

EXPLANATORY MEMORANDUM TO
THE NURSING AND MIDWIFERY (AMENDMENT) ORDER 2017
2017 No. 321

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Order amends the Nursing and Midwifery Order 2001 (NMO) (S.I. 2002/253)¹ removing the statutory requirement for the Nursing and Midwifery Council (NMC) to convene a Committee (who advise the Council at the Council's request, or otherwise, on matters affecting midwifery and who the Council must consult on the exercise of its functions in so far as they affect midwifery) and removing provisions relating to the local supervision of midwives and makes consequential amendments in that regard. It also amends Part V of the 2001 Order in respect of certain fitness to practise functions of the NMC in relation to both nurses and midwives.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This Order supersedes the Nursing and Midwifery (Amendment) Order 2017 which was laid in Parliament on 12th January 2017 and withdrawn on 25th January 2017. This was necessary in order to correct a defective commencement provision in article 1 of the draft Order. Certain provisions of this Order will come into force on 31st March 2017. The Order will be made at the March meeting of the Privy Council, therefore these provisions will come into force before a 21 day period has elapsed between the making of the Order and its coming into force. The Department considers that this period is not necessary in respect of this Order as the Order does not significantly diminish the legal rights of the persons affected, nor does it impose significant, more onerous duties on persons thereby requiring them to adopt different behaviours. The Order does not involve criminal sanctions.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

- 4.1 The Order amends the NMO to remove provisions relating to the Midwifery Committee and to the local supervision of midwives and makes consequential amendments in that regard. It also amends Part V of the NMO in respect of certain fitness to practise functions of the NMC.

¹ <http://www.legislation.gov.uk/uksi/2002/253/contents/made>

- 4.2 The amendments to the NMO, by this Order, provide the NMC with additional rule making powers in respect of its fitness to practise functions. The NMC will use these new powers and existing powers, to amend the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (which are set out in the Schedule to S.I. 2002/1671). The NMC ran a consultation on the proposed changes to the fitness to practise rules between 24 October and 19 December 2016. Further information can be found at the following link:

<https://www.nmc.org.uk/about-us/consultations/current-consultations/modernising-fitness-to-practise>

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom
5.2 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 Philip Dunne, Minister of State for Health has made the following statement regarding Human Rights:

“In our view the provisions of The Nursing and Midwifery (Amendment) Order 2017 are compatible with the Convention Rights”.

7. Policy background

What is being done and why

- 7.1 The NMO is the NMC’s governing legislation. It sets out the regulatory framework for both nursing and midwifery. In all key aspects - education, registration, standards and fitness to practise - the same framework applies to both professions. However the NMO currently contains an additional set of provisions unique to midwifery, specifically:

- a role for Local Supervising Authorities (LSAs), and through rules, Local Supervising Authority Midwifery Officers (LSAMOs) and Supervisors of Midwives (SoMs) in discharging supervisory functions for midwifery including determining whether to suspend a midwife from practice;
- a requirement for there to be a midwifery committee to advise the NMC Council on matters relating to midwifery.

- 7.2 There are no similar provisions to those set out above in relation to nursing or in relation to any other regulated health and care profession.

- 7.3 Removal of statutory supervision provisions

For historical reasons, midwives have been subject to an additional tier of local regulation. It has become increasingly clear over recent years that this additional tier is unnecessary, as midwives are no more inherently dangerous or risky practitioners than doctors, nurses or other healthcare professionals. It is also potentially detrimental to public protection, as conflicts may arise between the exercise of local supervision and investigation and the need for appropriate and independent regulatory action.

There have been a number of reviews in recent years which have commented on the distinct model of midwifery regulation and have made a number of recommendations.

Most notable are the Parliamentary and Health Service Ombudsman (PHSO) Report², the Kings Fund Report – Midwifery regulation in the UK³ and the Kirkup Report – The Report of the Morecambe Bay Investigation⁴. They all recommended midwifery supervision and regulation should be separate, with the NMC being in direct control of regulatory activity.

