



Introduction

- 1.1 UNISON is the largest public sector union with 1.3 million members; we have 450,000 members employed across the Health Service. We are pleased to have the opportunity of contributing to the Nursing and Midwifery Council (NMC) September 2011 consultation on proposed changes to NMC rules affecting their fitness to practise procedures.
- 1.2 As the largest trade union and the voice of the healthcare workers, we are instrumental at influencing policy at regional, national and international level. We work with Government and other international unions to shape healthcare. In addition we work collaboratively with other trade unions on healthcare issues. UNISON has a long history of working with organisations and individuals who work and campaign in these areas of practise and care. UNISON works closely with each of the regulators to establish standards & policies in both patient care and education. We are a key stakeholder and value the opportunity in our collaborations to improve patient care.

2. Background

- 2.1 We wish to acknowledge that in the last twelve months we have noticed and experienced a positive significant change relating to the NMC's handling of fitness to practise. We recognise that a significant amount of constructive work has been taking place for some time. It would be fair to say that there is a change in our confidence relating to the management of fitness to practise. We do not believe that either we or the NMC can be complacent as a large and growing number of cases still have to be addressed but it now feels as if we are all pulling in the same direction. We welcome many of these proposals as an opportunity to develop a more efficient way of working together.
- 2.2 Our submission covers all three proposals.

Proposal 1 – The investigation of fitness to practise allegations referred to the NMC

3. Question 1 – Do you agree or disagree that our Fitness to Practise staff should be allowed to carry out some evidence-gathering before a case is considered by the Investigating Committee?

3.3 UNISON **agrees** that NMC staff should be allowed to carry out some evidence-gathering before a case is considered by the Investigating Committee.

3.4 Once a Nurse or Midwife knows that they are being investigated by the NMC they want as swift a conclusion as possible, notwithstanding their own requirement for sufficient time to gather their resources to defend their case. Under the current arrangements it is not unusual for Registrants to wait up to a year before they know the full extent of the case against them, and there are cases that have waited more than one year, and many Registrants have had their cases returned for further investigation several times before a decision is made as to whether there is a case to answer (i.e. a decision as to whether there are reasonable prospects of a finding of current impairment of fitness to practise). So UNISON welcomes this proposal to improve the efficiency of the NMC process at this stage of the proceedings, for a swifter decision on reasonable prospects or case to answer.

3.5. Notwithstanding our agreement in this matter, UNISON would ask that the purpose of the investigation should not be simply to find evidence against the Registrant. The scope of the investigation should be based solely on the allegation prior to and excluding any response from the Registrant; and it should report evidence that undermines the allegations.

3.6 Although the question does not directly relate to this, UNISON refers to the NMC's recent new practise whereby they contact Registrant's witnesses, who might be their employers, before a hearing to authenticate their written testimonials. We take this opportunity to express our concerns that this might lead to some Registrants or their witnesses feeling intimidated; and we would ask that the NMC desist in this procedure.

4. Question 2 – Do you agree or disagree that we should not be required to particularise the allegations in the notice of referral to the Investigating Committee or other Practise Committee?

4.1 UNISON **disagrees** with this proposal because it is essential that the allegations are fully particularized before the Registrant is required to make a response to an Investigating or other Practise Committee. Any other arrangement would contravene Article 6(3) ECHR.

