

Notice of Decision of the Northern Ireland Social Care Council's Fitness to Practise Committee

Name: Kathleen Agnes Rae

SCR No: 6001912

NOTICE IS HEREBY GIVEN THAT the Fitness to Practise Committee of the Northern Ireland Social Care Council, at its meeting on **14 September 2016**, made the following decision about your registration with the Northern Ireland Social Care Council:

The Committee found the facts proved;

The Committee found that your fitness to practise is impaired by reason of your Caution in the United Kingdom for a criminal offence;

The Committee decided to make an Order for removal of your registration from the Register ('a Removal Order').

Particulars of the Allegation:

That, being registered as a social care worker under the Health and Personal Social Services Act (Northern Ireland) 2001 (as amended), and whilst employed as a senior care assistant at Brooklands Nursing Home, Kilkeel, County Down:

1. You admitted and accepted a caution on 25 August 2015 for the offences of:
 - a. Common assault on Patient B at Brooklands Nursing Home, Kilkeel, County Down;
 - b. Ill treatment of Patient A in care at Brooklands Nursing Home, Kilkeel, County Down, contrary to Section 121 of the Mental Health (Northern Ireland) Order 1986;
 - c. Ill treatment of Patient B in care at Brooklands Nursing Home, Kilkeel, County Down, contrary to Section 121 of the Mental Health (Northern Ireland) Order 1986.

And in light of the above, your fitness to practise is impaired by reason of this caution.

Preliminary Matters

Service

The Registrant was neither present nor represented. The Council was represented by Mr Anthony Gilmore, Solicitor, Directorate of Legal Services, Business Services Organisation. In a Notice of Hearing dated 16 August

2016, sent by Special Delivery and addressed to the Registrant at her address as it appears on the Register, the Council notified her of the date, time and venue for this hearing. The Notice was signed for by the Registrant on 17 August 2016. The Committee, in all the circumstances of the case, was satisfied that the Notice of Hearing had been served in accordance with Rule 3 of the NISCC Fitness to Practise Rules 2016 ("the Rules"), and the requirements of Paragraph 5 of Schedule 2 of the Rules.

Proceeding in the Absence of the Registrant

Mr Gilmore made an application under Paragraph 15 of Schedule 2 of the Rules that the Committee should hear and determine the case in the absence of the Registrant. Mr Gilmore advised the Committee that the Registrant had not engaged in the regulatory process or responded in any way to the Notice of Hearing. Mr Gilmore invited the Committee to conclude that the Registrant's absence was voluntary and to proceed with the hearing having regard to the public interest.

The Committee was mindful that the discretion to proceed in the absence of a Registrant should only be exercised with the utmost care and caution. In considering the application, the Committee was satisfied that all reasonable efforts had been made to notify the Registrant of the hearing.

The Committee accepted the advice of the Legal Adviser.

The Committee bore in mind the public interest and the need to ensure the expeditious disposal of hearings. The Committee observed that the Registrant had chosen not to engage with the NISCC proceedings against her and there was no evidence to indicate that the Registrant would be more likely to attend a future hearing if the matter was adjourned. Therefore, after careful consideration of all the issues, the Committee decided to exercise its discretion to proceed in the absence of the Registrant, taking into account the public interest and the serious nature of the allegation.

Application to Admit Hearing Bundle

The Committee acceded to Mr Gilmore's application to admit a hearing bundle (Exhibit 1) in accordance with Schedule 2, Paragraph 12 of the Rules. The documentary evidence contained within the bundle was directly relevant to the allegation to be determined. The Committee also concluded that there was no unfairness to the Registrant. She had been served with the hearing bundle by Special Delivery to her registered address on 30 August 2016, and had signed for it the following day. The Registrant had not contacted NISCC to raise any objection to the contents of the hearing bundle.

Background

On the date of the allegation, 15 March 2015, the Registrant was employed as a Senior Care Assistant by Conway Group Health Care. She worked at Brooklands Nursing Home ("the Home") from 22 October 1995 until her resignation on 16 March 2015. The Registrant is registered on Part 2 of the Register as an Adult Residential Care Worker. It was alleged by NISCC that the Registrant on 15 March 2015 acted inappropriately towards two

residents at the Home who were in her care. It was alleged that the Registrant used foul and abusive language towards these residents, Patient A and Patient B and, further, that she grabbed the arms of Patient B and shook her. The incidents were alleged to have occurred on the morning of 15 March 2015 and were witnessed by a work colleague, Witness A, who subsequently reported the matter to her employer. The Registrant was suspended by her employer on 15 March 2015 in order to facilitate an investigation into her conduct. The Registrant subsequently resigned from her post on 16 March 2015. The NISCC investigation which resulted in the current proceedings was instigated by NISCC upon receipt of an Employer's Referral Form from the Registrant's employers on 26 March 2015. It was further alleged that the Registrant on 25 August 2015 accepted a Caution administered to her by the Police Service of Northern Ireland ("the PSNI") in respect of ill-treatment of Patients A and B and a Common Assault on Patient B on 15 March 2015.

