EXPLANATORY MEMORANDUM TO

THE NURSING AND MIDWIFERY (AMENDMENT) ORDER 2014

2014 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 Order amends The Nursing and Midwifery Order 2001 ("the 2001 Order"). The purpose of these amendments is to improve consistency in decision making and to reduce the time it takes the Nursing and Midwifery Council (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). It also clarifies the law regarding the sanctions that can be imposed by a Practice Committee and amends the composition of a Registration Appeal Panel. These changes will result in a more efficient fitness to practise process and will enable the NMC to carry out its registration functions more effectively, which will improve public protection and increase the public's confidence in the regulation of nurses and midwives.

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

3.1 None

4. Legislative Context

4.1 This Order seeks to 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 amendments to the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (set out as a Schedule to SI 2004/1761) ("the Fitness to Practise Rules") and the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules 2004 (set out as a Schedule to SI 2004/1767) ("the Registration Rules").

4.2 A summary of the amendments to the 2001 Order introduced by this Order, is set out below.

4.3 This Order amends the 2001 Order to introduce powers to enable the NMC to appoint Case Examiners who will exercise certain functions currently exercised by the Investigating Committee; they will consider allegations that a registrant's fitness to practise is impaired and decide whether the registrant has a case to answer and that the allegation should be considered by the Health Committee or by the Conduct and Competence Committee.

4.4 This will improve the efficiency of the fitness to practise process which will help the registrant under investigation and improve public protection through speedier resolution of cases. Case examiners will be employees of the NMC

whereas Investigating Committee members are chosen from a pool of around 100 individuals who provide their services to the NMC as independent contractors and coordinating meetings can be time-consuming due to panel member's other commitments. Two case examiners (one lay and one registered nurse or midwife) will consider an allegation of impairment of fitness to practice whereas three Investigating Committee members are required at present. It is anticipated that the use of case examiners, will both speed up the fitness to practise process and lead to greater consistency in decision making as the case examiners will consider a greater number of cases on a regular basis than individual members of the large pool of Investigating Committee members do.

4.5 The NMC will make rules in connection with the above setting out the procedure to be followed by the case examiners in considering allegations of impairment of fitness to practise. These are expected to be laid in Parliament in January 2015 and a separate explanatory memorandum will accompany these.

4.6 The Investigating Committee will continue to have a role in the process in that, should the case examiners fail to agree whether there is a case to answer, the allegation will pass to the Investigating Committee to decide. The Investigating Committee will also continue make determinations on allegations of fraudulent or incorrect entries in the register.

4.7 The 2001 Order is amended to introduce a power for the NMC 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. Currently, if new information comes to light following a 'no case to answer' decision, or if it is considered that the decision not to refer to a full fitness to practise hearing is fundamentally flawed and it would be in the public interest to re-consider the decision not to refer the allegation, the NMC is powerless to act. Current powers only permit the NMC to take account of that allegation where, within 3 years from the date of the decision that there is no case to answer, the NMC receives a fresh allegation about that registrant. Only when considering whether in respect of the fresh allegation there is a case to answer can it take account of the original allegation.

4.8 The amendments will allow the NMC 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. These will be where the Registrar has reason to believe that the decision may be materially flawed and that a review would be in the public interest or that there is new information which may have led to a different decision and that a review of the decision not to refer to a practice committee is necessary in the public interest. Also, save in exceptional circumstances, the Registrar must not commence a review of a no case to answer decision more than one year after the date of that decision. The rules are expected to be laid January 2015 and will be accompanied by a separate explanatory memorandum.

4.9 The 2001 Order is amended to remove the requirement for an NMC Council member to Chair the Registration Appeals Panel thereby ensuring the proper

separation of the functions of the Council and its committees and thereby also improve public confidence in the NMC. It will also remove the requirement for a Registered Medical Practitioner to be on the panel in cases where the health of the person bringing the appeal is in issue as it is considered that medical advice in these circumstances will be better provided by appropriate expert witnesses.

