

Consultation on Fitness to Practise Rules

Your response

There are 12 questions relating to the rules and 3 relating to impact assessment. Please specify to what extent you agree or disagree with the education and training standards we have proposed, which can be found on the Social Work England website. There is opportunity throughout this survey for further comment.

The deadline for responding to this consultation is 5pm Wednesday 1 May 2019. We welcome your views both here and in future consultations to improve our profession.

About you

We would like to ask for some basic personal information about you. This information will help us understand how well we are reaching different audiences and make sure we understand the impact of our proposals on diverse groups. We will collect and use the information to:

- Listen to your ideas about our services.
- Evaluate and improve services.

A full privacy statement can be found on the Social Work England website.

a. What is your name?

Sarah Saunders and Pete Bentley on behalf of Nagalro

b. What is your email address?

nagalro@nagalro.com

c. Would you like your response to be kept confidential by Social Work England? Would you like your response to be kept confidential by Social Work England? Please tick.

Yes

No

d. Which of the following best describes the capacity in which you are responding to this consultation? Please tick.

- Adult social care – other
- Adult social care – social worker
- Charity or non-governmental organisation
- Children's social care – other
- Children's social care – social worker
- Higher education institution/academia
- Local authority
- Mental health services
- Other health services
- Person with lived experience of social work
- Social work student
- Prefer not to say

X Other

e. Are you responding to this consultation on behalf of an organisation?

X Yes

No

2. If you are responding on behalf of an organisation, please fill in the below.

a. What is the name of your organisation?

Nagallo, The Professional Association for Children’s Guardians, Family Court Advisers and Independent Social Workers.

b. Please chose the category below that best describes your organisation

- Education provider
- Employer
- X Professional body**
- Regulator
- Charity and/or voluntary sector organisation

Other

3. Fitness to practise questions

Rule 3: Triage

To what extent do you agree with our criteria to accept a case?

1 (strongly disagree)

X 2

3 (neither)

4

(strongly agree)

4. If you would like to add further comments, please do so below.

Some criteria are more clear-cut than others but all appear to be being treated with a similar ethos. Nagalro is concerned that there is an implicit assumption in 'Part 2 Triage' of wrong behaviour on the part of the SW. For example in relation to:- (ii) The likely availability of sufficient evidence to support an allegation of impaired fitness to practice :- Who will be the arbiter of there being "sufficient evidence to support an allegation of impaired fitness to practice " and what recourse will the social worker have to object to such a finding at this stage of the process? The questions listed are heavily biased against the social worker and do not take into account of the possibility that the complaint may be based on a misunderstanding of the social worker's duties and responsibilities. For example, a parent may feel aggrieved that their child has been removed, whereas the social worker was simply carrying out their duty to protect children at risk of significant harm. Equally the complaint may simply be malicious. It is not at all clear how these judgements will be made because the process is not open or placed under external scrutiny. The social worker will have had no recourse to advice or fair process at this stage. We do not believe sufficient consideration has been given to the issue of compliance with the Human Rights Act. For example, Article six of the Convention for the Protection of Human Rights and Fundamental Freedoms says: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The ability of a person to pursue his or her profession must be a matter of their civil rights. Nagalro's view is that there is no public hearing (fair or otherwise) in these proposals and far from being independent and impartial, the tribunal in this scenario would be the prosecutor.

5. Rules 10-11: Obtaining further information

To what extent do you agree that a social worker and a complainant should be given further opportunity to comment on a case prior to referral to the case examiners in circumstances where an investigation reveals new evidence?

- 1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

6. If you would like to add further comments, please do so below.

The social worker must be given immediate access to all new evidence. Additionally there should not be any expectation of a social worker being expected to comment without the opportunity for legal advice.

7. Rule 13: Interim orders

To what extent do you agree that interim order applications may be agreed in a meeting rather than in a hearing, where the social worker does not request a hearing?

