EXPLANATORY MEMORANDUM TO

THE NURSING AND MIDWIFERY ORDER (LEGAL ASSESSORS) (AMENDMENT) AND THE NURSING AND MIDWIFERY COUNCIL (FITNESS TO PRACTISE) (AMENDMENT) RULES ORDER OF COUNCIL 2017

2017 No. 703

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 To approve Rules amending the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 making the Nursing and Midwifery Council's ("the NMC") fitness to practise processes more efficient and proportionate.

2.2 Specifically, this Order, i) approves the Nursing and Midwifery Council (Fitness to Practise) (Amendment) Rules 2017 (the "Rules") made by the NMC which amend the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (which are set out in the Schedule to S.I. 2004/1761) ("the 2004 Rules") and ii) amends the Nursing and Midwifery Order 2001 (Legal Assessors) Order of Council 2004 (S.I. 2004/1763).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Nursing and Midwifery (Amendment) Order 2017 (S.I. 2017/321) amended the Nursing and Midwifery Order 2001 (S.I. 2002/253) ("the NMO") in respect of certain NMC fitness to practise functions. The amendments to the NMO included the introduction of a power to agree undertakings with a registrant where, at the end of the investigation stage of fitness to practise processes, it is found that there is a case to answer in respect of an allegation of impairment of fitness to practise. A new rule making power was also introduced in respect of undertakings (see article 26(5B) of the NMO). Rule 7(b) of the Rules approved by this Order is the first use of this new rule making power.

4.2 A further amendment to the NMO by the Nursing and Midwifery (Amendment) Order 2017 is to replace the Conduct and Competence Committee and the Health Committee by a single Fitness to Practise Committee. By virtue of the power in article 46(1) of the NMO, the Privy Council through this Order, amends article 2 of the Nursing and Midwifery Order 2001 (Legal Assessors) Order of Council 2004 (S.I. 2004/1763)

(which specifies the hearings at which advice tendered by a legal assessor must be given in the presence of the parties or their representatives) to reflect this change.

4.3 This Order also approves the Rules which make amendments to the 2004 Rules. Rules made under the NMO cannot come into force until approved by order of the Privy Council (see articles 47(1) and 48 of the NMO).

5. Extent and Territorial Application

5.1 The extent of this instrument is the United Kingdom.

5.2 The instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The Department of Health, through the Nursing and Midwifery (Amendment) Order 2017 made amendments to the NMO, the NMC's legislative framework, in relation to its fitness to practise process to ensure it is able to continue to uphold public protection in the most effective and proportionate way.

7.2 The 2004 Rules need to be further amended in order to implement the fitness to practise measures introduced by the Nursing and Midwifery (Amendment) Order 2017.

7.3 The amendments to the 2004 Rules relate to the following areas:

- the actions that can be taken by either the Case Examiners or the Investigating Committee at the conclusion of the investigation stage of the fitness to practise process to include i) the issuing of a warning or giving advice where it is determined that there is no case to answer in respect of an allegation of impairment of fitness to practise and ii) agreeing undertakings with a registrant rather than referring the allegation to a full fitness to practise hearing where it is determined that there is a case to answer
- **the procedures relating to undertakings**, including the actions that can be taken as a result of undertakings being breached
- **Registrar reviews of Case Examiner and Investigating Committee decisions** to include i) a decision to agree undertakings and ii) a direction that undertakings should no longer apply and that the allegation should not be considered further and iii) to clarify that a review of a no case to answer decision includes one where a warning or advice has been given
- the replacement of the Conduct and Competence Committee and Health Committee with a single Fitness to Practise Committee
- **notification requirements** when allegations are referred to the Investigating Committee or to the Fitness to Practise Committee

7.4 Currently, Case Examiners review the evidence from an investigation into an allegation about a registrant and decide if the concerns relating to the nurse or midwife's practice or conduct should be sent to a hearing for consideration by a panel

(currently of the Conduct and Competence Committee or the Health Committee but being replaced by a single Fitness to Practise Committee). If they deem that the case should be sent to a hearing this is a 'case to answer' decision. In 2014/15, the Case Examiners concluded that there was a case to answer in respect of the allegations of impairment of fitness to practise in 1,032 cases. These cases were then sent for consideration by a panel of the Conduct and Competence Committee or the Health Committee.

7.5 The new powers introduced by the Nursing and Midwifery (Amendment) Order 2017 and the effect of the amendments to the 2004 Rules by these Rules, will enable Case Examiners and the Investigating Committee (where the allegation has been referred to this Committee by the Case Examiners) to agree undertakings in certain cases where it is determined that there is a case to answer in respect of an allegation, without the need to send the case for further consideration by a fitness to practise panel. Likewise, certain cases that would otherwise have gone to a panel for the imposition of a sanction (even though there is no current impairment of fitness to practise but there are concerns as to past conduct or performance) can be dealt with more proportionately through the issue of a warning. This will allow the NMC to work in a more efficient and proportionate way whilst maintaining public protection.

