

UNISON response to DHSC consultation

Regulating healthcare professionals, protecting the public

June 2021

Introduction

- UNISON is the largest union in the United Kingdom with over 1.3 million members. Our members work across public services including health, local government, education and police services.
- We aim to influence 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 practice, and care.
- UNISON is uniquely placed to respond to this consultation. We represent almost half a million healthcare workers who work in roles registered with the Nursing and Midwifery Council; all 15 of the professions regulated by the Health and Care Professions Council; Pharmacy Technician members in the General Pharmaceutical Council; and Physician Associate and Anaesthesia Associate members soon to be registered with the General Medical Council.
- We are the primary union in the UK for many groups of registrants, and this is reinforced by our partnerships with the British Association of Occupational Therapists and the College of Operating Department Practitioners.
- UNISON works collaboratively with regulators with the aim of enabling systems and processes to be fair and transparent. We have a specialist unit based in London, which receives and assesses all regulatory cases affecting our members across the UK, the majority of which are dealt with by our in-house team. We also work with Thompsons solicitors who take on a small number of cases on our behalf.
- We hope that the Department of Health and Social Care will note the weight of UNISON's views as a major stakeholder and consider the significant proportion of the regulated healthcare workforce that we represent.

Summary

As the largest trade union operating in health and social care UNISON has a strong interest in seeing healthcare regulators conduct their work effectively and fairly. As the largest public service union and one of the largest membership organisations in the UK we also wish to see this for the benefit of our public services and those who use them.

We support the motive of improving consistency between regulators and enhancing clarity of their various functions. We find much in these proposals which we agree with.

However, a huge amount will depend on how regulators in healthcare use the new powers and the opportunities afforded to them by these changes. We therefore highlight the following principles which we believe must be recognised and adhered to throughout these reforms. Where relevant we refer back to these in our responses to specific proposals.

- **Trust** – It is crucial that all healthcare regulators act in ways which maintain the trust of both the public and the registrants they regulate.
- **Consistency** – Currently there is a great deal of unnecessary inconsistency in the processes and procedures of the various regulators. To improve the confidence and trust of registrants and the public we support better sharing of learning between regulators and improved consistency.
- **Cooperation** – These reforms propose many new powers for regulators. The success of the reforms will in many cases largely depend upon the processes by which the regulators determine how to use them. Membership organisations like UNISON must be key partners in cooperating on these changes. By involving UNISON and other partners any changes introduced in the practice of regulators will be greatly strengthened, both in terms of their effectiveness and in maintaining the trust of those they regulate.
- **Oversight** – Regulators will never themselves be perfect and free from error. It will remain hugely important going forward that there is appropriate, democratic oversight of their work that helps to maintain the trust of the public and of registrants. This also depends upon regulators being transparent in their work.
- **Effectiveness** – We support reforms that will improve the effectiveness of the work of regulators. These will benefit both the public and registrants, who are often needlessly burdened because ineffective processes are followed by regulators. Regulators owe it to the public they protect, and to the registrants who fund them, to operate effectively and efficiently.
- **Self-regulation** – This relates to the principle of trust. Healthcare professionals must pay their registration fees in order to practice in their chosen profession. They are entitled to expect a voice in their structures and in the oversight of their work.

We welcome changes to Fitness to Practise (FtP) procedures, many of which can be improved. As a union which represents registrants of various regulators, we urge the government to ensure that UNISON is involved as a key partner in determining changes to rules and guidance governing FtP. Please see our responses on FtP below for further detail.

The imposition of a duty to cooperate is welcome but, consistent with our expressed principles, this must include a duty to cooperate with the organisations representing registrants, **including** trade unions and professional bodies.

We cannot agree with the proposal to remove the determination of regulator's fees from parliamentary oversight. This could severely weaken the effectiveness of oversight which has previously forced regulators to re-examine other options for reducing costs and could also dramatically undermine the trust registrants hold in their regulators.

We strongly disagree with the removal of the duty to include a registrant on the board of regulators. This undermines the concept of self-regulation and would decrease trust in the work of regulators. We believe the boards should include registrants and also reflect the diversity of the workforce they represent.

We also are very concerned by the proposal to give regulators powers to require information from representative bodies. We believe this could seriously undermine trust in FTP procedures and contribute to a poorer safety and regulatory environment for patients in the longer term.

The safety of the public must remain paramount and the deployment of emergency powers that took place to meet the challenges of the Covid-19 pandemic should not become the norm.

Regulators should not provide an option through temporary registration powers for the government and accountable bodies to avoid responsibility for adequate long term workforce planning. This should account for the possibility of future pandemics and other emergencies. The decision to deploy a temporary register should be a last resort requiring the scrutiny and accountability that comes with elected members of parliament approving it. It should not be acceptable, for example, that deployment of an emergency temporary register becomes an accepted means for dealing with circumstances such as winter pressures or exceptional flu seasons.

