this to be granted. The registrant therefore has the opportunity to challenge this extension of time. The Court, in these cases, will consider issues such as delay and what steps have been taken by the regulator to ensure that the matter is proceeding at a satisfactory speed. These applications are not routinely granted.

In relation to the first proposal to extend time indefinitely if a hearing date is fixed ,we consider that this provision is mainly included to suit the administrative convenience of the SSSC. If the SSSC have issues holding hearings within a two year period then that is a problem which requires to be addressed separately and without prejudicing

registrants. This may be a staffing issue or this may be a lack of space/hearing room issue but neither of those are reasonable reasons for extending the period time the registrant is suspended. We consider that the stricter deadline on the length of suspensions also acts as a target for investigations and ensures that they do not go on indefinitely.

We consider that should the SSSC wish for an extension of an interim order passed the period of two years an application should require to be made to, and granted by, a Court.

With reference to third party investigations again we do not consider that it would be reasonable for the SSSC to wait until these are finished. The case of *A v Tayside Fireboard [2000] S.L.T. 1307* made clear that there is there is no presumption in favour of adjournment of proceedings due to other proceedings. What requires to be shown is that there has to *"a real, not merely notional, danger that there would be a miscarriage of justice in the absence of adjournment before the court would intervene."*

There is nothing preventing the SSSC investigating while the Police/Procurator Fiscal, employer or Employment Tribunal are seized of the matter. The Police/Procurator Fiscal regularly request that investigations are put on hold but there is no legal basis for this. It is merely a request. It need not be complied with if it raised Article 6 issues in the instant proceedings.

In terms of the employer's investigations, the SSSC are always of the view that they are independent of employers and will conduct their own investigations. Indeed, the SSSC regularly seek interim orders against registrants while there remains an ongoing investigation internally, or in situations where an internal matter has resolved. In these circumstances we consider that there would be no requirement for the SSSC to wait for the outcome of an employer's investigation.

There is no basis on which to delay pending Employment Tribunal proceedings. Contrary to popular belief, these proceedings to not generally make factual determinations of an employee's conduct: they make factual determinations of an employer's conduct. There is unlikely to be any crossover in the legal and factual determinations made.

Practise notes

We are introducing practise notes to provide procedural guidance for panels and those appearing before them about the approach to take when making decisions. This speeds up procedural decisions and helps provide consistency and transparency.

We plan to have practise notes for the following areas:

- going ahead if the worker is not attending the hearing
- giving evidence by video conferencing
- postponement requests
- vulnerable witness measures
- whether the hearing is held in private
- late documents.

Practise notes will reflect current case law and we will update them when

necessary. Q24 Do you think including practise notes will be helpful?

Yes

Please provide any other comments:

We consider that practise notes would be helpful, however we consider that engagement with stakeholders in the SSSC hearings process in the drafting of these practise notes would be required. Such practice notes would require to be drafted, and written, by a neutral party who has no stake in the process or the work related to the practice orders.

Please can you tell us why not, and any negative experience you have had in using them before:

Case management meetings

At the moment, before a hearing, we hold a pre-hearing review where we and the worker talk through a range of issues with the sub-committee legal adviser. This lets everyone understand the practical details that may affect the case such as the number of witnesses etc. However, no decisions can be made and all of the preliminary matters need to be discussed again and decided on at the hearing. This results in problems, for example, delays, the timings for witnesses being uncertain, witnesses not knowing until the last minute if they will be treated as vulnerable and given special arrangements and the press and others do not know if the hearing will be in private.

This will be replaced by a case management meeting where decisions can be made. It will take place before the final hearing. The panel chair and the panel legal adviser will be there and the chair will be able to make decisions on procedures and legal points in advance of the hearing. The final hearing should then be shorter and with fewer delays, meaning witnesses won't have to wait to give evidence while the panel deals with other matters. The types of matters that the panel chair will make decisions about are:

- going ahead if the worker is not attending the hearing
- vulnerable witness measures
- use of video conferencing
- late documents
- any objection to witnesses or documentary evidence
- whether the hearing should be heard in public or private
- legal challenges.

Q25 Do you think that there are any disadvantages to this arrangement?

No

Please tell us what these are, and any other suggestions that we should consider:

.

Decisions Guidance: for Fitness to Practise Panels and SSSC staff

This document sets out how staff and panels make decisions about sanctions in fitness to practise hearings. The courts have stated that regulators such as the SSSC should publish this type of guidance to make sure decision-making is consistent, open and clear.

This will replace the current Indicative Sanctions Guidance. We have expanded it to cover all hearing types which can be about:

- whether to grant an application for registration
- when fitness to practise is impaired due to conduct, competence or health
- granting a temporary order about a workers registration until a final hearing (interim suspension order)
- allowing a worker back on to the register after they have been removed (restoration).

