

# UNISON Scotland Response to Consultation on changes to SSSC 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>

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.

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

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](mailto:ftpstrategic@sssc.uk.com)

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

as an individual

on behalf of an organisation

Please give the organisation's name:

UNISON Scotland

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

Yes

No

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

Yes

No

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

No

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

No

Please provide contact information below:

UNISON Scotland  
14 West Campbell Street  
Glasgow G2 6RX

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Q6 Are you responding from the perspective of: a  
social service worker  
a union, or other representative body (i.e.  
solicitor) an umbrella organisation (i.e. Scottish  
Care, CCPS) someone who uses services, or a  
carer an employer or higher education institution  
(HEI) other

Please specify:

Trade union

## 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?

Please see detailed comments below

## 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 re-join 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:

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?

Please provide any other comments:

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

We work with many competent and responsible employers who engage with the register in accordance with the employer code. However, it is evident from the statistics and from our experience that many employers misuse the SSSC processes. This may reflect simple negligence in their management processes but may also include deliberate misuse of SSSC functions as a form of victimisation or as an alternative to active performance management in the workplace. Any process for employer endorsement must be counterbalanced by a mechanism which acknowledges and addresses the fact that employers are not a consistently reliable source of accurate information.

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:

## 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?

Part 2

Remove the reference to disability (2c, 5). Impairment is sufficient.  
Acknowledge that misconduct must be "serious" (3)

Part 3

"Application Case" – This is confusing and misleading – they should be referred to as "registration application" and "registration renewal" cases.

## 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 re-join 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:

The alternative suggested should not be necessary with:  
Comprehensive guidance notes;  
Acknowledgement of commonality with and relevance of other UK regulators;  
Recognition of UK wide case precedents.

## 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:

We agree that registration cases should be judged on current impairment criteria.

## 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 agree it is not necessary to re-send the same documentation. These should be available for electronic dispatch.

## 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:

It needs to be made clear to employers / universities that they should take no unilateral action based on the information received and only do so unless explicitly instructed by a substantive / interim order.

## 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:

Experience of nuanced burdens of proof in other jurisdiction suggests that people in quasi-judicial roles take some time to adapt to change and tend to retain a view that it for the applicant to make their case. Care is needed in the training of committee members and in the conduct of hearings to ensure that no adverse factual findings are accepted unless or until the SSSC has proved, not only that the material is admissible, but that on balance it is more likely to be true than not. Where applicants appear in person and give credible and reliable evidence we would expect that account to be given considerable weight. We will continue to present very robust challenge to weak or unsubstantiated allegations. It is therefore important that the implications of the revised burden of proof are reflected in enhanced procedures for receiving, screening, investigating and presenting allegations.

## 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?

Yes

No

Please provide any other comments:

In impairment processes there are in effect 4 main considerations:

Determination of the facts – what, when and where; Whether the facts amounted to misconduct at that time; Whether there is *current* impairment and if so what is the appropriate sanction

Please tell us what you think a better order for the process would be:

It should be left to a panel's discretion having invited submissions from the parties. In many cases, especially where there are admissions only three stages may be necessary. It is not clear to UNISON that the SSSC fully appreciates the way in which the duration of the process and the location of hearings operate as a barrier to justice. This measure risks extending the process and possibly increasing the number of occasions the applicant and representative is required to attend. All panel's and committees should have a very clear requirement to use their discretion to expedite the process providing that does not impair the quality of the assessment being made

## 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:

It is not clear to UNISON that the proposals recognise the legal limits on sanctions. Care careers and status as a registrant are possessions attracting ECHR protection (Art 1, first Protocol). Any interference in the enjoyment of that right must be proportionate. For example, the power of removal on medical grounds will rarely be proportionate with regards to necessity when suspension is sufficient to protect the public

If we remove a worker because their fitness to practise is impaired due to their health they can apply to re-join 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

While this distinction from conduct is welcome we question the underlying justification for removal on health grounds when suspension is an adequate protection

Please provide any other comments:

Please tell us any improvements we could make:

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

The circumstances in which medical removal is a lawful sanction must be narrowly defined. Suspension is clearly a sufficient sanction in the vast majority of cases. The council would need to prove, on balance, that there was no prospect of a return to the required level of health. Further, there needs to be guidance on what happens where the lack of co-operation is part of a health problem that is addressed and the registrant re-applies. Will the SSSC then fund a medical report as they would have done before removal?