We provide below a summary of our responses to the specific proposals. In addition we wish to express our desire to remain an active partner in these reforms and to work together to ensure in future all healthcare regulators exercise their powers effectively and appropriately.

Governance

- 1. Do you agree or disagree that regulators should be under a duty to co-operate with the organisations set out above? Please give a reason for your answer.*

We agree and would add for consideration that regulators should be required to cooperate with the police and law enforcement organisations.

We also strongly believe understanding the experience and views of healthcare professionals is essential to the proper functioning of health regulators. As such they should also be required to cooperate with trade unions and membership organisations representing healthcare professionals.

2. *Do you agree or disagree that regulators should have an objective to be transparent when carrying out their functions and should have these related duties? Please give a reason for your answer.*

We agree. It is extremely important that regulators maintain the trust of both the public and the professionals they regulate. Being transparent in their work is integral to that.

Legislation must recognise the right to confidentiality for those involved in regulators' processes and regulators must balance this with the need to be transparent and open in their work.

Whilst open board meetings are positive, there should also be the opportunity for registrants and the public to engage with boards and to ask questions about their work and performance.

It should also be stipulated in law and made clear that there must be ongoing reviews of regulators' processes and work. It is important there remains effective oversight and it should not be solely confined to consultation when processes or rules are being changed.

3. *Do you agree or disagree that regulators should be required to assess the impact of proposed changes to their rules, processes and systems before they are introduced? Please give a reason for your answer*

We agree. We also believe trade unions and membership organisations should be included in the assessment process and that both the public and regulated professionals' wellbeing must be taken into account.

4. *Do you agree or disagree with the proposal for the constitution on appointment arrangements to the Board of the regulators? Please give a reason for your answer.*

We disagree. We support the principle of self-regulation and believe it is crucial, especially considering the annual cost to registrants, that regulators maintain the trust of those they regulate by including a registrant on their boards. The requirement for this should not be lost.

5. *Do you agree or disagree that regulators should be able to set their own fees in rules without Privy Council approval? Please give a reason for your answer*

Disagree. We believe it is important there remains parliamentary oversight of the fees charged by regulators.

In an era defined by the long term pay restraint of healthcare workers registrants are rightly concerned that the mandatory fees charged of them in order to practise should be justifiable. Examples of proposals by regulators previously have demonstrated that increasing fees is often suggested instead of taking effective action to improve processes and reduce costs. Without

oversight by elected politicians rebuttal of these proposals would be made much more difficult.

For example, when the HCPC proposed increasing its fees by 18% in 2018 they held a public consultation on this. Despite over 90% of respondents to the consultation disagreeing with the move, the HCPC attempted to press ahead with their proposals. UNISON campaigned very strongly against the fee increase as we believed that the HCPC had not examined fully all the alternatives available to it to increase its funding.

MPs played an important role in scrutinising and challenging the HCPC's proposals, and without parliamentary oversight of the fee setting process we believe that the HCPC would not have been forced to re-evaluate its plans and find more cost-effective means to carry out its proposed strategy. We therefore strongly disagree with this proposal.

6. Do you agree or disagree that regulators should be able to set a longer-term approach to fees? Please give a reason for your answer.

Disagree. As expressed in the principles guiding our response to this consultation, maintaining the trust of registrants is a crucial aspect of regulators' work and enables them to be effective.

Any change in the fees charged of registrants should always be made with the utmost consideration of whether it is necessary. This should include thorough and responsive consultation and discussion with registrants and their trade unions.

Allowing regulators to have a longer-term approach to fees that would enable rises without further consultation could encourage very broad or sweeping approaches to fee setting. This could then leave registrants without a voice and with a decreased confidence in how their regulator operates. This again would undermine the principle of self-regulation and be damaging to the professions and ultimately the public.

7. Do you agree or disagree that regulators should be able to establish their own committees rather than this being set out in legislation? Please give a reason for your answer.

We agree regulators should have this power – again dependent on them operating transparently and cooperatively together with trade unions and membership organisations to ensure their decisions are effective and maintain trust. Although we do not take a view on the most effective means of achieving this, we believe there should be greater consistency in structures and operations between regulators to improve transparency and understanding amongst registrants and the public.

8. Do you agree or disagree that regulators should be able to charge for services undertaken on a cost recovery basis, and that this should extend to services undertaken outside of the geographical region in which they normally operate? Please give a reason for your answers.

We agree, dependent on this being done transparently and *solely* on a cost recovery basis. The fees charged of registrants should remain minimised and so regulators should be able to recover the costs associated with other services they undertake. There must remain adequate and appropriate oversight of regulator's activities to ensure these activities are being charged for fairly.