Evidence

The Committee considered the documentary evidence contained in Exhibit 1 and heard evidence from Witness A, a Healthcare Assistant called by NISCC who was alleged to have observed the Registrant's actions on the date in question.

Finding of Facts

The Committee heard a submission from Mr Gilmore on behalf of NISCC. It heard and accepted the advice of the Legal Adviser.

The Committee had regard to the Certificate of Caution signed by the Registrant in the presence of a Police Officer on 25 August 2015. The Certificate confirmed that the Registrant admitted the offences which formed the Particulars of the Allegation at 1a, 1b and 1c. The Committee was satisfied that this document was reliable evidence to support the proposition that the Registrant had admitted the offences concerned, and accepted a Caution for them. The Committee also had regard to a letter from the PSNI to NISCC dated 05 November 2015 which confirmed that the Registrant, on the date in question, appeared to lose her temper and swore at Patients A and B and, further, grabbed the forearms of Patient B and shook them roughly. The Committee also accepted the credible and consistent evidence of Witness A which supported the other evidence contained in the hearing bundle that the Registrant had sworn at both Patients A and B, and had grabbed Patient B's arms and shook her. For these reasons, the Committee found the facts contained in Particulars 1a, 1b and 1c proved.

Fitness to Practise

The Committee first considered the ground of alleged impairment in this case; namely that the Registrant's fitness to practise is impaired by reason of her receiving a Caution.

The Committee considered the Certificate of Caution carefully. It reminded itself that a Caution can only be administered where there is evidence of guilt which is sufficient to provide a reasonable prospect of conviction. From its consideration of this case at the fact finding stage, the Committee was in no doubt that there was ample evidence against the Registrant which could have resulted in her conviction had she been prosecuted in a

Criminal Court. Furthermore, the Registrant signed and dated the Caution in which she admitted the offence, and confirmed that she understood the meaning of an Adult Caution. The Committee was satisfied that the Caution demonstrated that the Registrant had made a clear and reliable admission to the offence which formed the Particulars of the Allegation, and that she had given her informed consent to accepting the Caution administered to her.

The Committee next turned to consider whether by reason of the Caution administered to her, the Registrant's fitness to practise is currently impaired. The Committee reminded itself that the Rules define impairment of fitness to practise as circumstances which call into question the suitability of a Registrant to remain on the Register without restriction or to be registered at all. The Committee further had regard to Schedule 2, Paragraph 24 (3) which provided guidance on those matters to take into account when deciding current impairment.

The Committee, in the exercise of its judgment, was satisfied that the Registrant's actions represented a serious departure from the standards to be expected of a social care worker. The Committee noted that the Registrant had an otherwise impressive career as a healthcare assistant and was well thought of by her work colleagues. Nonetheless, on the date in question, the Registrant had acted in a wholly unacceptable manner. She had shouted and verbally abused two elderly and vulnerable patients in her care. She had acted deliberately and had assaulted one of them when she shook Patient B by grabbing her forearms.

The Committee considered that the Registrant had breached the following provisions of the Codes of Practice (2002):

Code 1: As a social care worker, you must protect the rights and promote the interests of service users and carers. This includes:

1.1 Treating each person as an individual.

Code 2: As a social care worker, you must strive to establish and maintain the trust and confidence of service users and carers. This includes:

2.2 Communicating in an appropriate, open, accurate and straightforward way.

Code 3: As a social care worker, you must promote the independence of service users while protecting them as far as possible from danger or harm. This includes:

3.8 Recognising and using responsibly the power that comes from your work with service users and carers.

Code 5: As a social care worker, you must uphold public trust and confidence in social care services. In particular you must not:

5.1 Abuse, neglect or harm service users, carers or colleagues;

5.8 Behave in a way, in work or outside work, which would call into question your suitability to work in social care services.

