Witness to Harm-Holding to Account. Improving patient, family and colleague witnesses' experiences of Fitness to Practise proceedings: A mixed methods study.

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Background

In the UK over 2 million health and social care professionals are registered with 13 statutory professional regulators. When professional conduct falls below standard, registrants may face an investigation into matters such as their conduct, health or competence via Fitness to Practise (FtP) processes. The registrant has the opportunity to respond to allegations against them. If the case is serious it can proceed to a public hearing, where the evidence is tested before an independent adjudication panel. Sanctions may be imposed on the registrant including restricting their practice or removing them from the register.

The public, who may have raised a complaint, can be asked by the regulator to be a witness at a hearing and be cross examined on their evidence, which may be crucial. There is some research commissioned by regulators in the UK and Australia concerned with health professionals, that shows the experience of being a registrant in FtP proceedings can be onerous, protracted and distressing[1-4]. But much less is known about the public's experience of this process, such as why people raise concerns, and their experience of doing so, although it is acknowledged that this can be daunting.[3-5] Further, the process of being cross examined is known to be distressing in the criminal context, where the victim must retell their story about the harm they experienced and, in doing so, may have to face the alleged perpetrator [(6,7)]. In FtP, retelling stories could be similarly retraumatizing.[8,9]

Our research focusses on the public (and colleagues) who describe being harmed by a registrant and examines their experience of engaging with FtP processes.

Aims

Our mixed-methods approach aimed to increase awareness and improve understanding of the expectations and experiences of the public involved in FtP proceedings, identify improvements to the processes to minimise the secondary harm that could arise for witnesses, and to improve public trust in regulation and in the professions.

Methods:

The study collected data from all 13 of the UK health and social care/social work regulators for some of the research, and from between 6-8 regulators that agreed to take part in other parts of the research. We examined the information for the public on the regulators' websites. We recruited people to take part primarily through the participating regulators as they held the information about who had been involved in cases where a patient, service user and/ or their family (or colleague of the registrant) had alleged they were harmed. We also recruited participants by publicising the study on social media and the newsletter of the charity Action against Medical Accidents (AvMA). We undertook a survey of people who had raised a concern, and we interviewed people who had been part of a hearing. We examined the public websites of all regulators, case documents including witness statements, legal documents and policies, determinations of hearings and we observed hearings. We interviewed members of the public, lawyers and independent hearing panel members, as well as employers of registrants who provide health and care services. Our methods of analysis used several social science methods including content and thematic analysis, narrative portraits, institutional ethnography, and the use of readability and web site accessibility algorithms. To formulate recommendations from our findings, we used co-production with a range of stakeholders including from our three project advisory groups.

The research team worked with three advisory groups throughout the project: 1. Our public advisory group included people who had personal experience of FtP. 2. Regulators 3. Employers, lawyers and professional bodies. The independent study steering committee (SSC), appointed by the funder, included people with lived experience of FtP and health and social care services, professional regulation and academics involved in regulation, clinical negligence and patient safety research.

Research Questions

There are six research questions which are described below along with the results.

Summary of findings by research question:

Question 1: What are the experiences, support and information needs of patient/ family/colleague witnesses involved in different stages of FtP processes of the professional regulators' FtP investigations and hearings in the UK?

Of 62 survey harmed participants who had raised a concern about a registrant and whose case was closed without hearing, 54 were disappointed/very disappointed in this outcome, six were satisfied/very satisfied with the outcome, and two cases were

ongoing. Harm was defined more broadly by survey participants than by regulators and included rights harms (such as alleged failures to protect rights to choose care options). Participants we interviewed who had taken part in investigations were left very unsatisfied with why their case had not progressed if it was a pre-hearing disposal. Interviews with those attending a hearing showed they believed that the interests of the professionals were placed above those of service users/ patients. Having raised the concern, they often felt the case investigated and at a hearing did not address their concerns at the hearing. Interviewees concluded that their legitimate concerns were not important to the regulator. The interviewees' experiences of the hearing process left them feeling that little weight was given to their testimony or concerns, often due to registrants' representatives' undermining approach to cross-examination. In effect, "disposal" (in the general rather than legal sense) and disrespect characterised the experiences of participants [10].