You can read the Decisions Guidance: for Fitness to Practise Panels and SSSC staff (http://www.sssc.uk.com/component/edocman/?task=document.viewdoc&id=2617) before you answer these questions.

The key changes are:

It has been renamed 'Decisions Guidance: for Fitness to Practise Panels and SSSC staff' and has been made easier to read and understand.

Q26 Do you think that the guidance is clear?

Yes

Please provide any other comments:

Subject to answers 27-29

Please tell us about any changes you would like us to consider:

We have restructured the guidance to set out the key guiding principles and then the factors particular to different kinds of decision.

Q27 Do you think that this makes clear what is taken into account when decisions are made?

No

Please provide any other comments:

Comments on Part A – General

Equality and diversity statement (para 2): the second paragraph should have an example relating to health. For example, someone suffering from depression may suffer an impairment in cognitive functioning meaning that their decision making ability is lessened.

What standards do we expect of social service workers? (Para 5) This should make clear that a breach of the code of conduct is not automatically misconduct.

Comments on Part B – General Principles

We consider that the example under section 1 about the abusive worker is unduly negative and sets out an unduly negative view of social service workers and the types of behaviour they may engage in.

Para 1.1 – *"we must make sure the worker does not have the opportunity to repeat the behaviour"* – again we consider that this is unhelpful. No system will ever prevent repetition in all circumstances. It is the SSSC's role to ensure that the risk of repetition is minimal and that there is no ongoing risk to the public. Putting absolute statements into guidance which will be used by Panel's is unhelpful and means that Panels are often overly restrictive and risk averse in the sanctions which they impose. This will mean that Registrant's are often given harsher sanctions than is necessary. This again does not assist the SSSC in maintaining a worker register of social service workers. If there is a way of keeping someone in the profession that should be made possible, rather than trying to achieve the impossible.

Para 2.3 – This should state that "When considering the decisions available, the decision maker should start" **with no sanction.** This is in line with case law. The Panel should not start at the lowest sanction as the Panel should have the option to apply no sanction. This should be made clear.

Last paragraph – this requires to be deleted. It is wrong in law. The decision maker must weigh up all the factors and come to a sanction proportionate to the situation in hand. These factors include reputational and financial consequences for the Registrant. All of these factors must be determined before coming to a decision.

Para 3.1 – In relation to insight, regret and apology it should be made clear to Panels that the Registrant does have a right to deny the charges. This should not be held against a Registrant. It is perfectly possible for the charges to be denied and then the Registrant to show insight at a later stage in the process, or be able to show remediation of any failings which have been found proven.

Too often, at present, a denial of charges which are subsequently found proven is held against the registrant and comments made in judgments about lack of insight. In some cases this will no doubt be a fair comment but it should not be automatic. Recognition has to be given to the practical reality of denying the charges, i.e. if they are then found proven a registrant cannot then go back on their previous evidence and admit that their denial of the charge was a lie. It would be unreasonable to expect this of registrants, and Panels ought to be aware of this, in the

context of coming to their view on insight. A registrant has a legal right to make denials in respect of various charges in the course of formal legal proceedings without being subsequently criticised for doing so.

To reflect this we consider that the references to behaviour “during the hearing” should be deleted in bullet points 2 and 3.
In relation to aggravating factors(the last bullet point) we find it concerning that behaviour at work, prior to being registered – in a social care setting – may be aggravating. This is unfair. We can appreciate that previous behaviour may require to be considered in terms of an application for registration. However, we do not consider that this should be aggravated if it is in a social care setting. Social care workers, in general, have very little understanding of the SSSC and their codes of conduct. This is primarily a cultural issue but also employers must take their share of responsibility.

Para 3.6 – Duress: we consider that, similar to discrimination cases at the Employment Tribunal, the Panel ought to be allowed to draw inferences from the evidence which is presented regarding duress. Other than the registrant advising that this happened it is unlikely that there will be any further direct evidence. In these circumstances the Panel ought to be able to draw inferences from background circumstances and workplace incidents in order to determine whether or not a registrant has been subject to duress.

Para 3.8 – While cooperation with the SSSC is clearly a mitigating factor, this requires to be balanced with a registrant’s right to test the case made out against them. A registrant can be perfectly cooperative with the SSSC throughout an investigation but deny all the charges against them. This does not mean that they are being uncooperative with the SSSC.

This is a cultural shift that requires to take place within the SSSC. Cooperation with the SSSC should not be determined by whether or not admissions are made, or whether or not the registrant provides comments to the SSSC at an early stage. A registrant is entitled to put the case against them to the test. Quite often, initial requests for comments refer to vague allegations not supported by any evidence. In these circumstances, early admissions by the registrant are simply providing evidence for the SSSC to use against them. Detailed comments ought only to be provided once the SSSC have set out their case.

We are strongly of the view that cooperation should not be defined by admissions made and information provided to the SSSC. There also ought to be a recognition in the guidance that cooperation can also occur in situations where all the charges are denied.

