Nursing and Midwifery Council response to the General Medical Council consultation ‘Regulating Anaesthesia Associates and Physician Associates’

We welcome the opportunity to respond to the General Medical Council (GMC)’s consultation on the regulation of Anaesthesia Associates (AAs) and Physicians Associates (PAs). This is the start of a package of government-led reforms to the statutory framework that will be rolled out to a number of regulators in the next few years, including the NMC.

In our response to this consultation, we have not set out a view on the Government’s decision to regulate AAs and PAs or the decision that the GMC will be the regulator. Instead, we have focused on how the GMC is using the new and flexible powers set out in the Government’s reform framework to introduce the regulatory model for these professions. We are very interested in how the GMC is using its new powers and how its draft rules look and work, as we are currently drafting our own regulatory rules that we will consult on in line with the Government’s wider regulatory reform timeline.

In developing our own set of rules we are following a number of principles around accessibility, collaboration, accountability and proportionality. We think that rules should be based on evidence-based policy development which reflects the principles of good regulation and demonstrate adherence to the overarching statutory framework. They should be designed to be responsive and agile, allowing us to flex our regulatory approach when required. The development of rules should also be built upon a commitment to meaningful and appropriate collaboration and engagement, and should further ambitions around equality, diversity and inclusion, particularly in relation to eliminating discrimination and unfairness. Finally, they should be relevant to stakeholder and user needs, demonstrating consideration of feedback and challenge.

We believe the GMC’s rules strike the right tone, balancing formality with accessibility. Rules need to create a degree of certainty for those involved in regulatory procedures, so that they understand their rights and obligations and the rights and obligations of others, including decision makers. At the same time, rules need to allow some flexibility where appropriate. Overall, we think that the GMC’s rules achieve this important balance effectively.

Our response to the consultation questions

Each of our responses begins with whether we agree, disagree or neither agree nor disagree, as requested by the consultation. We have also indicated where we broadly agree.

In each section our general approach is that we have made comments on the policy approach followed by more technical drafting comments.

Where we have referred to "the Order" in this document we mean *'The Anaesthesia Associates and Physician Associates Order 2024'*.[1]

Education and training

Question 1: To what extent do you agree or disagree that the standards set out within the *Standards for PA and AA curricula* describe the essential criteria that must be met for each AA and PA curriculum to be approved?

We neither agree nor disagree.

As this question relates to the standards for the new professions that the GMC is going to regulate, we do not have any comments to make on the contents. However, we do think that the draft standards are a good example of how the regulator can use the new, more flexible powers to make standards, as appropriate, for their professions.

Question 2: To what extent do you agree or disagree that the standards set out within the *Standards for the delivery or PA and AA pre-qualification education* describe the essential criteria that must be met for an AA and PA course to be approved?

We neither agree nor disagree.

We have no further comments to make for this question.

Question 3: To what extent do you agree or disagree with our proposed approach to approving education and training, as described within our rules.

We broadly agree.

The rules relating to the requirements for approvals are articulated clearly and set out a process that appears fair and proportionate. In particular, the steps that both the regulator and the applicant must take are clear and easy to understand. The parameters around which the process will take place and the responsibilities and rights of both the regulator and the education institution are clearly set out.

[1] SI 2024/374

Question 4: To what extent do you agree or disagree with our proposed approach to monitoring and quality assuring education and training, as described within our rules?

We broadly agree.

The rules relating to monitoring and quality assurance are succinctly and clearly set out. We think the rules include the right amount of detail, giving a clear overview of the range of quality assurance activity the regulator may undertake, while retaining a degree of flexibility about how those activities are undertaken.

Question 5: To what extent do you agree or disagree with our proposed approach to attaching conditions to or withdrawing our approval of education and training, as described within our rules?

We broadly agree.

We agree that failure to comply with requirements that form part of the quality assurance process should be capable of leading to conditions on an approval or revocation of an approval.

We note that the GMC have not prescribed education and training decisions as revisable decisions because education providers will have multiple opportunities to submit evidence and make representations before a final decision is made. While that process will improve the quality of the regulator's decision-making, the education provider may still believe that the final decision was based on an error of fact or law. In those circumstances, we believe it is fairer and more proportionate to give the education provider an opportunity to challenge the merits of the decision through requesting a revision.