The Committee noted that the Registrant, presumably having reflected on the seriousness of her actions, tendered her resignation to her employer on 16 March 2015, the day following the incident. The Committee observed that the Registrant admitted the offences which she committed in her capacity as a Senior Care Assistant, and co-operated with the police investigation into her actions. The Committee noted, however, that the Registrant had failed to engage in the regulatory proceedings brought against her by NISCC. The Committee had no evidence from the Registrant to explain, in an otherwise unblemished career, the reasons or motivations for her actions on the date in question. The Committee concluded that the Registrant could only be said to have demonstrated insight in the most limited manner which was confined to her prompt actions in resigning her position immediately, and in accepting the Caution administered to her by the PSNI.

The Committee next considered the extent, if any, to which it could be said that the Registrant had remedied her conduct. As a general principle, the Committee was prepared to accept that with demonstrated insight and appropriate and rigorous training, the conduct in which the Registrant engaged was capable of remedy. However, the Committee had no evidence before it that this Registrant had any meaningful insight into her conduct, or any evidence to demonstrate that she had, in fact, remedied her behaviour. In the absence of this critical evidence, the Committee was satisfied that there was a substantial risk of the behaviour complained of being repeated in a social care setting by the Registrant.

The Committee also addressed the issue of whether the public interest required a finding of current impairment in this case. The Committee was satisfied that the Registrant's actions amounted to a serious departure from the standards to be expected of a social care worker. She had ill-treated two patients, and assaulted one patient, who were entrusted to her care. The Registrant had been employed in the social care setting for twenty years. The Committee inferred that she would have been well aware of the appropriate way to deal with distressed patients, which was fully described to the Committee in the oral evidence given by Witness A. The Registrant had acted in a manner which was clearly at variance with accepted standards. She had abused the trust placed in her by failing to show dignity and respect towards patients in her care. The Committee was satisfied, in order to declare proper standards of conduct and behaviour in the social care profession, and to maintain public confidence in NISCC as a regulatory body, that the public interest required a finding in this case of current impairment.

Finally, the Committee applied the formulation provided by Dame Janet Smith in her Fifth Report to the Shipman Inquiry and considered that the Registrant's actions, as found proved, and her subsequent Caution engaged the following provisions:

- a) Has in the past placed and is liable in the future to place vulnerable service users at unwarranted risk of harm;
- b) Has in the past brought and is liable in the future to bring the social care profession into disrepute; and
- c) Has in the past breached and is liable in the future to breach one of the fundamental tenets of the social care profession; and

d) [Dishonesty: The Committee considered that this test was not engaged in this case].

For the reasons given above, the Committee was satisfied that the Registrant's fitness to practise is currently impaired by reason of receiving an Adult Caution from the PSNI.

Sanction

The Committee heard a submission from Mr Gilmore on the question of sanction. The Committee heard and accepted the advice of the Legal Adviser.

The Committee was informed that the Registrant had no previous regulatory findings against her.

The Committee had regard to the NISCC Indicative Sanctions Guidance document (issued May 2016). The Committee had regard to the principle of proportionality, and the need to balance the public interest against the Registrant's interests. The Committee was also mindful that the purpose of any sanction was not to be punitive but designed to protect members of the public, maintain public confidence in the profession and NISCC, and to declare and uphold proper standards of conduct and performance.

When considering the appropriate sanction to apply, the Committee considered the aggravating and mitigating factors in the case.

The Committee took into account, as a mitigating factor, that the Registrant had a previous good history. Further, the hearing bundle contained a number of witness statements from work colleagues which attested to the Registrant's character and her previous high standard of care delivered in a social care setting. One witness referred to the Registrant as being "very professional and very caring" and that her actions on 15 March 2015 were "completely out of character".

The Committee took into account the following aggravating factors:

- The Registrant had abused the trust placed in her as a social care worker by ill-treating two patients and assaulting one patient in her care;
- The Registrant's actions were directly related to her employment as a social care worker;
- There was no evidence before the Committee that the Registrant had demonstrated insight into her conduct or had undertaken remedial actions to prevent the risk of the behaviour complained of being repeated in the future;
- The Registrant had failed to engage in the NISCC investigation into her conduct;
- The Registrant had not directly expressed to the Committee regret or demonstrated remorse for her actions;
- The Registrant's actions had the potential to cause harm to two elderly and vulnerable patients in her care.

Having balanced the mitigating and aggravating factors, the Committee proceeded to consider what sanction to apply in this case.