- 4.2 Our members often receive complaints from which it is difficult to ascertain quite what is being complained about. That is often the case when complaints are made by members of the public who might include their general complaints about the entire service at a hospital, or nursing home, and tie it to one person they know the name of, or who they mistakenly think is responsible for matters outside of their remit. Or, if the complaint originates from an employer: there might be matters that have been investigated and not found to be of substance that should not go before the NMC; or there might be matters that were not adequately investigated and which, if they had been properly addressed by the employer, would not come before the NMC either.
- 4.3 If the Registrant attempts to speculate as to what the charge is based on the letter of a member of the public, or if they try to address every bit of hearsay and other unsubstantiated evidence included in the employer's submission, the Registrant might go so far outside what should have been the allegation that they incriminate themselves unnecessarily.
- 4.4 On the other hand it seems fair that the NMC should, at the outset of their investigations, provide the Registrant with an indication of what behaviour it is that justifies the complaint being investigated and offers them the opportunity to address the matter without any undue pressure to respond. On this basis UNISON would welcome an approach similar to the General Medical Council (GMC) whereby the initial Notice of Referral letter to the Registrant says that they have received the enclosed complaint and intend to review it and, in the meantime, if the Registrant wants to provide any comments they may do so – but there is no obligation to do so – and their comments will be taken in to account when considering whether the case should be referred on. We consider a letter of that type would be more suitable as a way of informing the Registrant that there is a complaint before the NMC investigation is sufficiently advanced to particularize the allegations.
- 4.5 We therefore wish to make a distinction between the investigation stage of the proceedings, when arrangements as suggested above should be put in place and when a Registrant is referred to a Practise Committee, when the allegations against the Registrant should be adequately particularized. They should be adequately particularized so that the registrant knows the “what, who, where and when” of such allegations, in order that the registrant can gather any evidence in their defence and have sufficient time to gather such evidence. This is all the more important because the Practise Committees make decisions affecting the ability of the Registrant to practise their profession, which has been established as a Civil Right of a Registrant.
- 4.6 Furthermore, we would ask that the particularized allegations also identify the relevant NMC Code that it is alleged that the actions or omissions of the Registrant has contravened.

5. Question 3 – Do you agree or disagree that we should be allowed to carry out further evidence gathering following the referral of a case to CCC or HC?

5.1 UNISON is **not sure** whether the NMC should have the power to carry out further evidence gathering following the referral of a case to CCC or HC. We would agree **provided** that (a) it is used for fast tracking the most serious cases only and (b) only with a view to cancelling a meeting or hearing only and (c) **not** so that the NMC can fix meeting and hearing dates before they have completed their investigations as a matter of course for all their cases.

5.2 By comparison, it is the normal practise of the HPC to decide that there is a case to answer and fix hearing dates before they have concluded their investigations. As a result Registrants do not know the extent of the case against them, in terms of both witness statements prepared for the hearing and final exhibits, until just 42 days before the hearing. Further, the Registrant must respond with any objections to the HPC evidence within 14 days of receiving it. This offers the HPC the advantage of appearing to progress their cases more quickly than other Regulators when, in fact, they have not completed their investigations before deciding reasonable prospects and fixing the hearing date. This is disadvantageous to the Registrant as they then have very little time (just 2 weeks) to respond to evidence they haven't seen before and, not infrequently, the new evidence is quite substantial and significant. This is also disadvantageous to the Public and to the Registrants whose fees pay for the process, in that the HPC have to convene Preliminary Hearings, with all the associated costs, to amend the particulars of the allegations when it becomes evident they cannot after all substantiate some of them. Or the HPC pursues a case on the basis that there is a case to answer on the factual elements of the allegations only, omitting evidence of current fitness to practise, so cases progress to hearings when the allegations are not well founded and the Registrant's fitness to practise is not currently impaired.

5.3 UNISON might agree that the NMC should be allowed to carry out further evidence gathering following the referral of a case to CCC or HC provided that is done for exceptional serious cases only and with the assurance that it would not be done for less exceptional cases. The NMC carries out their investigations at considerable expense and, where cases would be fast tracked because they are so serious, there must be transparency around the gathering of any further evidence such that: (a) it is in relation to specific points noted by the IC or (b) in relation to evidence identified by the Registrant. And again, we take this opportunity to state that the Registrants' witnesses should not be contacted by the NMC prior to a hearing except with the agreement of the Registrant.

6. Question 4 – Do you agree or disagree that we should have the power to

cancel and close cases that have been referred to the CCC or HC prior to a hearing or meeting?

6.1 We **agree** that the NMC should have the power to cancel and close cases that have been referred to the CCC or HC prior to a hearing or meeting.

7. Question 5 – Do you agree or disagree with the amendment of charges proposal?

7.1 We **agree**.

8. Question 6 – Do you agree or disagree with the service of notices proposal?

8.1 UNISON **agrees** with the service of notices proposal; indeed we have already asked the NMC to send the notices to UNISON Representatives by email; it would be ideal to both post and email the notices to Representatives. The advantage is that with the advent of new technology the Representative does not have to be in their office to receive the notification. As Representatives are often away from the office at hearings, email notification is more likely to reach them on time for short notice hearings; and the posted paper copy would act a back up.