In those cases where a registrant is refusing to cooperate in a medical assessment of impairment this is arguably a conduct issue as opposed to an impairment issue. We can envisage removal on conduct grounds arising from a failure to engage around the impact of impairment, subject to assessment of the registrants capacity to engage. But simple removal on impairment grounds appears hard to justify.

Please comment here:

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:

AGREED subject to the requirement that it for the SSSC to satisfy the panel, on balance, that all the facts relating to medical impairment are proved

## 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 do not believe 2 years is acceptable. 18 months is the norm. To impose an order for such a long period of time without having made any finding of fact may be in breach of human rights. All registrants under an interim suspension order should have their cases prioritized to be heard as soon as possible. This links to the volume of cases with which the SSSC has been burdened as a consequence of the original regulations, the low threshold and the relative lack of discretion afforded to manage the register in a reasonable manner. The average duration of cases is remarkable. We have no data on the true length of protracted cases concealed behind the average data. If the average case duration can be as long as 18 months the most protracted cases must be lasting two/three years or perhaps more. Long suspension periods mitigate against effective action to reduce the duration of investigations. ECHR compliance requires that these delays are reduced and, therefore, the maximum suspension period must be reduced. This will, at least, compel the SSSC to review suspensions more frequently and prevent difficult cases being kicked into the long grass.

## 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:

Practice notes should be subject to initial and ongoing consultation with stakeholders and regular review.

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?

Yes

No

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

Generally we favor a system where the judicial bodies have a degree of discretion over the case management. The vital caveat to that is equality of arms. Where applicants are represented the chair, the SSSC and the representative should have the scope to manage cases in a way that expedites the process. However, unrepresented parties benefit from more transparent and predictable procedures. This nuance should be reflected in the guidance.

The designated Chair of the panel hearing the substantive case should not be involved in disputes over evidence admissibility. To make any determination she / he will normally have to see the offending material and, if ruled inadmissible will then have to recuse themselves.

Before a meeting is convened a case management form should be completed by each party to determine the necessity of this and telephone / video conferencing facilities should be available.

## 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:

The main focus of this document is on sanction – panels make decision in other key areas. We would suggest it is called sanctions guidance in line with other regulators.

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

Additional (decisions) guidance on facts, misconduct and impairment would be helpful setting out the standard of proof / judgement required at each stage and to include restoration hearings.

**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:

As stated above, if this is sanctions guidance say so! It should not include any interim (temporary) order decision making advice as these are, in effect a risk assessment and determination of the least onerous preventative measures necessary and should be approached very differently to decision making based on proven facts.

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

There should be separate guidance for decision making in:

Registration issues;

Interim orders;

Substantive hearings;

Sanctions guidance

**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:

This is weighted against the registrant. Need to stress necessity and proportionality. This is important, not just in relation to whether to apply a sanction or not, but in defining the level and duration of sanction. Sanctions should only be used when necessary AND the weight and duration of the sanction should be no greater than is absolutely necessary. This must be made clear

Please tell us why:

Disagree with bullet point 3. The most important consideration for any regulator is public protection, safety and the elimination of risk.

Whilst this forms an element of maintaining public confidence in the profession it is separate from another, namely the public interest concept.

**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?

No

Please provide any other comments:

Section 1.3 should also include the option of considering registration applications immediately where an application was originally refused because of a criminal conviction that has been subsequently overturned.