Warning – The Committee was not persuaded that a Warning was an appropriate response to the conduct identified in this case. The Committee was satisfied that a substantial risk remained of the conduct complained of being repeated and that the conduct itself involved serious wrongdoing on the Registrant's part.

Conditions of Practice Order – The Committee noted that the Registrant had failed to engage in the regulatory process and had resigned from her position as a Senior Care Assistant in March 2015. The Certificate of Caution signed by the Registrant in August 2015, confirmed that she described herself as retired. In the absence of evidence concerning the Registrant's insight and having regard to the serious nature of the allegations found proved, the Committee was unable to formulate any workable, enforceable and verifiable conditions which would attach to the Registrant's registration in order to adequately protect the public.

Suspension – The Committee was not satisfied that applying a sanction of Suspension would be a proportionate response to the conduct identified in this case. The Committee reminded itself that, in the absence of insight or remedial actions on the Registrant's part, a substantial risk remained that she would repeat the conduct complained of in a social care setting. The Registrant had acted in a wholly inappropriate manner. Her actions were serious and represented a serious departure from the standards expected of a social care worker. Furthermore, the Committee noted that the Registrant had failed to provide evidence to demonstrate that she would be able to remedy the behaviour complained of during any period of suspension imposed upon her.

Removal – The Committee therefore decided, in the public interest, to impose a Removal Order in this case. The Registrant's previous good history over a twenty year period in the social care setting weighed heavily with the Committee. There was evidence that she had performed a valuable role and acted to a high standard in her work up to the date giving rise to the allegation. In the Committee's estimation, however, the public was entitled to expect that social care workers would treat those in their care with dignity and respect. On this occasion, the Registrant failed to afford these basic rights to Patients A and B. The Registrant had abused the trust placed in her, and had ill-treated and assaulted elderly and vulnerable patients in her care. The Committee considered that this behaviour, which remained unexplained, was fundamentally incompatible with continuing to be registered as a social care worker. For these reasons, in order to protect the public and in order to uphold and declare proper standards of conduct and behaviour, the Committee decided that a Removal Order, to be imposed with immediate effect, was the only appropriate and proportionate sanction to apply in this case.

The Interim Suspension Order imposed on the Registrant is hereby revoked.

Legal Advice Given

Proof of service

These matters are dealt with in the relevant NISCC Fitness to Practise Rules 2016. It makes it clear in Schedule 2, Paragraph 5 that a Registrant shall be sent a Notice of Hearing containing certain prescribed matters to her address and advise the Registrant that the date, time and venue of the Hearing shall be taking place and that

Notice of Hearing shall give the Registrant 28 days clear notice of the Hearing. That is governed, as I say, by Paragraph 5 of Schedule 2.

The service of documents generally is dealt with by Rule 3 of the Rules which again makes it clear that in the case of a Registrant any reference to the sending of a Notice is a reference to it being sent to the Registrant's home address as it appears on the Register or if the last known address differs from the address on the Register, then the Registrant's last known address. In relation then to the effective date of service, sub-paragraph 2 of Rule 3 makes clear that any reference to the sending of a Notice to a Registrant is a reference to it being sent by registered post or by postal service and this delivery is recorded and that any such Notice shall be treated as having been served on the day after it was posted or mailed. In this case Mr Gilmore has made clear that the Notice of Hearing was sent on 16th of August, that 28 day notice period would therefore expire on 13th of September and allowing one day for service it will take us to 14th of September so I can advise you that in accordance with Rule 3 and paragraph 5 of Schedule 2 that service is effected in these circumstances.

Proceeding in absence

You have now indicated that you are satisfied that service has been effected in accordance with the Rules. You now must consider the discreet issue as to whether it is appropriate and fair to proceed with the case in the absence of the Registrant and you have heard a submission from Mr Gilmore that the public interest in this case requires the matter to proceed. The approach which you must adopt is to balance the Registrant's interests, her right to a fair Hearing, her right to be present, her right to challenge witnesses either through herself or through her representative against the Regulator's interests in respect of a fair and expeditious disposal of the case and also the broader public interest which encompasses not only the protection of the public and vulnerable service users, but also the more general concept of maintaining and upholding proper standards of conduct and behaviour, and the reputation of the Social Care Council as a regulatory body.

The Courts have offered guidance in relation to how those competing interests might be properly addressed and balanced and the leading case in this area recently approved of in the case of *Adegoba*, the case of *R v Jones*. The House of Lords, in that case, made it clear that any Panel in deciding whether or not to proceed in the absence of a Registrant must exercise its discretion, which was described by the Courts as a severely constrained discretion, and again the House of Lords in the case of *R v Jones* commented that the decision to commence and conduct proceedings in the absence of a Registrant should be exercised with the utmost care and caution.

