

NMC response to General Optical Council consultation on their draft protocols for remote hearings and service of statutory notices by email

About us

- 1 Our vision is safe, effective and kind nursing and midwifery that improves everyone's health and wellbeing. As the professional regulator of almost 732,000 nursing and midwifery professionals, we have an important role to play in making this a reality.
- 2 Our core role is to **regulate**. First, we promote high education and professional standards for nurses and midwives across the UK, and nursing associates in England. Second, we maintain the register of professionals eligible to practise. Third, we investigate concerns about nurses, midwives and nursing associates – something that affects less than one percent of professionals each year. We believe in giving professionals the chance to address concerns, but we'll always take action when needed.
- 3 To regulate well, we **support** our professions and the public. We create resources and guidance that are useful throughout people's careers, helping them to deliver our standards in practice and address new challenges. We also support people involved in our investigations, and we're increasing our visibility so people feel engaged and empowered to shape our work.
- 4 Regulating and supporting our professions allows us to **influence** health and social care. We share intelligence from our regulatory activities and work with our partners to support workforce planning and sector-wide decision making. We use our voice to speak up for a healthy and inclusive working environment for our professions.

Introduction

- 5 We welcome the opportunity to respond to both of your consultations and to share our own experience and learning. Like most regulators, we have had to respond quickly in order to adapt our processes in response to the pandemic. Changes were made to our legislation to allow us to respond to the situation ('Covid-19 emergency rules'). The changes were introduced on a temporary basis following discussion, but then became permanent.
- 6 [Our consultation document](#) sets out the background to our consultation, why we are consulting, gives our thoughts on the questions we are asking, and shows what we propose to do with the responses. The [Consultation analysis report](#) sets out an analysis of the responses and provides detail of the interviews and focus groups the research company held with "seldom heard" members of the public.

- 7 Our [report to Council](#) (at pages 45-62) provides relevant information that our Council considered when deciding whether to approve our recommendations on whether and how we should use our emergency rules beyond 31 March 2021 and once the emergency is over. It provides a summary of legal advice we received as well as a short summary of what we learnt from the consultation responses.
- 8 We published [guidance to deal with the Covid-19 emergency period](#) on 31 March 2020. This has been updated on a number of occasions, including after our consultation. We plan to review and revise the guidance once the emergency period is over.

Protocol on remote hearings

- 9 We agree that it is sensible to be as flexible as possible to best suit the needs of all parties and to find the most suitable approach in all the circumstances and therefore it is appropriate to offer physical, remote, hybrid and blended hearings.

Expectation that most non substantive events should be conducted virtually

- 10 We have taken a similar position, and in our guidance we say we anticipate that interim and substantive order events will continue to be listed as virtual hearings where it is “fair and practical to do so”. We anticipate that meetings will be heard virtually unless there is a good reason for us not to do so.

Access to and ability to use technology

- 11 In the GOC protocol, you explain that this factor will have greater weight than other factors when deciding how a hearing should be held. As a result of feedback from our consultation and legal advice (summarised in our report to Council) we decided to make this factor a prerequisite before considering holding a virtual hearing; it had previously been one of a number of factors.
- 12 In our guidance we explain that we think we should be able to overcome barriers in most cases, but where we cannot we will look to hold a physical hearing, with some or all parties attending our hearings centre. We wanted our guidance to afford us the flexibility to try and overcome barriers where a virtual hearing may be suitable but to also make it clear that if that is not possible we will hold a hearing at our hearings centre but that some parties may still attend virtually.

Registrant’s preference for a physical hearing

- 13 The GOC protocol states that if a registrant prefers a physical hearing, one will be arranged (and their preference will be considered where they prefer a remote hearing). For us, the registrant’s preference is a factor we will consider, but it is not the decisive factor.
- 14 The [PSA’s guidance on fitness to practise hearings during the Covid-19 pandemic](#) (‘PSA guidance’) says they do not think it is appropriate for a virtual hearing to require the registrant’s consent, although it is not clear if that will continue to be their position once the emergency is over.

- 15 Consent of the parties to hold a remote hearing is not listed in [guidance from the family court](#), although it does point out the need for caution where parties do not consent. Courts across the jurisdictions appear to be weighing the parties' views in the balance when considering how a hearing should be held.
- 16 Amongst the responses to our consultation there were a number of respondents, including the representative bodies, who said that a nurse, midwife or nursing associate should consent to having a virtual hearing before one is held. However, we indicated in our report to Council that the view of the nurse, midwife or nursing associate will remain a relevant, rather than the determinative, factor once the emergency is over. We feel the relevant balance and protections are best provided by ensuring access to and ability to use technology, balancing other appropriate considerations and making sure a hearing is fair and practical.