9. Do you agree or disagree that regulators should have the power to delegate the performance of a function to a third party including another regulator? Please give a reason for your answer.

We agree where this is necessary for the effective conduct of a regulator's functions.

We do not agree with any extension of powers which would enable regulators to delegate more functions to third party providers. We support collaboration between regulators where this will lead to more effective and efficient processes and so agree with extending the power to delegate the previous 'excluded' functions to other regulators. We would not support third party involvement in these functions.

10. Do you agree or disagree that regulators should be able to require data from and share data with those groups listed above? Please give a reason for your answer.

We disagree. We do not believe there is currently sufficient clarity on how this power would be exercised and how this power would be consistent with the rights of registrants to justice and confidentiality.

We believe regulators should work together more effectively and also agree that information should be shared between organisations when it is absolutely necessary for protecting the public.

However, registrants can reasonably expect a right to fair process and justice in their dealings with their regulator. They must be able to share information and experiences confidentially with their representative organisations and professional bodies without fear it may be handed over to a regulator and used in processes against them.

The consequences of this would be harmful for public safety. The safety of patients and the public is best maintained in the long term by an environment in health care in which registrants can be open about errors and learn from these. Professional bodies and trade unions play a key role in this and are trusted confidants of many registrants. As expert bodies we are well placed to listen to registrants to offer them advice to remediate and improve upon any poor practice. It would undermine confidence and help no-one if, as a result of this power, healthcare professionals felt unable to share information with professional bodies and chose instead to be silent.

The recent controversy around NHS Digital's plan to collect patient data – which has now been postponed – demonstrates the wider importance the public places on the need to safeguard sensitive data.

We therefore cannot agree currently that this power should be given to regulators and should apply to professional bodies and membership organisations.

Regulators have a responsibility to maintain confidentiality in line with GDPR as do all other organisations. In terms of sharing information with law enforcement and government agencies this, as mentioned, should be done only to the minimum necessary in line with their statutory objectives.

11. *Do you agree or disagree that regulators should produce an annual report to the Parliament of each UK country in which they operate? Please give a reason for your answer*

We agree. We believe in the principle of transparency in the work of regulators and think this would help to maintain public and registrant's confidence. Given the devolved nature of power in the United Kingdom this is a sensible requirement.

12. *Do you agree or disagree that the Privy Council's default powers should apply to the GDC and GPhC? Please give a reason for your answer.*

We agree.

Education and training

13. *Do you agree or disagree that all regulators should have the power to set:*

- *standards for the outcomes of education and training which leads to registration or annotation of the register for individual learners;*

Yes – agree

- *standards for providers who deliver courses or programmes of training which lead to registration;*

Yes - agree

- *standards for specific courses or programmes of training which lead to registration;*

Yes – agree

- *additional standards for providers who deliver post-registration courses or programmes of training which lead to annotation of the register; and*

Yes – agree

- *additional standards for specific courses or programmes of training which lead to annotation of the register? Please give a reason for your answer.*

Yes – agree

14. *Do you agree or disagree that all regulators should have the power to approve, refuse, re-approve and withdraw approval of education and training providers, qualifications, courses or programmes of training which lead to registration or annotation of the register?*

Agree. It is important that the standards are maintained and upheld and all stakeholders have confidence in the graduates they produce.

15. *Do you agree that all regulators should have the power to issue warnings and impose*

conditions? Please give a reason for your answer.

Agree. Regulators should be able to issue warnings and impose conditions upon education providers and courses to ensure they meet the required standards.

Appeals

16. Do you agree or disagree with the proposal that education and training providers have a right to submit observations and that this should be taken into account in the decision making process? Please provide a reason for your answer.

Agree. It is important all the appropriate information is taken into account when regulators are scrutinising education providers and programmes. Allowing providers to submit observations is a sensible way of ensuring their views are taken into account.

17. Do you agree that: • education and training providers should have the right to appeal approval decisions; • that this appeal right should not apply when conditions are attached to an approval; • that regulators should be required to set out the grounds for appeals and appeals processes in rules?

Agree. Again, it is important decisions on approvals are made justly and with proper consideration of all the important information. Providers should be able to appeal decisions that regulators make and regulators should set out and publish the grounds for appeal and the process clearly and consistently.

18. Do you agree or disagree that regulators should retain all existing approval and standard setting powers? (ie. for participation in revalidation etc)

We agree. These seem appropriate currently and should not be changed unless necessary.

19 Do you agree or disagree that all regulators should have the power to set and administer exams or other assessments for applications to join the register or to have annotations on the register?

We agree. As raised in our initial response to this section, as well as to the overall consultation, the exercising of this power should be dependent upon the regulator having conducted thorough and representative consultation to ensure their requirements are fair and appropriate for all involved.