The Court of Appeal in relation to the case of *R v Jones* set out a number of factors which might assist Panels such as yours in balancing the competing interests which you have heard about from Mr Gilmore and those factors which have been identified by the Courts in that regard might be stated as follows: First of all the nature and circumstances of a Registrant's absence and in particular whether the behaviour may be deliberate and voluntary, thus a waiver of the right to appear.

- Next, whether an adjournment might result in the Registrant attending the proceedings at a later date. Next,

the likely length of any such adjournment;

- Next, whether the Registrant despite being absent wished to be represented at the Hearing or whether she has waived that right;
- Next, the extent to which any representative would be able to receive instructions from and present the case on behalf of the absent Registrant;
- Next, the extent of the disadvantage to the Registrant in not being able to give evidence having regard to the nature of the case;
- Next, the general public interest and, in particular, the interests of any victims or witnesses that a Hearing should take place within a reasonable time of the events to which it relates;
- Finally for present purposes the effect of delay on the memories of witnesses.

Those are the factors that have been enunciated by the Courts as being relevant to your consideration. It is of course for you to exercise your judgment in relation to how those competing interests may be balanced in reaching a decision as to whether or not to proceed in the absence of a Registrant and I would advise you that it would be appropriate in those circumstances to retire at this stage in order to consider that particular issue.

Unless you have any questions for me, or unless there are any representations upon my advice, that would complete it at this stage.

Admission of Hearing Bundle

If it is prudent at this stage, I don't really propose to say very much about this, but it is right to say under the Rules, and indeed in relation to regulatory law generally Panels such as yours have a very wide latitude to admit into evidence material which would otherwise not be admissible in criminal or even in civil proceedings. So the test really to be applied is one of relevance in terms of relevance to the allegation which is the subject of your consideration and also in relation to fairness and you have heard from Mr Gilmore a submission that the Registrant has been provided in or around 31st of August with the Hearing bundle and has chosen, perhaps for her own reasons, not to make any submissions on the contents of that bundle. It is difficult, in the absence of seeing the bundle at this stage, to make any judgment in relation to that but I can advise you that it would be appropriate, it would be relevant and it would be fair at this stage to admit the bundle and of course exercise your judgment thereafter in relation to what matters you consider relevant to the allegation perhaps and those matters which you consider are less relevant to that consideration.

Unless you have any questions, or unless there are any representations upon my advice, that would conclude my advice to you at this stage.

Anonymity of Witness

I am happy to make it clear to you that it is actually quite common now, over the last number of years, for

witnesses in these type of proceedings, or companies to generally be anonymised, so I can certainly indicate to you that that is not an unusual request, and if it is acceded to then you can identify the witness in any public facing decision by way of a letter.

Finding of Facts

Before you retire now, the first stage of these proceedings in respect of Kathleen Agnes Rae, that is to say the fact finding stage, I am required to give you some advice in relation to those matters which you can properly take into account at this stage. The matter that you have got to address is the allegation and the factual particulars set out in the allegation. You must first of all look at the allegation as it is separated into three separate particulars. The evidence upon which the Council rests its case has been fully and extensively set out for you by Mr Gilmore, and he has also referred you to three categories of evidence which you must in my advice look at in relation to that allegation.

The first thing I would say is that the Registrant in these proceedings, Ms Rae, does not have to prove her innocence, for want of a better expression, that these proceedings have been brought against her by the Social Care Council, and it is therefore the Council which assumes the burden of proving the allegation to the requisite standard. It should also be said that you must not draw any adverse inference against the Registrant's decision for her own reasons not to engage with these proceedings today. You must apply the burden on the shoulders of Mr Gilmore to prove the case to the requisite standard. The standard to which you must be satisfied before a fact in dispute can be said to be proved is the civil standard of proof, that is to say the balance of probabilities. Guidance as to the balance of probabilities in the context of the civil standard of proof was provided by the House of Lords in the case of *Re H (Minors)*. In summary, the guidance provides that an event is proved on the balance of probabilities if a tribunal is satisfied that on the evidence the occurrence of the event is more likely than not. It does not require a tribunal to be certain that an event did occur. In the case of *Re B (Children)*, the House of Lords sought further to clarify the application of the civil standard of proof and in addition in the case of *Re Doherty*, from this jurisdiction also determined by the House of Lords, both these decisions made clear the following:

There is only one civil standard of proof, the balance of probabilities, and neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied. However, the tribunal in certain circumstances may require to look closely into the facts grounding an allegation, before accepting that the civil standard of proof has been discharged. Thus there are no general rules regarding the application of the civil standard, you must weigh the strength of the evidence presented to you, you must consider not only the documentary evidence, but also the oral evidence which you have heard and the submissions which you have heard from Mr Gilmore. Thereafter, it is a matter of common sense and logic based on the particular circumstances of each case presented to the tribunal.

