



CHCC COLLEGE OF
HEALTH CARE
CHAPLAINS



SSHA SOCIETY OF
SEXUAL HEALTH ADVISERS



Unite the Union Response to:

The Nursing and Midwifery Council (NMC);

A public consultation on the continued use of our powers arising from the coronavirus pandemic

This response is submitted by Unite in Health. Unite is the UK's largest trade union with 1.5 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 Physicians 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 nursing, 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 Nursing and Midwifery Council 'A *public consultation on the continued use of our powers arising from the coronavirus pandemic*'.
- 1.2. Since March, Unite has participated in the weekly joint trade union meetings with the NMC Fitness to Practise team, working in collaboration to deliver the emergency measures.
- 1.3. Recognising the urgency of the situation, Unite supported the concept of the Emergency Legislation. It was brought in with explicit reassurance that the measures would come to an end when they were no longer required and they were rightly pulled together with little consultation. However, the subsequent removal of the Sunset Clause has resulted in them becoming permanent.
- 1.4. Unite appreciates that the NMC Council listened and responded to the concerns raised by the representative bodies and committed to not use the powers until a full consultation had taken place. Nevertheless, a worrying precedent has been set.
- 1.5. Again, whilst Unite recognises that additional time has been allowed for the consultation to take place, the continued escalation of the pandemic has meant that Unite has not been able to engage as effectively with members on this response.

2. Consultation questions

Fitness to practise and registration and appeal hearings

We'd like to continue holding hearings virtually once the emergency period ends, so long as we can do so in a way which is practical and fair for everyone involved.

1. Do you think there are any reasons why we shouldn't continue to hold hearings virtually, once the emergency period ends?

Comment

Unite appreciates the benefits of virtual hearings. They have worked well for Interim Order and Review hearings. Indeed, they are likely to be the preferred option for many and may have benefit for other substantive hearings. In addition, they may assist in efforts to address the current delays at the adjudication stage. However, holding complex substantive hearings virtually, is as yet untested.

Following concerns raised by the representative bodies, the NMC has stated they will offer the registrant the opportunity to object to a virtual hearing and will respond to a reasonable objection. However, Unite remains concerned that the impact of virtual hearings on the outcomes of substantive hearings is unknown as a limited number of taken place and these have tended to be the less complicated cases. Unite does not consider that a registrant, who is concerned about whether they will have a fair hearing, should be required to persuade the NMC that their doubts about a novel process are reasonable. Unite's view is that whilst members subject to fitness to practise processes may be content to have their case dealt with in this way, they should not be compelled to. Unite would like therefore to see registrants given the choice.

In terms of virtual hearings becoming part of business as usual, the assumption seems to be that as no issues have been highlighted to date, it is acceptable for virtual hearings to become part of business as usual. However, Unite would argue that the cases that nurses, midwives and nursing associates are involved in are likely to be more emotive, high profile and contentious. Very few, if any hearings to date have involved complex substantive cases. Consequently, the full impact is

not yet known. Unite has been made aware of registrants who have had to access their hearing, including attempting to read the papers, on their mobile phone as they had no access to the appropriate IT equipment. There have also been issues around the availability of Wi-Fi, with reports of registrants having to access Wi-Fi in a public place. Furthermore, remote parts of the UK do not have robust fast speed broadband access, so the experience of a virtual hearing is not likely to be the same. Unite therefore considers that the possibility that a virtual hearing may generate less favourable outcomes for certain types of hearings or certain registrants still exist, as do the concerns around security.

Unite considers that research should be commissioned to look at the longer-term use of virtual hearings. Unite is not opposed to virtual hearings and appreciates the benefits, but the concerns that have been raised by Unite and sister Trade unions on a number of occasions with the NMC and the PSA remain. It is our view that these need to be mitigated prior to any decision about retaining virtual hearings in the long term.

Public access

Our rules say that our hearings must be open to the public except in certain circumstances, such as when someone's health is being discussed. Our current approach to virtual hearings is to allow observers to have audio access from their own private setting. We don't currently allow observers to have remote visual access to our virtual hearings. If observers want to view a virtual hearing, they can attend our hearings centre and we will display the virtual hearing on a screen where we have capacity to do so.

