



Department  
of Health

# The Nursing and Midwifery Council – proposed changes to the governing legislation

## A paper for consultation

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# Foreword

The Department of Health is firmly committed to working with the Nursing and Midwifery Council (NMC) to enable it to protect the public more effectively through the efficient and proportionate regulation of nurses and midwives.

The legislation within which the NMC operates has restricted its ability to effectively carry out its Fitness-to-Practise regulatory functions and legislative change to its procedures is needed to address this. That is why we are now publishing this consultation which outlines proposed amendments to the Nursing and Midwifery Order 2001.

These proposed amendments will give the NMC powers to carry out its Fitness-to-Practise and registration functions more effectively. They will form the legal basis for the NMC to make procedural amendments to the Nursing and Midwifery Council (Fitness-to-Practise) Rules 2004 (SI 2004/1761) (“the Fitness to Practise Rules”) and the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules 2004 (SI 2004/1767) (“the Registration Rules”) which sit beneath the Order.

# Executive summary

- This consultation is being taken forward in accordance with the requirements of Section 60 (S60) of the Health Act 1999. The regulation making power in Section 60 permits modifications to the regulation of healthcare professions by means of an Order in Council. The Health Act requires that the Secretary of State must consult on draft Section 60 Orders prior to their introduction into Parliament.
- In its responses to the final report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, the Government noted that health and care professional regulatory bodies in the United Kingdom (UK), including the NMC, are hampered by an outdated legislative framework, and committed to radically overhaul 150 years of complex legislation.
- To deliver on this commitment the Department referred to the Law Commission's work to review the legislative framework for professional regulation, with the aim of modernising and simplifying the regulatory landscape to ensure it is fit for the future. The Law Commission published the outcome of its review and recommendations for legislative changes on 2 April 2014.
- In advance of our consideration of the Law Commission's work, the Government intends to lay an order under Section 60 of the Health Act 1999 to make a small number of amendments to the Nursing and Midwifery Order 2001, the governing legislative framework which sets out the roles, functions and processes of the NMC. The Department considers that use of a Section 60 order, rather than awaiting a potential professional regulation Bill based on the Law Commission's work, is the preferred option in this instance. This is because the current legislation that the NMC is operating within is restricting its ability to effectively carry out its Fitness-to-Practise regulatory functions.
- The key purpose of these amendments is to ensure greater consistency in decision making and to reduce the time it takes the NMC to deal with Fitness-to-Practise cases (i.e. allegations of impairment to practise by reason of: misconduct, lack of competence, cautions or convictions or health issues about a nurse or midwife). This consultation document sets out the proposals and the rationale for the amendments to the Nursing and Midwifery Order 2001.
- This Government believes that the strengthened powers introduced by this S60 Order will enable the NMC to better carry out its Fitness-to-Practise role and functions resulting in greater, improved public protection and an increase in public confidence in the NMC.
- In parallel, the NMC is consulting on new provisions to its Fitness-to-Practise Rules and Registration Rules that will draw their legal basis from the amendments proposed in this consultation.
- You can view and respond to the NMC's consultation through the following link.

<http://www.nmc-uk.org/consultation-changes-rules>

# Introduction

## Policy Background

1. On 6 February 2013, the final report of the Mid Staffordshire NHS Foundation Trust Public Inquiry was published. This Inquiry, chaired by Robert Francis QC, was established under the Inquiries Act 2005 and the report made 290 recommendations for improvement based on the role of the commissioning, supervisory and regulatory bodies in the monitoring of the Foundation Trust.
2. On 28 March 2013, the Government published an initial response to the Inquiry report, *Patients First and Foremost* (CM 8576) followed on 19 November 2013 by, *Hard Truths: the journey to putting patients first* (CM 8777) the Government's further response, which included individual responses to each of the Inquiry's 290 recommendations.
3. In its responses, the Government noted that health and care professional regulatory bodies in the UK, including the NMC, are hampered by an outdated legislative framework, and committed to radically overhaul 150 years of complex legislation. To deliver on this commitment the Department referred to the Law Commission's work to review the legislative framework for professional regulation, with the aim of modernising and simplifying the regulatory landscape to ensure it is fit for the future. The Law Commission published the outcome of its review and recommendations for legislative changes on 2 April 2014.
4. In advance of our consideration of the Law Commission's work, the Government intends to lay an order under Section 60 of the Health Act 1999 (a "section 60 Order") to make a small number of immediate and urgent amendments to the Nursing and Midwifery Order 2001. The Nursing and Midwifery Order 2001 is the governing legislative framework which sets out the roles, functions and processes of the NMC.
5. This consultation document sets out proposals and rationale for amendments to this governing legislative framework. There are five areas subject to the proposed amendments. The purpose of these amendments is to ensure greater consistency in decision making and reduce the time it takes the NMC to deal with Fitness-to-Practise cases (i.e. allegations of impairment to practise by reason of: misconduct, lack of competence, cautions or convictions or health issues about a nurse or midwife). The Order will give the NMC powers to introduce case examiners into the Fitness-to-Practise process. It will introduce a power for the NMC to review 'no case to answer' decisions and close a legal loophole, where the Health Committee (HC) and the Conduct and Competence Committee (CCC) are currently unable to make a striking off order in an appropriate case when a registrant is not fit to practise for a reason relating to their health or lack of competence. It will remove the requirement for an NMC Council member to sit on a registration appeal panel, thereby removing any potential conflicts of interest. It will also remove the requirement for a registered medical practitioner to sit on a registration appeal panel where the health of a person is an issue, which will improve the transparency of the decision making (in line with previous amendments to the composition of Fitness-to-Practise panels). The Order will also introduce an amendment that will help the NMC to verify that a practising registrant has an appropriate indemnity arrangement in place.
6. In parallel, the NMC is consulting on new provisions to the Fitness-to-Practise Rules and Registration Rules that will draw their legal basis from the amendments proposed in this consultation. Please also refer to the NMC's consultation when considering the proposals

set out in this consultation.

