

Nursing and Midwifery Council response to the Department of Health consultation on language controls for nurses, midwives and other healthcare professionals

- 1 We are the Nursing and Midwifery Council (NMC). We are the statutory regulator for nurses and midwives in the UK. We exist to:
 - 1.1 protect the health and wellbeing of the public;
 - 1.2 set standards of education, training, conduct and performance so that nurses and midwives can deliver high quality healthcare consistently throughout their careers; and,
 - 1.3 ensure that nurses and midwives keep their skills and knowledge up to date and uphold our professional standards.
- 2 We hold the register of those who have qualified and meet those standards. If an allegation is made that a registered nurse or midwife is not fit to practise, we have a duty to investigate that allegation and, where necessary, take action to safeguard the health and wellbeing of the public.
- 3 We welcome the opportunity to respond to this consultation and broadly welcome the new proposed powers, which we believe will enhance patient safety. However, we would like to point out that the short time frame given to respond to this consultation has not enabled us to assess the full impact that this legislative change will have on our processes. We do believe however that the proposed changes could potentially have a significant impact on the NMC in terms of resource and processes. This should be borne in mind when considering our responses. We would also like to point out that no impact assessment was published alongside the draft legislation.
- 4 We also have some specific concerns about the legal drafting of the s60 and would welcome a meeting with the Department at the earliest opportunity to be able to discuss these.
- 5 Our responses to each of the questions posed by the consultation are provided below.

Q1 Do you agree that strengthening language controls as proposed will improve quality of care and patient safety?

- 6 We agree that strengthening language controls will improve quality of care and patient safety. We have long called for the clarification of language requirements for European Union (EU) and European Economic Area (EEA) trained nurses and midwives. We have been involved in all stages of the European Commission's development of the Directive and have been in broad agreement with the other EU

nursing and midwifery regulators on the importance of language competence for patient safety.

- 7 All nurses and midwives working in the UK, from the EEA and otherwise, must have the necessary knowledge of English in order to practise safely. Effective communication with colleagues and patients is vital to ensure patient safety. The Code¹ - the professional standards that registered nurses and midwives must uphold - requires them to be able to communicate clearly and effectively in the English language.
- 8 The NMC currently checks the language capability of non-EEA (overseas) trained nurses and midwives before they apply for registration, through a formal test. An overseas trained nurse or midwife must be able to demonstrate that they have the necessary knowledge of English before they are able to practise in the UK.
- 9 The NMC does not currently have the ability to check that nurses and midwives coming to work in the UK from the EEA have the necessary knowledge of English. In 2013 we received over 7,000 applications from EEA applicants and there are currently over 23,000 EEA trained nurses and midwives on our register. These numbers are growing each year.
- 10 It is important to note that employers have a role in ensuring that the staff they employ have the right skills to undertake their roles, including English language skills. However, we have no evidence that all employers do this comprehensively or consistently, and so we believe that it is important that they are reminded of this role.

Q2 Do you agree with the proposed changes for applicants in relation to registration and entry onto the Register in terms of knowledge of the English language?

- 11 We agree in principle with the proposed changes to registration and agree that regulators should put in guidance the specific requirements relating to the evidence and information that must be provided to satisfy the Registrar. However, at this stage we are unable to fully agree due to the fact that we need more clarity around some of the proposals.
- 12 The key issues that we have concerns about are:
 - 12.1 **Renewal of registration:** We do not support the provision for language controls at the point of renewal set out in the consultation. We believe that implementing this could be unworkable and lead to unintended consequences. Given the size of our register it is possible that the bar at renewal would need to be set so low (for example in the form of a self-declaration), that it would end up being almost meaningless. Alternatively, if a meaningful assessment was undertaken every three years, and evidence gathered, this would need to apply across the register (the current drafting of the legislation would apply to all registrants seeking renewal). This would be a significant change to our current process, would have a high cost implication, and would we believe be a disproportionate approach. We also

¹ The Code: Standards of conduct, performance and ethics for Nurses and Midwives (2008), NMC.

believe that it would be counter to the principles of right touch regulation. In most cases, concerns over language competence would be identified through employer processes. Requiring all registrants to satisfy the Registrar every three years would be disproportionate when considering that the primary objective of this piece of legislation is to address the lack of language controls for EEA migrants. The new legislation introduces language as a new ground for impairment and provides us with specific powers to deal with this. We believe it would be counter-intuitive to bring in a new impairment category, whilst simultaneously allowing us to effectively administratively erase someone at the point of renewal. The new Code is very clear about the requirements in this regard and revalidation, in time, will capture language competence. We would be interested in hearing any views that the Department has on the evidence base for requiring this at the point of renewal for all registrants, including those from the UK.