Para 3.10 – we consider that the word “victim” ought to be deleted in the third line and replaced with “complainer”. This is in keeping with Scottish Appeal Court authority on the matter.

Para 5.1 – With regards to sexual misconduct we consider that there ought to be recognition in the guidance that there are scales of sexual misconduct. Inevitably some sexual misconduct will be worse than other sexual misconduct, this is reflected in case law and ought to be made clear to Panels.

Para 5.3 – The dishonesty section ought to refer to the case law on dishonesty which is an objective not subjective. The case of *R v Ghosh [1982] Q.B. 1053* states that there is a two part test in relation to dishonesty. Firstly, an objective test, whether according to the ordinary standards of reasonable and honest people what was done by the defendant was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards then secondly, the subjective test: The panel have to

consider whether the defendant himself must have known that what he was doing was, by those standards, dishonest.

Lord Chief Justice, Lord Lane stated that *"in most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."*

Comments on Part C – Types of Decision:

Para 3.2 Possible Outcomes – We are concerned by the statement at the top of page 21 that in cases which are only about a worker's health a warning is unlikely to be appropriate.

We do not think it is appropriate that this is in the guidance. The SSSC ought not to be providing this level of guidance to Panel's regarding their decision making. There are health cases, for example relating to alcoholism, where a warning would be an entirely appropriate sanction.

We consider that stating in the guidance that a warning is unlikely to be appropriate means that Panels are less likely to give this sanction the consideration it deserves. In effect, it will prevent Panels considering it and even if they do consider it they are unlikely to impose it as it will be seen as a controversial decision.

Similarly, our comments apply to the bottom paragraph regarding a suspension order. It is perfectly possible for a registrant to be suspended from the register for a period of time to allow their health to recover. A worker ought not to be removed from the register due to their health. Please refer to previous comments regarding limiting the sanctions available in particular cases.

Comments on Part D – Applications to be restored to the Register:

We are concerned by the comments in the second paragraph, Additional Considerations, that a removal order "*is a clear indication that the behaviour was considered to be extremely serious"*. This relates only to removal due to misconduct. If the SSSC are to continue to seek to remove people on the grounds of health and/or lack of competence this would require to feature in this section of the guidance.

Comments on Part E – Conditions:

We are concerned that Conditions are not considered appropriate when there is a "denial of wrongdoing". Please refer to our comments to in relation to section B of the guidance on this issue. We consider that this ought to be removed.

In addition, we consider that a condition ought to be considered appropriate in all cases. We do not think it is fair, or correct, for the SSSC to state that conditions may not be appropriate in cases of conduct. This is entirely a matter for the Panel. Conditions are regularly adopted by other regulators in misconduct cases and are entirely apt where a registrant has shown some remediation but further work is required. Again our comments in relation to Part C should be considered.

The Panel should be free to consider whatever sanction they consider appropriate in the circumstances of the case. The SSSC guidance should not state which sanctions are appropriate in which cases.

In relation to section 2 we consider that Panels ought to be advised that when imposing conditions of practice there ought not be a suspension order in all but name.

:

The section on how decisions are made about applications to register is new.

Q28 Do you think that the guidance balances fairness to applicants with public protection and public interest?

No

Please provide any other comments:

In relation to the 4th bullet point within paragraph 1, we consider that adequate explanation of *Jideofo v Law Society [2007] WL 511 6865* requires to be provided. We agree that the same standards are applied to a worker joining the register as they would be to someone who is already registered. However the crucial point is that the standards being applied to a registered worker are in relation to a previous incident which has just come to light. The matter is not a consideration of conduct which has taken place at the current time. The situation of the applicant and the position of the registrant, following *Jideofo* require a direct comparison.

Please tell us why:

The section on how we make decisions about applications to register after we have removed a worker (known as restoration) is new. It includes how we will make decisions when we remove a worker on health grounds.

Q29 Do you think that the guidance balances fairness to applicants with public protection and public interest?

Yes

Please provide any other comments:

Please tell us why:

The SSSC has a responsibility to promote equal opportunities. We want to make sure that the new rules and decisions guidance do not negatively impact on people based on any of these characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion and belief
- sex
- sexual orientation.

Q30 Do you think the implementation of changes to the rules and decisions guidance will result in less favourable treatment for particular groups?

Yes

Not sure

Please provide any other comments:

Q31 Please indicate which groups will be affected and how:

age

disability

gender reassignment

marriage and civil partnership

pregnancy and maternity

race

religion and belief

sex

sexual orientation

Please comment here:

Inclusion of disability as an impairment ground sends out the wrong message.

Q32 Does the proposal to implement changes to the rules and decisions guidance promote equal opportunities?

Yes

No

Not sure

Please comment here:

See above

Q33 Are there ways we could change the rules and decisions guidance to better promote equal opportunities?

