Unite the Union Response to:

NMC Consultation: Modernising Fitness to Practise

This response is submitted by Unite the Union. Unite is the UK’s largest trade union with 1.4 million members across the private and public sectors. The union’s members work in a range of industries including manufacturing, financial services, print, media, construction, transport, local government, education, health and not for profit sectors.

Unite represents in excess of 100,000 health sector workers. This includes eight professional associations - British Veterinary Union (BVU), College of Health Care Chaplains (CHCC), Community Practitioners and Health Visitors' Association (CPHVA), Guild of Healthcare Pharmacists (GHP), Hospital Physicists Association (HPA), Doctors in Unite (formerly MPU), Mental Health Nurses Association (MNHA), Society of Sexual Health Advisors (SSHA).

Unite also represents members in occupations such as public health, allied health professions, healthcare science, applied psychology, counselling and psychotherapy, dental professions, audiology, optometry, building trades, estates, craft and maintenance, administration, ICT, support services and ambulance services.
1. **Introduction**

1.1. Unite welcomes the opportunity to respond to the NMC consultation on *Modernising Fitness to Practise*.

1.2. As part of this response, Unite has used its ongoing routes throughout the organisation to hear back the views of its nurse, midwife and Specialist Community Public Health Nurse (SCPHN) members regulated by the NMC and these are included in this response.

**Consultation questions**

2. **Question 1: Do you agree with our approach as to when Case Examiners should recommend undertakings?**

2.1. We agree with the proposal to offer undertakings and consider it has the potential to lead to more proportionality and the ability to reserve hearings for only the most serious of cases. This would be a very welcome introduction.

2.2. We agree that the registrant should agree the undertakings and would suggest that it will be important for the NMC to work with employers to ensure they understand and support registrant’s with compliance.

2.3. We suggest it will be essential to have detailed guidance for the Case Examiners to ensure any undertakings are appropriate to the registrant’s scope of practice and therefore workable. Indeed, we consider that the Case Examiner determining the undertakings should be a registrant on the same part of the register to ensure appropriateness and to avoid situations we have encountered with conditions of practice imposed that have not been possible for the registrant to meet.

2.4. We would like to see more information around the lifting of the undertakings, the timescales involved and generally the sort of undertakings that could be imposed.

3. **Question 2: Do you agree that where a nurse or midwife fails to comply with undertakings, Case Examiners should be able to send the original allegation for a hearing?**

3.1 Agreed.

3.2 However, it is unclear in the consultation whether it will be the Case Examiner or the dedicated review team who will send the allegation to a hearing.

3.2 We consider that the Case Examiner/Review team assessing whether or not there has been a breach, should include an expert in the same field of practice. This will enable a more comprehensive assessment of the context.

3.3 What recourse will the registrant have if they consider the assessment of the breach is not accurate?

3.4 We would be concerned if the alleged breach led to further charges.

4. **Question 3: Do you agree with our approach to publishing undertakings?**

4.1. Agreed.

5. **Question 4: Do you agree with our proposals that warnings may be issued where the past concerns are serious, but the nurse or midwife has demonstrated full remediation and does not pose a current risk to patients?**
5.1 In principle we agree that the issuing of a warning is positive move. It has the potential to deal more appropriately with less serious cases, with only the most serious going to a full hearing, whilst still fulfilling the NMC’s public protection remit.

5.1 We consider that if given the choice, registrants would opt for a warning rather than go through the ordeal of a full hearing.

5.2 It is positive to see that warnings will only be used in situations where it has been deemed there is a ‘case to answer’. We would not however, wish to see the number of case to answer decisions increasing and consider there may be a risk of Case Examiners erring on the side of caution and issuing a warning where previously they may have opted for a ‘no case to answer’ decision.

5.2 However, we are strongly opposed to the idea that warnings will be issued without the agreement of the registrant in question. Whilst we accept that the registrant will have accepted the regulatory concern, as the imposition of a warning has the potential to negatively impact on the registrant it is unfair and indeed wrong, not to allow them input into the process. There is a risk that warnings will be viewed by employers in the same way as conditions of practice can be, thereby leading to loss of employment or restricting those seeking employment.

5.3 There is a risk that warnings will be viewed by employers in the same way as conditions of practice can be, thereby leading to loss of employment or restricting those seeking employment.

5.4 The short summary of the warning published on the register may not give an accurate view of the facts or take into account the context. The registrant should therefore be given the opportunity for discussion and the option of going to a hearing to argue their case.