20. Do you agree or disagree that this power to set and administer exams or other assessments should not apply to approved courses or programmes of training which lead to registration or annotation of the register?

Agree. If the courses meet the required outcomes it would be unnecessarily burdensome for the regulator to also set exams or assessments.

21. Do you agree or disagree that regulators should be able to assess education and training providers, courses or programmes of training conducted in a range of ways?

Agree.

Inter-professional learning

We do not therefore propose that a requirement for inter-professional learning be included in the regulators' legislation.

We believe there is much to be gained by the public and all healthcare professionals through undertaking more inter-professional learning. Whilst we do not take a position on whether this is best mandated through legislation we would like to express this view and encourage it to be considered as part of this consultation.

22 Do you agree or disagree that the GMC's duty to award CCTs should be replaced with a power to make rules setting out the procedure in relation to, and evidence required in support of, CCTs? Please give a reason for your answer.

No position.

23 Do you agree or disagree that regulators should be able to set out in rules and guidance their CPD and revalidation requirements?

We agree that CPD and revalidation requirements for registrants should be set out in rules and guidance. It will be essential that registrants and their representative bodies are included in the discussions to determine these requirements. As expressed in our summary there must be a meaningful, appropriate duty on regulators to consult appropriately on their rules and guidance and how they reach decisions to modify them.

Registration

24. Do you agree or disagree that the regulators should hold a single register which can be divided into parts for each profession they regulate? Please give a reason for your answer.

Agree. This is already the case for the HCPC and does not appear to create any confusion for the different professions.

25. Do you agree or disagree that all regulators should be required to publish the following information about their registrants:

- *Name*
- *Profession*
- *Qualification (this will only be published if the regulator holds this information. For historical reasons not all regulators hold this information about all of their registrants)*
- *Registration number or personal identification number (PIN)*
- *Registration status (any measures in relation to fitness to practise on a registrant's registration should be published in accordance with the rules/policy made by a regulator)*

- *Registration history*

Disagree. The categories appear to be too broad and non-specific currently. Registration history for example could include a range of information and we would need more detail about what this is intended to capture and why it is considered necessary.

We would also question the value of displaying a registrant's PIN and would suggest that in order to prevent fraud/identity theft, the published information should be kept to a minimum.

Only active formal Fitness to Practise sanctions should be published and not any informal warnings or historical records which would have an unnecessarily punitive effect.

26. Do you agree or disagree that all regulators, in line with their statutory objectives, should be given a power allowing them to collect, hold and process data? Please give a reason for your answer.

Disagree. This is too broad a suggestion. Regulators should be given a power to collect, hold and process data when it is essential for them to do so to carry out their statutory duties. In line with GDPR we would suggest this should be the absolute minimum necessary.

27. Should they be given a discretionary power allowing them to publish specific data about their registrants? Please give a reason for your answer.

It is unclear if this proposal relates to registrants collectively, individually or both. We would caution against a general power that allows publication of an individual's personal information for privacy and legal reasons.

28. Do you agree or disagree that all regulators should be able to annotate their register and that annotations should only be made where they are necessary for the purpose of public protection? Please give a reason for your answer.

Agree. However, we do not agree that regulators should be able to charge for annotations. This could mean regulators were able to increase registration fees for significant groups of registrants without having to go through a consultation process.

29. Do you agree or disagree that all of the regulators should be given a permanent emergency registration power? Please give a reason for your answer.

Disagree. The emergency registers for the HCPC and NMC were set up in response to the COVID-19 pandemic. This was a once-in-a-generation emergency situation that created urgent measures to deal with long-term staff shortages. However, Parliament swiftly passed the necessary legislation and there has been no indication that the process was unduly lengthy or caused any delays. The current process allows there to be parliamentary scrutiny when the standards for registering healthcare professionals need to be changed or broadened.

We are extremely concerned that permanent emergency registration powers could lead to the more frequent use of a temporary register to cover events such as winter pressures within the NHS

or the flu season. We believe that this could create a situation where regulators were forced to adopt a temporary register on a more frequent basis, in effect lowering or widening entry standards to the professions in situations that should be dealt with through better workforce planning. We do not think that such a two-tier system of regulation should be permitted.

30. Do you agree or disagree that all regulators should have the same offences in relation to protection of title and registration within their governing legislation?

Agree. Consistency and equality across the regulatory framework should be a key principle - any differences should require an evidence-based justification.

31. Do you agree or disagree that the protection of title offences should be intent offences or do you think some offences should be non-intent offences (these are offences where an intent to commit the offence does not have to be proven or demonstrated)? Please give a reason for your answer.

Agree. The protection of title offence is a criminal law matter and intent is often a key consideration in determining guilt. Otherwise, an individual may have unknowingly lapsed from the register and, despite the absence of any intent or personal gain, be found guilty of a criminal offence.