<http://www.nmc-uk.org/consultation-changes-rules>

7. On 27 March 2014, the Department of Health published its response to the December 2013 House of Commons Health Committee report: *2013 Accountability Hearing with the Nursing and Midwifery Council (NMC)*<sup>1</sup>. In this response, the Department confirmed its intention to work with the NMC to draft this S60 Order and the associated procedural amendments the NMC is making to its Fitness-to-Practise and Registration Rules.
8. This Government believes that strengthened powers introduced by this S60 Order will enable the NMC to better carry out its Fitness-to-Practise role and functions resulting in greater, improved public protection and an increase in public confidence in the NMC.

## Who is the NMC?

9. The NMC is the healthcare regulator for nursing and midwifery in the UK. It is an independent body, which is accountable to Parliament, via the Privy Council (a formal body of advisors to the Queen), for the way in which it carries out its responsibilities.
10. It exists to safeguard the health and wellbeing of the public. It does this by setting standards of education, training, conduct and performance for nurses and midwives. It also holds 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, the NMC has a duty to investigate that allegation and, where necessary, take action to safeguard the health and wellbeing of the public.
11. Its Council must comply with all relevant legislation, including the Nursing and Midwifery Order 2001 and the Charities Act 1993. Two key roles of the Council are: setting the strategic direction for the NMC and overseeing the work of senior NMC staff. It is made up of twelve lay and registrant members, including one member from each of the four UK countries. Council members are appointed by the Privy Council. Registrant members are from a nursing or midwifery background and lay members are selected for their expertise in various fields and strategic experience.

## What are the proposals?

12. A summary of the proposals is set out below. The proposed amendments to the NMC Order and their rationale are discussed in more detail in pages 10-18 of this consultation document.
  - To give the NMC powers to appoint Case Examiners who will consider allegations of impairment of Fitness-to-Practise and decide whether the registrant has a case to answer. This approach is currently used by the General Medical Council (GMC) and the General Optical Council (GOC) is in the process of introducing it.

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<sup>1</sup> <http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/inquiries/parliament-2010/nmc-2013>



- To introduce a power for the Council to review ‘no case to answer’ decisions made in Fitness-to-Practise cases and to make rules in connection with the carrying out of such a review.
- To introduce a power to allow the Council to delegate this function to the Registrar (or another officer of the Council). The Fitness-to-Practise Rules will provide that this function will be carried out by the Registrar and will specify the circumstances in which such a review can be conducted (please refer to the NMC consultation on changes to the Fitness-to-Practise Rules and to the Registration Rules).
- To revise requirements for the composition of the registration appeal panel by removing the requirements for (1) an NMC Council member to Chair the panel, and (2) a Registered Medical Practitioner (RMP) to be on the panel in cases where the health of the person bringing the appeal is in issue.
- To clarify that the NMC’s HC or CCC has the power to make a striking-off order in a health or lack of competence case upon a review of a final suspension order or conditions of practice order, provided the registrant has been the subject of such a final order for at least two years.
- To introduce a power for the NMC to disclose certain information relating to a person’s indemnity arrangements to a third party for the purpose of verifying that information.
- To provide that the Investigating Committee (IC) may also make an interim order after it has referred a case to the HC or the CCC if that Committee has not begun its consideration of the case.

## Introduce Case Examiners in the Fitness-to-Practise process

### Current approach

13. When the NMC receives allegations that a nurse or midwife's Fitness-to-Practise may be impaired, an initial screening assessment is carried out by a screening team and, if considered appropriate, an investigation is commenced. Once the investigation has been carried out, the case including all evidence and witness statements will be referred to a panel of the NMC's IC.
14. The IC is made up of nurses, midwives and lay people outside of these professions. The IC is currently made up of a pool of approximately one hundred panel members who provide their services to the NMC as independent contractors.
15. The IC panel will consider the allegation, all the evidence obtained during the investigation and any response or evidence from the nurse or midwife and decide whether there is a case for the nurse or midwife to answer. The panel does not determine questions of fact.
16. If the panel decides that there is no case to answer, the case will be closed. If the panel decides that there is a case to answer, the case will be referred to the CCC or to the HC depending on the type of allegation, for adjudication.

### Issues with the current approach

17. The current legislation requires a panel of the IC to be made up of at least three people, including at least one registered nurse or midwife (the registrant panel member) and one lay individual. The Chair can be either a lay or registrant panel member.
18. The current approach presents issues in case-handling efficiency and the overall experience for the nurse or midwife against whom allegations that their Fitness-to-Practise is impaired have been made. This is because:
  - The system requires arrangements to be made for booking individual panellists from the pool to attend and although there is regular training and guidance provided, it can be difficult to achieve and demonstrate consistent, quality decision-making among a very large pool of panel members sitting in panels of at least three people.
  - The panels are supported by a team of panel secretaries and there are high costs in recruiting, training and providing administrative support to such a large pool of IC panel members, in addition to the costs of their daily attendance fees and travel.
19. The GMC carries out a similar function using pairs of lay and professional decision-makers, called Case Examiners, rather than a panel. This has introduced a level of expertise and experience which has improved consistency in decision-making and proportionality of approach. The GOC is also in the process of introducing Case Examiners.