Yes, remove any reference to disability, such circumstances that may have been envisaged here can be adequately covered by health.

Implement fee differentials to accommodate part-time workers (predominantly female)

Section 2

Q34 If you prefer not to answer the detailed questions please make any general comments here. Please note that the box is limited to 500 words which is approximately one page of A4.

Section 3

This section is for you to comment on the detail of the three draft documents - the revised SSSC Registration (No. 2) Rules 2016, the SSSC Fitness to Practise Rules 2016 and the Decisions Guidance: for Fitness to Practise Panels and SSSC staff. You can give us specific feedback about each part of the documents. You can comment on as few or as many parts as you wish from all or one of the documents.

Scottish Social Services Council Registration (No.2) Rules 2016 Part 1 - Introduction

1. Citation, commencement, transitional and saving provisions

Q35 Do you have any comments on this section of the rules?

No

2. Definitions

Q36 Do you have any comments on this section of the rules?

No

3. Power of SSSC where Rules not complied with

Q37 Do you have any comments on this section of the rules?

No

Part 2 - The Register

4. Form of the Register

Q38 Do you have any comments on this section of the rules?

No

5. Keeping the Register

Q39 Do you have any comments on this section of the rules?

No

Part 3 - Registration

6. Application for Registration

Q40 Do you have any comments on this section of the rules?

No

7. Grant of application for registration

Q41 Do you have any comments on this section of the rules?

No

8. Application for registration: referral to Fitness to Practise Panel

Q42 Do you have any comments on this section of the rules?

No

9. Refusal of application for registration where applicant on PVG list

Q43 Do you have any comments on this section of the rules?

No

10. Entry on Register on grant of application

Q44 Do you have any comments on this section of the rules?

No

11. Registration period

Q45 Do you have any comments on this section of the rules?

No

12. Renewal of registration

Q46 Do you have any comments on this section of the rules?

No

13. Variation of registration conditions: referral to Fitness to Practise Panel

Q47 Do you have any comments on this section of the rules?

No

14. Removal from Register: no referral to Fitness to Practise Panel

Q48 Do you have any comments on this section of the rules?

Consideration should be given to voluntary removal even where a registrant is subject to FtP proceedings.

15. Removal from Register: referral to Fitness to Practise Panel

Q49 Do you have any comments on this section of the rules?

No

16. Application for restoration to Register

Q50 Do you have any comments on this section of the rules?

No

17. Time limit for repeat applications

Q51 Do you have any comments on this section of the rules?

No

18. Requirement to provide disclosure application form for PVG scheme

Q52 Do you have any comments on this section of the rules?

No

Part 4 - Fees

19. Fees in connection with registration

Q53 Do you have any comments on this section of the rules?

No

20. Annual fee

Q54 Do you have any comments on this section of the rules?

No

21. Registration in two or more parts of the Register

Q55 Do you have any comments on this section of the rules?

No

22. Waiver of fees

Q56 Do you have any comments on this section of the rules?

No

23. Failure to pay fees

Q57 Do you have any comments on this section of the rules?

No

Schedules

Schedule 1 - Transitional and saving provisions

This section will be completed nearer the time of implementation.

Schedule 2 - Post registration training and learning requirements

Q58 Do you have any comments on this section of the rules?

Schedule 3 - Fees

Q59 Do you have any comments on this section of the rules?

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Scottish Social Services Council Fitness to Practise Rules 2016

Part 1 - Introduction

1. Citation, commencement, saving and transitional provisions

Q60 Do you have any comments on this section of the rules?

2. Meaning of fitness to practise and impairment

Q61 Do you have any comments on this section of the rules?

- Insertion of "serious professional misconduct" in place of "misconduct" at section 2(a) & 3
- Removal of disability at section 2(c) & 5

3. Other definitions <<link>>

Q62 Do you have any comments on this section of the rules?

No

4. Power of SSSC and Fitness to Practise Panel where Rules not complied with

Q63 Do you have any comments on this section of the rules?

No

Q64 Do you have any comments on this section of the rules?

5. Non-disclosure in the public interest

No

Part 2 - Fitness to Practise Panels

6. Fitness to Practise Panels

Q65 Do you have any comments on this section of the rules?

Part 3 - Impairment of fitness to practise allegations

7. Impairment of fitness to practise allegations Q66 Do

you have any comments on this section of the rules?

- Section 7(1) – “specific allegation” should be defined in the legislation. For example, a minimum level of detail should be required such as date(s) and location(s).
- Section 7(7) – this power should only be used “on cause shown” – presently this gives a lot of power to a regulator which does not appear to be checked in any way.

8. Impairment of fitness to practise allegations: SSSC's powers

Q67 Do you have any comments on this section of the rules?

Part 4 - Impairment cases and Application cases Chapter 1: Introductory

9. Overview

Q68 Do you have any comments on this section of the rules?