32. Do you agree or disagree with our proposal that regulators should be able to appoint a deputy registrar and/or assistant registrar, where this power does not already exist? Please give a reason for your answer.

Agree. This would enable the required personnel to be in place when the registrar is on annual leave or absent due to ill health.

33. Do you agree or disagree with our proposal that regulators should be able to set out their registration processes in rules and guidance? Please give a reason for your answer.

Agree but with the proviso that there should be recommended principles and practice across the regulators to ensure consistency. As previously mentioned there must also be a robust duty to consult on their registration processes and this must include trade unions and representative bodies.

34. Should all registrars be given a discretion to turn down an applicant for registration or should applicants be only turned down because they have failed to meet the new criteria for registration? Please give a reason for your answer.

No. If the criteria for registration is robust enough then there should be no need for the registrars to have a discretion to turn down an applicant. We do not see why this should be necessary and is likely to lead to inconsistencies and arbitrary decisions in the registration process. The only example given (i.e. a registrant who has had a long break in practice) can already be mitigated through the replication of existing rules from other regulators. Creating a process that encourages an appeals process is likely to lead to more stress for the applicant, more unnecessary work for the regulator and a more opaque and inconsistent process of registration.

35. Do you agree or disagree that the GMC's provisions relating to the licence to practise should be removed from primary legislation and that any requirements to hold a licence to practise and the procedure for granting or refusing a licence to practise should instead be set out in rules and guidance? Please give a reason for your answer.

This is largely a GMC issue, so we are neutral on this point. However, we would not want to see the practice of issuing licences extended to other regulators or professions that are added to the GMC register.

36. Do you agree or disagree that in specific circumstances regulators should be able to suspend registrants from their registers rather than remove them? Please give a reason for your answer.

Agree. We believe this to be a good idea as it enables individuals to get back on the register more quickly when there is an easily rectifiable problem.

However, we are concerned that the power of a regulator to suspend for a lack of up-to-date contact details needs to be offset by improvements in communications from regulators reminding registrants of this requirement and enabling them to do so easily. Regulators must be required to provide multiple channels through which registrants can update their details e.g. online, by post, by telephone.

We know that registrants have expressed concern at the difficulties they have in contacting certain regulators and we would not want registrants to be penalised due a regulator's archaic or inefficient methods of communication.

37. Do you agree or disagree that the regulators should be able to set out their removal and readmittance processes to the register for administrative reasons in rules, rather than having these set out in primary legislation? Please give a reason for your answer.

Agree in relation to the detail, but fundamental policy principles should be included in primary legislation to ensure consistency in application across all regulators.

38. Do you think any additional appealable decisions should be included within legislation? Please give a reason for your answer.

A general right of appeal should be included in legislation.

39. Do you agree or disagree that regulators should set out their registration appeals procedures in rules or should these be set out in their governing legislation? Please give a reason for your answer.

Agree in relation to the detail, but fundamental policy principles should be included in governing legislation to ensure consistency in application across all regulators

40. Do you agree or disagree with our proposal that the regulators should not have discretionary powers to establish student registers? Please give a reason for your answer.

Agree. This would create unnecessary work for the regulators and may cause additional stress for

the students. The potential benefits are not clear. We would also not want to see students charged to join the register – in which case the cost would fall on existing registrants which would be unnecessary and unfair.

41. Do you agree or disagree with our proposal that the regulators should not have discretionary powers to establish non-practising registers? Please give a reason for your answer.

Agree. This would create unnecessary work for the regulators and be confusing from a public protection point of view.

42. Do you agree or disagree that the prescriptive detail on international registration requirements should be removed from legislation? Please give a reason for your answer.

Agree – as long as these are set out clearly are only implemented following detailed consultation with trade unions and representative bodies.

Fitness to practise

43. Do you agree or disagree with our proposal that regulators should be given powers to operate a three-step fitness to practise process, covering:

1: initial assessment

2: case examiner stage

3: fitness to practise panel stage

Disagree. This list excludes the crucial investigation stage that should be undertaken to ensure Case Examiners have the necessary information to make an informed decision as to next steps.

In our experience the NMC are now best practitioners. Their thorough investigations, including taking their own witness statements focused on the crucial issue of current impairment, enable safe and informed decision making by Case Examiners.

Other regulators, however, do little initial investigation, often relying on a referring employer's disciplinary documentation to decide whether to progress a case to a hearing. This is flawed due to potential bias and lack of focus on impairment issues.

It is noted that year on year some 25% of HCPC substantive hearing panels deliver verdicts that the HCPC case is not well founded. We believe this is a major waste of resources, contradicting our desired principle of effectiveness, not to mention the unnecessary stress caused to registrants.

Unless the requirement for a regulator to undertake their own proper and thorough investigation at stage 2 is made explicit, this situation will not be properly addressed.