## Proposal

20. It is proposed that:

- The Council will be given the power to appoint Case Examiners. A pair of case examiners (one lay and one professional (a registered nurse or midwife)) will consider, in the light of the information obtained and any representations or other observations made, allegations of impairment of Fitness-to-Practise and decide whether there is a case to answer.
- The Registrar would be able to refer cases to the IC where one or both of the Case Examiners believed an Interim Order<sup>2</sup> (IO) should be considered.
- The IC would retain its role in deciding whether an IO should be made restricting the nurse or midwife's practice and it will be able to make an IO after it has referred an allegation to the HC or to the CCC, but only if that Committee has not yet begun its consideration of the case. This is to ensure that, if new information is received which suggests that an IO is necessary for the protection of the public after a case has been referred to another Practice Committee, but before the Committee has started to consider it, the IC still has the power to make an IO.
- The IC would also retain its role as the panel which determines all allegations relating to fraudulent or incorrect entries on the NMC's register.

21. The appointment of Case Examiners, with clear functions and relevant expertise is intended to provide a more proportionate approach to the investigation of allegations while maintaining the independence in decision-making. It will achieve greater consistency in quality decision-making and improved efficiency because there will be a smaller team of Case Examiners (circa eight full-time roles) who will be directly employed by the NMC specifically for this purpose and will be fully trained to carry out this role. This will improve the NMC's ability to handle more cases over a shorter period. This will support the NMC's main regulatory function of protecting the public whilst making the process shorter and more effective for nurses and midwives.

**Q1 - Do you agree with the proposal to give the NMC power to introduce Case Examiners in the Fitness-to-Practise process?**

**Q2 - Do you agree that the Investigating Committee should be able to make an interim order after it has referred an allegation to the Health Committee or to the Conduct and Competence Committee but before that Committee has begun its consideration of the case?**

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<sup>2</sup> A temporary measure (suspension from practice or conditions of practice) that the NMC is able to place on a nurse or midwife whilst considering a Fitness-to-Practise allegation against them. The measures available are set out in Article 31 of the Nursing and Midwifery Order 2001 and Rules 2 & 8 of the Nursing and Midwifery Council (Fitness-to-Practise) Rules 2004.

## Review Fitness-to-Practise no case to answer decisions

### Current approach

22. Under the NMC's current legislation, when a decision is made by a panel of the IC that there is no case for a nurse or midwife to answer against an allegation of impaired Fitness-to-Practise, the NMC does not have the power to review that decision of its own volition or at the request of an interested party. For example, if new evidence comes to light which was not available to the original panel – e.g. a key witness who was believed to be untraceable comes forward, or new evidence is received which demonstrates the allegation was not an isolated incident.
23. Only if the IC receives a fresh allegation of impairment of Fitness-to-Practise within three years from the service of a 'no case to answer decision' can it take account of the original allegation when considering whether or not there is a case to answer in respect of the fresh allegation.
24. The IC may only correct small accidental and administrative errors in its decisions which do not substantially affect the rights of the parties involved. Therefore, the only method of addressing an inappropriate IC decision is if a third party commences judicial review proceedings.

### Issues with the current approach

25. Where a case against a nurse or midwife has been closed after a no case to answer decision and new evidence about the same allegations comes to light, the NMC cannot either investigate further or re-commence Fitness-to-Practise proceedings in respect of that allegation.
26. Similarly where a decision is made by the IC, which the NMC considers to be materially flawed, there is no power for this decision to be re-considered under the current legislation and action cannot be taken to address this without a successful judicial review by an affected third party, which is a lengthy and expensive process.
27. This current approach prevents the NMC from acting efficiently or in the public interest in order to protect the public and restricts its ability as a regulator to fulfil its duty. This lack of a power to review IC decisions is inconsistent with the powers of the GMC<sup>3</sup> and the General Dental Council (GDC)<sup>4</sup>.

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<sup>3</sup> See Rule 12 of the General Medical Council (Fitness to Practise) Rules 2004.

<sup>4</sup> See Part 2, Section 10 of the General Dental Council (Fitness to Practise) Rules 2006.

## Proposal

28. It is proposed that where Case Examiners or a panel of the IC have determined that there is no case for a nurse or midwife to answer following allegations that their Fitness-to-Practise is impaired :
- The NMC will be given the power to review such decisions;
  - The NMC would have the ability to make Rules for carrying out such reviews.
29. This amendment is necessary because it will allow the NMC to properly fulfil its duty as a regulator by ensuring it can give further consideration, and where necessary, take direct action to re-visit closed cases in specified circumstances. (Please refer to the NMC consultation on changes to the Fitness-to-Practise Rules and to the Registration Rules). This is important because it improves public protection and would bring the NMC's powers into line with the GMC and GDC and will ensure the public have equal confidence in the NMC as an effective regulator and public confidence in the nursing and midwifery professions to be maintained.