Evidence

- 17 In your draft protocol at 3.2.2 you indicate that where a registrant contests the case it may be more appropriate for the matter to be heard in person and, at 3.2.3, where parties consider it would be beneficial for evidence to be heard in person it may be more suitable to list the matter in person.
- 18 In our own [guidance on evidence](#), we say that “in most circumstances there is no disadvantage in a witness giving evidence by video-link compared to appearing in the same room as the panel.”
- 19 We rely on case law to inform this view. Our thinking is led by statements in the judgment in *YI v AAW*¹, in which Lady Wise rejected the argument that it would be difficult to assess credibility of parties and witnesses giving evidence remotely on video screen and, whilst noting it was a little unsatisfactory that some witnesses gave evidence by mobile telephone, said that this did not have a bearing on her assessment of their credibility and reliability².
- 20 We feel that the “demeanour of a witness is actually often the least useful barometer by which to determine whether their account is accurate”. Several cases support this approach and understanding³. In particular we take into account the following passage from *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018]⁴:

[36] ... it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J...:

¹ [2020] CSOH 76

² Several cases also support this statement: *Polanski v Conde Nast* [2005] UKHL 10; *A Local Authority v Mother, Father, SX* [2020] EWHC 1086 (Fam); *National Bank of Kazakhstan v The Bank of New York Mellon* [2020 unreported]; *Re Smith Technologies (Insolvency and Companies Court)* [2020 unreported]; *Re One Blackfriars Ltd, Hyde v Nygate* [2020] EWHC 845 (Ch); and *Municipio de Mariana v BHP Group* [2020] EWHC 928 (TCC).

³ This includes examples such as *R v Turnbull* [1977] QB 224 and *Suddock v NMC* [2015] EWHC 3612 (Admin).

⁴ *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

- 21 Whilst the opinions expressed by MacKenna J appear to be influential rather than binding, we think it is sensible to take this into consideration when assessing evidence. Additionally, the PSA guidance does not identify these criteria as items to consider, a point which informs our own approach.

Public access

- 22 Although it is not directly stated in the GOC protocol, on our reading it can be inferred that observers are able to view a remote hearing from private premises. We currently only allow audio access from private premises unless there is a particular need for visual access (such as a reasonable adjustment) and there are other protections in place. Our [protocol](#) sets out further detail on this.
- 23 Only 39 percent of those responding to our consultation were in favour of visual access from private premises. However, we're aware that the PSA guidance shows the PSA are supportive of allowing visual access from private settings in order to allow maximum accessibility; whilst they recognised the concerns surrounding privacy and information security they felt there was now experience in providing public access and that regulators had identified solutions to deal with this.
- 24 We set out the reasoning for the approach we're currently taking in paragraphs 31 and 32 of our [report to Council](#) (page 56 in the papers). However, we also make it clear we will continue to keep our position on public access under review in order to make sure we take on board our own and other regulators' experience, consider any relevant developments and properly balance competing interests.

Breach of privacy

- 25 Point 4.2.2 of the draft protocol lists the following as a factor to consider in determining what mode of hearing is appropriate: "**Whether there is a reason to believe that there are risks of a breach of privacy** that we cannot overcome." It is unclear whether this points towards a physical or remote hearing. We flagged a similar concern to the PSA when they consulted on the draft of the PSA guidance and we note the final version clarifies that "[s]erious risks of a breach of privacy online might point to a physical hearing".

Oath taking

- 26 At 7.11 your draft protocol says "If the witness wishes to take a religious oath, they will need the relevant holy book physically available with them. Otherwise, the

witness will be asked to make an affirmation.” The [Equal Treatment Bench Book](#), (which is a guide for the judiciary) might be a helpful reference point, and says the following:

- 27 “We would suggest that it is not necessary to touch a religious book when taking a religious oath.” [At paragraph 55]
- 28 “If the requested holy book is not available, the individual should not be persuaded to swear the oath on a different religious book which court staff think is sufficiently similar. It is good practice to apologise and to offer the witness the opportunity of swearing the oath without the religious book (see paragraphs 55- 59 below) or affirming, even if he or she is initially willing to swear an oath on the holy book of another religion. The important point is that the individual can choose and feels bound by the oath or affirmation (as the case may be).” [At paragraph 52]

Equality Impact Assessments and considerations

- 29 We completed EQIAs in 2020 in relation to virtual hearings and public access to virtual hearings. There were similarities in the protected groups who we identified as potentially being impacted in both. These assessments identified that the relevant protected characteristics which were most likely to be affected by our approach include age, race, disability and those with caring responsibilities or from lower socio economic groups. Both positive and negative impacts for these groups were identified.
- 30 There were also some potential negative impacts identified in relation to people with certain religious beliefs, people who cannot read and people suffering from domestic violence/coercive control. Individuals may fall into more than one protected group and, given the impact on certain groups could either be positive or negative, it is important to consider each individual’s needs.
- 31 When we carried out our consultation we ensured our qualitative research was held with diverse groups and took steps to ensure that people with key protected characteristics relevant to the fitness to practise process participated in the qualitative research.
- 32 Of course, it is important that the protocol provides flexibility to allow any potential negative impacts to be dealt with and barriers to be removed so that no group is particularly disadvantaged.

Protocol on service of statutory notices by email

- 33 We have adopted a similar policy and procedure. Although the GOC requires a recipient to opt in, as your legislation requires consent in writing, in our case we send notices where we have a “confirmed email address”.
- 34 Similarly to you we don’t have any particular EQIA findings to highlight. However, in light of the responses to our consultation, we now make checks to see if notices have been received by email; if we don’t have confirmation that a notice has been accessed then we will make reasonable efforts to confirm that parties are aware.

- 35 I hope that these comments are useful and we would be happy to discuss our response in more detail if that would be helpful. We would also welcome any learning you can share with us as a result of your consultation.

Yours sincerely

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