- x 1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

8. If you would like to add further comments, please do so below.

Nagalro strongly disagrees with Interim Orders being made by Case Examiners. Article Six of the Convention for the Protection of Human Rights and Fundamental Freedoms says: 'In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' The ability of a person to pursue his or her profession must be a matter of their civil rights. In these proposals there is no public hearing. Such a process would not be

independent and impartial. In effect, the tribunal is the prosecutor. The proposed procedure for interim orders does not, in our view, even pretend to comply with Article 6. Nagalro is also concerned that registrants who may not be able to afford access to legal advice may be placed under unfair and improper pressures to agree an outcome which is not, in fact, justified by the evidence. Furthermore, a 7-day notice period before this is automatically imposed, would not allow any opportunity for the SW to take proper legal advice.

9. Rules 14-15: Notice of fitness to practise

To what extent do you agree that there should be different time frames for issuing notices of hearings, with cases involving criminal convictions or straightforward concerns being given a shorter time frame?

- 1 (strongly disagree)
- 2
- x3 (neither)**
- 4
- 5 (strongly agree)

10. If you would like to add further comments, please do so below.

Nagalro is concerned that fast tracking seems to be the priority rather than thoroughness and ensuring the right outcomes. How are “straightforward concerns” to be defined and by whom? If there is to be a fast track, the inclusion of a case in this track would have to be agreed by the SW, the complainant and by the regulator. In any event, Nagalro would have serious reservations about this approach. There is a risk that pertinent information is not available and outcomes which could be highly prejudicial may be made without the registrant having had the opportunity to obtain proper advice. As an organisation we believe that decisions should be made via proper procedures which are open, fair and transparent. The process set out is neither open, fair, nor transparent. Once an order has been made this cannot be unmade even if it is subsequently reviewed and amended.

11. Rule 16: Review of orders

To what extent do you agree that review hearings should be referred to the adjudicators for a decision, rather than being decided by employees of the regulator or the case examiners?

- 1 (strongly disagree)
- 2

- 3
- 4
- 5 (strongly agree)

12. If you would like to add further comments, please do so below.

We do not agree with either proposition put forward. Nagalro is concerned that there is limited protection for the practitioner against the imposition of interim orders. There are severe restrictions of time limits (7 days) for the social worker to have the opportunity to make written or oral submissions before the order is made. Once the order has been made, recourse to redress via a High Court appeal will be financially untenable for any social worker put in this position as they will not be eligible for legal aid. This power imbalance is unjustified and not compliant with Article six of the Convention for the Protection of Human Rights and Fundamental Freedoms.

13. Rule 32: Procedure at hearings or meetings

To what extent do you agree that the rules should allow panels to decide how to regulate the procedure followed at hearings?

- x1 (strongly disagree)**
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

14. If you would like to add further comments, please do so below.

Nagalro has concerns about the compliance of the proposed processes with ECHR case law. The issue of whether a tribunal can be considered 'independent' has been considered on several occasions by the European Court of Human Rights. In *Campbell and Fell v UK*, 7 EHRR 165 and in *Belilos v Switzerland*, 10 EHRR 466, the court laid down that the independence of a tribunal was to be assessed by looking at, inter alia, the existence of guarantees of freedom from outside pressures and whether the body gives an appearance of independence. In this instance, the case examiner, with no external oversight, checks or balances will in effect decide the outcome of his or her own case. The other requirement, for a Human Rights Act compliant tribunal, is that it must be impartial. There are subjective and objective elements to this and the case examiner at Social Work England would fail both tests. Since they are the prosecutor bringing the case, they clearly come to the task of considering interim sanctions with a position already established in their own mind and so the subjective test

cannot be passed. On the objective test, the European Court in *Piersack v Belgium* 5 EHRR 169, has said very clearly that; ‘Any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society’. Any system of regulation must have the confidence, not only of the public, but also of the members of the profession to be regulated. Our members are unlikely to feel confidence in SWE as a Regulatory Body for the reasons stated above. Nagalro does not believe this process meets the criteria in relation to Human Rights legislation as set out in the case law above.

15. Rules 33-34: Legal advice at hearings

To what extent do you agree that Social Work England should be able to hold interim order and review hearings without a legal adviser or legally qualified panel chair in suitable circumstances?

