EXPLANATORY MEMORANDUM TO

THE HEALTH CARE AND ASSOCIATED PROFESSIONS (KNOWLEDGE OF ENGLISH) ORDER 2015

2015 No. [XXXX]

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 This draft order seeks to amend:

- the Nursing and Midwifery Order 2001 to strengthen the Nursing and Midwifery Council's (NMC) powers around English language controls for nurses and midwives in the UK;

- the Dentists Act 1984 to strengthen the General Dental Council's (GDC) powers around English language controls for dentists and dental care professionals in the UK;

- the Pharmacy Order 2010 to strengthen the General Pharmaceutical Council's (GPhC) powers around English language controls for pharmacists and pharmacy technicians in Great Britain; and

- the Pharmacy (Northern Ireland) Order 1976 to strengthen the Pharmaceutical Society of Northern Ireland's (PSNI) powers around English language controls for pharmaceutical chemists in Northern Ireland.

This will ensure that healthcare professionals seeking registration in, or who are on, the registers of these regulatory bodies have a sufficient knowledge of the English language to enable them to practise safely in the UK.

2.2 These amendments have been subject to a six week public consultation period and the general principles of the policy aim are supported by the NMC, GDC, GPhC and PSNI ("the relevant regulatory bodies").

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 In May 2010 the Coalition Agreement stated that "We will seek to stop foreign healthcare professionals working in the NHS unless they have passed robust language and competence tests[1]".

4.2 The NMC regulates nurses and midwives in the UK, the GDC regulates dentists and dental care professionals in the UK, the GPhC regulates pharmacists and pharmacy technicians in Great Britain and the PSNI regulates pharmaceutical chemists in Northern Ireland. This Order seeks to amend these regulators' parent Act or Order (where relevant) to enable the relevant regulatory bodies to apply language controls, where appropriate, for European nurses, midwives, dentists, dental care professionals, pharmacists and pharmacy technicians[2].

4.3 The draft Order is also seeking to create a new category of impairment for these regulatory bodies to strengthen their powers. This will ensure that each of the regulators can take pre-emptive fitness to practise action where serious concerns about the English language competence of a practising professional are identified which present a significant risk to the public.

4.4 Any changes to the law in this area must take account of the EU legislation on the mutual recognition of professional qualifications, in particular Directive 2005/36/EU, as amended ("MRPQ Directive").

5. Territorial Extent and Application

5.1 The Order extends to the United Kingdom. However, the amendments made by the Order have the extent of the enactment they amend. The Dentists Act 1984 and the Nursing and Midwifery Order 2001 extend to the United Kingdom, the Pharmacy Order 2010 extends to England, Wales and Scotland and the Pharmacy (Northern Ireland) Order 1976 extends to Northern Ireland only.

5.2 Ministers in Scotland, Wales and Northern Ireland all agree that the UK Government should take forward these measures: the consultation that took place was therefore on behalf of all four UK health Departments.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf

[2] In this memorandum, the term 'European' in reference to a healthcare professional means a healthcare professional who is:

- a national of a relevant European state (this means a national of a member state of the European Economic Area or Switzerland other than the UK), or
- not a national of a relevant European state, but is entitled to be treated no less favourably for these purposes because he or she benefits under the Citizenship Directive from an enforceable Community right.

5.3 To date there has been a restriction on the extent to which Orders made under section 60 of the Health Act 1999 can deal with the regulation of the pharmacy profession in Northern Ireland. This restriction was contained in paragraph 12 of Schedule 3 to the Health Act 1999 but has been repealed by the Health and Social Care Act 2008. That repeal was recently brought into force, with the agreement of Northern Ireland Ministers, so as to remove the restriction[3].

5.4 Pharmacy technicians working in Northern Ireland are not required to be registered with the PSNI, so references in this document to pharmacy technicians are to those working in Great Britain only.

6. European Convention on Human Rights

6.1 The Parliamentary under Secretary of State for Health, Dr Daniel Poulter has made the following statement regarding Human Rights:

In my view the provisions of the Health Care and Associated Professions (Knowledge of English) Order 2015 are compatible with the Convention rights.

7. Policy background

What is being done and why?

The policy objectives

7.1 Current legislation does not allow the regulatory bodies to require evidence of a European applicant's knowledge of the English language prior to registration even where the regulatory body has cause for concern. The NMC, GDC, GPhC and PSNI are however already able to carry out language controls on non-European applicants who wish to practise in the UK.

7.2 Furthermore, not having the necessary knowledge of the English language is currently not a ground in its own right on which the NMC, GDC, GPhC and PSNI can carry out fitness to practise investigations, until that lack of knowledge has resulted in deficient professional performance in practice. In some circumstances, this could pose a risk to patient safety.