**Q3 - Do you agree that the NMC should gain the power to review no case to answer decisions in Fitness-to-Practise proceedings?**

# Changes to the composition of a panel considering registration appeals

## Current approach

30. Under the NMC's legislation, a decision to refuse an application for registration or readmission to the register, or to refuse the renewal of an existing registration, may be appealed<sup>5</sup> - 'a registration appeal'.
31. A registration appeal will be considered, either at a meeting or a hearing, by a panel appointed by the Council (a registration appeal panel). Legislation requires each registration appeal panel to include a serving Council member as the Chair and, where the health of the person making the appeal is an issue, a registered medical practitioner (RMP).

## Issues with the current approach

32. The Council has a formal and defined role within the governance structure of the NMC, including holding the Registrar and the executive to account. It is essential that the independence of the Council is maintained by ensuring that there is a clear separation between the Council's oversight functions and the operational functions of the Registrar and executive. Not doing so gives rise to a potential conflict of interest between the functions of the Registrar and the Council. This concept, and the need to address it, has been highlighted by recent case law developments<sup>6</sup>.
33. The current requirement for a registration appeal panel to include a RMP in cases where health issues arise is inconsistent with previous legislative amendments which have removed such a requirement from NMC Fitness-to-Practise processes<sup>7</sup>.

## Proposal

34. It is proposed that Council members should no longer play any part in a registration appeal panel.
35. This would maintain a clear separation of duties between the operational and governance functions of the NMC to ensure impartiality and avoid any suggestion of a perceived or actual bias. This would bring the NMC in line with legal principles recently set out by the higher courts. It is also expected that registration appeal panel hearings would be dealt with more swiftly by not having to rely on the availability of a limited number of trained Council members.
36. It is proposed that the current requirement for a registration appeal panel to include a RMP, where the health of a person making an appeal is in issue, is removed. This current requirement is inconsistent with previous legislative amendments removing such a requirement for NMC HC panels considering allegations of impaired Fitness-to-Practise on

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<sup>5</sup> See Article 37 of the 2001 Order and Rules 18-33 of the 2004 Registrations Rules.

<sup>6</sup> [2011] EWCA Civ 1168 – The judgment of Rix LJ in *R (on the application of Darsho Kaur) v. (1) Institute of Legal Executives Appeal Tribunal and (2) The Institute of Legal Executives* - paragraph 49

<sup>7</sup> Amendment Order 2008 No 1485 - [http://www.legislation.gov.uk/uksi/2008/1485/pdfs/uksi\\_20081485\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/1485/pdfs/uksi_20081485_en.pdf)

the grounds of ill-health.<sup>8</sup>

37. This proposed amendment is necessary because it will ensure that any medical evidence is given before the parties to the registration appeal hearing by relevant medical experts and no medical advice or evidence is given to the panel by the RMP, and that a clear separation of functions is therefore maintained
38. The overall aim of these proposed changes is to reinforce the impartiality of the panels, ensure consistency in approach and ensure decision-making is more transparent.

**Q4 - Do you agree that the requirement for a Council member to chair Registration Appeal Panels should be removed?**

**Q5 - Do you agree that the requirement for a registered medical practitioner to form part of the panel in cases where health is an issue should be removed?**

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<sup>8</sup> <http://www.nmc-uk.org/Documents/Consultations/NMC-Report-of-consultation-on-proposed-changes-to-the-composition-of-respondents-not-identified.pdf> - The same logic and analysis is equally applicable here.

## Clarification on powers of panels to make striking-off orders in health and lack of competence Fitness-to-Practise cases

### Current approach

39. Where a panel of the CCC or HC has considered a case and determines that a registrant's Fitness-to-Practise is impaired, it may impose one of a number of sanctions. These include, in the most serious cases, making an order striking the registrant's name from the register (a striking-off order) where it is considered that such a step is the only proportionate means of adequately protecting the public or acting in the public interest.
40. Where the sanction is an order for a period of suspension or for the registrant to be the subject of conditions of practice, it will be reviewed prior to its expiry date and, amongst other options, could be extended or varied.
41. Where a CCC or HC panel determines that a registrant's Fitness-to-Practise is impaired due to their health or lack of competence, the available sanctions are limited. Until recently, it was considered that the current legislation did allow the panel to impose a striking-off order in such cases, but only after the registrant had been the subject of continuous suspension or conditions of practice for a period of two years.

### Issues with the current approach

42. A recent decision of the High Court interpreted the legislation to suggest that a panel cannot make a striking-off order in a health or lack of competence case (at the first hearing or on any subsequent review) unless, at the time of the original decision to impose a sanction, the registrant has been the subject of a continuous substantive suspension or conditions of practice order for at least two years. In practice this interpretation means that a striking-off order can never be an available option in a health or lack of competence case unless separate findings are made against the registrant in another Fitness-to-Practise case. The intention of the legislation is that a striking-off order would be available in these cases but this High Court decision has thrown doubt onto that and the legal position is therefore no longer clear and any decision of a panel to impose a striking-off order in such cases is vulnerable to legal challenge.
43. Consequently, the NMC have advised their panels that they should not impose a striking-off order in such health or lack of competence cases or on review of a suspension order or conditions of practice order in such cases. This approach increases uncertainty for all parties involved in the proceedings and undermines public confidence in the NMC as a regulator. It has resulted in an increase in the number of registrants who have become subject to long-term suspension or condition of practice orders.
44. Making a striking-off order when reviewing an existing suspension or conditions of practice order in a health or lack of competence case can be the most appropriate option in some cases. This may be because the registrant has stopped engaging completely or has retired from practice, or simply does not wish to take any remedial steps following a finding of lack of competence. It can also be in the best interests of, and is sometimes sought by, the affected registrant. This is particularly apparent where a nurse or midwife suffers from health issues that require a restriction on their registration and Fitness-to-Practise proceedings may contribute to further detriment to their welfare. In such circumstances, the panel cannot currently consider whether the imposition of a striking-off order is



appropriate and in the public interest. In addition, voluntary removal from the register is also not currently permitted.