The proposals in this Order will result in a clear separation of supervision and regulation of midwives. The NMC, as the regulator, will be in direct control of all regulatory activity under its existing framework. The Secretary of State for Health accepted the recommendations of the Kirkup Review and the PHSO Report in relation to midwifery supervision and committed to amending the NMC's legislation.

The statutory requirement for a system of supervision is being removed from legislation to ensure midwifery supervisors will no longer be involved in regulatory investigations and sanctions. However, this does not mean a model of supervision will not exist in the future. The new model of midwifery supervision, focussing on support and development for midwives continues to be developed in each of the four countries through task forces working in collaboration with a range of stakeholders. The four countries are working towards introducing the new model of supervision in line with the removal of the current statutory requirements. This is anticipated to be 31st March 2017.

7.4 Removal of the statutory requirement for the NMC to have a midwifery committee

The proposal to remove the statutory Midwifery Committee is derived from the three UK Law Commissions' review⁵ of the regulation of health and (in England) social care professions which considered the streamlining of processes across healthcare regulators. This included the proposal that the regulators should be given broad rule-making powers to determine their own governance arrangements, including the ability to establish committees if they wish to do so. This should replace any statutory requirement to have particular committees. The Law Commissions concluded that all statutory committees, with the exception of fitness to practise and appointment committees should be abolished. Having a statutory committee providing an advisory role for a particular profession (midwives) in a professional regulator is unique.

The proposed change does not prevent the NMC from establishing committees or groups on midwifery or any other subject under its standing orders. It simply removes the statutory requirement. The NMC has established a strategic Midwifery Panel to advise the Council on securing appropriate midwifery input. This panel has four country representation and includes the Royal College of Midwives and a lay representative amongst others. As an additional measure, the NMC has appointed a Senior Midwifery Advisor to provide expert advice on midwifery issues.

7.5 Amendments to fitness to practise processes for nurses and midwives

In order for the NMC to continue to keep its fitness to practise processes up to date and ensure they are efficient and proportionate, the Department is proposing a number

² <http://www.ombudsman.org.uk/reports-and-consultations/reports/health/midwifery-supervision-and-regulation-recommendations-for-change>

³ <http://www.kingsfund.org.uk/projects/midwifery-regulation-united-kingdom>

⁴ <https://www.gov.uk/government/publications/morecambe-bay-investigation-report>

⁵ <http://www.lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/>

of changes to the NMC's fitness to practise functions. The proposed amendments in relation to the NMC's fitness to practise processes cover both nurses and midwives.

The fitness to practise changes proposed are:

- Giving the Investigating Committee (and through rules, the Case Examiners) the power to agree undertakings with a registrant at the end of the investigation stage of the fitness to practise process, where otherwise the case would have been referred to a Practice Committee, if it is determined that the agreement of undertakings would lead to a more proportionate resolution of a case, protect the public and address the concern about the professional.
- Giving the NMC powers to make rules in this regard, for example, to make provision for the consequences of a breach of undertakings. This Order will also extend the NMC's power to review decisions by the Investigating Committee or the Case Examiners to agree undertakings, rather than refer an allegation to the Fitness to Practise Committee and the power to review a decision that undertakings no longer apply.
- Giving the Investigating Committee (and through rules, the Case Examiners) power to issue a warning or give advice to a registrant, when the investigation concludes there is no case to answer, but the NMC has some concerns about a registrant's past practise or conduct.
- Replacing the Conduct and Competence Committee and the Health Committee with a single Fitness to Practise Committee. This will be more efficient, as currently cases must transfer between the two committees where there are issues of both conduct and health. The single Fitness to Practise Committee will be able to hear cases on all grounds, reducing the potential for protracted proceedings and stress on registrants and witnesses during such proceedings.
- Removing the requirement for the NMC to specify in rules the size of its Practice Committees. This means the NMC will no longer be required to set an upper limit on the total pool of panellists appointed to Practice Committees. It will give the NMC greater flexibility in meeting future needs of its fitness to practise processes, without having to amend its rules.
- Extending the time limit, from three months to six months, for second and subsequent reviews of interim orders. This change will reduce the number of hearings the NMC has to hold. Currently, reviewing interim orders every three months can hinder case progression. It will benefit registrants by reducing the number of hearings they are required to attend. The provision in the NMO requiring the NMC to review an interim order at any time where there is new evidence relating to that order will remain unchanged.
- Removing the mandatory requirement to hold a fitness to practise hearing in the country of the registrant's registered address. This will enable hearings and appeals to be heard where they are most convenient for all relevant parties.
- Enabling the Fitness to Practise Committee, in appropriate cases, to direct the Registrar that a suspension order or a conditions of practice order need not be reviewed before the expiry of that order. This will reduce the need for additional hearings where a substantive order is imposed on public interest grounds i.e. where the registrant does not present a current risk of harm to the public but where a sanction is considered necessary to declare and uphold the