- 12.2 **Readmission to the register:** We believe that a requirement to demonstrate the necessary knowledge of English at the point of readmission to the register would be of benefit. There is some evidence to suggest that language skills may degenerate over time if not regularly used. If someone applies for readmission after having been off the register for a number of years, it is in the interests of patient protection for the nurse or midwife to be required to meet our requirements for necessary knowledge of English. We would however like clarification on whether we have the flexibility to define the conditions which must be met for re-admission, and whether these can be different for those who have not been in practice for several years as opposed to those whose registration has lapsed for a shorter period.
- 12.3 **General systems applicants and compensation measures:** It is important that applicants for registration who are required to undertake a compensation measure (such as a period of adaptation) are competent in English before they potentially have access to patients. We therefore believe that we should be able to seek evidence of language competence before a nurse or midwife begins a compensation measure. However, the Directive states that language controls can only be applied after the recognition of qualifications. Under our current legislation we do not recognise an EU migrant's qualification until after they have completed an adaptation or aptitude test.² The result of this is that we would not have the specific legal ability to apply language controls to this group, and so we request that specific provision be put in place to remedy this.
- 12.4 **Overseas registration:** We are pleased to note that in paragraph 28 of your consultation document you would support us retaining our existing language controls for overseas applicants. We would wish to continue to apply a language test for non-EEA applicants at the start of the application process. We are keen to work with you to ensure that the legal drafting permits this.

² The Nursing and Midwifery Order 2001 (2001), Article 13(1)(E) and (F) of the NMC Order

- 13 We also have concerns over the movement of temporary and occasional migrants from the EEA and believe that these pose a potential public protection risk. For these applicants, the NMC has little control over access to the register and the testing of language competency in these cases is not allowed under EU law. Under the amended Directive temporary and occasional migrants will self-declare that they are competent in the English language. We believe that this is not robust in terms of public protection and may actually encourage more applications down this route. We realise that temporary and occasional migrants are outside the scope of this consultation, however we wanted to state our concerns on this issue.

Q3 Do you agree with the proposed additional powers to take fitness to practise action where there are concerns that a nurse, midwife, dentist, dental care professional, pharmacist or pharmacy technician has insufficient knowledge of the English language?

- 14 We can already take action on the grounds of impaired fitness to practise (FtP) due to a lack of adequate communication skills as part of the existing ground of impairment of lack of competence. As a result, we do not believe there to be a regulatory gap that requires any legislation to close. If however, there is a public perception of there being a gap in our regulatory powers with regards to fitness to practise, then we note that these changes are intended to address that issue as contributing to public confidence in the profession.
- 15 We are concerned however that this additional ground may lead to an increase in the number of unfounded FtP allegations, which may have an impact on our caseload and resources. A major concern that we have is over the lack of clarity in the legislation as to what constitutes a necessary knowledge of the English language. We believe that with no clear definition, employers may use FtP allegations of insufficient knowledge of the English language as a means to prevent a nurse or midwife from practising where there are more general employment and other non-FtP concerns.
- 16 The specific wording of the definition in paragraph 43 (a) and (b) of the s60 states that a necessary knowledge of English is “in the interest of the person and the person’s patients”. We are unclear as to why it is appropriate for this knowledge to be in the interests of the person – ie the applicant or registrant. In addition we would note that midwives do not have “patients” as such, rather mothers and babies. Similarly, many nurses or midwives do not work in clinical environments, instead working with and for individuals who are not their patients. This definition is therefore too “medico-centric” and does not reflect the wider scope of practice of our registrants. We would welcome a discussion about a more appropriate definition.

Q4 Do you think that the powers that are already in legislation are sufficient to secure that healthcare professionals have the necessary knowledge of the English language?

- 17 We believe that our current legislative powers are not sufficient to ensure that all nurses and midwives have the necessary knowledge of English. In relation to registration, there is clear difference between how regulators are required to treat EEA applicants and the treatment of overseas applicants. Overseas applicants currently have to fulfil language requirements prior to being able to submit an

application for registration, whereas EEA do not. This is a clear gap in our ability to protect the health and wellbeing of the public. In order to make the necessary changes and amend the gap in language requirements, a legislative change is required.