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:

disability

There is systemic unconscious discrimination in society and that is evident to a degree in the conduct of all judicial bodies. That must be acknowledged as a risk and a rigorous and continuous programme of action taken to address it. There is a particular risk in relation to protected characteristics that have only acquired protection relatively recently. It is only 16 years since Scottish people voted in large numbers to retain unlawful state discrimination on grounds of sexual orientation albeit that the referendum had absolutely no legal standing. PSED exist to proactively challenge such underlying prejudice. The duty is not simply to treat registrants equally but to actively promote equality. That distinction is commonly lost and there is little evidence that public bodies promote equality in a proactive way.

Particular risks arise in the following areas:

The inclusion of disability as an impairment is potentially unlawful. It reflects a medical model of disability and risks importing discrimination into FtP assessments. The SSSC should be assessing in objective terms whether an impairment affects fitness to practice.

There is an important distinction between societal discrimination on disability grounds that can be overcome through reasonable adjustments AND medical impairment that makes a registrant unfit to practice. No worker should be sanctioned on the grounds of disability when a reasonable adjustment would enable that worker to perform competently. Knowledge of the social model of disability is essential as is detailed consideration of what the employer has done to combat disability discrimination. Only when that onus is discharged and a residual level of impairment has been identified, can a panel competently say that despite the reasonable adjustments of the employer the impairment is too serious to retain the worker on the register.

There is an unlawful provision in the Equality Act which states, in terms, that impairment arising from addiction is not a disability. There is a distinction for addictions arising from prescription medication. This exclusion is not ECHR compliant. Reading the Human Rights Act 1998 alongside the Scotland Act 1998 it is clear that the SSSC is unable to rely on s.6(2) of the HRA as a defence in a case of ECHR breach. The SSSC is therefore required to have regard to disability discrimination obligations when considering addiction issues in FtP hearings. This will feature prominently in the expansion of the register and is something that requires early and detailed consideration.

gender reassignment

marriage and civil partnership

pregnancy and maternity

race

religion and belief

sex

sexual orientation

Please comment here:

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.

As a general caveat to any adverse comment we would like to stress our recognition of the important role and work of the SSSC and the limitations placed on discretion by the statute and regulations. We are concerned that at the aggregate and individual level the frequency, duration and impact of investigations is greater than that which can be justified as necessary to meet the purpose of the Council. Action is required at the level of statute, regulation, procedure and practice. We are keen to work in partnership to achieve a marginal but important adjustment in the impact of regulation. The risk appetite of the organisation is low. Thresholds for intervention are too low. Hearings rely on ECHR by proxy through the appeal to Sheriff Court and yet only a fraction of cases go to a hearing of any type, far less to the Sheriff Court. Most of the 2000-3000 cases "opened" by the SSSC are never subject to any judicial or quasi-judicial examination. This raises a question about disposal. Should all these cases have been opened and, if so, how have they been closed if fewer than 5% actually go before a panel? Action is required to bring transparency to the grounds on which investigations are started, the way investigations are case managed, the duration of those processes, the effect of measures to expedite investigations and the manner in which cases are closed. In addition to issues of volume, delay and the necessity of these interventions we are concerned about the quality of justice attached to hearings and voluntary disposals.

Despite the curiously low number of hearings for such a large caseload, the number of undefended hearings and unrepresented registrants is worryingly high. Given the obvious human rights risks the SSSC must fully analyse the underlying reasons for these judicial outcomes. Similar issues arise in relation to voluntary orders. Many registrants are intimidated by the draft sanction order and assume a full hearing has taken place in their absence. The intimidating effect of this procedure must be reviewed. Measures also require to be taken to reassure the council that registrants right to legal assistance with voluntary orders has been respected and that registrants are accepting on the basis of informed consent.

We recognise that many of these matters are not within the gift of the SSSC to change and that with restricted resources the quality of justice available will be impaired. However, we would welcome an opportunity to work with the SSSC to examine these issues in detail, improve our understanding of factors we may have overlooked and work towards an enhanced system for registrants and the sector as a whole

## 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?

|    |
|----|
| No |
|    |

### Schedule 3 - Fees

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

We welcome the basic differential between support workers and professional registrants that is based on ability to pay.