Establishing a register of AAs and PAs

Question 6: To what extent do you agree or disagree with our approach to the form and keeping of the register, as described within our rules?

We broadly agree.

We agree with the approach to the form and keeping of the register as set out in the draft rules. The approach is clear as is the information that will be shown on the register.

Gaining entry to and removal from the AA and PA register

Question 7: To what extent do you agree or disagree with our proposed approach to registration, as described within our rules?

We broadly agree.

We find the explanatory statements at the start of each part provide a useful overview and guide to the rules.

We agree that registration procedure rules should give applicants a clear understanding of the procedure for applications, the information that's required in support of an application, the process for assessing that information when reaching decisions, and for notifying applicants of the decision.

We also support the intention that rules should provide flexibility in relation to how applicants can demonstrate that they have met those requirements based on their individual circumstances. We note that rule 4(3) requires the regulator to set out in guidance how an applicant "*must fulfil"* various application requirements e.g. evidence of the required knowledge of English language or evidence to support the applicant's fitness to practise. We agree that the regulator can use its broad guidance making powers to set out the types of evidence which should satisfy decision makers that the applicant meets the standards for registration. However, we don't think that the guidance can or should be so prescriptive as to restrict decision makers or applicants by setting requirements to be fulfilled in every case. If certain types of evidence are considered mandatory, to ensure transparency and accountability we believe that strict requirement should be stated in the rules.

We agree that the regulator should not be under a duty to make a decision on an incomplete application, as provided for in rule 5(9)(c). However, the drafting at rule 5(3) suggests that the regulator could refuse to make a decision on an incomplete application where the applicant fails to comply with a request for further information under rule 5(1)(b). If that is the policy intention, we would question whether it is fair to refuse to make a decision in those circumstances. For example, where the regulator has made an unreasonable request for further information, without a refusal decision the applicant is denied an opportunity to challenge the regulator's position via an appeal.

We also have a number of minor drafting points to make in this section:

- The use of "or" as a conjunctive in rule 5(1) suggests that the Registrar can only do one or the other (make enquiries or take other steps OR request information from the applicant). We presume that the intention is that the Registrar can use one or all of these powers, in which case we suggest that the word "or" is removed. We would make the same point about rule 8(1).
- We agree the regulator should be able to take steps to verify any evidence provided (rules 5(4) and 20(4)). We would suggest that where the information received as a result of verification steps is relevant to the consideration of the applicant's fitness to practise, it should be included in the duty to make disclosure to the applicant under rules 5(5) and 20(6).
- It may not be sufficiently clear that the regulator cannot make a decision under rule 5(8) before the applicant has given their written representations in response to information provided to them or the period for representations has expired.
- We think that rule 5(9) should contain a "must" not a "may" as the Registrar must take one of the steps set out in this rule following consideration of the application.

Question 8: To what extent do you agree or disagree with our proposed approach to re-entry, as described in our rules?

We broadly agree.

We agree with the general approach set out in the rules.

We did however note the comment within the consultation document that some categories of applicants must also demonstrate that their fitness to practise is not impaired. The categories include applicants who had a fitness to practise concern raised since the date their entry was removed from the register or who have declared a fitness to practise concern as part of their application. We agree that regulators must be satisfied that applicants are safe to practise, but when considering unproven allegations about fitness to practise, it is not necessarily for the applicant to "disprove" those allegations. The regulator should be expected to make appropriate enquiries and the applicant must cooperate fully with those enquiries to enable the regulator to make a sound, evidence-based decision.

