



UNISON response to Department of Health consultation; The Nursing and Midwifery Council – amendments to modernise midwifery regulation and improve the effectiveness and efficiency of fitness to practise processes.

1. Introduction

1. UNISON is the largest public sector union in the United Kingdom and Europe with over 1.3 million members. Our members work in a range of public services including Health, Local Government, Education and Police services. They are at the front line of caring for the most vulnerable in our society. We are pleased to have the opportunity to respond to this consultation by Department of Health looking at midwifery regulation and the Nursing and Midwifery Councils fitness to practise processes.
2. We are also in a unique position to respond to these proposals as we currently cover four of the nine healthcare regulators. This gives us an over view of the different ways regulators operate and also enables us to make more informed judgements on which elements work more effectively than others.
3. As the largest trade union and the voice of the healthcare team, we are instrumental in influencing policy at regional, national and international level. UNISON has a long history of working with organisations and individuals who work and campaign in the areas of regulation, safeguarding, practise and care.
4. Our members are responsible for the delivery of high quality health and social care to the most vulnerable in our society. We have actively sought the views of our nursing and midwifery members who are responsible for the delivery of quality care services. In addition to registered nurses and midwives.
5. We hope that the Department of Health will take into account the weight of UNISON's views as a major stakeholder and representative of the majority of regulated healthcare professionals.

2. Executive summary

1. UNISON does not support the proposed changes to midwifery legislation including the removal of the Local Supervisor of Midwives and the abolition of the Midwifery Committee.
2. UNISON supports a number of changes to the Fitness to Practise legislation. We do not however support the merger of Health and Fitness to Practise processes; we have suggested an alternative which government could consider. Our overriding concern is balancing public protection but also ensuring the health of the registrant.
3. UNISON does not support the proposal that the NMC should be allowed to issue an undertaking or warning where there is no case to answer.

3. Background

1. In order to formulate our response and encourage active open participation we used a variety of mediums to communicate and discuss the proposals with our members. These included an email sent out to all members of the nursing and midwifery family in May, drawing their attention to the proposals and seeking their views.
2. Information also has been communicated via our UNISON Face book and Twitter accounts encouraging registrants to participate.
3. Given the impact of the proposals of midwives we have sought to gain specifically their feedback in regional conversations.
4. Finally we have also taken the time to speak to other organisations whose members are also affected by these plans.
5. We have chosen not to respond on the form as it restricted our ability to feedback fully.

4. Midwifery, we have been asked a series of questions regarding substantive changes that the Department wishes to make

Q1:- Do you agree that this additional tier of statutory supervision for midwives should be removed?

1. UNISON is deeply worried about the proposed removal of the regulatory aspects of midwifery supervision. Midwifery in numbers is a small part of the NMC register, without some of these layers it will not have the voice, which it so clearly needs.

2. UNISON nursing members have always been envious of midwifery supervision as it identifies consistently another layer of support and guidance, which is not available to them.
 3. We recognise that the Kirkup report¹ into University Hospitals Morecombe Bay recommended its removal however there was a complete system failure in that organisation. In other organisations we see the benefit of this role; in removing it from legislation fully, we miss the opportunity to amend and retain the best parts of it.
 4. We have no guarantee it will be replaced and even if it is with guidance we see all too often in our practice how ineffective guidance is. Public protection can best be achieved by ensuring consistency legislation is the vehicle to achieve this not local arrangement. A midwife meeting the needs of mothers and babies is not just a historical legacy of regulation; it is a fundamental requirement of gender equality.
 5. We could understand amending it to remove the investigatory powers but do not see why this should in turn lead to the entire legislative change.
 6. Our members believe that midwifery is a unique profession in the vast majority of cases mothers are safely delivered of healthy babies. However, every day midwives have to make life and death decisions as a matter of routine, now more than ever they need access to 24/7 clinical decision making support but nowhere in these plans is this assured by government.
 7. In the current economic climate we can see what's promised today could be denied or removed tomorrow. Midwives have greater confidence in legislation than they do in local determination by employers.
 8. We would lose not just the Local Supervisor of Midwives (LSM) but also the midwifery standards. There are many situations currently where women are unable to access the midwifery care they want and that midwives want to provide. Often the LSM provides timely intervention and can negotiate the tricky balance of the women's wishes and the service constraints.
 9. On balance of this UNISON midwifery members do not support this move.
- 5. Q2:- Do you agree that the current requirements in the NMCs legislation for a statutory Midwifery Committee should be removed?**