### Proposal

45. The proposed amendment would provide legal certainty by providing that the sanction of a striking-off order is an option for consideration by a CCC or HC panel reviewing a suspension order or a conditions of practice order in a health or lack of competence Fitness-to-Practise case, provided the registrant has been the subject of a continuous substantive suspension order or conditions of practice order for a period of at least two years.
46. The panel will still be required to take into account any evidence called, and submissions advanced, by either party and to act in a proportionate way. In reaching its decision the registrant's interests together with the need to protect the public and act in the public interest would be taken into account.

**Q6 - Do you agree that a Health Committee panel or Conduct and Competence Committee should have the power to make a striking-off order in a health or lack of competence case provided the registrant has been the subject of a continuous substantive suspension or conditions of practice order for at least two years?**

## Power to seek verification of indemnity information from third parties

### Current approach

47. Registered nurses and midwives will soon be required under a separate Section 60 Order 'Health Care and Associated Professions (Indemnity Arrangements) Order 2014' ("the Indemnity Order") to have an appropriate indemnity arrangement in place for their practice. This will be a condition of registration with the NMC. The NMC will need to ensure that all registered nurses and midwives have such an appropriate indemnity arrangement in place for their practice. Information about this requirement was set out in the recent Department of Health consultation and government response '*Indemnity or insurance for regulated healthcare professionals*<sup>9</sup>'
48. As a result, the NMC will need to monitor compliance with this new requirement and may need to disclose information relating to a person's indemnity arrangement to third parties, for the purpose of verifying that information. Such third parties may include employers or agencies.

### Proposal

49. It is proposed that the NMC should be given the power to disclose certain information relating to an individual's indemnity arrangement to third parties for the purpose of verifying that information.
50. This amendment is necessary to enable the NMC to take the appropriate steps to monitor compliance with the new requirement for nurses and midwives to have an appropriate indemnity arrangement to protect the public.

**Q7 - Do you agree that the NMC should be given the power to disclose certain information relating to an individual's indemnity arrangement to third parties for the purpose of verification, in order to protect the public?**

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<sup>9</sup> <https://www.gov.uk/government/consultations/protecting-patients-from-negligence>

# Costs and benefits and equality analysis

51. During the development of our proposals we have looked at the costs and benefits and the possible impact they might have. We believe that the changes will have an overall relatively small monetary impact and no direct impacts on business. Most of the costs and benefits will fall on the NMC in terms of a one off cost of £180,000 (primarily from introducing a new system of case examiners) and additional minimal annual costs from the need to review additional 'no case to answer' decisions but this will be offset by estimated annual efficiency savings in the region of £340,000 (worst) to £650,000 (best).
52. There are also significant non-monetised benefits from introducing a more efficient system by providing better protection to the public and improving public confidence in the NMC. In addition, we consider there are potential indirect benefits to those businesses outside of the NHS that employ registrants in terms of reducing costs, such as salaries, backfill, recruitment, training and HR support, of employees suspended during Fitness-to-Practise proceedings.
53. We intend to gather further evidence on any potential issues and impact of this policy as part of this consultation.

## **Q8 - Will the proposed changes affect the costs or administrative burden on your organisation or those you represent?**

An increase

A decrease

Stay the same

Some

Please explain your answer.

54. The Department of Health and the NMC are covered by the Equality Act 2010, and specifically, the Public Sector Equality Duty.
55. The Duty covers the following protected characteristics: age; disability; gender reassignment; pregnancy and maternity; race (includes ethnic or national origins, colour or nationality); religion or belief (includes lack of belief); sex and sexual orientation.
56. There are three parts to the Duty and public bodies must, in exercising their functions, have due regard to all of them. They are:
  - The need to eliminate unlawful discrimination, harassment and victimisation;
  - Advance equality of opportunity between people who share a protected characteristic and people who do not; and
  - Promote good relations between people who share a protected characteristic and those who do not.
57. We have carried out an initial assessment of these proposals and this shows no evidence of adverse equality impacts or potential for discrimination. We intend to carry out further equality analysis on these proposals which will include information received as part of this consultation.

**Q9 - Are you aware of any particular groups who will be affected by this legislation?**

**Q10 - Are you aware of any groups for whom these proposed legislation changes could have a detrimental effect?**

# The draft order

58. This section deals with each of the provisions in the draft Nursing and Midwifery (Amendment) Order in Council 2014 and aims to set out the effect of each provision and the policy intention behind it.

## **Article 1 – Citation, commencement and interpretation**

Article 1 makes provision for the Order to come into force on the day after it is made.

## **Article 2 – Amendments to the Nursing and Midwifery Order 2001**

Article 2 provides that the Nursing and Midwifery Order 2001 will be amended as set out in articles 3 to 9.