7.3 The Government therefore proposes to amend the Nursing and Midwifery Order 2001, the Dentists Act 1984, the Pharmacy Order 2010 and the Pharmacy (Northern Ireland) Order 1976 to strengthen the relevant regulatory bodies' powers to introduce proportionate controls and require European applicants to provide evidence of their knowledge of the English language following recognition of their qualification, but before registration and admission onto the register. We also propose corresponding amendments to the fitness to practise powers of the NMC, GDC, GPhC and PSNI, to ensure that not having the necessary knowledge of the English language would

[3] See the Health and Social Care Act 2008(Commencement No. 19) Order 2014/3251 http://www.legislation.gov.uk/uksi/2014/3251/contents/made

become a ground for taking fitness to practice proceedings in its own right, instead of the regulators having to wait until this causes deficient professional performance in practice.

7.4 This may of course require evidence of a registrant's knowledge of the English language to be provided in fitness to practise cases where language is cited as an issue. There is currently provision for most of the relevant regulatory bodies to commission assessments of performance where fitness to practise allegations have been made. The proposals therefore also include giving power to the relevant regulatory bodies to require an individual currently practising in the UK to undergo an English language test as part of fitness to practise proceedings.

7.5 Recent changes negotiated by the UK to the MRPQ Directive have clarified the ability of national authorities to carry out language controls on European applicants where the profession has patient safety implications. Any language controls must be fair and proportionate, for example, there cannot be automatic testing for all European applicants and any controls must not take place until the applicant's qualification has been recognised by the regulatory body.

7.6 We have been working with the relevant regulatory bodies to ensure that they have powers to assess the knowledge of the English language of nurses, midwives, dentists, dental care professionals, pharmacists and pharmacy technicians seeking to work in the UK, in a way which is compliant with European law and does not impair free movement of healthcare professionals. The provisions within the Order achieve this aim.

The current system

7.7 The current system does not ensure that all healthcare professionals have the necessary knowledge of the English language to practise safely before they are registered with a regulatory body. If a European nurse, midwife, dentist, dental care professional, pharmacist or pharmacy technician applies to register in the UK, the relevant regulatory bodies do not at present have the powers to require evidence of the applicant's knowledge of the English language, prior to registration, even if concerns are identified at that point. The application of European law, in particular the MRPQ Directive, entitles these applicants to recognition of their qualifications in the UK and therefore registration. Most of the governing legislation explicitly prevents English language controls being applied to this group of applicants, by only allowing such controls for non-European overseas applicants.

7.8 Registration with the relevant regulatory bodies performs the dual function of recognition of qualifications and granting access to practise the profession. The approach to date has been to exclude English language controls at the point of considering applications for registration, in order to guarantee the right to recognition of qualifications. This approach has enabled European healthcare professionals to gain access to the profession in the UK without any validation of them having the necessary knowledge of the English language.

The proposals

7.9 Following the amendments made to the MRPQ Directive referred to previously, the Department has worked with the relevant regulatory bodies to achieve a compliant proposal that enables them to impose English language controls prior to registration of European healthcare professionals wishing to practise in the UK, whilst at the same time protecting their right to recognition of their qualifications.

7.10 The main policy aims we seek to achieve through the draft Order are as follows:

- the removal of any current restrictions on a relevant regulatory body imposing English language controls on European applicants for registration;
- the introduction of a new registration requirement for all applicants, including those who are UK nationals, of having the necessary knowledge of English;
- including a new definition of the "necessary knowledge of English";
- requiring relevant regulatory bodies to publish information about the evidence, information and documents which will demonstrate the necessary knowledge of English;
- imposing requirements as to the English language controls that the relevant regulatory bodies can impose on European applicants for registration, so that they must first request and consider any available evidence before requiring a test;
- requiring the relevant regulatory bodies to issue a letter recognising the qualifications of European applicants in cases where registration cannot proceed because the language knowledge of such an applicant need to be investigated further;
- amending certain time limits in relation to giving a decision on an application by a European healthcare professional for registration, so that it is clear as to how the time limits will operate when further investigations as to language knowledge need to be carried out;
- ensuring that there is a right of appeal where appropriate against certain decisions that can be made in respect of applicants as regards language controls;
- adding a new ground for fitness to practise proceedings of not having the necessary knowledge of English;
- providing for knowledge of English assessments in connection with fitness to practise proceedings, and certain restoration cases which are being considered by a fitness to practise panel or committee;
- when applying for restoration to the register, applicants will have to demonstrate that they meet the requirements for original registration

which will include in future having the necessary knowledge of English; and

- the requirement on the relevant regulatory bodies to ensure that language controls are compliant with the MRPQ Directive in order to act as a competent authority.