We found that witnesses' experiences of FtP were onerous and, often, difficult and disappointing. We found that these experiences arose due to the nature of witness work that was required, the epistemic injustice [11,12] perpetrated during cross-examination, the ways in which witnesses were made vulnerable during and by the hearing process and the discrepancies between what witnesses expected of hearings and the focus and procedures followed by regulators. This had the potential to undermine their trust in the regulatory process. Further, the experience was distressing. Following the hearing, several participants said the communication by regulator's staff was limited and impersonal. Of the witnesses we interviewed, few had used the regulators' outsourced witness support offerings (Victim Support). Overall, it was reported by participants that they had experienced very poor communications from regulatory staff, which some suggested added to the trauma arising from the original events involving the registrant.

Question 2: What factors influence these witnesses' view of the outcome of pre-hearing disposal decisions and hearings, including their view of the registrant's admissions, the weight given to their testimony, expressions of apology or regret by the registrant?

The 41 witnesses' interview responses with the public or colleagues who described experiencing harm showed they often felt disposed of in the regulators' processes, with little proactive communication about their case during the long periods leading to a hearing. They were expected to give evidence within the system, and not allowed to tell their own story and critically to explain its impact and ongoing consequences. The factors are being treated with respect which includes being proactively informed of the case progress, administrative care and attention, managing expectations and putting the public witness at the centre.

Regarding apology, two participants felt that saying sorry was key and expressed incredulity at how hard it seemed for people to apologise. One participant was horrified the registrant was allowed to say sorry to him during the hearing, while some others felt any apology made was 'empty' and unconvincing. Further, apology can apply to the regulator, as one participant said it took 56 email exchanges with the regulator before someone said they were sorry her baby died. She was also

shocked that the person who spelt her baby's name wrong on a form did not apologise after correcting it.

Question 3: How accessible are the witness support offer (information, staff and independent witness support/victim support and adjustments to FtP processes by regulators), how they experienced, and how might these be improved?)

Regulator website content was found to broadly address all stages of FtP, but with great variation in volume at each stage and between regulators. Large volumes with much redundancy could be overwhelming. There were some examples of flow charts and formats such as videos which were welcomed by the public we consulted. Readability results showed many documents would require at least school age reading of 14–16-year-olds complexity, and most required a higher level of reading ability. Only 4/17 websites were compliant with the government's accessibility criteria. Website usability, which reflects how people navigate a website to enable them to create and submit a complaint, was below the norm for all but two regulators. Improvements to all the above functions are recommended including the co-production of information with the public to enable regulators' information to be more accessible and easily understood. When reviewing the websites we found the information about what support a regulator might offer to be highly variable between regulators. The support was often confined to an alternative to using a form, such as phone call, when submitting a concern. It was then unclear what support they might gain at later stages, which our participants felt did not support their decision-making about whether to engage or to continue to engage with the regulator.

We were unable to recruit people identified by the two regulators with in-house witness support services who had used these services. During the study, four regulators offered an external support service (Victim Support). Few interviewees were aware it was available but felt that lack of information about the progress of the hearing was more important than emotional support. One participant received support from a new witness contact role introduced by a regulator. This experience was positive in terms of the witness feeling less isolated and having someone to chase for updates, however, this did not ameliorate the harm the participant experienced as a witness in the process.

Question 4: What are the experiences of health and social care employers of the support needs of witnesses, including the decision to refer, and throughout FtP investigations and hearings?

We interviewed 25 employers of health and care professionals across the UK. We found they offer similar information and wellbeing support to registrants as they would to employees during a local disciplinary or complaints investigation including from the line manager, occupational health, and external counselling services. Some interviews with harmed colleague witnesses found employers gave varying support for their staff members, and none to agency staff. Further, they revealed concerns about having harmed colleagues come back to work alongside those about whom they had raised concerns while it was being investigated by the regulator. Of the 25 employers interviewed, eight senior staff who had prior experience of being a witness in FtP were more willing to give support to registrants involved in hearings both personally and via their organisation than those who had no prior experience. This suggests that

awareness of the difference between the two processes led them to conclude that more personal support was needed when becoming a witness in a regulatory process.

This was in stark contrast to the support they offered to patients and service users attending FtP hearings which comprised only that offered routinely to those going through local complaints procedures, such as the Patient Advice and Liaison Service (PALS). The employer that offered the equivalent support for both staff and service users did so in the context of having a long-term relationship with their mental health service users, and rebuilding trust in their service in the organisation.

Question 5: What is the experience of lawyers for the registrant and for the regulator of the support needs of witnesses, and the approach to fair witness testimony, and cross-examination in hearings?

