



Department  
of Health

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

Consultation Response: *26 September 2014*

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- Consultation Response.

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

*Consultation Report: 26 September 2014*

Prepared by Professional Standards Branch, Strategy and External Relations Directorate,  
Department of Health

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## Executive summary

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. Therefore on 17 April 2014, the Department of Health published a UK-wide consultation paper '*Nursing and Midwifery Council – proposed changes to governing legislation*', on behalf of the four UK Health Departments.

The implementation of these recommendations requires a Section 60 Order to amend the Nursing and Midwifery Order 2001 and in accordance with the requirements of Section 60 of the Health Act 1999, these recommendations and the draft Order that will implement this requirement, have been considered at length via this UK-wide consultation.

The consultation paper was accompanied by the draft Order, which set out the Government's proposed amendments to the Nursing and Midwifery Order 2001, the governing legislative framework which sets out the roles, functions and processes of the Nursing and Midwifery Council.

The consultation was available on the Department of Health website for the period between 17 April and 12 June 2014. The Department received 21 consultation responses and this document provides a summary of those responses.

The purpose of these amendments is to improve the efficiency of the NMC's fitness to practise processes and ensure greater consistency in decision making. They will also help maintain public confidence in the NMC as an effective regulator.

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 ensure that the Health Committee (HC) and the Conduct and Competence Committee (CCC) can make a striking-off order in an appropriate case when a registrant is not fit to practice 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.

The majority of respondents to the consultation supported all of the proposals and recognised the significant benefits resulting from giving the NMC strengthened powers through this Section 60 Order, which will enable the NMC to carry out its fitness to practise role and functions more effectively. This will result in more efficient processes to benefit registrants, improved public protection and an increase in public confidence in the NMC.

A number of issues were raised that were misunderstandings about the impact or the policy intention of the proposals. We have tried to clarify these misunderstandings in the consultation response chapter. In addition, a number of points were raised about the fitness to practice processes confusing this consultation with the parallel consultation the NMC had carried out on its Rules and they have been passed onto the NMC for consideration.

These proposed amendments will also 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. The NMC have been consulting separately on the Rules and will publish their consultation response in October 2014.

This Government believes that the strengthened powers introduced by this Section 60 Order will enable the NMC to better carry out its fitness to practise role and functions resulting in benefits to registrants, improved public protection and an increase in public confidence in the NMC through proportionate regulation of nurses and midwives. The Department of Health is firmly committed to working with the NMC to enable it to achieve this goal.

An assessment of the impacts of the proposals has been carried out. This includes consideration of any equality related issues. A full Equalities Analysis will be published alongside this consultation response.

## Background

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.

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.

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.

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 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.

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) resulting in a more efficient process which will improve public protection and increase the public's confidence in nurses and midwives.

In parallel, the NMC is making amendments to introduce new provisions to the Fitness to Practise Rules and Registration Rules that will draw their legal basis from the proposals set out in the Order

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 Section 60 Order and the associated procedural amendments the NMC is making to its Fitness to Practise Rules and Registration Rules.

This Government believes that strengthened powers introduced by this Section 60 Order will enable the NMC to better carry out its fitness to practise role and functions resulting in improved public protection and an increase in public confidence in the NMC.

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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>



## Consultation process

The Department consulted on a UK-wide basis, on behalf of the four UK Health Departments, for an 8 week period on the draft Order to make a small number of amendments to the Nursing and Midwifery Order 2001.

The consultation ran from 17 April 2014 to 12 June 2014 and was taken forward in accordance with the requirements of Section 60 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.

The consultation sought views on the provisions in the draft Order that will:

- 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);
- 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;
- 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;
- 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;
- 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;

- 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;
- provide that the Investigating Committee (IC) may also make an interim order after it has referred a case to the Health Committee (HC) or the Conduct and Competence Committee (CCC) if that Committee has not begun its consideration of the case (at present once the IC refers a case to the CCC or HC the power to make an interim order only rests with the CCC or HC).

The consultation invited respondents to consider 11 questions about the effects that these provisions could have, and sought clarification on the costs and benefits or any impacts as a result of the proposals, both to individual regulated healthcare professional and to the regulators themselves.

The consultation also asked respondents to consider any equalities issues that could result from implementing the proposals.

The Department received 21 responses; the respondents identified themselves as follows:

<b>Category</b>	<b>Number of respondents</b>	<b>Percentage</b>
A member of the public	2	9%
A health or social care professional	10	48%
On behalf of an organisation	8	38%
Not answered	1	5%
<b>Total</b>	<b>21</b>	<b>100%</b>

It should be noted that not all of the respondents answered all of the questions in the consultation.