- 18 As stated above, we believe that our current powers in relation to fitness to practise are sufficient where there are concerns over whether a nurse or midwife has the necessary knowledge of English. The NMC Order states that an allegation of fitness to practise can be undertaken in relation to a lack of competence. We believe that allegations with regards to language skills and communication can be considered within the scope of this ground. However, we do not oppose the inclusion of a further ground of impairment on the grounds of consistency across the nine healthcare regulators, if it is thought to be necessary, provided the definition of “necessary knowledge of English” is amended so as to be appropriate for our registrants.

Q5 Do you agree that the proposed changes to the relevant legislation, as set out in the draft Order, will strengthen the knowledge of the English language of nurses, midwives, dentists, dental care professionals, pharmacists and pharmacy technicians in the UK?

- 19 It is unclear from the consultation document how the proposals will strengthen the language competence of nurses and midwives in the UK *in general*, apart from in relation to migrants trained in the EEA who are not currently subject to language controls.
- 20 We believe that the main aim of the legislation is not to strengthen the knowledge of the English language of nurses and midwives in the UK. The changes in legislation ensure that EEA applicants are able to demonstrate that they have the necessary knowledge of English to be able to practise in the UK, and that registrants in general have a satisfactory level of competence in the English language. We are satisfied with the existing controls that are in place for overseas applicants, and the assurances we receive about UK graduates.

Q6 Do you think there is an alternative to these proposals that does not require a change to legislation?

- 21 We believe there to be no alternative as current legislation prevents us from implementing language controls for EEA applicants. However, it would be helpful if the Department emphasised the additional role employers can play in checking that those they employ have the necessary knowledge of English, to support this new piece of legislation.

Q7 Do you have views or evidence as to likely effect on costs or the administrative burden of the proposed changes

- 22 Due to the short response period for this consultation, we were unable to undertake a full cost analysis of the proposals to fully understand the costs and administrative burden the changes will have on the NMC. Any Rules that we make as a result of the legislation will be subject to a full cost analysis.

- 23 Please note that the following costs and impacts are based on the assessment of our comments and proposals being accepted. If we were to apply the full requirements as drafted, the cost and impact would be significantly higher. The proposed changes are likely to place additional costs and administrative burden on the NMC. The separation of the recognition and registration processes is likely to impose extra administrative costs. We have already articulated that should we be required to introduce a new process at renewal this may have a significant cost implication for us. In addition, the legislation requires time consuming manual interaction for staff in assessing and checking evidence and test results.
- 24 The proposed changes may also have a significant financial impact on our appeals process. Registrants will have the informed right of appeal to any decision that is made with regards to them having to sit a test. We currently receive a number of appeals from EEA migrants against our registration decisions. For example in 2013 we received 44 appeals at an average cost of £5,100 per appeal. Any increase in the number of appeals that we receive will place an additional financial cost on the organisation which will be borne by our wider registrant base.

Q8 Do you think there are any benefits that are not already discussed relating to the proposed changes?

- 25 We think that the proposed changes to language controls for EEA nurses and midwives will have the benefit of increasing consistency and lowering levels of unfairness with regards to the different registration requirements for EEA and overseas applicants.
- 26 The proposals will also have the benefit of providing the Department with the opportunity to clarify the role of employers in checking the language skills of those that they employ.

Q9 Do you have any evidence of harm caused to patients due to the lack of English language proficiency of a nurse, midwife, dentists, dental care professional, pharmacist or pharmacy technician?

- 27 Language competence is part of the commitment that nurses and midwives make to be able to communicate with colleagues and people in their care and to whom they provide services. We do not have any evidence of specific fitness to practise cases where language competence alone has been a factor leading to disciplinary measures being taken.
- 28 However, the NMC has experience of processing EEA applicants and while we ensure that they have met the required qualification standards, we do not currently have the ability of checking their language competence.

Q10 Do you agree with the Department's assessment that these proposals will address the current disparity between the existing controls in terms of language competence of European healthcare professionals and those from outside of the EEA?

- 29 Yes, we believe that by applying the new powers that the s60 will impose, we will be able to increase the consistency in the way that EEA and non EEA applicants are treated when applying to enter the register. As already noted however, we

wish to have the power to retain our current arrangements for overseas applicants, which may not be precisely the same as the new arrangements for EEA applicants.

Q11 Are you aware of any particular groups who will be affected by this legislation, other than European nurses, midwives, dentists, dental care practitioners, pharmacists and pharmacy technicians?

30 We do not have any evidence that this legislation will affect other groups.