standards of professional conduct required by members of the profession and for public confidence in the profession.

- Introducing a power to allow the court on an application by the NMC to extend an interim order, or on an application by a registrant, to replace an interim suspension order with an interim condition of practice order or vice versa, where appropriate. This will improve public protection by enabling the court to, where it considers necessary, replace an interim conditions of practice order with an interim suspension order. It will be fairer to a registrant subject to an interim suspension order, if the court considers they are safe to practise if they are subject to an interim conditions of practice order instead.
- Removing the requirement for specified persons, including governments of the four UK countries, to be notified when an allegation is referred to a Practice Committee. This is to remove an unnecessary burden on the NMC as at this stage there has been no finding of impairment of fitness to practise. The requirement to notify a registrant's employer, where known, will remain.

7.6 This Order also revokes the Nursing and Midwifery Council (Midwives) Rules Order of Council 2012 (S.I. 2012/30125) and amends the Nursing and Midwifery Council (Midwifery and Practice Committees)(Constitution) Rules Order of Council 2008 (S.I. 2008/3148) reflecting the changes to the NMO in respect of local supervision of midwives and the abolition of the Midwifery Committee.

Consolidation

7.7 The NMC will produce a consolidated version of the legislation amended by this Order for publication on its website at <https://www.nmc.org.uk/about-us/our-legal-framework/our-order-and-rules/>.

8. Consultation outcome

8.1 The Department ran a public consultation from 21 April to 17 June 2016. The Department received 1,424 responses to the consultation from individuals (mainly midwives) and organisations, such as the UK health and care professional regulators, trade unions and professional bodies.

Removal of statutory supervision of midwives - The majority of responses we received disagreed with the proposal to remove statutory supervision for midwives (84%). Key concerns were around patient safety and quality assurance if statutory supervision is removed; potential removal of support for midwives; and concerns relating to the NMC's ability to manage an increased fitness to practise referral rate. The Department acknowledges the concerns respondents have expressed through this consultation. However, we remain of the view that the NMC should be responsible for all aspects of midwifery regulation, consistent with the regulatory system in place for all other regulated healthcare professionals and that the findings of a number of reviews and reports support this view. We believe the concerns put forward by respondents as part of this consultation will be addressed by the new model of supervision being developed.

Removal of the statutory requirement for the NMC to have a midwifery committee - The majority of responses we received disagreed with the proposals to remove the statutory requirement for a midwifery committee (91%). The main concerns of those that disagreed were the potential loss of representation by midwives in the NMC; midwives and nurses being inappropriately treated as one profession;

and the detrimental impact this could have on the regulation of midwives and the profession as a whole.

Healthcare professional regulation has been moving away from the model of professional self-regulation to a model of independent professional regulation for many years. As set out in the consultation document, the Department does not think a statutory Midwifery Committee is consistent with this approach. The proposed change does not prevent the NMC from establishing committees or groups on midwifery or any other subject under its standing orders. It simply removes the statutory requirement.