44. Do you agree or disagree that:

- All regulators should be provided with two grounds for action – lack of competence, and misconduct?*
- Lack of competence and misconduct are the most appropriate terminology for these grounds*

for action?

- *Any separate grounds for action relating to health and English language should be removed from the legislation, and concerns of this kind investigated under the ground of lack of competence?*
- *This proposal provides sufficient scope for regulators to investigate concerns about registrants and ensure public protection?*

Whilst it is welcomed and we agree that regulators should have common grounds for impairment across their legislation, as the proposal currently stands there is insufficient guidance for Health to be considered solely as competence.

To avoid a blurring of parameters potentially causing double jeopardy for registrant cases with health ramifications being pursued linked to misconduct as well as competence, specific guidance which is common to all regulators needs to be set out.

Further, it should be explicit that a strike off sanction should not be permissible as a first resort under the new competence category, as is currently applied by many regulators. Practice conditions / suspension would provide the necessary safeguards. Voluntary Removal would also remain an option.

45. Do you agree or disagree that:

- *all measures (warnings, conditions, suspension orders and removal orders) should be made available to both Case Examiners and Fitness to Practise panels; and*
- *automatic removal orders should be made available to a regulator following conviction for a listed offence?*

In relation to 'regulators required to publish warnings for a period of 2 years', clarity needs to be provided on (i) is 2 years a standard term ie, what if a warning is for 1 year?

Importantly (ii) a distinction needs to be made on the nature of the warning for publishing ie, is the warning a caution or a formal warning/panel decision? Is the legislation proposing that informal warnings are also published?

If conditions or suspension can be extended by review, what appeal process will the registrant have after (the maximum 12 months) has expired? Currently there is none proposed on the basis the registrant has consented been at the outset of the order. There should be a mechanism of appeal available to the registrant at the point of review.

46. Do you agree or disagree with the proposed powers for reviewing measures? Please give a reason for your answers.

Clarity and consistency are required across the regulators on what and how a review should be conducted within their rules. As an example, should a review be conducted 2 weeks prior to the expiry of a measure, what notice should be given, does the registrant have the right to appeal?

If measures have been agreed for a term and a panel or case examiner believes the registrant has not complied with the condition, what further measures would be available to the case

examiner/panel?

47. Do you agree or disagree with our proposal on notification provisions, including the duty to keep the person(s) who raised the concern informed at key points during the fitness to practise process? Please give a reason for your answer.

Agree. However we feel it should also be stated that notice should be given to registrants at the earliest opportunity and not at such a late stage that it prejudices their ability to respond or participate fully in the process.

48. Do you agree or disagree with our proposal that regulators should have discretion to decide whether to investigate, and if so, how best to investigate a fitness to practise concern? Please give a reason for your answer.

We agree that regulators should have discretion to decide whether to investigate. However, as stated elsewhere it is imperative to provide some structure to ensure an investigation is fit for purpose. The regulators should not be given powers to compel registrants to participate in any case building / evidence gathering exercise. We are unsure what exactly is meant by “assessment” in this context.

49. Do you agree or disagree that the current restrictions on regulators being able to consider concerns more than five years after they came to light should be removed? Please give a reason for your answer.

Disagree. This would only encourage unacceptable delays and such a passage of time would prejudice a registrant’s ability to respond to concerns raised.

50. Do you think that regulators should be provided with a separate power to address non-compliance, or should non-compliance be managed using existing powers such as “adverse inferences”? Please give a reason for your answer.

No. Such a power would be contrary to the laws of natural justice, the right of a respondent in proceedings not to incriminate themselves and could undermine the entirety of the proceedings.

51. Do you agree or disagree with our proposed approach for onward referral of a case at the end of the initial assessment stage? Please give a reason for your answer.

Disagree. As stated elsewhere, a thorough investigation is crucial before the Case Examiners are engaged.

52. Do you agree or disagree with our proposal that regulators should be given a new power to automatically remove a registrant from the Register, if they have been convicted of a listed offence, in line with the powers set out in the Social Workers Regulations? Please give a reason for your answer.

We are neutral on this point but welcome the proposal that in the event of a conviction being overturned the regulator would have to revisit their position.

53. *Do you agree or disagree with our proposals that case examiners should:*

- 1. have the full suite of measures available to them, including removal from the register?*
- 2. make final decisions on impairment if they have sufficient written evidence and the registrant has had the opportunity to make representations?*
- 3. be able to conclude such a case through an accepted outcome, where the registrant must accept both the finding of impairment and the proposed measure?*
- 4. be able to impose a decision if a registrant does not respond to an accepted outcomes proposal within 28 days?.*

In response to 1) have the full suite of measures available to them, including removal from the register? Only as an “accepted” outcome.