- x1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

16. If you would like to add further comments, please do so below.

See answers above to Question 14. The proposals seem to show an unacceptable willingness to sacrifice fairness and justice for the sake of speed and expediency. The presence of a legal adviser, or legally qualified chair is an important safeguard against procedural unfairness and an important way of ensuring that those who are being regulated may have confidence in the integrity and fairness of the process.

17. Rule 35: Quorum

To what extent do you agree that it is suitable to use lay panels (panels of adjudicators or case examiners that do not include a registered social worker) in certain types of cases?

- x1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

18. If you would like to add further comments, please do so below.

Nagalro believes that any determination about a SW's conduct should be considered by a panel including a registered social worker. It would not be acceptable in any other profession for determinations to be made by lay members alone and it should not be acceptable in the case of social work. Whilst lay representation is important, there must also be a member of any tribunal who has a knowledge and understanding of the work, the ethics and principles and experience of the day-to-day challenges of this work. Preferably these should include specialists in either Children and Families, Mental Health, Disability or Adult Services as it is important for the social work representative to have the appropriate specific skill base which relates to the matter under scrutiny.

19. Rules 38-39: Attendance of the public at hearings

To what extent do you agree that hearings should be held in public unless there is an accepted reason for all or part of a hearing to be held in private (e.g. to consider a health or family matter)?

- 1 (strongly disagree)
- 2
- 3 (neither)
- 4**
- 5 (strongly agree)

20. If you would like to add further comments, please do so below.

Nagalro agrees that hearings should be as open as possible. However, there is likely to be information which could breach confidentiality and put a vulnerable person at risk by breaching their right to privacy. This also needs to be added to the matters which need to be weighed in the balance in terms of openness. Nagalro believes there should be a right for the Chair of the Tribunal to put a bar on the disclosure of information such as names of children or other vulnerable individuals, addresses or other means of identification. In addition, some matters may only be able to be dealt with in private such a medical information and family matters. There should be a provision whereby the hearing can move into private (closed) session where this is necessary to protect the welfare of vulnerable individuals.

21. Rule 48: Eligibility to act as an investigator, case examiner or adjudicator

To what extent do you agree that Social Work England should be able to replace an adjudicator during a hearing if one of the original adjudicators is unable to continue, rather than restart the hearing with a fresh panel?

- 1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

22. If you would like to add further comments, please do so below.

An adjudicator who has not heard all of the evidence could not be perceived as being in possession of all the facts and it is hard to imagine how the procedure could be accepted as being fair or how either the registrant or, for that matter, the complainant could have any confidence in the outcome. Nagalro would have significant concerns about this proposal.

23. Rules 49-51: Period for which information must remain on the register

To what extent do you agree with the timescales proposed for maintaining annotations on Social Work England's online register after the sanction has expired?

- x1 (strongly disagree)
- 2
- 3 (neither)
- 4
- 5 (strongly agree)

24. If you would like to add further comments, please do so below.

SWE proposals for this have not been found.

Nagalro is concerned about the lack of transparency and rationale behind the specification of these time periods. These decisions will be made by Case Managers with no hearing or external oversight and with no apparent recourse by the social worker concerned to have this reviewed in an open and transparent way. The basis for these decisions is not made clear in the consultation document. Until such time as clarity is provided in relation to this

issue it is impossible to offer any constructive comment. SWE should be much clearer and more transparent about how this is going to be employed and why these timescales need to be applied. It would appear that SWE will have carte blanche to make these decisions with no oversight and no clear process for the SW to request a change.

25. Do you have any other comments?

26. Impact assessment questions

Do you think that the proposed changes will bring benefits for you, your organisation or those you represent?

Yes

No

27. If yes, what impact do you foresee?

28. Do you think that the proposed changes will impact differently on people based on protected characteristics?

The Equality Act (2010) lists nine protected characteristics: age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.

Yes

No

29. If yes, which characteristics?

Choose as many as you like

Age

Disability

Gender reassignment

Race

Religion or belief

Sex

Sexual orientation

Marriage and civil partnership

Pregnancy and maternity

Please fill this in

30. Do you think the proposed changes will adversely affect you, your organisation, or those you represent?

31. If yes, what impact do you foresee?

Thank you for taking part in this consultation.

Once the consultation period has finished, we will provide a response which will summarise the feedback we receive and detail any changes we make.