Chapter 2: Impairment cases - procedure

10. Impairment case: initial notice

Q69 Do you have any comments on this section of the rules?

11. Impairment case: disclosure pack

Q70 Do you have any comments on this section of the rules?

- Insert at section 11(1) a requirement on the SSSC to disclose all unused material to the Registrant.

12. Impairment case: case management meeting

Q71 Do you have any comments on this section of the rules?

- Within section 12 insert provision for the Chair to of the case management meeting to be different from the Chair of the Final Fitness to Practice Panel.

13. Impairment case: case management meeting procedure

Q72 Do you have any comments on this section of the rules?

14. Impairment case: hearing

Q73 Do you have any comments on this section of the rules?

15. Impairment case hearing: initial proceedings

Q74 Do you have any comments on this section of the rules?

16. Impairment case hearing: findings of fact

Q75 Do you have any comments on this section of the rules?

- Insert “of their case” at the end of section 16(4)

17. Impairment case hearing: finding of impairment to fitness to practise

Q76 Do you have any comments on this section of the rules?

- This section does not adequately set out the decision that the Panel requires to come to. The Panel requires to consider if the facts are proven; if so, do they amount to misconduct/lack of competence/ill-health; if so, is current fitness to practice impaired; if so what sanction should be applied?

We consider that this is fundamental of the fitness to practice process which is missing from the rules.

18. Impairment case hearing: mitigation

Q77 Do you have any comments on this section of the rules?

- We do not consider that section 18(9) is necessary. The Panel should be in a position to impose whatever conditions they consider necessary and proportionate in the circumstances.
- In addition, this process is used by the SSSC are an opportunity to re-run the case. If the SSSC have sought a different order from the proposed conditions order the Panel are minded to impose an objection is always made to the conditions. This is rarely, if ever, about the workability and enforceability of the conditions. Instead, submissions are made to the effect that the Panel have made the wrong decision, the conditions should not be imposed and a harsher sanction should be. We consider that by the time the panel is asking for submissions on workability and/or enforceability, the time for making submissions on the public protection and public interest elements of the order has already passed. The panel have found that conditions are appropriate: the only question which remain live is: “which conditions?” .

- There are time and cost implications to this additional practice.

- No other healthcare regulators have this process.

- This process makes it less likely that Panels will impose conditions if the employee is not currently working. This is unfair. If the case is a case where a conditions order should be imposed this should be able to be imposed regardless of whether or not the employee is in employment. If not in employment, the conditions would not come into force until the employee was working in a registered role. We are concerned that this extra step means that in situations where an employee is no longer employed in a registered role that conditions are unlikely to be applied as they may be deemed not workable or enforceable at the point of the judgment. Even if someone is not currently working, general conditions can easily be formulated which will apply if the registrant in reemployed in a registered post. That is standard practice in other regulatory bodies.

19. Impairment case hearing: sanctions

Q78 Do you have any comments on this section of the rules?

20. Impairment case: notice of decision

Q79 Do you have any comments on this section of the rules?

21. Impairment case: note and transcript of proceedings

- Similar to our answer at question 78 we consider that section 7 should be deleted.

Q80 Do you have any comments on this section of the rules?

- We consider that provision should be made within this section for transcripts to be provided to all parties, including the Panel, when a case goes part-heard. This would assist all parties and the Panel in the case. It would allow for better decisions and smoother proceedings as the transcripts would be there as a record of evidence on previous dates. The decisions would be more accurate and it would be of great assistance to the practitioners involved and the Panel in providing a detailed note of what happened on previous occasions. We do not consider that there should be a charge for the transcripts in these circumstances.

- This is standard procedure before other health care regulators

- 2. Impairment case: amendment of the Register

Q81 Do you have any comments on this section of the rules?

23. Impairment case: publication of decision

Q82 Do you have any comments on this section of the rules?

- We consider that only decisions where misconduct/lack of competence/health is found should the decision be published (subject to consideration for the privacy rights of the registrant).

- We do not consider that decisions where the facts have been found proven but the case proceeds no further should be placed on the website. In these circumstances the registrant has, in effect, done nothing wrong, they should not have their professional reputation tarnished by the fact that the SSSC brought a case against them.

- The SSSC should be extremely cautious about the language use in published decisions. For example, it is disproportionate to routinely categorise minor acts of misconduct as “abuse”. Intemperate language if often picked up by the press and leads to extremely prejudicial reporting.

- Registrants should be given clear guidance when being offered voluntary orders that, if the sign up to those orders, they will be published on the SSSC website and may be reported by the press.

24. Impairment case: review of suspension order and conditions

Q83 Do you have any comments on this section of the rules?

Chapter 3: Application cases - procedure

25. Application case: initial notice

Q84 Do you have any comments on this section of the rules?