In response to 2) make final decisions on impairment if they have sufficient written evidence and the registrant has had the opportunity to make representations? Only as an “accepted” outcome.

In response to 3) be able to conclude such a case through an accepted outcome, where the registrant must accept both the finding of impairment and the proposed measure? Yes

In response to 4) be able to impose a decision if a registrant does not respond to an accepted outcomes proposal within 28 days? No, disagree. This should state: 28 days after the registrant has been served with such a proposal.

Please note we also strongly disagree with the following:

‘All case examiner decisions must be made publicly available, unless there are exceptional reasons why they should not be. Published information must include the reasons that a particular outcome was reached and, if applicable, why a particular measure was imposed’.

Only those outcomes where a formal measure (sanction) is to be applied should be published.

Infringing data protection and libelling registrants by repeating unfounded allegations are amongst the potential undesirable consequences of this proposal.

54. *Do you agree or disagree with our proposed powers for Interim Measures, set out above? Please give a reason for your answer.*

UNISON believes the interim measure rules need to be more prescriptive to ensure consistency across the regulators, and as such would suggest specific guidance in this respect.

Established legal principles applying to interim measures should be explicit, including that interim measures (orders) should only be applied in cases where there is a real risk of significant harm to patients, colleagues or others and rarely on the basis of public interest alone.

Whilst the facts of the case and final outcome are not determined by way of interim measures, they can have a significant and lifelong adverse impact on a registrant both financially and mentally. Consistency in operational application is key to ensure adequate regard for notice, response, representation needs and so on.

55. Do you agree or disagree that regulators should be able to determine in rules the details of how the Fitness to Practise panel stage operates? Please give a reason for your answer.

Disagree.

UNISON believes that it is imperative for there be consistency across the regulators at Fitness to Practise Panel stage. Therefore, there is a need to reinforce guidance principles on many specific areas which are currently silent, such as the civil standard of proof through to what would be the case management process.

These issues are rudimentary in ensuring the principles of the Human Rights Act, natural justice, accepted good practice and complementary statute and case law are followed by all regulators. This would enhance consistency and reduce the likelihood of expensive and time-consuming appeals to higher authorities.

56. Do you agree or disagree that a registrant should have a right of appeal against a decision by a case examiner, Fitness to Practise panel or Interim Measures panel? Please give a reason for your answer.

Agree. A registrar review would be workable in the first instance followed by an external right to High Court etc if not resolved. UNISON believes an opportunity for an internal resolution process is key in reducing the burden of unnecessary external appeals.

57. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland? Please give a reason for your answer.

Agree and please see response to previous question. A process of internal appeal need not be mutually exclusive to an external one, merely an additional opportunity to resolve at an appropriate level.

58. Do you agree or disagree that regulators should be able to set out in Rules their own restoration to the register processes in relation to fitness to practise cases? Please give a reason for your answer.

This is another area where consistency across the regulators is required. A legislative framework would ensure adherence and prevent deviation from key principles.

59. Do you agree or disagree that a registrant should have a further onward right of appeal against a decision not to permit restoration to the register? Please give a reason for your answer

Agree for reasons of transparency and scrutiny of decisions, without which the perception of regulatory process and trust in regulators would be compromised.

60. Should this be a right of appeal to the High Court in England and Wales, the Court of Session in Scotland, or the High Court in Northern Ireland? Please give a reason for your answer

Agree, most appropriate jurisdiction as already established.

61. Do you agree or disagree that the proposed Registrar Review power provides sufficient oversight of decisions made by case examiners (including accepted outcome decisions) to protect the public? Please provide any reasons for your answer

Agree, on the proviso sufficient measures are put in place for registrant appeal. Without adequate appeal process for registrants, scrutiny of the decision will be rendered void which will be injurious to both registrant and regulator.

62. Under our proposals, the PSA will not have a right to refer decisions made by case examiners (including accepted outcome decisions) to court, but they will have the right to request a registrar review. Do you agree or disagree with this proposed mechanism? Please provide any reasons for your answer

Agree, with adequate measures in place including that the registrant is fully involved in any such process.

63. Do you have any further comments on our proposed model for fitness to practise?

UNISON believes this is a great opportunity to achieve consistency across all regulators Fitness to Practice (FtP) processes.

However, we do not believe the current proposals sufficiently identify key principles that all regulators should adopt in their FtP rules. UNISON believes it would be helpful if the rules of all regulators were prefaced with those key principles.

This would, we believe achieve much greater consistency in process and decision making and reduce the number of expensive and time-consuming appeals to outside courts.

We list below some of those key principles that we believe should be specified.