Proposed Registration Process

7.11 For European applicants seeking registration, recognition of qualifications and admission onto the register could be considered as two distinct steps in cases where the registrar of the relevant regulatory body concerned is not satisfied with the applicant's knowledge of the English language from the material supplied by the applicant at the initial stage.

7.12 European applicants have the option (but would not be required) to supply evidence of English language knowledge with their application for registration. If this is sufficient, then the applicant would be assessed for registration in the usual way.

7.13 If the applicant has not supplied evidence of their knowledge of the English language, or if this does not sufficiently demonstrate an applicant's English language knowledge, the relevant regulatory body would consider the applicant's professional qualifications. If these are acceptable, the relevant regulatory body would write a letter to the applicant recognising them as entitling the applicant to registration, subject to meeting the other registration requirements. The relevant regulatory body could request further evidence in relation to English language knowledge at that point. The relevant regulatory body would set out in advance the criteria as to what evidence would be appropriate to demonstrate an acceptable level of English language knowledge. The criteria must be flexible.

7.14 If evidence cannot be supplied, the applicant could be requested by the relevant regulatory body to undergo an appropriate English language test. It is up to each relevant regulatory body to decide which English language test(s) they will accept. Further details of which test or evidence of language they would accept will be published by each relevant regulatory body.

7.15 If the applicant supplies sufficient additional evidence or passes the test, the applicant will be assessed against the other registration requirements i.e. character, health and financial standing/indemnity and then be admitted onto the register, subject to having satisfied those other requirements. The applicant might be given more than one opportunity to pass a test but multiple failures would eventually lead to the application for registration being rejected.

7.16 We believe that the proposed powers will improve quality of care and patient safety and will help prevent patients from being put at risk of harm from nurses, midwives, dentists, dental care professionals, pharmacists and pharmacy technicians who do not have the necessary knowledge of the English language.

Why legislation is necessary

7.17 In order to achieve the policy objectives, it is necessary for the Government to legislate to amend the governing legislation of the relevant regulatory bodies in order to:

- Remove the current restrictions in the governing legislation on a relevant regulatory body imposing English language controls on European applicants for registration, by repealing provisions of that legislation;
- Introduce a new registration requirement for all applicants, including those who are UK nationals, of having the necessary knowledge of English;
- Provide for a separate fitness to practise ground of not having the necessary knowledge of English to ensure that not having the necessary knowledge of the English language would become a ground for taking fitness to practice proceedings in its own right, instead of the relevant regulatory bodies having to wait until this causes deficient professional performance in practice; and
- Confer powers on the relevant regulatory bodies to enable them to require assessments of knowledge of English during a fitness to practise investigation.

None of the key policy aims could be achieved without amending the governing legislation of each of the relevant regulatory bodies.

The size and nature of the problem it is addressing

7.18 There is a need to give the NMC, GDC, GPhC and PSNI additional powers to enable them to carry out proportionate language checks on European nurses, midwives, dentists, dental care professionals, pharmacists and pharmacy technicians where concerns are raised following recognition but before registration and admission to the register, to ensure quality of care and patient safety. This brings these professions into line with doctors as language controls have already been introduced, where appropriate, for European doctors wishing to practise in the UK.

7.19 The relevant regulatory bodies provided the Department with estimates of the number of European applications they receive per annum. These figures were then combined with published registration statistics to estimate the percentage of the workforce accounted for by new European applicants in a given year.

	Professional	Total Registrants	No. European Applications	% Registrants Accounted for by European Applicants
NMC	(No breakdown provided)	673,567	15,300	2.2%
GPhC *of which:*	Pharmacists	49,242	400	0.8%
	Pharmacy Technicians	22,237	30	0.1%
GDC *of which:*	Dentists	40,423	801	1.9%
	Dental Care Professionals	63,027	68	0.1%
PSNI	(No breakdown provided)	2,155	5	0.2%

(Source: DH Analysis Regulators' Returns + Published Registration Statistics[4])

7.20 The Department believes that the implementation of these proposals will reduce the risk to patient safety where a healthcare professional is subsequently prevented from treating patients due to an insufficient knowledge of the English language.

8. Consultation outcome

8.1 Prior to issuing a formal consultation document, the Department of Health informally consulted with the relevant regulatory bodies during Summer and Autumn 2014. The Government then undertook a public consultation on the measures contained within this Order for a period of six weeks, from 3rd November to 15th December 2014[5]. Respondents were given the opportunity to comment via the Department's gov.uk website, through Citizen Space (a web based consultation and public engagement device) and in hardcopy.