We interviewed two lawyers who considered the impact of the FtP process and hearing on the witness. They reflected on the tension they experience in not leading witnesses in the statement process and the limited preparation of witnesses that they are allowed to do within the rules for hearings, and the need to make sure the witness is able to give their best evidence. There was also concern about the circumstances in which regulators compel witnesses to be part of the hearing process. They said the power was seldom, if ever, used with members of the public. The website analyses showed that some regulators, but not all, mentioned a legal obligation to be a witness which could be enforced by a court order. It is unsurprising therefore that some witness participants we interviewed felt under some pressure to be a witness, albeit implied rather than stated.

Question 6: What are the key legal and regulatory frameworks which impact on how witness vulnerability is understood and responded to in fitness to practise proceedings in the context of the regulation of social work and social care professionals in the four countries of the UK, and how might these be improved?

We found that textual constructions of witness vulnerability in the four social work and social care professional regulators' legal and policy frameworks were, at the same time, too narrow, too broad and potentially stigmatising, and further sit uncomfortably with a social model of disability. We call for a more holistic textual approach to how witness vulnerability is framed and make suggestions how this may be operationalised in policy and law. Our findings have wider application, beyond the regulation of the UK-wide social work and social care workforce, where regulatory processes designed to protect the public rely on witnesses coming forward to provide evidence.

Recommendations for policy and practice

Our findings suggest that the FtP process is experienced as unjust by public witnesses (patients, service-users, family members and friends) and can generate additional harm for public referrers. This harm is an outcome of embedded practices that lead to experiences of epistemic injustice[11,12] disrespect[13] and disposability. Our co-produced recommendations should be read within this context.

For Government

1. We reiterate a key recommendation from *Tackling Concerns Locally* (2009, p58) concerning medical regulation: "People who wish to raise concerns – whether patients, carers or other members of staff including trainees – should be encouraged to do so and supported throughout the process {locally through to the regulator}" (p.8). It recommends *"advice and clearer signposting for those considering raising a concern; support in articulating the concern, including advocacy support for vulnerable people" (p.55*).[14] This should include confidential advice and clearer signposting for those considering raising a concern; support in articulating the concern, advocacy support; and support as the concern is progressed, including for witnesses at FtP hearings. Much of this advice has not been implemented in relation to the health service[15] and it is not apparent in relation to FtP.

For regulators and employers

2. Regulators and employers in health and social care should review and extend informational, well-being and emotional support offered to people known to their services, e.g. as patients, members of the public, registrants, and colleague witnesses involved in FtP processes.

Independent advocacy

3. Regulators and employers should signpost public referrers to sources of independent advocacy and advice across the various processes including inquests, civil proceedings, NHS complaints, social services complaints, criminal cases.

For regulators

4. Recognise the key role public referrers have in FtP processes.

5. Develop a holistic understanding of how FtP processes can be experienced by public referrers: their motivations for making a complaint; the impact of the unfamiliarity of these processes; the work involved for the referrer; and harm caused by communications that may be experienced as overly legalistic or disrespectful.

6. Recognise that public referrers may be distressed, or re-traumatised by all stages of FtP processes, and as such that they should:

> 6.1 Minimise the need for public referrers to retell their story, and ensure all staff/lawyers are aware of their communication preferences, communicate deadlines and adhere to them;
>
> 6.2 Take all efforts to consider how fairness, kindness, respect and humanity can be demonstrated in all interactions with people.

7. Consider how good practices and guidelines from other areas of law may be used in FtP processes to:

> 7.1 Support all witnesses to give their best evidence;

7.2 Recognise the different ways in which people may be made vulnerable in and by FtP processes;

7.3 Expand the opportunities for witnesses to explain to regulators and hearing panels the personal impact of the case, for example, using victim personal or impact statements.

8. Establish feedback mechanisms or review current approaches to ensure continuous feedback from people who have raised concerns (including those whose cases do not proceed to hearings) to assess their experience and use that to improve FtP processes.

Information provision

9. Support members of the public to understand FtP processes and decision-making steps.

10. Provide clearer public-facing information, co-produced with members of the public, about the steps that can be taken to support people to raise concerns and to provide evidence as a witness, throughout the process, and at a hearing.

11. Public-facing information should be designed to be understood by most of the UK adult population by being compliant with UK government website accessibility, and public health education requirements, including being worded to be understood by those with limited literacy and available in alternative audio-visual formats.

12. A liaison function to employers, where this does not already exist, could improve the selection and management of cases and identify issues which may fall on the employer to support the witnesses.