The Department would like to thank all of those who responded to this consultation and is grateful to them for their input.

## Consultation responses

### **Q1: Do you agree with the proposal to give the NMC power to introduce Case Examiners in the fitness to practise process?**

Around 71% (15) of respondents agreed with this proposal and the majority thought that the introduction of Case Examiners will result in more robust and consistent decisions, a quicker fitness to practise process and reduced costs. It was recognised that this is a skilled role with a clear remit and that having a core staff, with the required skills and expertise and appropriate support and training in place, is sensible. A view was expressed that there should also be appropriate quality assurance monitoring to review decisions to ensure both examiners are equally involved in decisions. One point was raised about the importance of the diversity of examiners, especially in regard to ethnicity and gender, to contribute to fairer and informed decisions. A view was expressed this new power will ensure consistency with General Medical Council (GMC) and, in addition to focusing on consistency in decision making and a faster process, there should be focus on benefit realisation from the (GMC) about the effectiveness of the decision's made and using this information to promote improvements in care in order to maintain public safety.

There were 10% (2) of respondents who disagreed with this proposal and 5% (1) were unsure. One respondent thought that as Case Examiners will be employees of the NMC they will be target driven rather than acting as independent professionals. This will not be the case. Although employed by NMC, Case Examiners will be both registrant and lay (non-registrant) and experienced senior decision makers who are used to making independent decisions. A decision on whether there is a case to answer will be based solely on the information they have been provided with. Another point made was that the power was not necessary because the NMC already carries out these functions. This is a misunderstanding because the NMC does not have Case Examiners, the functions that will be carried out by case examiners, in the investigating stages of the fitness to practise process, is currently carried out by a panel of the Investigating Committee. This current process has a number of efficiency and consistency issues which were set out in the consultation document.

One respondent, while agreeing that Case Examiners would provide for a more efficient and speedier fitness to practise process, expressed views that a case must be fully investigated with the registrant having appropriate time to respond before it is passed on to the Case Examiners to review. In addition, the registrant should receive appropriate notification of the Case

Examiners' decision. The Department understands that registrants are currently informed of Investigating Committee's decisions and this will remain so following the introduction of Case Examiners.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
15	2	1	3
71%	10%	5%	14%

**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?**

Eighty per cent (17) of respondents agreed with this proposal with many comments considering that it would speed up the fitness to practise process, improve public confidence that complaints are being taken seriously and improve public protection. One respondent thought that this proposal would provide a framework of action for both employers and employees, although they did not expand further on how this framework would work. A view was expressed that the IC are specialists in undertaking these proceedings, which involve risk assessment considerations, whereas panels dealing with substantive resolution have a different approach. Another view expressed was that if IC's are given this new power then the processes put in place to implement it must be rigorous to ensure reliable systems and outcomes. Points were made that it would be appropriate for there to be a mechanism for an interim order to be imposed at any stage of a case and a registrant should be given adequate opportunity to prepare and present their case if an interim order was been considered. Another respondent thought that the interim order should be reviewed every six months to avoid unnecessary restriction to practise for registrants awaiting a committee hearing date.

Only 5% (1) of respondents disagreed with this proposal and 10% (2) were unsure. Concern was raised that the proposal would result in the registrant being considered guilty before all the facts of the case are heard before a full committee hearing. One respondent agreed providing there was provision made for the registrant to be able to request an interim review hearing if new evidence is brought to light. The purpose of the interim order is to protect the public by restricting or removing a registrant's right to practice, if there is evidence that they could pose a risk of serious harm to the public or patients, while further investigations are carried out and a substantive decision can be made in the case. This power to make an interim order already exists, but currently once the IC refers an allegation to the CCC or to the HC, an interim order can then only be imposed by the CCC or HC. This means that there is a potential gap in that new information might come to light after referral to the CCC or to the HC but before the CCC or HC has convened to consider the case. The amendment introduced by this order will mean that, in such circumstances, the IC could make the interim order. The proposal consulted upon does not seek to introduce interim orders; the purpose of this proposal is to ensure that any gaps in the process are closed and that public protection is enhanced.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
17	1	2	1
80%	5%	10%	5%

**Q3: Do you agree that the NMC should gain the power to review no case to answer decisions in fitness to practise proceedings?**

Around 71% (15) of respondents agreed with this proposal commenting that it is an important step for public safety and ensuring accountability and transparency and is in line with NMC's functions to protect the public and uphold the reputation of the profession. However, most respondents thought that the power to review no case to answer decision should only be for cases where new evidence came to light. Views were also expressed that there needed to be appropriate governance and strict guidance setting out on what grounds the decision can be reviewed and clear timelines put in place so the registrant would know when the matter would be finally closed.