4.10 The amendments will clarify that the NMC's Health Committee and Conduct and Competence Committee have 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. Following the judgment in *Okeke v Nursing and Midwifery Council*[1] which although was decided on different point, the judge's comments cast doubt over the interpretation of the existing legislation.

4.11 The amendments will introduce a power for the NMC to disclose certain information relating to a person's indemnity arrangements for the purpose of verifying that information for the NMC's registration functions. Following the coming into force of the Health Care and Associated Professions (Indemnity Arrangements) Order 2014 (S.I. 2014/1887), practising nurses and midwives must have an appropriate indemnity arrangement in place as a condition of registration with the NMC. This new provision will enable the NMC to verify information that it receives to ensure that there is in fact a current indemnity arrangement in place and that it provides appropriate cover taking into account the nature and extent of the risks associated with a registrant's practise.

4.12 The amendments will enable the Investigating Committee to also 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. This is necessary to improve public protection. An interim suspension order or an interim conditions of practice order can be imposed, before there is a full finding of fact in a case, if the committee making the order is satisfied that such an order is necessary for the protection of the public or is otherwise in the public interest or it is in the interests of the person concerned. At present, once the Investigating Committee refers a case to the Conduct and Competence Committee or to the Health Committee, the power to make an interim order rests with the committee to which it was referred. Therefore, should information come to light following a referral by the Investigating Committee which suggests an interim order might be necessary but the Conduct and Competency Committee or the Health Committee has yet to convene to consider the case there could be a delay before such an order is made, thereby compromising public safety.

5. Territorial Extent and Application

5.1 This instrument extends to all of the United Kingdom

[1] [2013] EWHC 714 (Admin); *see* paragraphs 24 and 25 of the judgment.

6. European Convention on Human Rights

The provisions of the Nursing and Midwifery (Amendment) Order 2014 are compatible with the Convention rights.

Dan Poulter MP, the Parliamentary Under-Secretary of State at the Department of Health, responsible for this legislation has made the following statement:

"In my view the provisions of the Nursing and Midwifery (Amendment) Order 2014 are compatible with the Convention Rights".

7. Policy background

What is being done and why

7.1 In its response 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 UK, including the NMC, are hampered by an outdated legislative framework, and committed to radically overhaul 150 years of complex legislation. To evidence the delivery of this commitment the Department referred to the Law Commission's work to review the legislative framework for the regulation of health care professionals and, in England only, social care, 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, the Government response will be published in due course.

7.2 In July 2012, the PSA (then CHRE) published its report of its Strategic Review of the NMC which identified problems with the NMC'S fitness to practise process and recommended these should be addressed at the earliest opportunity. To support the NMC address these problems, and in recognition of the fact that the current legislative framework does not assist the NMC in carrying out its fitness to practise function in the most efficient way, in March 2013 the Department agreed that an NMC Section 60 Order should be prioritised in advance of the Law Commission's report. This Order will 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. These changes will result in a more efficient fitness to practise process and will enable the NMC to carry out its registration functions more effectively, which will improve public protection and increase the public's confidence in the regulation of nurses and midwives.

7.3 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)[2]. 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.

[2] http://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/inquiries/parliament-2010/nmc-2013

8. Consultation outcome

8.1 An 8 week public consultation exercise took place between 17 April 2014 and 12 June 2014 and was made available on the Department of Health website for that period. A link to the consultation document *The Nursing and Midwifery Council – proposed changes to governing legislation* can be found on the Government's website at:

https://www.gov.uk/government/consultations/nursing-and-midwifery-council-changes-to-governing-legislation

8.2 An 8 week consultation was chosen as this was deemed proportionate and realistic in allowing the stakeholders sufficient time to provide a considered response.

8.3 This consultation document set out proposals and rationale for amending the NMC's governing legislative framework. 21 responses were received putting forward a variety of views about the proposed legislation.