- Section 25(2)(a) to (e) should be deleted. We do not consider there to be any need for the SSSC to set out their case in the Notice of Hearing. How the case will be dealt with is a matter for the Panel. By making a proposal the SSSC are unduly influencing the Panel. If the Panel do not agree with the SSSC recommendation they may think twice before deciding in this way. This is entirely unnecessary and not in keeping with other healthcare regulators.

26. Application case: disclosure pack

Q85 Do you have any comments on this section of the rules?

-

27. Application case: case management meeting

Q86 Do you have any comments on this section of the rules?

- We would repeat our answer to question 71

28. Application case: case management meeting procedure

Q87 Do you have any comments on this section of the rules?

29. Application case hearing normally to be held in private

Q88 Do you have any comments on this section of the rules?

30. Application case hearing: order of proceedings

Q89 Do you have any comments on this section of the rules?

31. Application case hearing: findings of fact

Q90 Do you have any comments on this section of the rules?

32. Application case hearing: finding on fitness to practise

Q91 Do you have any comments on this section of the rules?

- We would repeat our answer to question 76.

33. Application case: decision

Q92 Do you have any comments on this section of the rules?

34. Application case: notice of decision

Q93 Do you have any comments on this section of the rules?

35. Application case: resumed hearing where conditions imposed

Q94 Do you have any comments on this section of the rules?

Chapter 4: Common provisions

36. Impairment case hearings and application case hearings: common provisions

Q95 Do you have any comments on this section of the rules?

37. Combining cases

Q96 Do you have any comments on this section of the rules?

38. Postponement of hearing

Q97 Do you have any comments on this section of the rules?

39. Adjournment of hearing

Q98 Do you have any comments on this section of the rules?

40. Fitness to plead

Q99 Do you have any comments on this section of the rules?

41. Procedure at hearing

Q100 Do you have any comments on this section of the Rules?

42. Representation and entitlement to be heard

Q101 Do you have any comments on this section of the rules?

43. Evidence and standard of proof

Q102 Do you have any comments on this section of the Rules?

- Section 43(8) should be deleted. We do not consider that a Fitness to Practice Panel can simply rely upon facts found in relation to other civil matters. This would be entirely dependent upon what evidence was heard and how the determination in fact was made.

Section 43(9) – Employment Tribunals should be removed from Schedule 3.

- In relation to the burden of proof we are concerned as to where the burden lies in relation to impairment cases. Clearly the burden in relation to the facts lies with the SSSC. However in relation to misconduct and impairment before other regulators this is a matter for the professional judgment of the Panel. It is not a matter that the SSSC requires to prove . Instead, the Panel – using their professional judgment – ought to determine whether in the circumstances fitness to practice is impaired and on what grounds it is impaired.

- We consider that if this is a matter which the SSSC will be required to prove this will make this section of proceedings unnecessarily adversarial. In most cases the SSSC will be seeking to argue – regardless of the circumstances – that the allegations amount to misconduct/lack of competence/health and that fitness to practice is impaired. We do not consider this to be a positive approach and may be unduly influential on the Panel making their determination.

- We remain concerned as to the SSSC Fitness to Practice department's failure to properly understand their role in proceedings. It is simply and only this: to expertly present the evidence (on facts, impairment and sanction) and allow the Panel to make whatever decision they see fit in relation to those matters. It is not (except in relation to the facts) to advance a particular position in relation to those matters. Particularly where a registrant is not represented or not present, it is not in the public interest to allow panels to have to determine important civil rights based on such a partial and one-sided picture of a case. This is especially where there is an acute Article 6 issue around inequality of arms.

44. Witnesses

Q103 Do you have any comments on this section of the rules?

45. Vulnerable witnesses

Q104 Do you have any comments on this section of the Rules?

- Consideration will require to be given to the new Lord Carloway rules on this issue.

46. Hearing in absence of applicant or registrant

Q105 Do you have any comments on this section of the rules?

Part 5: Restoration to the Register

47. Application for restoration to the Register

Q106 Do you have any comments on this section of the Rules?

48. Application for restoration: disclosure pack

Q107 Do you have any comments on this section of the rules?

49. Application for restoration: case management meeting

Q108 Do you have any comments on this section of the rules?

50. Restoration hearing: procedure

Q109 Do you have any comments on this section of the rules?

OK

51. Restoration hearing: notice of decision

Q110 Do you have any comments on this section of the rules?

Part 6: Temporary order referrals

52. Temporary order referral: initial notice

Q111 Do you have any comments on this section of the rules?

53. Temporary order referral: disclosure pack

Q112 Do you have any comments on this section of the rules?

54. Temporary order referral: expedited procedure

Q113 Do you have any comments on this section of the rules?

- We consider that this section should be deleted.

- We understand that the operation of this section will be that section 54(1)(b) means that the Panel will have to consent, at the start of the hearing, to there being good reasons for dispensing with the 28 day notice period. Essentially the SSSC will require to demonstrate to the Panel and the Panel will require to make a determination on the matter before the hearing proceeds. This is not how the rules currently read. If this is how they are intended to operate, "the SSSC" in section 54(1)(b) requires to be deleted and replaced with "the Panel".