There were 14% (3) of respondents who disagreed with this proposal and 10% (2) were unsure. One view expressed was that once a decision has been made it should not be revisited. A concern was raised that there is a risk that the independence of the fitness to practise process becomes compromised as a consequence of political pressure to meddle. One respondent considered that if the current systems and processes are reliable and appropriately quality assured then this new power is an unnecessary step. There is a place for review of all NMC decisions for quality assurance and benefit realisation to further improve quality decision making. They also considered that if the NMC is given this power, it would be important to consider consistency with the GMC's process although they did not say how or why. Another respondent expressed the view that the NMC should not have the power to review these decisions because they considered that current case law does not allow regulatory bodies, of their own volition, to reverse a decision of the Investigating Committee. A reversal can only be sought at High Court. However, the NMC consider that having no option to review a no case to answer decision represents a flaw in their regulatory arrangements and adding this power will improve public protection. It should be noted that the NMC will only use this review power if new evidence came to light that had a material impact on the original decision or it came to light that a decision is materially flawed and in the public interest to do so. The limits on the use of this power are set out in the NMC's Fitness to Practise Rules and Registration Rules.

One respondent considered that to ensure fairness the registrant should also be able to seek a review of decisions where there is a case to answer. A one year time limit for starting a review of no case to answer decisions would be appropriate providing the registrant also had one year to review case to answer decisions. Also, the registrant should be notified of the reason for the review of the no case to answer decision, and be given 28 days to respond and submit further

evidence. The provisions as drafted allow for any party to raise any new evidence with the NMC, who would look, based on the new evidence presented, at whether the case met the conditions for a review or not.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
15	3	2	1
71%	14%	10%	5%



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

There were 85% (18) of respondents who agreed with this proposal and supported the clear separation of duties between the operational and governance functions which would avoid suggestions of perceived bias and conflict of interest. Some also considered that this proposal would result in cases being heard quicker. Other views expressed were that the Council need to have oversight of processes but do not need to have direct involvement, a panel Chair should have had some healthcare practice within the past 3 years and it is important to ensure they are fully supported in their role. Under the proposals the Chair of the Registration Appeal Panel will be an existing Chair of a practice committee and may be either a registrant or lay member.

Ten per cent (2) of respondents disagreed with this proposal - one thought that a council member should always chair a panel and one commented that the NMC was supposed to be an independent body and too much information was controlled by the Department of Health. This is a misunderstanding of the process. The NMC is an independent body and the Department has no involvement with the running of the NMC or with any of its Committees. Under Section 60 of the Health Act, amendments to the Nursing and Midwifery Order 2001 are made by an Order in Council, which is issued by the Queen “by and with the advice of her Majesty’s Privy Council”. The Ddepartment facilitates the legislation through parliament. The NMC and the Department work together on an agreed way forward, with the Department providing oversight on the proposals and a vehicle to implement the legislative changes.

The purpose of this amendment is to increase impartiality of the panel by removing conflict of interest in the panel Chair position. This would ensure that the panel Chair is an independently contracted person and will bring Registration Appeal Panels in line with all other Fitness to Practise panels.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
18	2	0	1
85%	10%	0%	5%

**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?**

There were 71% (15) of respondents who agreed with this proposal, with many commenting that it was more appropriate for medical advice to be provided by expert witnesses and medical reports. This would ensure consistency between registration appeals and fitness to practise appeals. One view expressed was that the current position was an unnecessary requirement which adds to the cost of the panel hearing. One suggestion was that for complex cases, and only in exceptional circumstances, an expert medical practitioner could be employed on a 'consultancy' basis. However, this function is currently fulfilled by an expert witness so this provision would duplicate unnecessarily adding undue burden and no added value.

There were 14% (3) of respondents who disagreed with this proposal and 10% (2) were unsure. Comments were that medical practitioners are sufficiently qualified and experienced to be a competent panel member and have a specific level of knowledge (or can easily access it) to inform risk assessment while the hearing is ongoing. Although we agree with this comment, the same outcome can also be achieved by medical experts called to witness. Having an independent medical witness will ensure that the panel remain detached from the process and is therefore more able to make an independent decision, so making the process more robust and transparent.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
15	3	2	1
70%	15%	10%	5%

**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?**

Around 85% (18) of respondents agreed with this proposal and considered it important for public protection and for the public to have confidence in the profession. Other comments were that this would streamline the fitness to practise process and there was support of the need to empower decision making in the process without delay. One view expressed was that this striking-off order should not be automatic after the two years, but decisions should be made on a case by case basis taking account of the individual merits of the case. Some respondents also thought that a registrant should have the right to voluntarily remove themselves from the register at any time after the supervision order or condition of practice order has been made. Especially in cases where it is clear the registrant has a disability which will prevent them from practising or the realisation that they will never reach the level of competence required of them.