8.2 We felt this was proportionate given the scale and relatively uncontroversial nature of the proposals. It took into account the specialised subject area and the response rate of a previous consultation of a similar nature operated by the Department (the consultation on language controls for doctors[6]). The general principles of the policy proposals also have the support of the NMC, GDC, GPhC and PSNI, who will be responsible for operating the system. In addition, the Department alerted interested parties to the consultation's launch; relevant Royal Colleges, patient representative groups, the professional regulatory bodies, trades unions and the devolved administrations.

8.3 In total, 71 responses were received. Stakeholders who responded include the NMC, the GDC, the GPhC , the PSNI, the Royal College of Nursing and the Royal college of Midwives.

[4] Note that the figures used did not cover the same time periods. For example, the GDC figures on number of European applicants were average annual figures from the last three years. Whereas their total registration figures were as at the end of 2013.

[5] https://www.gov.uk/government/consultations/language-controls-for-healthcare-and-associated-professions

[6] https://www.gov.uk/government/consultations/ensuring-doctors-have-sufficient-english-language-capability

8.4 The vast majority of responses (99%) were supportive of the proposals and either agreed or strongly agreed that strengthening language checks as proposed will improve quality of care and patient safety.

8.5 A total of 94% were in favour of the new ground of impairment of fitness to practise which will strengthen the regulatory bodies' powers to take fitness to practise action where concerns about the English language competence of a practising professional are identified.

8.6 Following analysis of the consultation responses received and views raised, we are of the opinion that subject to minor and technical changes to the draft Order (none of which alter the original policy intentions) the amendments should be proceeded with. In summary these are:

- Adding a duty to consult for PSNI, GPhC and GDC in relation to the guidance setting out the evidence, information or documents to be provided by an applicant for the purpose of satisfying the registrar that the applicant has the necessary knowledge of the English language and the process by which the registrar is to determine whether he is satisfied – the NMC already have a general duty to consult on all their statutory guidance so no change has been made for them in this respect.
- For the NMC, changing the language controls provisions at the renewal stage so that the NMC can set out in rules as to how language controls may apply at the renewal of registration stage (see article 35).
- Amending the definitions of "necessary knowledge of English" for the GPhC, NMC and PSNI. The NMC raised concerns about the definition of necessary knowledge of English for the professions they regulate, in particular that the concept of "patient" was very limiting given that e.g. midwives do not see the users of some of their services as "patients". We thought similar arguments apply to the services provided by pharmacists, pharmacy technicians and pharmaceutical chemists in Northern Ireland and so we have similarly amended the definitions of "necessary knowledge of English" in their legislation. (see articles 5, 43 and 45). This amendment is also being made for the GPhC.
- As anticipated in the consultation, in response to knowledge of English assessments, the Department said it would remove the draft provision in the Order that provided "rules may specify circumstances in which an examination or assessment of whether a person has the necessary knowledge of English may be undergone otherwise than in accordance with a direction." This applied to the NMC, GDC, and GPhC provisions only. The Department received no responses in favour of this provision and as no-one has been able to give reasons as how or when it might be used, it has been removed.

9. Guidance

9.1 The draft Order imposes a statutory duty on the relevant regulatory bodies to publish guidance relating to the evidence, information and documents to be

provided for the purpose of demonstrating that a health care professional has the necessary knowledge of the English language. We therefore do not consider it is necessary for the Department to provide further guidance on this issue.

10. Impact

10.1 The impact on business, charities or voluntary bodies is to individual professionals (who are likely to be European applicants) who may be required to take a language test at a cost of around £140 or will be stopped from working in the UK in some cases where their English language skills are not at the necessary level. The majority of costs will fall to the individual regulatory bodies themselves in terms of set up and administration costs. However, the regulatory bodies are not classed as a business, charity or voluntary body in terms of the better regulation framework.

10.2 The impact on the public sector is nil.

10.3 A Regulatory Triage Assessment has been prepared for this Order, which received a green opinion from the Regulatory Policy Committee, as having no or limited impact on business. Therefore, an Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The policy objective is to ensure that all healthcare professionals working in the UK have the necessary knowledge of the English language to practise in a safe and competent manner. This will be measured by the number of future complaints made to the relevant regulatory bodies about concerns of a health care professional's language capability. We will ask the relevant regulatory bodies to keep the Department updated on this.

12.2 The Department remains committed to this policy objective and at the next legislative opening, subject to Parliamentary approval, plans to give similar powers to the Health and Care Professions Council, the General Optical Council, the General Osteopathic Council and the General Chiropractic Council.

13. Contact

13.1 Sharon Corner at the Department of Health Tel: 0113 254 6150 or email: sharon.corner@dh.gsi.gov.uk can answer any queries regarding the instrument.