In this case one of the issues which you must consider is the issue of the Caution in this case. Again, if and only if you proceed to impairment, I will perhaps say a little more about that, but one of the matters that you must look

at with care is the Certificate of Caution contained in the papers and of course that is also at the impairment stage the statutory ground upon which impairment is alleged to have been made out in this case. Mr Gilmore has given you a submission about that and I don't wish at this stage to say much more about that unless of course you wish me to do so.

Those are my advices to you now, and unless you have any questions from me, or unless there are any representations upon my advice from Mr Gilmore that would complete it at this stage.

Impairment

Before you retire to consider this, the second stage of the proceedings against this Registrant, Kathleen Agnes Rae, I am required to give you some brief advice in relation to those matters which you can now properly take into account.

By way of general introduction, that it is perhaps helpful to remind you that allegations comprise of three elements which you are required to consider sequentially. First of all, whether the facts as set out in the allegation are proved, and of course you have already indicated that you are satisfied to the requisite standard that they are. If you are so satisfied whether those facts amount to a statutory ground set out in the allegation and in consequence whether the Registrant's fitness to practise is impaired. The first matter to which you should have regard therefore, is the ground upon which it is alleged that the Registrant's fitness to practise is currently impaired. That will require you to look again with some care at the Caution which is contained within the bundle submitted in the Hearing. The ground of impairment, namely a caution, it is important to remember is not about punishing a Registrant twice for the same offence, the administering of the caution should only lead to further regulatory action being taken against a Registrant if as a consequence of the caution the Registrant's fitness to practise is found to be impaired. Your role therefore is to protect the public, and maintain the high standards and reputation of the Social Care profession. The practice for administering Cautions varies from jurisdiction to jurisdiction but certain common principles apply. A Caution is in this jurisdiction a discretionary, non-statutory means of disposing of an offence without the need for an offender to appear before a court. Typically, a Caution is used for a first time offence committed by an adult, the word diversion from the courts is considered to be appropriate for both the offence and the offender. Although a Caution is a non-statutory disposal of a criminal offence, it is nonetheless treated as an offence brought to justice and will appear on the criminal records bureau and relevant criminal record checks. For that reason, there are safeguards in place to protect the offender, the principles of which are that a Caution should only be administered where, first, there is evidence of guilt such as to be sufficient to provide a realistic prospect of conviction; second, the offender must make a clear and reliable admission of the offence and, third, the offender understands the significance of and gives informed consent to accepting the Caution. A Caution should not be administered where there is insufficient evidence to bring a prosecution, or where a person does not admit of the offence or there are doubts about an offender's capacity to do so. You must therefore consider the reliability of the Certificate of Caution contained in the Hearing bundle and if, and only if, you are satisfied that this is a reliable document of record can you consider whether in light of

that Caution it can be said that the Registrant's fitness to practise is impaired. The Panel should note that the test of impairment is expressed in the present tense, that is to say fitness to practise is impaired. As the Court of Appeal noted in the case of *GMC v Meadow*, the purpose of fitness to practise procedures is not to punish the practitioner for the past misdoings, but to protect the public against the acts and omissions of those who are not fit to practise. The Panel thus looks forward not back, however, in order to form a view as to the fitness of a person to practise today it is evident that it will have to take account of the way in which the person concerned has acted or has failed to act in the past. Thus, although the Panel's task is not to punish for past misdoings you do need to take into account a range of past acts or omissions in determining whether it can be said that the Registrant's fitness to practise is impaired.

What then are the factors to be taken into account. This again is touched upon in the Rules to which Mr Gilmore has referred. In the case of *GMC v Cohen* the High Court stated that *"it was 'critically important' to appreciate the different tasks which Panels undertake at each of step in the adjudicative process."*

You are currently concerned with the issue of whether in light of any Caution proved, the fitness of the Registrant to practise has been impaired taking into account the critically important public policy issues. Those critically important public policy issues which must be taken into account by Committees such as yours were described by the Court in the case of *Cohen* as:

"The need to protect the individual [service user] and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect... and that public interest includes amongst other things the protection of [service users] and maintenance of public confidence in the profession."