## **Article 3 – Amendment to article 12A**

Article 3 amends article 12A of the Order (which will be inserted by the Health Care and Associated Professions (Indemnity Arrangements) Order 2014 see Part 7 of this Order as set out in Annex A) to provide that the Council can disclose information relating to a person's indemnity arrangement for the purposes of verifying that information.

## **Article 4 – Amendment to article 25**

Article 4 amends article 25(1) to provide that a person authorised by the Council may require any person to supply information for the purposes of assisting the Council, any of its Practice Committees, the Registrar or the Case examiners in carrying out Fitness-to-Practise functions. This provision is extended to requiring the provision of information to assist the Registrar and Case Examiners as a result of the powers introduced by article 6 of this Order allowing the Registrar and the Case Examiners to carry out certain Investigating Committee and Council functions.

## **Article 5 – Amendments to article 26**

Article 5 amends article 26(2) of the Order to provide that, where an allegation is referred to the Investigating Committee, the Council, rather than the Investigating Committee, will notify the person concerned of the allegation and invite that person to submit written representations. It also amends article 26(11) of the Order to provide that the Investigating Committee may also make an interim order in accordance with article 31 after it has referred a case to another Practice Committee but before that Practice Committee has started to consider the case. This change is necessary as new information which suggests that an interim order may be appropriate might be received by the Council after the allegation has been referred to the Health Committee or to the Conduct and Competence Committee but before that Committee has begun its consideration of the case. Article 8 makes consequential amendments to article 31 of the Order (interim orders).

## **Article 6 – Insertion of articles 26A, 26B and 26C**

Article 26A provides that rules made under article 26(3)<sup>10</sup> may make provision for the Registrar or any other officer of the Council to exercise certain functions<sup>11</sup> of the Investigating Committee. By virtue of these provisions, Case Examiners, will investigate allegations of impairment of fitness to practise and will make case to answer decisions at the conclusion of the investigation stage.

Article 26B introduces a power for the Council to review a decision made by the Investigating Committee under article 26(2)(d)(i) of the Order or made by Case Examiners by virtue of rules made under article 26 of that Order that there is no case to answer and to make rules in connection with the carrying out of such a review.

Article 26C provides that the Council may make rules providing for the Registrar or any other officer of the Council to exercise the functions of the Council under articles 22 (allegations)<sup>12</sup>, 26(2)(a) (notification of allegation and invitation to submit written representations) and 26B(a) (review of a decision of no case to answer).<sup>13</sup>

## **Article 7 – Amendments to article 30**

Article 7 amends article 30 of the Order to allow the Health Committee or the Conduct and Competence Committee, before the expiry of a suspension order or a conditions of practice order, to review the order and (subject to article 29(6) and (7)), with effect from the expiry of the order, make any order falling within article 29(5) . It makes similar provision in respect of a review of a suspension order or a conditions of practice order undertaken on the application of the person concerned or where the Committee, at any time, considers that a review is necessary. This amendment is necessary to ensure that the Health Committee and the Conduct and Competence Committee can make a striking-off order in these circumstances.

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<sup>10</sup> Under article 26, the Investigating Committee must investigate any allegation referred to it in respect of impairment of fitness to practise or that an entry in the register has been fraudulently procured or incorrectly made. Article 26 specifies what the Investigating Committee must do when it receives an allegation. Article 26(3) provides that the Council shall make rules as to the procedure to be followed by the Investigating Committee in carrying out an investigation.

<sup>11</sup> These functions are those in article 26 paragraphs (1) (investigating allegations), (2)(b)(notifying the person making the allegation of representations received from the registrant), (2)(c) (taking such other steps as is reasonably practicable to obtain as much information about the case), (d) (considering whether there is a case to answer), (5) (notifying the person concerned and the person making the allegation whether there is a case to answer), (6) (where there is a case to answer, referring the allegation to the Health Committee or to the Conduct and Competence Committee) and (8) (where it is concluded that there is no case to answer, making a declaration to that effect when requested to do so or with consent of the person concerned).

<sup>12</sup> See paragraph 5 of the Schedule to the draft NMC (FTP) (Education, Registration and Registration Appeals) (Amendment) Rules Order of Council 2014 on which the NMC are consulting. This inserts a new rule 2A providing that the Registrar shall refer allegations to either the Investigating Committee (in relation to allegations of fraudulent or incorrect entries in the register) or to the Case Examiners (where the allegation is of impairment of fitness to practise).

<sup>13</sup> see paragraph 12 of the Schedule to the draft NMC (FTP)(Education, Registration and Registration Appeals) (Amendment) Rules Order of Council 2014 on which the NMC are consulting Paragraph 12 of the Schedule inserts new rule 7A to the NMC (Fitness to Practise) Rules 2004, providing that the Registrar may, in specified circumstances, carry out a review of a 'no case to answer' decision and specifies the procedure to be followed by the Registrar when the registrar decides to carry out such a review.

**Article 8 – Amendments to article 31**

Article 8 amends article 31 of the Order. This is necessary as a consequence of the amendment to article 26(11) of the Order (by article 5(b) of this draft Order) allowing the Investigating Committee to make an interim order after it has referred a case to the Health Committee or the Conduct and Competence Committee if that Committee has not begun its consideration of the case.

**Article 9 – Amendment to article 37**

Article 9 amends article 37 of the Order to remove the requirement for a Council member to chair the Registration Appeals Panel and to remove the requirement for this Panel to include a registered medical practitioner where the health of the person bringing the appeal is in issue.