7.6 The introduction of alternative routes for disposal of cases such as undertakings, warnings, and advice will also bring the NMC broadly into line with some of the other healthcare regulators who already operate more proportionate fitness to practise models, for example the General Medical Council and the General Dental Council.

7.7 Further details of the main changes to the 2004 Rules are given below.

Undertakings

7.8 Undertakings are an agreement between the regulator and the registrant that the registrant will undertake activities such as training or operate under supervision as a means of addressing concerns about the registrant's clinical competence or conduct. Undertakings can be agreed where the Case Examiners or the Investigating Committee consider that there is a case to answer in respect of an allegation but where the concerns can be addressed through agreeing undertakings rather than referring the allegation to a full fitness to practise hearing. This enables the resolution of a case in a way that protects the public and addresses the concern about the professional.

7.9 Undertakings will be a more appropriate, speedy, and proportionate measure in certain cases, maintaining public protection whilst reducing stress for the registrant and the level of NMC resource required.

7.10 Where undertakings are agreed, the Case Examiners or the Investigating Committee cease their consideration of the allegation and any interim order in place ceases to have effect.

7.11 The NMC will monitor compliance with undertakings through a dedicated review team[1]. Where it appears that undertakings have been breached, the allegation will be referred back to the Case Examiners who will have the power to revoke the

1 In their guidance the NMC state that the role of the monitoring and compliance team is to maintain regular contact with the nurse or midwife, and review the nurse or midwife's progress against the undertakings on an ongoing basis.

undertakings and refer the allegation to the Fitness to Practise Committee or, in appropriate cases, vary the undertakings. Also, where monitoring indicates that the undertakings need to be varied, for example, where the original undertakings have become unworkable, the Case Examiners will have the power to suggest alternative undertakings to manage the risk in the case. Where monitoring compliance indicates that the registrant no longer poses a risk to patients, Case Examiners can direct that the undertakings are lifted and the case closed.

7.12 A registrant need not agree to comply with undertakings and in these cases the allegation will be referred to a full fitness to practise hearing for consideration. Where the registrant has agreed to comply with undertakings but does not agree to these undertakings being varied, the Registrar can review the decision to agree undertakings and consider whether undertakings are still the most appropriate way to deal with the case. The outcome of such a review can be that the original undertakings can stand, other suitable undertakings might be suggested or the case can be referred to the Fitness to Practise Committee.

7.13 The Rules make provision that undertakings cannot be agreed where the Investigating Committee or Case Examiners consider that if the case was referred to the Fitness to Practise Committee, that Committee might make a striking-off order.

[see rules 7(b) (inserting new paragraphs (2) and (2A) of rule 6C to the 2004 Rules), 8(b) inserting new paragraphs (2) and (2A) to rule 6D of the 2004 Rules) and 9 of the Rules]

Warnings

7.14 The Nursing and Midwifery (Amendment) Order 2017 amended the NMO to provide that the Investigating Committee can issue a warning or give advice to a registrant where there is a 'no case to answer decision' in respect of an individual registrant's fitness to practise. The Rules amend the 2004 Rules to enable the Case Examiners to do the same when they are exercising the Investigating Committee's powers in considering cases at the investigation stage.

[see rules 7(b) (inserting new paragraphs (2B) and (3) of rule 6C of the 2004 Rules) and rule 8 (inserting new paragraphs (2B) and (3)) of rule 6D of the 2004 Rules]

7.15 A warning might be appropriate where, although there is no case to answer in respect of the registrant's current fitness to practise (i.e. that the registrant does not pose a current risk to patients) there are aspects of the registrant's past practice or conduct that cause concern. At present, such cases need to be referred to a hearing for a sanction to be imposed – a sanction being necessary in order to uphold the reputation of the profession and to indicate to the profession and to the wider public that the past conduct represented a serious breach of professional standards and the NMC's Code.

7.16 The 2004 Rules provide that the Registrar must send the registrant a notice of referral when the Registrar refers an allegation to the Case Examiners. This notice of referral must include any evidence not previously seen by the registrant. Rule 6(d) of the Rules amend the 2004 Rules to provide that the registrant must also be informed in that notice of the actions that the Case Examiners can take at the end of their investigation stage, and this includes the power to issue a warning or give advice. The registrant is invited to make representations on this aspect as well as on the allegation, before the Case Examiners make their decision.