We also have a number of other minor drafting points in relation to this section:

- Rule 19(3)(b) appears to create an additional head of impairment, in that it provides for additional readmission restrictions on professionals who have been removed "for reasons which include a criminal conviction". We would question whether this is in the spirit of the reforms, which seek to reduce the number of grounds for action. It also complicates the decision-making process in cases where there are multiple concerns: it will not be as straightforward to reach a holistic outcome as the decision to impose the final measure must cite the conviction as a reason for the decision.
- Rule 19 (3)(b)(i) – covers the time-period for making an application for readmission following a conviction. It says the application cannot be made within five years of removal or "the end date of the sentence set out in the certificate of conviction has not passed". Given that certificates may not always specify an end date, we think it may be clearer to rephrase this e.g. to prohibit applications before the sentence which is set out in the certificate has ended.
- We note from the consultation document that anyone who was removed from the register on the basis of a fraudulently or incorrectly made entry cannot apply under the re-entry process. However, we think the rules could make that point more clearly, for example, by confirming that the process set out in Part 2, "Getting onto the register", applies to this category of applicant.

Question 9: To what extent do you agree or disagree with our proposed approach to removal, as described within our rules?

We broadly agree.

We agree with the proposed approach to removal. The rules create a clear, proportionate and fair process for the Registrar when exercising new powers of removal. The rules are easy to follow and ensure that, where appropriate, the associate is given the opportunity to make representations and provide key information to the Registrar before a removal decision is made.

We also have a number of minor drafting points in relation to this section:

- We agree that the associate should be warned that if they do not make representations within the specified time period the Registrar will make a decision regardless. However, some of the drafting could wrongly infer that the Registrar can only make a decision in the absence of representations (see for example rules 13(2)(d) and 14(2)(d)).
- Rule 7(3) deals with re-entry after automatic removal from the register following conviction for a listed offence. The rule limits the right to apply for re-entry to cases where "a listed offence is quashed". As some offences qualify for automatic removal only where they result in a custodial sentence, we think this rule is possibly too narrow and that it should extend to cases where the appeal outcome means the offence no longer meets the requirements of article 9(1)(c) e.g. because the sentence has been replaced with a non-custodial sentence. We would also suggest that it's clearer to refer to a conviction being quashed rather than the "listed offence" being quashed.

Question 10: To what extent do you agree or disagree with our proposed approach to handling requests for removal (including where there may be outstanding fitness to practise concerns), as described within our rules?

We broadly agree.

We have no further comments to make for this question.

Question 11: To what extent do you agree or disagree with our proposals for when decisions to remove an entry from the register will take effect?

We broadly agree.

We agree that where the Registrar has decided that an entry should be removed from the register, it should be possible for that decision to take effect immediately. However, we think that the Registrar would benefit from the power to delay the removal taking effect where they're satisfied public protection does not require immediate removal and that it's appropriate for registration to continue while the associate appeals the removal decision.

Fitness to practise proceedings and decision-making principles

Question 12: To what extent do you agree or disagree with our proposed approach to initial assessment, as described within our rules?

We broadly agree.

We broadly agree with the proposed approach.

We note from the consultation papers that the GMC wants to use the increased discretion provided in the legislation to take swift action to protect the public or close cases where regulatory action is not required. However, we note that rule 3(1)(b)

requires the regulator to refer a matter to case examiners where there is a “reasonable likelihood” that the regulator will need to take action under the rules. Rather than making an assessment about what a future decision maker is likely to conclude in the next stage of the proceedings, we believe the regulator should be required to close a case as soon as it can reach an evidence-based decision that regulatory action is not required. This could shorten the fitness to practise process in a significant number of cases, encouraging swifter decision making and ensuring that cases are not moved on to the next stage of the process unless it is necessary to do so.

Question 13: To what extent do you agree or disagree with our proposed approach to interim measures and interim measure reviews, as described in our rules?

We broadly agree.

We support the policy intention, described in the consultation document (page 35), that regulators should be able to withdraw a referral to an Interim Measures Tribunal where they consider that an interim measure is no longer necessary. However, the drafting in rule 6(4) only allows for withdrawal where it appears to the regulator that the tribunal “must not consider” imposing an interim measure, which appears overly restrictive. We’d suggest that the regulator should be able to withdraw the referral where they consider it’s “no longer appropriate” for the tribunal to consider imposing an interim measure.

The process for deciding whether to impose an interim measure appears both fair and proportionate. We would only query whether the requirement to send two notices before the hearing is necessary (rule 6(2) notice of referral to a hearing and rule 7(1) notice of a hearing). Given the emergency nature of these hearings and the likelihood that there will be little or no gap between the referral decision and the fixing of a hearing date, we think the rules should avoid a requirement for two separate notices in every case.