5.5 The proposal of non-consensual warnings is contrary to the Law Commission review of Healthcare Regulation that stated the following:

Some concern was expressed that a warning can be imposed by a regulator, without the agreement of the registrant or the safeguard of a panel hearing, even though this could impact on the person’s right to practise their profession. As noted above, article 6 does not require a hearing in such cases. But we accept the broader point being made about the lack of appropriate safeguards. We have therefore concluded that where a warning is the regulator’s preferred option, the registrant should have a right to request a formal hearing. It would be left to the regulators to decide if this should be undertaken by an investigation committee, fitness to practise panel or some other bespoke panel of three members constituted for this purpose. The procedure for such a hearing would be left to the regulators to determine in rules, but the constitution of the panel must be the same as a fitness to practise panel.

5.6 We are aware that the NMC has opted for non-consensual warnings because they fear that without imposition, registrants might elect to have a hearing in a case that might otherwise have been destined for a no case to answer outcome, increasing workloads.

As previously stated we do not support this view and consider that most registrants who have accepted a regulatory concern are unlikely to opt for a hearing that might result in a more severe outcome, unless they are very sure that the warning and form of words in the summary are inaccurate and unfair.

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1 Regulation of Health Care Professionals Regulation of Social Care Professionals in England
5.7 We are also concerned that the only route to appeal is through the Registrar as our experience of this is that it can be a lengthy process so ultimately there is a risk that the warnings will expire before the registrant is afforded the opportunity to put their case.

5.8 We consider the opportunity for the registrant to agree to a warning is the main issue and are therefore extremely concerned that the consultation only asks for an opinion about the circumstances that should give rise to a warning, and about the approach to publishing the content of warnings. This suggests that the NMC has already made up its mind on this point which is not in the spirit of true consultation.

6. Question 5: Do you agree with our approach to publishing the content of warnings?

6.1. Our objection to the NMC’s plans for publishing Warnings is linked to our disagreement with the non-consensual nature of warnings.

6.2. As previously stated the short summary of the facts which the nurse has agreed to, may not set the facts in context, or detail the nurse’s remediation or insight. A caution, that should signify a more serious concern, may appear less serious because it will detail the fact of the caution, without the additional narrative. There needs to be an opportunity for discussion and if the summary is potentially damaging, then the registrant should be allowed the option of seeking a hearing.

7. Question 6: Do you agree with our proposals on when Case Examiners may give advice?

7.1. Agreed.

8. Question 7: Do you agree that the Registrar should also be able to review decisions to give advice, issue warnings, and recommend or lift undertakings, using these principles?

8.1. We agree that the Registrar should be able to review the decisions listed, with the exception of warnings that have not been agreed.

8.2. As stated we do have concerns that the Registrar route is conducted behind closed doors and takes a considerable time.

9. Question 8: Where a Case Examiner decision is materially flawed, or new information which could change the decision has become available, do you agree that in addition to a new decision being in the public interest, ‘preventing injustice to a nurse or midwife’ should become a new factor which would point towards a new decision being made?

9.1. Agreed.

9.2. This is particularly important if warnings are to be imposed. The term ‘materially flawed’ will need to be defined.

10. Question 9: Will any of these proposals have a particular impact on people who share these protected characteristics (including nurses, midwives, patients and the public)? If yes, would this impact have a positive or negative effect?

10.1. The proposal is that warnings given to registrants will not be consensual because to allow such safeguards would create more work for the NMC. However, those regulated by the GMC, where warnings are consensual have safeguards in place. We are concerned that this therefore implies that the professional status of nurses and midwives is not considered equivalent to that of doctors. As women make up the majority of the nursing and midwifery workforce, we are therefore concerned that this devalues them.

10.2. We are concerned that the combining of the health and conduct committees, detailed in the new rules, will impact upon nurses with a disability and has the potential to breach
It will be obvious to those in the room that the registrant has a health issue when the panel adjourn into private session.

10.3. BME nurses, older nurses and men are disproportionately represented among registrants referred to the NMC, so if there are any unfair outcomes as a result of imposed warnings, these will impact disproportionately upon those groups.

11. How can we amend the proposals to advance equality of opportunity and foster good relations between groups?

11.1. We suggest amending the proposals to include that warnings are issued with consensual agreement would both advance equality of opportunity and foster good relationships between groups. Enabling the registrant to be part of this process would not only reduce the chance of unfairness but would enable them to engage early, reflect more effectively and learn within a non-blame environment.

12. Do you agree with our proposed transitional provisions?

12.1. Agreed.

13. Do you have any comments on the draft Rules?

Additional comment

13.1. No.

Date 16th December 2016

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