**Q11 - Do you have any further comments on the draft order itself?**

## Summary of questions

- Q1. Do you agree with the proposal to give the NMC power to introduce Case Examiners in the Fitness-to-Practise process?
- Q2. Do you agree that the Investigating Committee should be able to make an interim order after it has referred an allegation to the Health Committee or to the Conduct and Competence Committee but before that Committee has begun its consideration of the case?
- Q3. Do you agree that the NMC should gain the power to review no case to answer decisions in Fitness-to-Practise proceedings?
- Q4. Do you agree that the requirement for a Council member to chair Registration Appeal Panels should be removed?
- Q5. Do you agree that the requirement for a registered medical practitioner to form part of the panel in cases where health is an issue, should be removed?
- Q6. Do you agree that a Health Committee panel or Conduct and Competence Committee should have the power to make a striking-off order in a health or lack of competence case provided the registrant has been the subject of a continuous substantive suspension or conditions of practice order for at least two years?
- Q7. Do you agree that the NMC should be given the power to disclose certain information relating to an individual's indemnity arrangement to third parties for the purpose of verification, in order to protect the public?
- Q8. Will the proposed changes affect the costs or administrative burden on your organisation or those you represent?
- An increase
  - A decrease
  - Stay the same
  - Some
  - Please explain your answer
- Q9. Are you aware of any particular groups who will be affected by this legislation?
- Q10. Are you aware of any groups for whom these proposed legislation changes could have a detrimental effect?
- Q11. Do you have any comments on the draft order itself?



# Annex A

This Annex sets out Part 7 of the draft Health Care and Associated Professions (Indemnity Arrangements) Order 2014 that makes amendments to the Nursing and Midwifery Order 2001, to introduce arrangements in legislation in relation to indemnity arrangements and professional liability insurance. It also amends the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules in relation to evidence of indemnity.

The Health Care and Associated Professions (Indemnity Arrangements) Order 2014 will be in force before this Section 60.

## PART 7

### Amendments to the Nursing and Midwifery Order 2001 and related matters

The Nursing and Midwifery Order 2001<sup>(14)</sup> is amended in accordance with paragraphs 24 to 29.

#### Amendment of article 9

In article 9<sup>(15)</sup> (registration), in paragraph (2), after sub-paragraph (a) insert—

“(aa) satisfies the Registrar that there is in force in relation to the applicant, or there will be as necessary for the purpose of complying with article 12A, appropriate cover under an indemnity arrangement;”.

#### Amendment of article 10

In article 10<sup>(16)</sup> (renewal of registration and readmission)—

in paragraph (2), after sub-paragraph (a) insert—

“(aa) satisfies the Registrar that there is in force in relation to the applicant or there will be as necessary for the purpose of complying with article 12A, appropriate cover under an indemnity arrangement;”;  
and

in paragraph (4), after sub-paragraph (a) (but before the following “and”) insert—

“(aa) the applicant satisfies the Registrar that there is in force in relation to the applicant or there will be as necessary for the purpose of complying with article 12A, appropriate cover under an indemnity arrangement;”.

#### New article 12A

After article 12 insert—

##### “Indemnity arrangements

**12A.**—(1) Each practising registrant must have in force in relation to that registrant an indemnity arrangement which provides appropriate cover for practising as such.

(2) For the purposes of this article, an “indemnity arrangement” may comprise—

- (a) a policy of insurance;
- (b) an arrangement made for the purposes of indemnifying a person;
- (c) a combination of the two.

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<sup>(14)</sup> S.I. 2002/253.

<sup>(15)</sup> Amended by S.I. 2007/3101.

<sup>(16)</sup> Amended by S.I. 2007/3101.

(3) For the purposes of this article, “appropriate cover”, in relation to practice as a registered nurse or midwife, means cover against liabilities that may be incurred in practising as such which is appropriate, having regard to the nature and extent of the risks of practising as such.

(4) The Council may make rules in connection with the information to be provided to the Registrar—

- (a) by or in respect of a person applying for registration (including an application for restoration or readmission) for the purpose of determining whether or not the Registrar is satisfied that if the person is registered, there will be in force in relation to that person, by the time that person begins to practise an indemnity arrangement which provides appropriate cover;
- (b) by or in respect of a person applying for renewal of their registration for the purpose of determining whether or not the Registrar is satisfied that if the person’s registration is renewed, there will be in force in relation to that person, by the time that person resumes practice an indemnity arrangement which provides appropriate cover; and
- (c) by or in respect of a registrant for the purposes of determining, whether at any time, there is in force in relation to the registrant an indemnity arrangement which provides appropriate cover.

(5) Rules made under paragraph (4) may require information to be provided—

- (a) at the request of the Registrar; or
- (b) on such dates or at such intervals as the Registrar may determine, either generally or in relation to individual registrants or registrants of a particular description.

(6) The Council may also make rules requiring a registrant to inform the Registrar if there ceases to be in force in relation to that registrant appropriate cover under an indemnity arrangement.

(7) The Council may also make rules requiring a registrant to provide the Registrar with such information as is necessary for the purpose of satisfying the Registrar that there is or will be in force in relation to that registrant appropriate cover provided under an indemnity arrangement by an employer.