8.4 In parallel, the NMC consulted on new provisions to the Fitness to Practise Rules and Registration Rules that will draw their legal basis from the powers in the Order.

8.5 The majority of the respondents supported all of the proposals and recognise 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 practice functions more effectively. Commenting that the amendments will result in more efficient processes to benefit registrants, improve public protection and increased public confidence in the NMC.

8.6 A number of issues were raised that were misunderstandings about the impact or the policy intention of the proposals. For example one respondent thought that Case Examiners, as employees of the NMC would be target driven rather than acting as independent professionals. This is not the case. Two case examiners, one a registered nurse or registered midwife and one lay person i.e. someone who is not and never has been a registered nurse or registered midwife, will consider each allegation of impairment of fitness to practise, based on the facts of each case and not on attaining output targets. Two respondents raised concerns that the proposals were a result of interference from government in the running and accountability of the NMC. The NMC is an independent statutory body. Where it is considered necessary to improve the regulation of a profession, this can be done by the Privy Council through an Order in Council under section 60 Health Act 1999 and the department has an operational role in facilitating these legislative changes through Parliament. These and other similar misunderstandings have been fully explained in the consultation response. 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. For example, assurances around processes such as ensuring respondents were given appropriate time to respond before a case is passed to case examiners and that registrants receive appropriate notification of a decision that has been made about them. These points have been clarified in the consultation response and they have also passed onto the NMC for consideration.

8.7 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 greater, improved public protection and an increase in public confidence in the NMC.

8.8 A link to the consultation response *The Nursing and Midwifery Council – proposed changes to governing legislation consultation response* can be found on the Government's website at:

https://www.gov.uk/government/consultations/nursing-and-midwifery-council-changes-to-governing-legislation

8.9 There are no plans to consolidate this legislation at this stage in advance of the consideration of the of the Law Commission's work.

9. Guidance

9.1 This Order amends primary legislation for the NMC which is an independent healthcare professional regulatory body. The provisions contain powers which enable the NMC to make rules. The NMC will provide guidance to their registrants on the provisions set out in the Order and the Rules they make. The Department of Health does not intend to issue guidance.

10. Impact

10.1 Most of the impact of costs and benefits will fall on the NMC, which as a professional regulator, is not considered as a business in the better regulation processes.

10.2 The monetary savings are not the key drivers for these proposals. The key drivers to these amendments are non-monetised benefits that will give the NMC additional powers to make necessary improvements to its fitness to practise processes and enabling the NMC to more effectively carry out their regulatory functions, whilst acting in registrants' interests together with balancing the need to protect the public and act in the public interest.

10.3 As part of the consultation we asked a question about any costs or administrative burdens that the proposed changes might have. Two 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 materially flawed or when new evidence came to light and it is in the public interest to do so (as set out in their Rules). Further the power to review will be time-limited in that, except in exceptional circumstances, a review will not commence more than one year after the date of the decision not to refer to a Practice Committee. 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.

10.4 A regulatory triage assessment has been carried out and it is estimated that the introduction of these amendments will result in a net benefit to the NMC of nearly £490k per annum. The wider impact of these proposals was considered to be minimal and it is not expected there will be any negative impact on the public sector. Therefore these amendments are outside the scope of the Regulatory Policy Committee.

10.5 An equalities analysis has been carried out on these amendments and this did not highlight any equalities issues. The Equalities Analysis can be found on the Government's website at :

https://www.gov.uk/government/consultations/nursing-and-midwifery-council-changes-to-governing-legislation

11. Regulating small business

11.1 The legislation does not directly apply to small business, the changes that it brings about relate to the individual rather than business.

12. Monitoring & review

12.1 The Department of Health and the NMC will jointly monitor, on an ongoing basis, the operation of the legislation, including how it works in practice to ensure benefits are realised.

13. Contact

Lindsey Proctor at the Department of Health Tel: 0113 2545811or email: Lindsey.proctor@dh.gsi.gov.uk can answer any queries regarding the instrument.