7.17 A registrant can seek a review of a no case to answer decision where a warning is issued if he disagrees with this. The 2004 Rules provide that all or part of a no case to answer decision can be reviewed by the Registrar where the Registrar has reason to believe that the decision may be materially flawed or if new information comes to light that might have led to a different decision and that a review would be in the public interest. Rule 11 of the Rules amend the 2004 Rules to i) clarify that a review of such a decision includes one where a warning has been issued or advice given and ii) includes as a ground for review, where a review would be in the public interest or where it would be necessary to prevent injustice to the registrant.

Advice

7.18 Advice might be issued by Case Examiners (or the Investigating Committee where the allegation has been referred there from the Case Examiners) when an investigation reveals a concern but the Case Examiners or Investigating Committee consider that, although the allegation should not be referred to the Fitness to Practise Committee, if the behaviour in question were repeated it might lead to further regulatory investigation being required. The purpose of the advice is to remind the registrant to reflect on their professional obligations and areas of the NMC's Code that are relevant to the concerns that were investigated.

7.19 The 2004 Rules are amended by these Rules to provide that, at the conclusion of the investigation, the notice to the person who referred the allegation will inform them of the fact that the case was closed and advice given to the registrant but it will not give details of that advice.

[see rules 7(b) (inserting new paragraphs (2B) and (3) of rule 6C of the 2004 Rules) and rule 8 (inserting new paragraphs (2B) and (3)) of rule 6D of the 2004 Rules]

Single Fitness to Practise Committee

7.20 Currently the NMC has two committees that hear cases where the Case Examiners or the Investigating Committee have deemed there to be a case to answer. There is a Conduct and Competence Committee (CCC) and a Health Committee (HC).

7.21 The Nursing and Midwifery (Amendment) Order 2017 amended the NMO to provide for a single Fitness to Practise Committee which will hear allegations of fitness to practise on all grounds. The introduction of the Fitness to Practise Committee will improve public protection and improve the process for those involved by allowing concerns relating to impairment of fitness to practise on health grounds and those on other grounds to be dealt with as part of the same adjudication process. This will reduce unnecessary delays and improve the fairness of the process by ensuring that all cases are heard by one committee. There will be no delay, as can happen at present, where, for example, a case being considered by the CCC has to be transferred to the HC for consideration of a health related issue.

7.22 These Rules amend the 2004 Rules to make consequential amendments to reflect the replacement of the CCC and the HC by the Fitness to Practise Committee.

[see rules 3, 10, 13, 14(a), (b) and (d) to (f), 15 70 25 and 27-31 of the Rules]

Reviews of Suspension Orders and Conditions of Practice Orders

7.23 Where an allegation is referred to a hearing, the CCC or HC (from 28th July 2017, a single Fitness to Practise Committee) will make a decision about whether a nurse or

midwife's fitness to practise is impaired. If it determines that the nurse or midwife's fitness to practise is impaired it can impose a striking-off order, a suspension order, a conditions of practice order or a caution order if it considers it necessary to protect the health and wellbeing of the public or the reputation of the professions, or to maintain public confidence in them. Amendments to the NMO by the Nursing and Midwifery (Amendment) Order 2017 removed the requirement for a Practice Committee to review every suspension or conditions of practice order where, at the time of making that order, it considers that it will not be necessary to extend or vary the order or to make any other order. This removes an unnecessary burden for both the NMC and the registrant.

7.24 Rule 26 of the Rules amends rule 24 of the 2004 Rules (which sets out the procedure for hearings before a fitness to practise panel) to reflect the new power for the Fitness to Practise Committee to decide that a conditions of practice order or a suspension order need not be reviewed before its expiry.

Registrar Reviews of Case Examiner and Investigating Committee Decisions

7.25 The Rules amend the 2004 Rules to include a power for the Registrar to review the Case Examiners' or Investigating Committee decision to agree undertakings with a registrant rather than refer the allegation to the Fitness to Practise Committee. The 2004 Rules are also amended to allow the Registrar to review a decision that undertakings no longer apply and that a case can be closed. The purpose of these amendments is to ensure that public protection is not compromised. If anyone considers that agreeing undertakings is an inappropriate measure in the circumstances or if the release of a registrant from undertakings and the closure of a case is considered to pose a risk to public safety then a review of those decisions can be made by the Registrar.

7.26 The review provisions are also amended in respect of the issue of a warning which is dealt with in paragraph 7.17.

Notification Requirements

7.27 The Rules amend the 2004 Rules to remove certain unnecessarily burdensome and ineffectual notification requirements. When an allegation of a fraudulent or incorrect entry to the register is referred to the Investigating Committee, the NMC will no longer be required to notify the Secretary of State, the Scottish Ministers, the National Assembly for Wales and the Department of Health, Social Services and Public Safety in Northern Ireland. Neither will it be required to notify these bodies when an allegation of impairment of fitness to practice is referred to the Fitness to Practise Committee. Where known to the NMC, it will continue to notify the employer or agency with whom the nurse or midwife has an arrangement to provide services, of such referrals.