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408480/47487_MBI_Accessible_v0.1.pdf

1. UNISON does not support the removal of the midwifery committee within the NMC, we believe that there are significant risks associated with such a move which could be to the detriment of women, babies and mothers.
2. We also did not support the removal of the nursing committee, we believe that currently within the NMC there is a void of the professional voice and this is reflected in the lack of proactive advice and guidance to registrants, which better help them understand how they meet their professional obligations.
3. The NMC council currently has six registrant members and six lay members, only one of whom is a midwife, so it's hardly a dominating profession. If anything it is the opposite and the maintenance of the midwifery committee is essential to ensure its voice is heard.
4. The NMC have established a nursing engagement group, but this is not in any way comparable, as the midwifery committee meets, produces minutes, papers and agendas, finally reporting to council. This affords it a greater degree of transparency and openness. It also ensures consistency in a four country provision of service. This has proved essential to UNISON midwifery members as the commissioning, governance and policy control differs across the UK.
5. There are also differences in midwifery cases in fitness to practise which need to be considered, if looked at separately, these could clearly identify areas or gaps in the current standards, which the midwifery committee could develop and address thus better protecting women, babies and the public.
6. The International Confederation of Midwives² established a clear frame work of midwifery regulation and governance as the best vehicle to meet the needs of childbearing women. The Department of Health's view of equality appears to be treating everyone equally is treating them the same and this is far from the truth. Article 3 (5) of The Nursing & Midwifery Order 2001 make this clear. If you remove the midwifery committee you fail to provide due regard to this requirement.
7. The appointment of a midwifery advisor with the NMC does feel woefully inadequate if they are only going to be working a day a week.
8. Since the abolition of the nursing committee we have seen a weakening of guidance being issued to the service. Whilst we welcomed the revised code of conduct other

² ICM Global Standards for Midwifery Regulation (2001)

information is needed to help registrants be clear on the standards which they are expected to uphold. For example communication tends to feature regularly in disciplinary procedures but we have no clear guidance on this, likewise the medicines advice is out of date. UNISON believes that the NMC can better meet its public protection obligation if it were to focus on preventing harm occurring in the first place by helping registrants to better uphold the code of conduct.

9. As a result of this we believe that removal of the midwifery committee would only place them in the same position as nurses and we do not believe that this is adequate. If it does not remain in statute we cannot be assured it will be considered, implemented or maintained. It also fails to take into account the impact on the moral of midwives if this is removed, as it ensures a clear voice for midwives.
6. **Fitness to practice, we have been asked a series of questions surrounding the NMC fitness to practice proceedings and changes which the Department of Health wish to make.**
 1. UNISON recognises that many of the proposals put forward by the Department of Health and the NMC are a pragmatic way of resolving many of the current challenges. We had all hoped that first Queen's speech would have introduced the much wanted and indeed needed changes outlined in the Law Commission Review³ in 2014.
 2. **Q3:- Do you agree that, when the Investigating Committee or the Care Examiners determine that there is no case to answer but there are some concerns as to past practice or conduct, the Investigating Committee and case examiners should have the power to issue a warning or advise to a nurse or midwife?**
 3. UNISON does not support this position. The NMC has a vigorous investigatory process which incorporates an adversarial approach to questioning and cross examining all of the evidence. There are clear legal powers that specify how this is taken forward; additionally the NMC uses the civil rather than criminal standard as the burden of proof. This is clearly recognised as a lower threshold to prove probability than in comparison with the criminal standard, therefore easier to prove if there is a case to answer.