(8) If a registrant is in breach of paragraph (1)—

- (a) the Registrar may remove that person from the register; or
- (b) the person’s fitness to practise may be treated for the purposes of article 22(1)(a)(i) as being impaired by reason of misconduct, and the Registrar may accordingly refer the matter to persons appointed by it under article 22(5)(b)(i) (where rules under article 23 provide) or to a Practice Committee under article 22(5)(b)(ii).

(9) If an applicant breaches rules under paragraph (4), or there is a breach of rules under that paragraph in respect of the applicant the Registrar may refuse the applicant’s application for—

- (a) admission (or readmission) to the register;
- (b) restoration to the register; or
- (c) renewal.

(10) If a registrant breaches rules under paragraph (4)(b) or (c), that person’s fitness to practise may be treated for the purposes of article 22(1)(a)(i) as being impaired by reason of misconduct, and the Registrar may accordingly refer the matter to persons appointed by it under article 22(5)(b)(i) (where rules under article 23 provide) or to a Practice Committee under article 22(5)(b)(ii) .

(11) This article does not apply to a person who has an entitlement to be registered under article 39A (visiting general system nurses from relevant European States), or article 39 and Schedule 2A (visiting midwives, and certain nurses from relevant European States).”.

### **Amendment of article 33**

In article 33 (restoration to the register of persons who have been struck off) in paragraph (7)(a), after “the relevant part of the register” insert “on his satisfying the Registrar as mentioned in article 10(4)(aa),”.

### **Amendment of article 37**

In article 37(17) (appeals against Registrar’s decisions)—  
in paragraph (1), after sub-paragraph (aa) insert—

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<sup>(17)</sup> Amended by S.I. 2007/3101.

“(ab) removes the name of a registrant from the register on the grounds that the registrant has failed to satisfy the Registrar that there is in force in relation to the registrant appropriate cover under an indemnity arrangement;”;

after paragraph (1), insert—

“(1A) Paragraph (1)(ab) does not apply where the removal is in consequence of a refusal of an application for renewal (including an application for readmission or restoration where registration has lapsed).”; and

after paragraph (2A), insert—

“(2B) No appeal lies to the Council if the complaint of the person aggrieved is, in effect, that a provision of rules under article 7, 9, 10 or 12A is invalid.”.

### **Amendment of Schedule 3**

In Schedule 4(**18**) (interpretation), insert the following definitions at the appropriate place—

““appropriate cover” is to be construed in accordance with article 11A(3);”;and

““indemnity arrangement” is to be construed in accordance with article 11A(2);”

The Schedule to the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules Order of Council 2004(**19**) is amended in accordance with paragraphs 31 to 33.

### **Amendment of rule 5**

In rule 5(**20**) (application for admission to a part of the register), in paragraph (2), omit the “and” at the end of sub-paragraph (a)(iv) and after paragraph (a) insert—

“(aa) evidence that there is in force in relation to the applicant, or will be as necessary for the purpose of complying with article 12A of the Order, appropriate cover under an indemnity arrangement;”.

### **Amendment of rule 13**

In rule 13(**21**) (renewal of registration), in paragraph (1), after sub-paragraph (a) insert—

“(aa) evidence that there is in force in relation to the applicant, or there will be as necessary for the purpose of complying with article 12A of the Order, appropriate cover under an indemnity arrangement;”.

### **Amendment of rule 15**

In rule 15(**22**) (readmission to the register), in paragraph (2), after “Rules 5(1)” insert “, (2)(aa) and (b)”.

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<sup>(18)</sup> Schedule 4 has been amended by S.I. 2007/3101 and 2008/1485.

<sup>(19)</sup> S.I. 2004/1767.

<sup>(20)</sup> Amended by S.I. 2007/3101.

<sup>(21)</sup> Amended by S.I. 2005/3354.

<sup>(22)</sup> Amended by S.I. 2007/3101.

# Responding to this consultation

## Consultation process

This document launches a consultation on proposed changes to the Nursing and Midwifery Order 2001.

The consultation is being run, as far as is practical, in accordance with the Cabinet Office Code of Practice on Consultations (reproduced below). The closing date for the consultation is 12<sup>th</sup> June 2014.

There is a questionnaire on the GOV.UK website which can be printed and sent by post to: **NMC Section 60 Consultation, Professional Standards, 2N09, Department of Health, Quarry House, Quarry Hill, Leeds, LS2 7UE.**

Completed questionnaires can also be sent electronically by e-mail to: [HRDListening@dh.gsi.gov.uk](mailto:HRDListening@dh.gsi.gov.uk)

Alternatively you may also complete the online consultation response document at: <http://consultations.dh.gov.uk>

It will help us to analyse the responses if respondents fill in the online consultation response document but responses that do not follow the structure of the questionnaire will be considered equally. It would also help if responses were sent in Word format, rather than in pdf format.

## Criteria for consultation

This consultation follows the Government Code of Practice, in particular we aim to:

- Formally consult at a stage where there is scope to influence the policy outcome;
- Consult for a sufficient period.
- Be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- Ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- Keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;
- Analyse responses carefully and give clear feedback to participants following the consultation;
- Ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at: [www.bis.gov.uk/policies/better-regulation/consultation-guidance](http://www.bis.gov.uk/policies/better-regulation/consultation-guidance)

## Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter ([www.dh.gov.uk/en/FreedomOfInformation/DH\\_088010](http://www.dh.gov.uk/en/FreedomOfInformation/DH_088010)).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

## Summary of consultation responses

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the GOV.UK website ([www.gov.uk/dh](http://www.gov.uk/dh)).