2. How do you think that members of the public should have access to our virtual hearings?

Comment

Under the Emergency Legislation, virtual hearings were not directly accessible by the public. The removal of the amendment to Rule 19 re-opened the right of public access. At the time Unite and sister trade unions raised a number of concerns, in particular;

- The possibility of screenshots or recordings of proceedings that then appear on social media
- The possibility of observers sharing evidence with witnesses prior to them giving evidence

In response to these concerns, the NMC proposed that direct audio access to virtual hearings for the general public would be provided. Transcripts would also continue to be available. The NMC were looking at providing the opportunity to view a hearing at one of their hearing centres. Unite is aware that at least two other regulators, the MPTS for the General Medical Council and Social Work England have this system in place. These allow public access at a physical site and all the current safeguards against misuse apply. Members of the public who prefer not to travel are provided with a transcript of every word spoken during the hearing.

The resurgence of the pandemic and the subsequent lockdown measures has of course resulted in the re-opening of hearing venues being halted, removing the ability to offer the public a venue to view a hearing. Acknowledging the requirement for, and importance of open justice, Unite's view continues to be that NMC registrants should not be exposed to the risks attached to giving direct access to virtual hearings. In particular when the duty to be open can be met in other ways and other healthcare practitioners will be spared such risks.

Constitution of panels

The changes to our rules allow us to hold meetings and hearings where:

- *we do not have a panel member who is a nurse, midwife or nursing associate*
- *we have panels of two panel members rather than three*

We don't intend to use our power to have a panel without a nurse, midwife or nursing associate member, outside of a national emergency.

3 (a). Do you agree with this approach?

3(b). Please tell us if you think there are any other circumstances where it would be reasonable for us to have a panel without a registrant member.

Comment

The emergency measures anticipated that a shortage of nursing and midwifery staff may mean that panels might need to convene without a registrant member. Unite understands that this has not been the case and the NMC have not had to use this power to date. As registrants find it reassuring to have and know that someone is bringing the professional voice to the hearing and its determination, Unite would be concerned about continuing without a nurse, midwife or nursing associate. Unite also questions the use of the term 'national emergency' without an explanation of what this would include. Unite would suggest that in a 'national emergency' every effort should be made to identify a registrant member and the affected registrant and their representative informed prior to the meeting or hearing where this cannot be achieved.

We would use our power to have a panel of two members (i.e. one lay member and one nurse, midwife or nursing associate) in exceptional circumstances only. Our current approach where a panel has started hearing a matter and one panel member is unable to continue (for example, due to illness or incapacity), is to carry on with the hearing with a new panel member. We intend to continue with our current approach, however we are interested in hearing your views as to whether there are circumstances where we could have panels with two members.

3(c). What do you think the exceptional circumstances should be where we would have a panel with two members?

Comment

Unite remains concerned about a panel with two members, in particular in the scenario where there is a difference in opinion between the two panel members.

Sending notices of meetings and hearings

The changes to our rules allow us to send notices of our hearings and meeting by email.

4. Do you think we should continue to send notices of our hearings and meetings by secure email?

Comment

It could be argued that issuing notices electronically is more environmentally friendly and certainly during the pandemic it has been more efficient given the challenges faced by the postal services. However, it makes the assumption that everyone has access to the right technology and format to access the information. It may be that the registrant has been using their work email address as the one for contact and if they are then not working due to the referral, they do not have access to this. Their access to for example, Wi-Fi and a suitable device may also be impacted by a reduction in income if they are no longer working. Unite suggests that the NMC need to ensure the registrant has an active and accessible email address and should not assume this to be the case.

In addition, whilst some representatives may find it easy to format and print bundles for registrants this may not be the case for all. For example, those who have had to change their way of working may not have access to a printer. It may also not be practical or potentially financially viable for a registrant to do this themselves.

Revalidation and fee payment

We only grant revalidation and fee payment extensions in limited circumstances. This may be, for example, where there has been an unforeseen event such as illness or a recent bereavement that has prevented a nurse, midwife or nurses associate from completing their revalidation application or paying their fee on time.

5. Do you think we should continue to grant revalidation and fee payment extensions in limited circumstances such as those outlined above?

Comment

Unite supports the continuation of revalidation and fee extensions in the circumstances detailed above.

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