We do have a number of comments in respect of the process for reviews of interim measures. The same comments apply in respect of reviews of final measures.

We question the fairness of giving the regulator an unfettered power to refuse a request for a review (as set out in rule 8(2)(b)). We agree that regulators need to be avoid being obliged to conduct repeated reviews where there is no new information to consider. However, this needs to be balanced with fairness to the professional and we think it’s appropriate that the regulator is required to hold a review when the associate’s request is supported by evidence of a material change of circumstances and representations as to why the measure should be varied, replaced or revoked on the basis of that information.

The Order permits regulators to create more efficient and proportionate processes for reviewing measures, so that action can be made as swiftly as possible in response to any change in the level of risk to the public. With this in mind, we think the process set out in these rules is unnecessarily protracted. For example, the process of the regulator directing the case examiner to conduct a review (rule 8(5)) or case examiners requesting information from the regulator (rule 14) appear overly complex given that the case examiner is essentially undertaking the review on the regulator’s behalf (noting

that the power to conduct a review is bestowed on the regulator under articles 12 and 14 of the Order).

In these rules, upon review the case examiners can only propose the measure and await the professional's response or refer the matter to a panel to impose the measure. When the panel reaches a decision on the review the professional will then have a right of appeal to another internal panel. We don't think that's necessary or proportionate. When case examiners are satisfied that new information necessitates a change to the measure, the case examiners should be able to make that change without delay, subject only to the requirement, as set out in the Order, to have regard to the associate's representations. The associate can exercise their right of appeal to an internal panel if they wish to challenge the outcome of the review.

We would question the intended impact of rule 11(7) which prevents the case examiners from withdrawing an accepted proposal when they become aware of new relevant information. We understand that once a proposal is accepted by the professional, it is too late to withdraw the proposal itself. However, there is a distinction between the associate accepting a proposed outcome and the subsequent imposition of the accepted outcome. As a result, we think the rules could be more flexible here, so that if the regulator becomes aware of new relevant information between the date of the professional's acceptance and the measure being imposed, the regulator is not required to impose the measure if it is no longer appropriate.

Question 14: To what extent do you agree or disagree with our proposed approach to accepted outcomes, as described in our rules?

We broadly agree.

We agree that the draft rules will help to deliver a clear, fair and proportionate process that's focused on reaching agreement with associates, reducing the number of tribunal hearings and the associated stress for those who required to give evidence before a tribunal.

We think those aims could be further served if the rules could prevent unnecessary hearings where the associate accepts impairment but is unable to agree to the case examiner's proposed conditions on practice. While we agree that the rules need to avoid creating a negotiation phase at this stage of the process, we think it's appropriate for case examiners to be able to consider sensible requests to change the proposed conditions on practice and to issue a new proposal (as permitted under the Order) rather than being obliged to refer the matter to hearing.

We also believe that rules around how associates must submit their request for a hearing can help to ensure that the resulting panel hearing is more effective and proportionate. By expanding on rule 19 and 20 to require associates to confirm the basis upon which they reject the case examiner's proposal, the rules would enable the regulator to begin effective preparation for a focused hearing.

We agree that where the case examiner has reached a decision and the conditions set down in the Order are met, in other words the associate has agreed the proposed outcome or failed to respond within the specified timeframe, the measure should take

effect without delay, as provided for in rule 21. However, there may be some benefits in allowing greater flexibility here, for example to allow for a direction that a suspension measure will not take effect until the conclusion of any appeal, where the circumstances of the case warrant that approach. On a more minor drafting point, we would suggest that rule 21(2)(f) should be amended, as current drafting could wrongly infer that the final measure expires at the conclusion of any appeal or revision.

Question 15: To what extent do you agree or disagree with our proposed approach to adjudication, as described in our rules?

We broadly agree.

We support the simplicity and clarity of the requirement to maintain a list of appointees who can sit on panels determining interim measures, substantive fitness to practise hearings and reviews.

We fully support the robust approach to case management that is set out in the draft rules, including the process for making a broad range of binding case management directions with limited discretion for a panel to reverse those directions, and clear consequences (drawing adverse inferences and refusing to admit evidence) in response to failure to comply with case management directions.