The current legislative regime does not allow the NMC to agree to voluntary removal from the register whilst the registrant remains the subject of a substantive order following a final fitness to practise hearing where there has been a finding of impairment of fitness to practise. Neither can there be an administrative lapsing of registration in these circumstances.

Ten per cent (2) of respondents disagreed with this proposal. Although supportive of the proposal for conduct cases one respondent thought in cases where performance was impaired because of adverse health this would be unfair to the registrant and potentially discriminatory. It was also considered that the proposal was not in line with some other regulators who do not make striking off orders in these circumstances. It was suggested that instead the registrant should be given an indefinite suspension order after the two years, which would enable them to re-apply for registration should their health improve. However, the legislation already makes provision for any striking-off order to be reviewed, so this power could be used should a person's health improve. This issue was also raised under questions 9 and 10 where it is discussed more fully.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
18	2	0	1
85.0%	10.0%	0.0%	5.0%

**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?**

There were 71% (15) of respondents agreed with this proposal. The majority considered that as it would be a legal requirement for practising nurses and practising midwives to have indemnity in place, it is reasonable that certain information about their arrangements could be disclosed. Comments were made that this was important for public protection. However it was considered that this should be subject to appropriate governance and clear guidance to ensure scrutiny of the third party request and that the information is kept up to date. It should be noted that the purpose of the power allows the NMC to disclose third parties e.g. indemnity providers, employers etc only for NMC purposes to ensure that appropriate indemnity cover is in place.

Ten per cent (2) disagreed with this proposal and 14% (3) were unsure. Concern was raised that it was not the NMC's role to interfere in indemnity insurance and pass information onto third parties and more clarification is required to define the use of appropriate when taking appropriate steps to monitor compliance with the new indemnity requirements. However the Health Care and Associated Professions (Indemnity Arrangements) Order 2014 requires that each practising nurse or practising midwife must have appropriate indemnity arrangements in place as a condition of their registration. The new power, introduced by this Order, to allow disclosure to verify indemnity information is being introduced so that the NMC can check that indemnity arrangements are in fact in place and provide sufficient cover against the liabilities that may be incurred by a practising nurse and practising midwife registrant and is appropriate to the nature and extent of the risks of their practise.

Other comments were that it was unclear why the NMC would need to do this, it should be sufficient for the NMC to assure the third party that the registrant is indemnified and any information held by the NMC should be already in the public domain. This is a misunderstanding, the NMC has no existing power to disclose such information and does not wish to rely on the registrant's consent in every case, which could be administratively burdensome. This new disclosure power is narrow and limited to disclosure of information that it has received in respect of indemnity arrangements and for verification purposes only.

Other comments questioned why the NMC alone had been given this power and not the other regulators and why this had not been done through the Indemnity Section 60 Order. Not all regulators require or want this power but the NMC has no other power to use in this regard.

<b>Agree</b>	<b>Disagree</b>	<b>Unsure</b>	<b>Not answered</b>
15	2	3	1
71%	10%	14%	5%

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

There were 57% (12) respondents thought that the impact of the fitness to practice process on their organisation would stay the same when these powers are introduced. The majority of these respondents thought that the new processes would speed up fitness to practise decisions, reducing the length of time a registrant is taken out of the workplace and unable to continue to practise. One comment was that improving the timeliness of the process is likely to release staff time in terms of seeking feedback regarding dates and outcomes etc. One respondent commented that there is not enough evidence at this stage to fully comment.

Fourteen per cent (3) of respondents thought there would be a decrease in organisational costs because the fitness to practise process would result in speedier decisions enabling decision about their staff to be made sooner which would release them from costs associated with a member of staff being out of the workplace e.g. back filling, business planning and HR support.

Ten per cent (2) of respondents thought there would be an increase to their organisational costs because although overall the fitness to practise process would speed up, the new power to review no case to answer decision would place an additional administrative burden on them in re-opening case files, liaising with registrants and responding to the case review. It should be noted that the NMC would only review no case to answer decisions, where the decision is flawed or when new evidence came to light and it is in the public interest to do so (as set out in their Rules) . It is therefore considered that numbers would be small and this burden would be minimal and is outweighed by the NMC's duty to protect patients and the public and ensure professional standards are maintained.