1. Human Rights Act. It was established in the case of *Le Compte v Belgium* that Article 6 rights to a fair trial applied to disciplinary (regulatory) proceedings. It would be helpful if this was formally acknowledged.
2. Key case law principles. These have helped develop and guide FtP processes and keep them in line with laws of natural justice. These include:
 - That the standard of proof required for determination of facts is the civil standard.
 - Where facts are in dispute it is for the regulator to prove its case. There is no onus on the registrant to prove anything.
 - That formal FtP processes should abide by civil court principles including with regards to detailed allegations, responses, evidence admissibility and service and hearing procedures.
3. Another key principle we believe should be adopted is regarding investigations. It has been our experience that inadequate investigation, including relying on employer's disciplinary evidence only and failing to obtain proper witness statements and other key evidence, has

led to a significant number of cases progressing to a hearing where they are dismissed.

The proposals provide for the use of Case Examiners (CE) by all regulators, which we agree with. However, unless those CE's have all the information that would be before a potential future hearing panel their decision making may be compromised. We would submit that this should be clearly identified.

4. Representation

Many existing rules recognise that registrants will often be represented in this process by their Trades Union. This should be standard across all regulators, including that where formal notification of this has been communicated to a regulator, the regulator should not contact a registrant directly with regards to FtP proceedings but should always deal with their representative in the first instance.

Regulation of PA and AAs

64. Do you agree or disagree with the proposed approach to the regulation of PAs and AAs? Please give a reason for your answer

Agree, subject to equality of:

1. Registration fees with like professions on similar pay bands;
2. Registration and fitness to practice procedures following the principles applicable to other regulators, including recognition of Trade Union and professional body representation;
3. Representation of those professions to all bodies overseeing governance / education issues.

65. In relation to PAs and AAs, do you agree or disagree that the GMC should be given a power to approve high level curricula and set and administer exams? Please give a reason for your answer.

Agree, subject to representation of those professions to all bodies overseeing governance / education issues.

66. Do you agree or disagree with the transitional arrangements for PAs and AAs set out above? Please give a reason for your answer

Agree.

67. Do you agree or disagree that PAs and AAs should be required to demonstrate that they remain fit to practise to maintain their registration? Please give a reason for your answer.

Agree, in line with revalidation and continuing professional development principles applied elsewhere.

Equalities Impact Assessment

68. Do you agree or disagree with the benefits identified in the table above? Please set out why you've selected your answer and any alternative benefits you consider to be relevant and any evidence to support your views.

We agree that many of the identified potential benefits are possible, though we also have concerns that many of the benefits associated with consistency, transparency, and consultation will not be borne out if the regulators lose the trust of their registrants and changes are made without full and proper consultation.

69. Do you agree or disagree with the costs identified in the table above? Please set out why you've chosen your answer and any alternative impacts you consider to be relevant and any evidence to support your views.

The costs set out in table B are solely financial costs and we believe, in line with the non-financial benefits identified in Table A, that there are a number of non-financial costs that should be considered. If these proposals proceed unamended these costs should also be considered in the impact assessment.

- With the greater powers to determine process and procedures through the setting of their own rules and guidance, there is a significant risk of cost to the public that these result in a less effective regulatory environment if there is not meaningful consultation with unions and representative bodies
- If regulators are able to set fee strategies without parliamentary oversight there is a significant risk that this could result in a greater financial cost to be borne by registrants. Many healthcare professionals have experienced pay restraint over the past 11 years and this cost should be considered carefully.
- Removing their duty to require a registrant as part of the constitution of their boards could seriously undermine the trust of registrants in their regulators
- The normalisation of operation of a temporary register which could occur if registrants are given this power permanently could be a serious risk to patient safety which must be considered
- The power for regulators to be able to require information from representative bodies could contribute to a poorer patient safety culture in health services in the long run with potentially severe consequences for patients and the public

70. Do you think any of the proposals in this consultation could impact (positively or negatively) on any persons with protected characteristics covered by the general equality duty that is set out in the Equality Act 2010, or by Section 75 of the Northern Ireland Act 1998?

Healthcare regulators have at times identified that the impact of their processes can disproportionately affect certain groups with protected characteristics. The NMC for example have shared that Black practitioners are more likely to see their cases go to the adjudication stage during FTP proceedings (<https://www.nmc.org.uk/news/news-and-updates/nmc-publishes-findings-of-new-equality-diversity-and-inclusion-research/>).

Changes to the ways in which health regulators operate could have both positive or negative outcomes for people with protected characteristics. If, for example the effectiveness and fairness of FTP proceedings are improved then this would likely mean a positive impact.

It will be essential that a thorough EQIA is conducted on all potential changes of processes. It will also be essential that, as stated throughout our response, trade unions and professional bodies are consulted meaningfully on all changes to ensure they are appropriate, fair and do not discriminate against groups with protected characteristics.

For further information regarding this consultation response, please contact Celestine Laporte (c.laporte@unison.co.uk) or Stuart Tuckwood (s.tuckwood@unison.co.uk).