Thus in determining whether fitness to practise is impaired, you must take into account a range of issues which in essence comprise two components. First, the personal component, that is to say the current competence, behaviour of the individual Registrant and, second, the public component, that is to say the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. As the Court noted in *Cohen* the sequential approach to considering allegations means that not every finding in respect of a statutory ground in this case, a caution, will automatically result in a Panel or Committee concluding that fitness to practise is impaired as the Court stated:

"There must always be situations in which a Panel can properly conclude that the act... was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired..."

The Court continued:

*"It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable,
Second that it has been remedied and third that it is highly unlikely to be repeated."*

It is important for you to recognise that the need to address these critically important public policy issues identified in the case of *Cohen* to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession, means that you cannot adopt a simplistic view. I would conclude that fitness to practise is not impaired simply on the basis that since the allegation arose the Registrant has corrected matters or learned his or her lesson.

As indicated in the case of *Health Professions Council v Brennan*, in a case where a Panel or Committee makes a finding of impairment solely on the basis of the public component of an allegation, the Panel or Committee must explain the reasons for that decision. It is insufficient simply to recite that, for example, it is necessary in order to maintain public confidence in the profession. In addition to addressing the personal and public components, I would also refer you to the case of the *Council for Healthcare Regulatory Excellence v the NMC and Grant*, a decision of the Administrative Court [2011], in which the judge in that case, Mrs Justice Cox, cited with approval a formulation provided in the Fifth Shipman Report authored by Dame Janet Smith in which she provided a formulation for Panels and Committees such as yours to determine whether it can be said that fitness to practise is currently impaired. I am modifying the terminology slightly but I am reading directly from that formulation. It was stated as follows:

"Do our findings of fact in respect of the [Registrant's caution] ... show that her fitness to practise is impaired in the sense that she

" (a) has in the past acted and/or is liable in the future to act so as to put a patient [or vulnerable service user] at unwarranted risk of harm; and/or

(b) has in the past brought and/or is liable in the future to bring the [Social Care profession] into disrepute; and/or

(c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the [Social Care profession]."

Mr Gilmore has also alluded to statements contained in the Hearing bundle in relation to the Registrant and which attests to her character, and also to some extent her conduct in a clinical setting.

In deciding, therefore, whether her conduct is easily remediable, has been remedied and is unlikely to be repeated, you may also need to consider such evidence which in other proceedings might only be heard at the sanction stage after a finding has been made. Whilst it is appropriate for Panels to admit evidence such as this for the purposes of determining impairment, in so doing you must exercise caution. As the Court of Appeal noted in the case of the *Crown & the application of Campbell and the General Medical Council* issues of culpability and mitigation are distinct and need to be decided sequentially. The fact that there has, in some cases there might be an overlap does not justify treating evidence which is exclusively relevant to personal mitigation as relevant to the prior question whether the allegation has been established. I would repeat that if, and only if, you move to a sanction stage, you can independently reassess that witness evidence in light of the relevant guidance to be provided at that stage, should you arrive at it.

The other and final thing I would say to you is that on the question of impairment, current impairment of fitness to

practise you are not required to adhere to any standard of proof, as the case of *Biswas* makes clear you are required rather to exercise your judgment and apply the advice which I have sought to give you.

So unless you have any questions for me, or unless there are any questions from you or any representations upon my advice from Mr Gilmore, that would conclude my advice to you at this stage.

Sanction

Before you retire now to consider this, the third stage of these proceedings, mitigation and sanction, I am required to give some advice in relation to those matters which you might properly consider in respect of Kathleen Agnes Rae.

The available sanctions are set out in Paragraph 26 of Schedule 2 which makes clear that in ascending order, the Committee can warn the Registrant for a specified period of up to 5 years or make a Conditions of Practice Order for a specified period not exceeding 3 years, or make an order suspending the Registrant's registration for a specified period not exceeding 2 years and the most restrictive sanction is that of removal, to make a Removal Order in respect of the registration of the Registrant and to remove her from the Register.