In relation to supportive measures, we note that the GMC is framing these around witness vulnerability. We believe it's appropriate to consider supporting all witnesses to give their best evidence rather than restricting these provisions to vulnerable witnesses.

Question 16: To what extent do you agree or disagree with our proposed approach to final measure reviews, as described in our rules?

We broadly agree.

As noted in our answer to question 13 above, our comments in respect of the process for reviewing interim measures apply also to the process for final measure reviews. In addition, we make the following drafting points:

- We note the strict duty to "allow the existing measure to continue" where a case has been considered solely on the basis of failure to comply but the case examiner has decided that there has not been a failure (rule 59). We think that in these circumstances, the case examiner should have the option of varying a condition on practice, for example where an ambiguously worded condition caused the initial concern about compliance.
- In relation to the rule 67(4) and (10) requirement for the case examiners or Associates' Tribunal to make their decision on the new case before undertaking a review, we agree that the rules should enable the decision maker to consider both the new referral and the existing final measure. However, we're concerned that a requirement to delay the review until a decision is reached on the new referral may be overly restrictive, particularly in cases where the new referral relates to a completely unrelated concern and regulator is in possession of information which justifies an immediate review of the existing final measure.

Question 17: To what extent do you agree or disagree with our proposed approach to accepted outcome decisions to be made by a single case examiner, selected from a team of case examiners?

We neither agree nor disagree.

We support the flexibility of the Order in this area that allows for single case examiners, and we do agree that there are cases where two case examiners would be appropriate and others where one would be more suitable. We continue to consider our policy approach to this area as we discuss changes to our own legislation. In any case, we are clear that the regulator must ensure that case examiners have the appropriate skills, knowledge and training to make safe and fair decisions.

Question 18: To what extent do you agree or disagree with our proposed decision-making principles for impairment guidance?

We broadly agree.

The guidance documents set out in the consultation are a good example of the flexibility that the new framework will bring, particularly in terms of being able to set out different requirements as appropriate for the professions being regulated.

We think the categorisation of behaviours and performance set out in the document look broadly right, however we would query whether violent behaviour should ever be at the low end of the seriousness spectrum.

We note that the document sets out that a question about a registrant's health can be one of the factors in deciding whether a warning is required in specific cases. We would (and do currently) take a different approach to warnings and consider that they are generally more suitable for concerns about attitudes, values or behaviors. We generally won't issue warnings in cases where the concern arose because of someone's ill health. If the concerns are serious enough to affect fitness to practise it may be that regulatory action is needed to ensure public protection.

Question 19: To what extent do you agree or disagree with our proposed decision-making principles for guidance on what restrictive action is required?

We broadly agree.

We agree that the principles of proportionality, measurability, workability and appropriateness should inform the guidance.

Question 20: To what extent do you agree or disagree with our proposed decision-making principles for guidance on warnings?

We broadly agree.

Revisions and appeals

Question 21: To what extent do you agree or disagree with our proposed approach to revisions, as described within our rules?

We broadly agree.

In relation to education and training, in our response to question 5 we raised the potential fairness implications of not having a revision process for these decisions.

We note that the draft rules give the professional concerned the right to invoke the revision process for a decision to refer to case examiners and for case examiner outcomes. We don't think this is proportionate given that the professional can challenge the decision via another process (the case examiner process following referral and the interim appeal process following a case examiner outcome). The regulator can revise their decision if they agree with the professional's representations or appeal grounds. We don't think it is proportionate to have two separate but parallel processes.

We note the GMC's reasoning for imposing time limits on submitting requests for revision. However, in response to the statement that certain fitness to practise decisions can only be revised on the ground that there's been an error of fact or law "which would have already occurred by the time the decision was made" we would highlight that in some cases the error of fact may only become apparent with the emergence of new evidence at a later date. Therefore, we think that any time limits should take account of requests for revisions on the basis of new evidence which was not previously available.