55. Temporary order referral: procedure and hearing

Q114 Do you have any comments on this section of the rules?

• We consider that section 55(3) (b) should make clear that the Registrant may give evidence. The SSSC must recognise that the registrant is entitled to lead evidence in some cases to establish that

56. Temporary order referral: disposal

Q115 Do you have any comments on this section of the rules?

- We consider that section 56(2) should be deleted. The Panel should not be obliged to take into account the decisions guidance. This is not in keeping with other healthcare regulators. The Panel should require to state in their decision why they have not followed the guidance if they chose not to do so.

57. Temporary order referral: notice of decision

Q116 Do you have any comments on this section of the rules?

58. Review of temporary order

Q117 Do you have any comments on this section of the rules?

- At section 58(4) there should be a mandatory section added in to each notice of review hearing requiring the SSSC to set out what actions have been taken to investigate the case since the last calling of the case. Panels always ask this question and there are always delays when SSSC Case Presenters require to take instructions on this point. If it was in the papers it would be clear for everyone and save time. It would also incentivise case handlers to make steady and regular progress with the investigation of all cases.

59. Review of temporary order: procedure at hearing

Q118 Do you have any comments on this section of the rules?

- We consider that section 59(7) should be deleted. Please see our earlier written comments.

60. Temporary order referrals and reviews: cancellation of hearings

Q119 Do you have any comments on this section of the rules?

Schedules

Schedule 1 - Transitional and saving provisions

This section will be completed nearer the time of implementation.

Schedule 2 - Fitness to Practise Panels

Q120 Do you have any comments on this section of the rules?

- We do not consider that section 4 should be included. A Chair should not be involved in any one hearing more than once, regardless of what involvement that Chair had previously.

Schedule 3 - Regulatory bodies whose decisions may be considered by a Fitness to Practise Panel under Rule 43

Q121 Do you have any comments on this section of the rules?

Decisions Guidance: for Fitness to Practise Panels and SSSC staff

Part A - General

Q122 Do you have any comments about this part of the guidance?

Equality and diversity statement (para 2): the second paragraph should have an example relating to health. For example, someone suffering from depression may suffer an impairment in cognitive functioning meaning that their decision making ability is lessened.

What standards do we expect of social service workers? (Para 5) This should make clear that a breach of the code of conduct is not automatically misconduct.

Part B - General principles

Q123 Do you have any comments about this part of the guidance?

We consider that the example under section 1 about the abusive worker is unduly negative and sets out an unduly negative view of social service workers and the types of behaviour they may engage in.

Para 1.1 – *"we must make sure the worker does not have the opportunity to repeat the behaviour"* – again we consider that this is unhelpful. No system will ever prevent repetition in all circumstances. It is the SSSC's role to ensure that the risk of repetition is minimal and that there is no ongoing risk to the public. Putting absolute statements into guidance which will be used by Panel's is unhelpful and means that Panels are often overly restrictive and risk averse in the sanctions which they impose. This will mean that Registrant's are often given harsher sanctions than is necessary. This again does not assist the SSSC in maintaining a worker register of social service workers. If there is a way of keeping someone in the profession that should be made possible, rather than trying to achieve the impossible.

Para 2.3 – This should state that "When considering the decisions available, the decision maker should start" **with no sanction.** This is in line with case law. The Panel should not start at the lowest sanction as the Panel should have the option to apply no sanction. This should be made clear.

Last paragraph – this requires to be deleted. It is wrong in law. The decision maker must weigh up all the factors and come to a sanction proportionate to the situation in hand. These factors include reputational and financial consequences for the Registrant. All of these factors must be determined before coming to a decision.

Para 3.1 – In relation to insight, regret and apology it should be made clear to Panels that the Registrant does have a right to deny the charges. This should not be held against a Registrant. It is perfectly possible for the charges to be denied and then the Registrant to show insight at a later stage in the process, or be able to show remediation of any failings which have been found proven.

Too often, at present, a denial of charges which are subsequently found proven is held against the registrant and comments made in judgments about lack of insight. In some cases this will no doubt be a fair comment but it should not be automatic. Recognition has to be given to the practical reality of denying the charges, i.e. if they are then found proven a registrant cannot then go back on their previous evidence and admit that their denial of the charge was a lie. It would be unreasonable to expect this of registrants, and Panels ought to be aware of this, in the context of coming to their view on insight. A registrant has a legal right to make denials in respect of various charges in the course of formal legal proceedings without being subsequently criticised for doing so.