The matters which you may properly take into account are also set out for you in sub-paragraph 2 to which reference has already been made by Mr Gilmore, and I don't seek to repeat what is stated there, and I will commend that to you, together with the Indicative Sanctions Guidance document. That document makes clear at the outset that the purpose of a sanction is not to be punitive, and you are not required to punish the Registrant for a second time. The Courts, however, have recognised that the imposition of a sanction can have a punitive effect both in terms of the Registrant's reputation and also, potentially, financially. But the purpose of a sanction is that it should be applied in the public interest, and the public interest is set out for you at paragraph 2.4 in which it is stated that the primary purpose of a sanction is to ensure that the social care worker does not have the opportunity to repeat any misconduct found and, secondly, to maintain the reputation of the profession. Paragraph 2.3 makes it clear that the public should have confidence that NISCC as the Regulator of social care workers will uphold proper standards of behaviour and conduct, and the public interest additionally requires that the public and social care users are protected from unsafe practice and that confidence in the profession of social work and the social care workforce in general is maintained.

In relation to the proper approach to be adopted you must, as it were, calibrate the seriousness of the conduct which you have found proved in this case, and in order to do that I would again commend to you paragraph 3.2 of the Indicative Sanctions Guidance document and paragraph 3.3 of the document which deals respectively with mitigating factors and aggravating factors.

Mr Gilmore has been very fair and has outlined mitigating and aggravating factors in this case, and you should also not only bear in mind what he has said to you about that, but you also must look at and exercise your own judgment in relation to what you have heard and read with regard to the non-exhaustive list of factors set out for you. When you have calibrated the seriousness of the conduct, then and only then should you consider the

appropriate sanction to apply in this case. You are given again, a helpful non-exhaustive checklist in relation to those factors which can be properly identified in relation to each appropriate sanction. In order for you to act proportionately as required by the Rules, you should start with the least restrictive sanction, that is to say a Warning. If, and only if, you are satisfied that the public would not be adequately protected by the imposition of a warning should you move through the sanctions in ascending order of severity looking at each of the factors applicable and of course, it is right to say in this case that you may look up to and including the most restrictive sanction, that is to say the sanction of removal.

If, in your consideration, and in the exercise of your judgment you identify a sanction short of removal which you consider adequately protects the public, you should not move to consider a more restrictive sanction as that would have the effect of punishing the Registrant which, as I have said to you, the purpose of a sanction is avowedly not to be imposed in that manner.

The Committee should also be referred, and I will now refer you to a certain paragraph in relation to the Indicative Sanctions Guidance document at paragraph 5.16 in relation to a breach of a privileged position enjoyed by a registered professional. It states in the Indicative Sanctions Guidance document that in addition to the responsibilities that come with a caring relationship, Registrants have other privileges which society has given them on the understanding that they will be used responsibly and for legitimate professional purposes. A social care professional who abuses the trust which society places in them should forfeit the privileges which come with registration.

I would also simply remind you again, and you no doubt will be well familiar with this, that at the sanction stage of these proceedings, again, you are not required to adhere to any standard of proof, you must exercise your judgment, and having the public interest which includes the maintenance and upholding of proper standards of conduct and behaviour and protecting vulnerable service users, at the forefront of your minds.

So unless you have any questions for me, or unless again Mr Gilmore has any representations upon my advice, that would conclude it at this stage.

You have the right to appeal this decision to the Care Tribunal. Any appeal must be lodged in writing within 28 days from the date of this Notice of Decision.

You should note that the Fitness to Practise Committee's decision takes effect from the date upon which it was made.

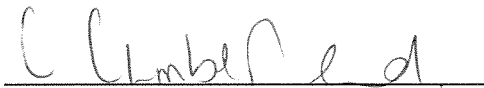
The effect of this decision is that your entry in the Register has been removed.

You are prohibited from working as a social care worker in any of the following positions:

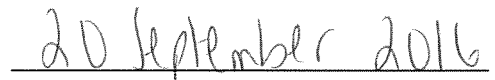
- Care staff in a children's home, residential care home or nursing home.
- Manager of a residential care home, day care setting or domiciliary care agency.

It is **compulsory** for the above social care workers to be registered with the Northern Ireland Social Care Council in order to work. This is pursuant to the Northern Ireland Social Care Register (Social Care Workers Prohibition) and Fitness of Workers Regulations (Northern Ireland) 2013.

In accordance with Schedule 3, Paragraph 9 of the NISCC Fitness to Practise Rules, you may not apply to be restored to the Register within five years from the date of removal. This does not affect your right to appeal the Committee's decision to the Care Tribunal.



Committee Manager



Date