Communication

13. Approach communication with public referrers as a two-way dialogue, as opposed to a one-way transmission of information, to allow public referrers to feel valued and heard in the FtP process. This will involve, for example:

13.1. Clearly explaining the function and purpose of the process, and for each case explain why aspects of a case might not be included, or a referral may be closed;

13.2. Actively listening to and, as far as possible, addressing people's concerns about the process;

13.4. Recording a statement of their concerns and the impact of these concerns, which should be available to regulator staff throughout the case (see 7.3);

13.5. Establishing the preferred means of communication, amount of information and timings of communications with the public referrer and others

affected by the referral and make this available to regulator staff throughout the case;

13.6. Keeping people affected by the referral regularly updated on progress. In the event of unavoidable delays explain as clearly as possible why this has happened and what will happen next. This should include ongoing communication across the whole progress of a case e.g. throughout adjournments.

13.7. Ensure decisions are communicated by appropriate staff members using the preferred means of communication (see 13.5) who can answer questions.

14. Review the use of terminology and provide staff training in respectful and empathetic engagement and communication.

The hearing

15. The process of cross-examination can generate additional harm for witnesses. Regulators should support witnesses to understand what it is like to be a public witness and go through cross- examination, including: clearly explaining what happens at a hearing; the purpose of cross-examination and what sort of questions may be asked in cross-examination; what actions witnesses can take when giving evidence such as asking for breaks, and for questions to be rephrased; and acknowledgement that cross-examination is broadly understood to be inherently stressful and difficult.

16. Panel members (especially the Panel Chair) and legal advisers should better understand the experience of public witnesses and intervene in inappropriate and distressing cross-examination.

17. Where appropriate, and in conjunction with the public witness, consider whether alternative or modified approaches to cross-examination may be possible within existing FtP processes. More broadly, consider whether alternatives to the adversarial approach can be sought out and evaluated.

18. Support witnesses to observe proceedings after they have given evidence if they want to.

19. Online hearings should ensure that all attendees have their correct and/or anonymised name and role on display.

20. Witness and other interested parties should receive feedback after the hearing and the opportunity to make sense of the outcome.

Questions for future research:

- How can health and social care regulators communicate better throughout the FtP process with the public who raise concerns and/or who may become witnesses?
- What is the impact of difficult experiences of the FtP processes on public (dis) trust in regulators and/or professions/services?

- How can public witnesses be better supported to give evidence in a way that they find more empowering and less distressing?
- To what extent can victim personal or impact statements be used in FtP processes to provide opportunities for witnesses to explain to regulators and hearing panels the personal impact of registrants' actions?
- From the public's perspectives, how useful are the regulator support services, independent services, and support services commissioned by regulators such as Victim Support.
- What is the experience for the public of expressions of apology and of regret by registrants?
- From the public's perspective what is the impact of current and new FtP processes including consensual disposal?
- How do health and social care regulators assess the situational vulnerability of all public witnesses and how are the special measures implemented and with what effects?

Concluding remarks

The research has provided a global first of multi- regulator health and social care research into the role of the public in FtP, conducted and funded independently of the regulators. Our study makes a novel and important contribution to research on professional regulation which also contributes to the wider body of patient safety research. This research provides evidence of the experience of the public in whose name professional regulation takes place, who often find the process unjust, distressing and disappointing.

Resources from the project

Updated June 2024

Please see our website and resources:
https://wels.open.ac.uk/research/witness-harm-holding-account
There are films on the resources page of the site of the views of participants (the public, regulators, and academics) who took part in our dissemination event in London in February 2024:
https://wels.open.ac.uk/research/projects/witness-harm-holding-account/resources

Our public resources will be available on these websites:

From July 2024 we will be launching two a free to access OpenLearn "courses" for (a) the pubic) and (b) health and social care professionals and their employers and educators, regulatory lawyers and professional defense organizations. These materials include animations. These resources can be used in the training and education of those involved in a professional capacity in fitness to practise proceedings.
https://www.open.edu/openlearn/

There will be 9 stories of people who have taken part in our research and have taken part in a fitness to practise hearing as a member of the public (date to be confirmed), listed under F for Fitness to Practise:

https://healthtalk.org

PSA blog- https://www.professionalstandards.org.uk/news-and-blog/blog/detail/blog/2024/04/04/customer-care--personalised-care---it-s-just-not-good-enough.--more-compassion-is-needed-in-complaints-handling

Please also see resources referred to in our recommendations:
https://www.traumatransformation.scot/about/
https://www.traumatransformation.scot/tailored-support/victims-and-witnesses/

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