We also note the approach to give the regulator the power to revise a decision to admit someone to the register. We agree that it's appropriate for the regulator to be able to revise a decision <u>not</u> to register an individual, but once they are admitted to the register, the legislation sets out specific processes for removal e.g. removal on the basis of incorrect or fraudulent entry or impairment. We would query the fairness of a regulator being able to circumvent those processes by revising the decision to register.

Question 22: To what extent do you agree or disagree with our proposed approach to internal appeals, as described within our rules?

We broadly agree.

We fully support the robust approach to case management that is set out in the draft rules, including the process for making a broad range of binding case management directions with limited discretion for a panel to reverse those directions, and clear consequences (drawing adverse inferences and refusing to admit evidence) in response to failure to comply with directions.

In relation to supportive measures, we note that the GMC is framing these around witness vulnerability. We believe it's appropriate to consider supporting all witnesses to give their best evidence rather than restricting these provisions to vulnerable witnesses.

We are concerned that an internal appeal panel cannot require a witness to give evidence under oath unless the appeal concerns fitness to practise proceedings (see

rule 15(2)(e)(i)). We presume this limitation is caused by the Order which only allows for an oath to be administered for the purpose of “fitness to practise proceedings before a Panel” (see paragraph 9(1)(4) of Schedule 4 to the Order). The power to require witness evidence on oath is an important safeguard for the integrity of all hearings and we will be working with the Government to try to ensure that our appeal rules can include this power.

We support the clear articulation, in rule 5, as to when the appeal panel may allow an appeal against different decisions. We agree that where an appellant is pursuing an appeal against a final measure imposed by case examiners the appeal should be confined to considering the circumstances under which the professional accepted the proposal or failed to respond to the proposal within the specified timeframe. For accessibility purposes, we would suggest that the first column of the helpful table in rule 5(3) should clarify that the “provisions” listed are those contained in the Order.

Fees

Question 23: To what extent do you agree or disagree with our proposed approach to setting and charging fees, as described within our rules?

We broadly agree.

It is vital that regulators have sufficient resources to effectively carry out their functions, and that income they receive covers the cost of what they are expected to deliver. It is also important that this income supports them holding appropriate reserves and the ability to plan for contingencies. As most regulators, including the NMC, have an income that is solely based on the registration fees of their professionals it is vital that they are transparent and evidence-based in how they go about setting those fees.

We strongly support the intention of the Government’s reforms that regulators should be able to approve their own fees rules and when doing so must clearly set out what they want to deliver, provide evidence and publicly consult and engage on any fee proposals. This approach brings welcome flexibility that will enable us to regulate more effectively. However, we fully recognise the difficult economic and financial environment that registrants have been facing, which is why that it is important that regulators ensure that any increases to fees are small and that they avoid large or sudden increases.

We agree that regulators should set out principles for how they manage their fee income and any change to this, especially around ensuring proper engagement and having regard to the likely impact on registrants and groups of registrants.

Question 24: To what extent to you agree or disagree with our proposed principles for setting and varying fees in future.

We broadly agree.

See answer given above to question 23.

Equalities considerations and Welsh language standards

Question 25: Referring to our separate EQIA, to what extent do you agree or disagree that we have identified all relevant impacts (for AAs, PAs and members of the public) for our proposed rules/guidance/standards as currently drafted?

We broadly agree.

We broadly agree with the points raised in the EQIA and these reflect some of the themes that have been emerging in our own thinking in this area. In particular, we agree with the aspiration for greater consistency in our regulatory processes and in achieving more equitable outcomes.

One of the most important changes that regulatory reform will bring is the ability of regulators to approve their own rules. This will mean that they are able to be more responsive and quickly act to remove barriers and mitigate unfairness. We will develop our own EQIA and seek views on it as part of our own reform work and rules consultation.

Question 26: In your opinion, could the proposals have either positive or negative effects on opportunities for people to use the Welsh language and on treating it as no less favourable than English?

We neither agree nor disagree.

From the consultation document and our review of the rules, we have not identified any negative effects of the proposals on opportunities to use the Welsh language.

Question 27: Could the proposals be revised in any way to increase opportunities for people to use the Welsh language and to help treat it as no less favourable than English?

We neither agree nor disagree.

From the consultation document and our review of the rules, we have not identified any additional ways to increase opportunities for people to use the Welsh language.