

Health and Social Care Fitness to Practise in the context of Covid-19

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The Coronavirus pandemic has had an ongoing impact upon daily lives for almost one year now. Its impression on the health and care sector is likely to have lasting effects well into the future. Since March 2020 we have seen the regulators jump into action to address the demands and concerns raised by this unprecedented healthcare emergency.

One of those reactions was the creation of temporary registers allowing professionals to re-join the workforce. For example, the Health and Care Professions Council (HCPC) has registered thousands of former paramedics, biomedical scientists, radiographers and other professions essential to testing and treating coronavirus patients. The General Medical Council (GMC) has given temporary registration or a licence to practise to suitable doctors and under similar emergency legislation, the NMC has registered nurses who had left the register within the previous three years. The Chief Executive of Social work England has stated that the temporary register for social workers is likely to be needed for the long haul as needs currently hidden from view come to the fore.

It is clear that a number of retired and current health and social care practitioners have responded bravely and positively to this emergency. It really has been a case of all available hands-on deck.

However, even with the additional numbers in key roles, practitioners have had to be deployed beyond their usual professional roles and responsibilities in order to meet the needs of the public.

For those working in critical care who are the most involved in caring for seriously ill Covid-19 patients, the mounting number of patients needing respiratory support via ventilators has exceeded the supply of nurses with the appropriate skill set. Consequently, many non-critical care nurses are placed in unfamiliar territory facing professional challenges.

Furthermore, whilst ordinarily healthcare practitioners would be making decisions in the best interests of the patient based on the benefits and risks of different treatment options; the realities of the pandemic mean that they are also having to take into account factors such as

the availability and capacity of resources when making what should be purely clinical decisions.

Alongside this, professionals have also been placed in the position of having to choose between treating patients and keeping themselves and other patients safe.

Unfortunately, there is the inevitable concern of what potential criticism or complaint may come from making these choices. Regulators' surveys have reported practitioners' fear of investigations arising from difficult decisions made during the pandemic.

On 14 January 2021, nine of the statutory regulators of health and social care published their updated joint statement. Within the statement, the regulators comment: -

“We recognise that in highly challenging circumstances, professionals may need to depart from established procedures in order to care for patients and people using health and social care services. Our regulatory standards are designed to be flexible and to provide a framework for decision-making in a wide range of situations. They support professionals by highlighting the key principles which should be followed, including the need to work cooperatively with colleagues to keep people safe, to practise in line with the best available evidence, to recognise and work within the limits of their competence, and to have appropriate indemnity arrangements relevant to their practice.

We recognise that the individuals on our registers may feel anxious about how context is taken into account when concerns are raised about their decisions and actions in very challenging circumstances. Where a concern is raised about a registered professional, it will always be considered on the specific facts of the case, taking into account the factors relevant to the environment in which the professional is working. We would also take account of any relevant information about resource, guideline or protocols in place at the time.”

(See the full statement [here](#))

In essence, the regulators have expressly reiterated that the exceptional circumstances of the pandemic will be taken into account if complaints are made about fitness to practise.

Both the GMC and the General Dental Council (GDC) have published specific guidance for decision makers that reinforces the point that each case must be determined on its individual merits. The guidance also sets out factors to be taken into account when considering the impact of Covid-19 on a professional's ability to deliver care and concluding whether there is a real prospect that a registrant's fitness to practise could be considered impaired.

The non-exhaustive list of considerations includes:

- the availability and distribution of resources to provide healthcare;
- the change in healthcare provision due to social distancing guidance;
- the uncertainty and rapidly evolving evidence-base about a novel disease and effective care and treatment;
- the disproportionate impact of disease and mortality rates for individuals from black and minority ethnic groups (BME);
- access and availability of personal protective equipment (PPE);
- wearing PPE for extended periods of time causing discomfort and impeding communication with patients and colleagues;
- staff shortages due to Covid-19 infection or self-isolation requirements;
- ways of working outside of normal routine and practice and requirements to work in unfamiliar roles, teams and/or environments at short notice; and
- changing and sometimes conflicting guidance and protocols, often produced and communicated quickly.

(see the guidance documents [here](#))

At present the landscape of fitness to practise cases arising out of the pandemic is unknown. However, it is clear that the principle of “context is key” has never been more important when deciding whether some action or inaction amounts to misconduct and/or impaired fitness to practise. Consequently, lawyers on both sides and ultimate decision makers will have to exercise careful judgment when preparing and determining these cases.

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22 January 2021



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