³ http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf

4. UNISON would not support this move for a number of reasons; firstly if there is no case to answer due fairness should mean that that is the end of it. Secondly there would be no evidence which could be objectively tested to carry this out in a fair, equitable and transparent manner. It would in effect be subjective, open to inconsistency and unfairness. Thirdly if there is no case to answer on what grounds would the investigating committee or case examiners issue a warning. Fifthly there is no information on how this will be evidenced giving further concern as to both the fairness and appropriateness of this additional process, how far back would you go? The consultation fails to identify how long this warning and information would be in the public domain.
5. You could in effect be issuing warnings or advise in relation to allegations that have not been tested without the registrant having any right to challenge your view or the accuracy of the information used.
6. Fundamentally any regulatory structures have to be fair, equitable and consistently applied, such warnings could unnecessary tarnish a registrants reputation and ability to gain or move employment.
7. It is already clear that a higher proportion of black and minority ethnic (BME) nurses and midwives are referred to the NMC than their white counter parts. Referrals can also be subject to unconscious bias on the part of the person referring them. We believe that this could lead to more BME nurses and midwives being inappropriately disadvantaged.
8. **Q4:- Do you agree that, where the Investigating Committee or the case examiners determine that there is a case to answer in respect of an allegation, the Investigating Committee and that case examiners should have the power to agree undertakings with a nurse or midwife?**
9. In principle UNISON supports this move; we believe that it has the potential to benefit public protection significantly in addition to reducing the costs to the NMC by preventing the need for a full hearing. Finally it also reduces the impact on registrants who would no longer have such a lengthy process to endure, which is often stressful to them before the matter concludes.
10. However we would offer the following observation, that in developing guidance to Investigating Committee and or case examiners the NMC should encourage them to take account of the professional conduct of the registrant who acknowledges and admits their lapses in professional conduct. The commissioned work of a promise to

learn, a commitment to act undertaken by Don Berwick⁴ in the wake of the Mid Staffordshire public enquiry by Sir Robert Francis⁵, identified the need to create a culture of no blame where we encourage staff to be open about mistakes that occur and to learn from them.

11. We also believe it's important to acknowledge the difficulties sometimes faced by registrants in accessing support for additional training. It would be helpful if the NMC took account of this stressing not just the responsibility of the registrant but also the employer in assisting them to achieve any learning or development outcomes as a result of the undertakings.
12. We would also wish to see this monitored to enable us to look at the impact and ensure that it is being fairly applied and resolved when the undertaking has been achieved. Finally we need more detailed information surrounding guidance and process not least consistency and clarity around time limits for undertakings.
13. **Q5:- Do agree that the Conduct and Competence Committee and Health Committee should be replaced by a single Fitness to Practise Committee which will deal with allegations of impairment of fitness to practise on all grounds?**
14. UNISON is not supportive of this change; we do however recognise the challenges faced by NMC colleagues.
15. We believe it's important to ensure due regard is considered in health cases. In particular, in relation to scheduling and timing. For example, someone with depression may not at the time have the capacity to engage in the process – their way of dealing with it could be inaction. We would hope that case examiners and committee members receive up to date training on their understanding and knowledge of these issues to ensure that registrants receive a fair hearing and do not assume that they are refusing to engage in the process.
16. We believe that Health Committees have safeguards in place for registrants when they are at the most vulnerable in their health. If you merge both Fitness to Practice issues in conjunction with health they may not be in a position to cope or respond effectively to questions or the process. Health Committees also tend to be shorter in

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226703/Berwick_Report.pdf

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279115/0898_i.pdf

duration and are not normally adversarial, which is often not the case in Fitness to Practice hearings when questioning the registrant and evidence.

17. The other major concern is that registrants who are unwell can attend the Health Committee hearing knowing that they cannot be struck off. The prospect of defending their registration and whole livelihood whilst struggling with an illness can be overwhelming, and it is an important safeguard that the hearing takes place without that particular pressure.
18. UNISON does however recognise the issues faced by the NMC and we fully appreciate the rationale being put forward by them. There could however be an alternative; in that health cases remain separate unless and in circumstances where the registrant in conjunction with their representative agree that they are of sufficient health for the matters to be dealt with as a single case.
19. Together we could develop joint guidelines which outline this process and that by doing this with mutual consent we have the opportunity to test the process and ensure sufficient safeguards are in place. We recognise that the NMC would also not wish to do anything which could undermine further the persons health so hope that they would be receptive to this approach.
20. The effect of this would be that the legislation would provide the context and safety net needed for the health of the registrant but the joint guidance could offer a pragmatic way forward.
21. **Q6:- Do you agree that the requirement for the NMC to specify in rules the size of its Practice Committee is unnecessary and should be removed?**
22. UNISON would not support a change to the minimum number on a panel this should remain at three. However we do support the need for flexibility of current and future demand should they need to increase the size of its Practice Committees.
23. We also believe that further urgent work is needed to be undertaken by the NMC to address what remains a lack of diversity amongst its pool of panel members. We acknowledge that they have sought to address this but much more needs to be done in this area.
24. **Q7:- Do you agree that the statutory requirement regarding the location of preliminary meetings and hearings of Practice Committees and hearing of appeals**

against the Registrar's decisions should be removed providing flexibility to hold these hearings in the most convenient location for all parties?