[see rules 5 and 14(c) of the Rules]

7.28 The Rules also amend the 2004 Rules to enable the Registrar to refer an allegation of impairment of fitness to practise to the Fitness to Practise Committee rather than to Case Examiners where this is appropriate. This enables certain serious cases, for example where a registrant has been convicted of a serious criminal offence to be fast tracked to the Fitness to Practise hearing stage and for a sanction to be applied as quickly as possible. There is an existing power in the NMO for the Council to make such a referral. The amendment to the 2004 Rules enables the Registrar to do the

same when exercising powers of the Council. The provision in the 2004 Rules that a Case Examiner can direct the Registrar to refer a case to the Investigating Committee to consider making an interim order is also amended to enable the Registrar to refer to the Fitness to Practise Committee to consider making such an order.

[see rules 4 and 7(c) of the Rules]

7.29 This Order also amends article 2 of the Nursing and Midwifery Order 2001 (Legal Assessors) Order of Council 2004 to replace reference to the Conduct and Competence Committee and to the Health Committee with reference to the Fitness to Practise Committee. This is in consequence of the amendment to the NMO by the Nursing and Midwifery (Amendment) Order 2017 (S.I. 2017/321) which replaced these committees by a single Fitness to Practice Committee.

Consolidation

7.30 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 NMC conducted a consultation on the proposed amendments to their Rules between 25 October 2016 and 19 December 2016. A short summary is provided below.

8.2 Overall the NMC received 132 responses, 91 from individuals and 41 from organisations. The proposals received a high level of supportive responses from organisations and individuals. For example:

- 82% of organisations and 74% of individuals agreed with the NMC's proposed approach to when Case Examiners should recommend undertakings.
- 91% of organisations and 92% of individuals agreed that where a nurse or midwife fails to comply with undertakings, Case Examiners should be able to send the original allegation for a hearing.
- 67% of organisations and 77% of individuals agreed with the NMC's approach to publishing the content of warnings.

8.3 Of those that disagreed with the NMC's proposals, key comments were:

- the need for guidance in order to be consistent and effective;
- concern that the Professional Standards Authority (PSA) would not have the power to appeal decisions made by Case Examiners or the Investigating Committee where a case does not go to a panel hearing; and
- that the issuance of a warning must be consensual

8.4 The NMC's consultation report confirms that guidance for Case Examiners and Investigating Committees will follow the changes to their legislation (see section 10 of Explanatory Memorandum for more detail).

8.5 In relation to the concerns raised around the PSA not having the power to appeal decisions made by case examiners to either agree undertakings where there is a case to answer or issuing a warning or advice where there is no case to answer, it is open for the PSA, or any other interested party, to request that the NMC review such a

decision. The Rules amend the 2004 Rules in this regard (see paragraphs 7.17 and 7.25 of this EM).

8.6 With regard to the view that the registrant must consent to the issue of a warning, the NMC have taken concerns on board and have added a requirement to the 2004 Rules that the registrant must, when an allegation is referred to Case Examiners, be informed of the options available to the Case Examiners, which includes issuing a warning, and the registrant will be invited to make representations which the Case Examiners must consider before making their decision (see para 7.16 of this EM).

8.7 A copy of the NMC's consultation report can be found online at: https://www.nmc.org.uk/about-us/consultations/past-consultations/2016-consultations/modernising-fitness-to-practise---changes-to-the-fitness-to-practise-rules-2004/

9. Guidance

9.1 The NMC has developed guidance for Case Examiners and the Investigating Committee in relation to their new powers for disposal of cases.

9.2 During the development of its guidance the NMC sought views and feedback from stakeholders and professional bodies including royal colleges and trade unions. The NMC have published guidance on their website at the following link - https://www.nmc.org.uk/concerns-nurses-midwives/hearings-and-outcomes/our-panels-case-examiners/case-examiners/

10. Impact

10.1 The impact of the fitness to practise changes was assessed as part of the Nursing and Midwifery (Amendment) Order 2017 and an impact assessment was published alongside that Order and can be found at the following link - https://www.gov.uk/government/consultations/changes-to-nursing-and-midwifery-council-governing-legislation

10.2 In summary, 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.

10.3 The impact on the public sector is expected to fall on the NMC. We estimate the changes will deliver savings for the NMC of £60million over a 10 year period. These savings will be made through the improvement in efficiency to the NMC's current fitness to practise processes.

10.4 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses as it can impact upon registrant fees paid to the NMC by self-employed nurses and midwives. 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 of the Privy Council made under article 48 of the Nursing and Midwifery Order 2002.

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 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 Elaine Plumb at the Department of Health Telephone: 01132545998 or email: elaine.plumb@dh.gsi.gov.uk can answer any queries regarding the instrument.