We would like to see this extended to cover part time workers who are predominantly women.

# 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?

Remove disability from 2c.

### 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?

OK

## 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?

3b, c

We do not agree with use of the word “suspect”. Who makes this decision? What safeguards are in place to ensure that issues that may be confidential (e.g. health) are kept confidential?

4

See above. This needs expansion on to be clear about the process and to protect the human rights / data of individuals.

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

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

8v.

Technically conditions cannot be prescribed on someone who has been suspended from the register. Panels can make recommendations as to what a registrant needs to do to have the suspension lifted.

12

Please give examples / list criteria of “exceptional circumstances”.

13

The process proposed for “joining” cases requires expansion.

## Part 4 - Impairment cases and Application

### cases Chapter 1: Introductory

#### 9. Overview

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

OK

## Chapter 2: Impairment cases - procedure

### 10. Impairment case: initial notice

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

1 – typo first line – “the its”

insert after 1bi – “registrant’s representative”

### 11. Impairment case: disclosure pack

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

1 Add in line 2 “and any nominated representative”

### 12. Impairment case: case management meeting

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

12, 2. The parties should be consulted on the date before it is fixed.

4. There is a question whether the designated chair of the hearing panel should attend. One of the major subjects dealt with at preliminary meetings is evidence admissibility. If the chair of the hearing panel has already been witness to inadmissible evidence this would be to the prejudice of the registrant.

### 13. Impairment case: case management meeting procedure

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

This would be better sequentially coming before 12 above.

#### 14. Impairment case: hearing

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

1 – It should be identified whether the SSSC envisages the issue of misconduct being dealt with at 1a or 1b

#### 15. Impairment case hearing: initial proceedings

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

OK

#### 16. Impairment case hearing: findings of fact

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

After 3. The process needs to accommodate half time submissions. We recommend adoption of something similar to the NMC rules on this point (rule 24, 7, 5).

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

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

OK

## 18. Impairment case hearing: mitigation

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

This includes sanction issues ( 6 onwards ) that are better placed in 19.

## 19. Impairment case hearing: sanctions

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

A temporary (or interim) order is not a sanction and 1, 2 and 3 should be located elsewhere.

4f – this wording is better than that at 8v!

7 – The requirement to adjourn and reconvene if conditions are proposed should not be an absolute. There may be difficulty in the same panel and representatives being available – it is often not possible for part heard hearings to be rescheduled until many months later.

Conditions should be made at the time of the hearing. They do not need an employer's approval (see Perry v NMC). If there is a problem another panel can consider any issues.

The effect of these proposals as written will make panels reluctant to propose conditions.

## 20. Impairment case: notice of decision

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

OK

## 21. Impairment case: note and transcript of proceedings

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

OK

## 22. Impairment case: amendment of the Register

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

OK

## 23. Impairment case: publication of decision

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

This should state something like “subject to relevant data protection and human rights legislative requirements.”

## 24. Impairment case: review of suspension order and conditions

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

2 – Requesting review of a substantive conditions of practice order should be open to either party in the event of material change of circumstance....

7 ....this suggests a registrant can apply to have an order or conditions varied or revoked.

9 Variation of conditions should only require an adjournment for consideration when necessary, not as a rule. Otherwise the inefficiency of such a process will itself influence parties not to vary.

## Chapter 3: Application cases - procedure

### 25. Application case: initial notice

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

Yes – please refer to these as registration (application) cases as is done by other regulators and for clarity.

### 26. Application case: disclosure pack

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

4. The registrant should have the opportunity to respond to any additional documents lodged by the SSSC including with further documentation.

### 27. Application case: case management meeting

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

We repeat our concerns that the Chair may see prejudicial documents that are ruled to be inadmissible at the hearing.

### 28. Application case: case management meeting procedure

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

The panel determining an unresolved direction should not be that which sits at the substantive hearing.