To reflect this we consider that the references to behaviour "during the hearing" should be deleted in bullet points 2 and 3.
In relation to aggravating factors(the last bullet point) we find it concerning that behaviour at work, prior to being registered – in a social care setting – may be aggravating. This is unfair. We can appreciate that previous behaviour may require to be considered in terms of an application for registration. However, we do not consider that this should be aggravated if it is in a social care setting. Social care workers, in general, have very little understanding of the SSSC and their codes of conduct. This is primarily a cultural issue but also employers must take their share of responsibility.

Para 3.6 – Duress: we consider that, similar to discrimination cases at the Employment Tribunal, the Panel ought to be allowed to draw inferences from the evidence which is presented regarding duress. Other than the registrant advising that this happened it is unlikely that there will be any further direct evidence. In these circumstances the Panel ought to be able to draw inferences from background circumstances and workplace incidents in order to determine whether or not a registrant has been subject to duress.

Para 3.8 – While cooperation with the SSSC is clearly a mitigating factor, this requires to be balanced with a registrant's right to test the case made out against them. A registrant can be perfectly cooperative with the SSSC throughout an investigation but deny all the charges against them. This does not mean that they are being uncooperative with the SSSC.

This is a cultural shift that requires to take place within the SSSC. Cooperation with the SSSC should not be determine whether or not admissions are made, or whether or not the registrant provides comments to the SSSC at an early stage registrant is entitled to put the case against them to the test. Quite often, initial requests for comments refer to vague allegations not supported by any evidence. In these circumstances, early admissions by the the registrant are simply providing evidence for the SSSC to use against them. Detailed comments ought only to be provided once the SSSC ha set out their case.

We are strongly of the view that cooperation should not be defined by admissions made and information provided to the SSSC. There also ought to be a recognition in the guidance that cooperation can also occur in situations where all the charges are denied.

Para 3.10 – we consider that the word "victim" ought to be deleted in the third line and replaced with "complainer". This is in keeping with Scottish Appeal Court authority on the matter.

Para 5.1 – With regards to sexual misconduct we consider that there ought to be recognition in the guidance that there are scales of sexual misconduct. Inevitably some sexual misconduct will be worse than other sexual misconduct, this is reflected in case law and ought to be made clear to Panels.

Para 5.3 – The dishonesty section ought to refer to the case law on dishonesty which is an objective not subjective. The case of *R v Ghosh [1982] Q.B. 1053* states that there is a two part test in relation to dishonesty. Firstly, an objective test, whether according to the ordinary standards of reasonable and honest people what was done by the defendant was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards then secondly, the subjective test: The panel have to consider whether the defendant himself must have known that what he was doing was, by those standards, dishonest.

Part E - Conditions

Lord Chief Justice, Lord Lane stated that *"in most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."*

Part C - Types of decision

Q124 Do you have any comments about this part of the guidance?

Para 3.2 Possible Outcomes – We are concerned by the statement at the top of page 21 that in cases which are only about a worker's health a warning is unlikely to be appropriate.

We do not think it is appropriate that this is in the guidance. The SSSC ought not to be providing this level of guidance to Panel's regarding their decision making. There are health cases, for example relating to alcoholism, where a warning would be an entirely appropriate sanction.

We consider that stating in the guidance that a warning is unlikely to be appropriate means that Panels are less likely to give this sanction the consideration it deserves. In effect, it will prevent Panels considering it and even if they do consider it they are unlikely to impose it as it will be seen as a controversial decision.

Similarly, our comments apply to the bottom paragraph regarding a suspension order. It is perfectly possible for a registrant to be suspended from the register for a period of time to allow their health to recover. A worker ought not to be removed from the register due to their health. Please refer to previous comments regarding limiting the sanctions available in particular cases.

Part D - Applications to be restored to the Register

Q125 Do you have any comments about this part of the guidance?

We are concerned by the comments in the second paragraph, Additional Considerations, that a removal order "*is a clear indication that the behaviour was considered to be extremely serious"*. This relates only to removal due to misconduct. If the SSSC are to continue to seek to remove people on the grounds of health and/or lack of competence this would require to feature in this section of the guidance.

Part E - Conditions

Q126 Do you have any comments about this part of the guidance?

We are concerned that Conditions are not considered appropriate when there is a “denial of wrongdoing”. Please refer to our comments to in relation to section B of the guidance on this issue. We consider that this ought to be removed.

In addition, we consider that a condition ought to be considered appropriate in all cases. We do not think it is fair, or correct, for the SSSC to state that conditions may not be appropriate in cases of conduct. This is entirely a matter for the Panel. Conditions are regularly adopted by other regulators in misconduct cases and are entirely apt where a registrant has shown some remediation but further work is required. Again our comments in relation to Part C should be considered.

The Panel should be free to consider whatever sanction they consider appropriate in the circumstances of the case. The SSSC guidance should not state which sanctions are appropriate in which cases.

In relation to section 2 we consider that Panels ought to be advised that when imposing conditions of practice there ought not be a suspension order in all but name.

Thank you for taking the time to complete the consultation. Please click submit to send your responses.