9. Question 7 – Do you agree or disagree with the proposed change to notice of IC decision?

9.1 We **agree**.

10. Question 8 – Do you agree or disagree with the proposal about notice of decision of CCC or HC meetings?

10.1 We **agree** because that would be a much fairer system.

11. Question 9 – Do you agree or disagree with the proposed changes concerning the provision of copies of rules?

11.1 We **agree** as this would save costs, provided that it is made clear to Registrants that they can obtain the documents by request.

12. Question 10 – Do you agree or disagree with the proposal to remove reference to the Code?

12.1 UNISON **does not agree**. We agree if it applies to references to the Code in the abstract. However, it is important to know which part(s) of the Code the NMC alleges to have been broken by the actions or omissions of the Registrant in the Investigator's Report to IC.

12.2 Given the usefulness of identifying the relevant broken Code when particularizing allegations, it might be safer to refer to "the Code *or some other description*."

Proposal 2 – Procedures for seeking and making interim orders

13. Question 11 – Do you agree that the Council should be able to refer a case directly to a Practice Committee for an interim order hearing and serve an interim order notice?

13.1 We are **not sure**.

13.2 Certainly it would be in the public interest, to protect the public, for interim order hearings to take place as soon as possible after a complaint is made. However, if the complaint comes as a complete surprise to the Registrant (e.g. if there have been no complaints at work and a member of the public sends the referral directly to the NMC) they might not have time to arrange necessary representation at such short notice. Therefore UNISON would be more agreeable to the change provided it was made clear that applications for postponement are given due consideration and granted as appropriate to allow the Registrant time to arrange for a Representative to attend a hearing with them.

14. Question 12 – Do you agree or disagree that it should be possible for an interim order to be made at a meeting to protect the public during the appeal period following the making of a final order?

14.1 We **agree**.

Proposal 3 – arrangements for allowing nurses and midwives to voluntarily remove themselves from the register

15. Question 13 – Do you agree or disagree that some registrants should be allowed to voluntarily remove themselves from the register following a referral about their fitness to practise?

15.1 We agree.

15.2 UNISON is anxious for this proposal to succeed as it would be most appropriate for Registrants who are seriously unwell with little prospect of recovery; or older Registrants who lack competency, possibly due to huge developments in the field that they have not been able to keep up with at the end of a long career.

15.3 Voluntary removal would be a more dignified way for Registrants to exit a life-long profession that they have served with dedication until the very end when circumstance outside of their control lead to their fitness to practise becoming impaired.

16. Question 14 – Do you agree or disagree that the consent of the referrer should not be a condition for voluntary removal?

16.1 We agree.

16.2 This would be in accordance with Article 8 ECHE.

17. Question 15 – Do you agree or disagree with our proposals concerning the readmission of a nurse or midwife to the register following her voluntary removal?

17.1 We agree.

18. Question 16 – are there any other comments you would like to make about any of the proposals set out in this consultation? It would help us if you state which proposals you are referring to.

18.1 We have made all our comments against each question. However, aside from that, we would like to acknowledge the recent commitment by the NMC to continue to work in partnership with ourselves and other registrant representative bodies on these issues of mutual interest; and we look forward to them continuing to do so.

19. Question 17 Are you responding as an individual or on behalf of a group or organisation?

18.1 This response is made **on behalf of an organisation** – UNISON is a Trades Union representing public sector workers including nearly half a million health workers.

20. Question 20 – Please tick ONE box which best describes the type of organisation you represent?

20.1 UNISON is the largest public sector Trades Union.

21. Question 21 – Please give the name of your organisation

21.1 UNISON

22. Question 22 – Would you be happy for your comments in this consultation to be identified and attributed to your organisation in the reporting, or would you prefer that your response remains anonymous?

22.1 UNISON is **happy** for comments to be attributed to our organisation.

23. Question 23 – Please state where your organisation mainly operates:

23.1 UNISON operates **UK-wide**.

24. Question 31 – How did you find out about this consultation?

24.1 We found out about this consultation at an NMC meeting.

25. Question 32 – How far do you agree or disagree that:

25.1 We **strongly agree** that we know what this consultation can and cannot influence.

25.2 We **tend to agree** that we have been provided with enough information on the subject.

25.3 We **tend to agree** that the consultation documents were easy to understand.

25.4 We **tend to agree** that it was easy to give our views.

26. Question 33 – How do you think this consultation could be improved?

26.1 This consultation could be improved if we were given more time; the deadline was very tight, but we made every effort to comply with it.

27. Question – Email address for identifying response

27.1 J.Freeman@unison.co.uk