25. UNISON does support this move, however currently registrants have to pay their own costs to attend their hearings. The proposal is to give the NMC greater flexibility to schedule hearings in the most inconvenient and cost effective location for all of those involved in the hearing. As the NMC normally have more people attending than the registrants, this could inadvertently be bias towards them. A way to overcome this would be in the development of the guidance. We could introduce the principle of discretion the option of the NMC paying the registrants travel and accommodation could be included where their length of travel or cost is increased as a result of the location of the hearing.
26. We appreciate fully the pragmatic nature of this proposal by Government but the process has to be balanced and fair to all parties. We would also want to ensure that the NMC monitors the implementation of this to ensure it meets the intended outcome of reducing the travel costs.
27. We would also wish to see the added safety net of it being heard in a location which best meets the registrants need in health related matters. Cost should not overrule the health and well being of a nurse or midwife.
28. **Q8:- Do you agree that all interim order reviews, including those where the court has granted an extension, should be held at six month intervals?**
29. UNISON is supportive of this, providing it allows registrants to request an early review hearing when their circumstances change or new information comes to light.
30. **Q9:- Do you agree that the court should have additional powers to replace an interim suspension order with an interim conditions of practice order (or visa versa)?**
31. UNISON is supportive of this proposal providing the registrant is afforded the opportunity to argue against any NMC application and or argue for an interim order to be revoked or changed.
32. We would wish to see a reduction in the number of interim suspension orders by the NMC and more detailed monitoring of their impact. For example if a registrant is subject to an interim suspension order and at the end of the proceedings there is no case to answer, we believe this should warrant the NMC reviewing their process to

ensure that they approach was fair and in the public and registrants best interest. We believe just as the service is expected to monitor and review serious untoward incidents the NMC should better monitor its processes and ensure they remain fair and effective to all parties.

33. Q10:- Do you agree that it is not necessary to the Practice Committee panel to review all conditions of practice or suspension orders but instead should have the discretion to direct whether an order needs to be reviewed before expiry of that order?

34. UNISON is supportive of this move provided that the registrant still has the ability to call a review, this is a sensible provision that will avoid unnecessary hearings and will allow for short suspension or Conditions of Practice orders to fall away naturally.

35. Q11:- Do you agree that the requirement to notify specified persons, including governments of the four countries, when an allegation is referred to a Practice Committee panel for a hearing should be removed?

36. UNISON is supportive of this move.

37. Q12:- Will the proposed changes affect the cost of administrative burden on your organisation or those you represent by way of – an increase, a decrease, stay the same?

38. At this stage it is too early to tell what the longer term impact may be on UNISON, like the NMC we would wish to monitor the process. There may be some cost savings if over all the number of hearings reduce. Depending on the location of the hearing this may or may not reduce the costs to registrants.

39. However, we would hope that over time and once we have seen the draft guidance produced by the NMC, the process can be improved. We would like the NMC to work with UNISON on their guidance as a major stake holder. We would also wish to see any savings passed onto registrants both in improving the level of support, guidance and information which is available to help prevent them being in breach of the code of conduct in the first place but also in a reduction in the current level of registrant fees. To date the NMC have used increasing fitness to practice costs to argue for ever increasing registration fees to be implemented. We know that registrants would appreciate this saving being given back to them, as they carry a disproportionate cost of the burden of regulation currently. Not least the fact that

their registration fees are the NMCs only source of income so surely they should see the financial benefit of these improvements.

40. Q13:- Do you think that any of the proposals would help to achieve any of the following aims:-

- **Eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equalities Act 2010?**
- **Advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?**
- **Fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?**

41. There is no evidence in the consultation or indeed in the NMCs processes that these changes will significantly improve the impact on diversity. We have outlined some areas in which we believe it could risk deterioration. However of fundamental importance is diversity monitoring at all parts of the different regulatory stages. Whilst the NMC publish an annual report they would benefit from producing a state of regulation report which looks back on previous years giving a more transparent total picture.

42. We believe that the NMC can benefit from working more collaboratively with the trade unions and professional associations who have additional expertise in this area. We welcome the appointment of the equalities lead at the NMC which has been missing for some time.

43. Like other parts of the system the NMC as an employer could also benefit from enhancing its own diversity at all levels.

44. Q14:- Do you have any comments on the draft order?

45. As we know the devil is in the detail and as important to us is the development of any guidance that the NMC produce. We would wish to have sight of any drafts and for our opinion as major stakeholders in this process to be sought.