The proposed change does not affect the NMC's statutory duty to consult midwives and those with an interest in midwifery on relevant matters. The NMC is required under Article 3(5) of the NMO to take into account the views of those it regulates and others when exercising its functions. In addition, Article 3(14) also places it under a duty to consult with affected groups when establishing standards and guidance.

Fitness to practise changes – These new powers are broadly in line with changes the Department has made to the legislation of a number of other healthcare regulators. They will enable the NMC to apply a more proportionate approach to regulation whilst still maintaining public protection.

The majority of respondents to the fitness to practise questions were supportive of the proposed amendments. However, 52% disagreed with the proposal to remove the requirement for the NMC to specify the size of the pool of panellists. 57% disagreed with the proposal to remove the requirement for the NMC to notify the governments of the four countries when an allegation is referred to a Practice Committee panel for a hearing.

Size of pool of panellists - Some respondents thought this change was about the number of panel members on an individual panel rather than the numbers in the overall pool of Practice Committee members. The proposed change will give the NMC greater operational flexibility in meeting the future needs of its fitness to practise proceedings. It will no longer have to amend its rules should the size of the pool need to be increased, for example due to an increase in hearings. This is consistent with the arrangements of other regulators.

Removal of the requirement for the NMC to notify the governments of the four countries, when an allegation is referred to a Practice Committee panel for a hearing - There were a number of common themes around ensuring robust information sharing systems; the current systems adding unnecessary bureaucracy; notification of allegations before they were proven; and keeping the NMC Register up to date. The Department and the devolved administrations consider the current requirement is out of date and creates an unnecessary burden on the NMC.

The requirement for the NMC to notify the registrant's employer and any other body which authorises him to practise (where known) will remain. The Department believes this is a more proportionate approach to disclosure.

8.2 After consideration of the responses and comments made as part of this consultation the Department intends to implement the proposals.

8.3 A more detailed analysis of the consultation outcome is available at <https://www.gov.uk/government/consultations/changes-to-nursing-and-midwifery-council-governing-legislation>.

9. Guidance

- 9.1 The NMC will issue guidance for the Investigating Committee and Case Examiners in relation to their new powers, to ensure they are applied consistently against set criteria.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is based on the number of self-employed nurses or midwives. We estimate there will be a £120,000 net present value direct benefit to business. These savings will be made through the improvement in efficiency to the NMC's current fitness to practise processes.
- 10.2 The impact on the public sector is expected to fall on the NMC. We estimate the changes will deliver savings for the NMC of £60 million over a 10 year period. These savings will be made through the improvement in efficiency to the NMC's current fitness to practise processes.
- 10.3 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

- 11.1 The legislation applies to activities undertaken by small businesses, as it can impact upon the registrant fees paid to the NMC by self-employed nurses and midwives. However, the estimated impact on these professionals is a benefit. Therefore, the policies outlined will add no regulatory burden to small businesses.

12. Monitoring & review

- 12.1 The duty under section 28 of the Small Business, Enterprise and Employment Act 2015, for a Minister of the Crown to make provision for review in secondary legislation, does not apply in respect of this Order which is an Order made by Her Majesty in Council under the powers conferred by section 60 of the Health Act 1999.
- 12.2 The Professional Standards Authority for Health and Social Care (PSA) conducts annual performance reviews of each of the health and care professional regulatory bodies. It is anticipated the PSA, when performing such reviews, will take into account the changes introduced by this Order and provide insight into the establishment of these measures. The Department will also keep these measures under review as part of its role in developing and maintaining the professional regulatory landscape.

13. Contact

- 13.1 Jon Stones at the Department of Health Telephone: 0113 254 5458 or email: jonathan.stones@dh.gsi.gov.uk can answer any queries regarding the instrument.