Additionally, a medical school considered that they would have additional costs in record keeping, establishing new monitoring systems, education, quality assurance and management of risk. However no detailed information was provided to enable further analysis.

<b>An increase</b>	<b>A decrease</b>	<b>Stay the same</b>	<b>Some</b>	<b>Not answered</b>
2	3	12	0	4
10%	14%	57%	0%	19%

The information collected as part of question 8 has been fed into the assessment of impacts of these proposals

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

<b>Yes</b>	<b>No</b>	<b>Unsure</b>	<b>Not answered</b>
6	12	2	1
29%	57%	10%	5%

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

<b>Yes</b>	<b>No</b>	<b>Unsure</b>	<b>Not answered</b>
4	14	2	2
19%	67%	10%	10%

There were a range of responses to these questions. The need for more diversity on panels was raised, in particular a point that black, minority and ethnic (BME) employees are disproportionately represented within the disciplinary systems of both employers and regulators and that better insight into ethnic health and social issues was required. These comments have been fed back to the NMC to consider.

Concerns were raised that members of the public may be put at risk if decisions are target driven and there is a need to ensure that the NMC's rules, drafted to implement this legislation, are done so carefully with fairness to all in mind. This comment has also been fed back to the NMC to consider.

A comment was made that independent midwives without indemnity insurance would not be able to practice. It should be noted that the legal requirement for practising midwives to have appropriate indemnity arrangements in place is not within the scope of this Order.

A concern was raised that in the majority of cases a registrant whose fitness to practise is impaired on adverse health grounds will be considered a 'disabled person' for the purposes of equality legislation. Therefore it was suggested that the striking off power, in these cases, is more likely to affect or disadvantage disabled registrants than non-disabled.

However, the NMC is not being given new powers to enable it to make a striking-off order in a health case. In a recent High Court case<sup>2</sup> the judge's comments threw doubt on the existing law and the amendment is intended to clarify the legal position. Article 29(6) of the 2001 Order envisages a full range of sanctions being available in all fitness to practise cases but in relation to a health or lack of competence case, there cannot be a striking-off order unless the registrant has been continuously suspended for 2 years or has been subject to a conditions of practice order for this period. The NMC does not have a power to indefinitely suspend following a full fitness to practice hearing therefore the periodic reviews of a substantive suspension order can be intrusive and upsetting for a registrant and can be in itself detrimental to health. In some cases it is the registrants themselves who wish to come off the register.

The Department has discussed this in detail with the respondent who raised the concern and they have retracted this concern on the understanding that if a registrant subsequently recovers and wishes to practise again there is a power under article 30(7) of the 2001 Order which allows for a review of the striking off order and for restoration to the register.

The information collected as part of questions 9 and 10 has been fed into the full equalities impact analysis of these proposals. The equalities analysis will accompany the Order when it is laid in Parliament.

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<sup>2</sup> Okede v Nursing and Midwifery Council (2013) EWCH 714 (Admin)



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

The majority, 76% (16), of respondents did not answer this question and 24% (5) commented on the draft Order. A view was expressed that the Order was clearly set out and easily understood. Unison reiterated their point that registrants should be informed of the possible review of no case to answer decision in writing when being informed of the decision. This point has been discussed under question 3. They also advised they would support the introduction of the possibility of consensual disposal via the Case Examiners. However this is not in the scope of the powers being introduced. They made two further comments but these were about the NMC's Rules and these have been passed on the NMC for consideration.

Two respondents raised concerns about government departments interfering with the running and accountability of the NMC. This is a misunderstanding. The NMC is an independent statutory body however any changes to its governing legislative framework are subject to the requirements of Section 60 of the Health Act 1999. Therefore the Department has an operational role in facilitating these legislative changes through Parliament. The proposals set out in the Order give the NMC powers to carry out their statutory functions, the processes that are put in place to do this are set out in the NMC's Rules which they are responsible for setting and amending. Therefore in parallel, the NMC is making amendments to introduce new provisions to the Fitness to Practise Rules and Registration Rules that will draw their legal basis from these proposals.

The Professional Standards Authority (PSA) put forward some comments on the wording of the draft Order and these have been discussed with the Department's Legal Services, the NMC the PSA itself.

One respondent recommended that registrants should also have the power to request a review of a referral to a practice committee. They also expressed views that they would support the introduction of the possibility of consensual disposal via the Case Examiners.