29. Application case hearing normally to be held in private

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

OK

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?

After 3 insert half time submission paragraph.

32. Application case hearing: finding on fitness to practise

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

2 and 3. Witnesses should be open to cross-examination and the panel should have the opportunity to put questions to them also.

### 33. Application case: decision

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

4. conditions – we would again submit that adjournments to consider these should be an exception not the rule. If there are problems with particular conditions a review can be sought by either party. Our experience is this only happens in a small minority of cases and it would be a considerable waste of resources to apply this in every case as well as deterring conditions being used.

### 34. Application case: notice of decision

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

OK

### 35. Application case: resumed hearing where conditions imposed

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

OK

## 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?

Please refer to these as registration cases.

37. Combining cases

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

We would suggest specific timescales are used to ensure compliance etc..

38. Postponement of hearing

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

We would suggest specific timescales are used to ensure compliance etc..

## 39. Adjournment of hearing

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

OK

#### 40. Fitness to plead

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

OK.

#### 41. Procedure at hearing

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

OK.

#### 42. Representation and entitlement to be heard

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

OK

#### 43. Evidence and standard of proof

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

8 – We do not agree with this proposal. Civil courts will have different considerations and decisions may be made as a compromise to achieve a settlement. In our experience there are few if any instances where decisions of civil courts have been referred to let alone relied upon in FtP proceedings.

#### 44. Witnesses

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

The rules need to provide for:

The agreement of witness statements;

The requirement for all witnesses to attend where requested by the other party,

Inadmissibility / weighting of hearsay evidence.

#### 45. Vulnerable witnesses

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

OK

#### 46. Hearing in absence of applicant or registrant

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

OK

## 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?

OK

### 48. Application for restoration: disclosure pack

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

OK

### 49. Application for restoration: case management meeting

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

OK with reservations as stated before on the need to do this in every case and use of a case management form

### 50. Restoration hearing: procedure

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

OK

51. Restoration hearing: notice of decision  
OK

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

OK

## Part 6: Temporary order referrals

### 52. Temporary order referral: initial notice

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

Would suggest these are referred to as Interim Orders to be consistent with other regulators, case precedent etc.

### 53. Temporary order referral: disclosure pack

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

OK

### 54. Temporary order referral: expedited procedure

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

It should be stressed that the expedited procedure will be applied in exceptional cases presenting an immediate risk of potential significant harm to vulnerable services users or colleagues.

### 55. Temporary order referral: procedure and hearing

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

Does the "evidence in support" include live witnesses?

56. Temporary order referral: disposal

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

Yes – the test is not prima facie evidence of the allegations but that the registrant presents a genuine and immediate risk to the public. The public interest element should be downplayed as no decisions on fact will have been made.

57. Temporary order referral: notice of decision

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

OK

58. Review of temporary order

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

OK

59. Review of temporary order: procedure at hearing

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

5, 6 – would propose 18 months ..

60. Temporary order referrals and reviews: cancellation of hearings

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

OK

# 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?

4. Please confirm that this rules out anyone involved in a preliminary meeting being on the substantive hearing panel.

7 We believe the quorum should be 3

## 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?

16 – This should be the General Pharmaceutical Council (UK) and Pharmaceutical Society of Northern Ireland.

# 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?

We do not believe merging the guidance works – this primarily remains a sanctions guide.

Each step of the process should be set out and considerations such as the onus and standard of proof required made clear.

A separate temporary (interim) order guide should be available to emphasis the major differences in the decision making process from those of registration and substantive impairment hearings.

## Part B - General principles

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

Please see above

## Part C - Types of decision

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

2 – Temporary Orders – there are no aggravating or mitigating factors here – only a risk assessment based on the prima facie case. As stated, this should be subject to separate guidance.

## Part D - Applications to be restored to the Register

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

OK

## Part E - Conditions

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

We recommend a conditions of practice library similar to that used by the NMC.

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