Department of Health

The Nursing and Midwifery Council - amendments to modernise midwifery regulation and improve the effectiveness and efficiency of fitness to practise processes

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The Nursing and Midwifery Council - amendments to modernise midwifery regulation and improve the effectiveness and efficiency of fitness to practise processes

A paper for consultation

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Foreword

The Nursing and Midwifery Council (NMC) is the healthcare professional regulator for nursing and midwifery in the UK. It is an independent body, which exists to safeguard the health and wellbeing of the public. It does this by setting standards of education, training, conduct and performance for nurses and midwives. It also holds the register of those who have qualified and meet those standards. If an allegation is made that a registered nurse or midwife is not fit to practise, the NMC has a duty to investigate that allegation and, where necessary, take action to safeguard the health and wellbeing of the public.

All four UK Health Departments recognise the important work that the NMC, and the other eight health professional regulatory bodies, undertake in protecting the public and delivering efficient and effective regulation. The four countries are therefore committed to working with the NMC to ensure the legislative framework surrounding nurses and midwives' regulation remains fit for purpose.

The Nursing and Midwifery Order 2001 (NMO) is the NMC's governing legislation that sets out the regulatory framework for two distinct professions, nursing and midwifery. In all key respects the same framework applies to both professions: education, registration, standards and fitness to practise. However the NMO currently contains an additional set of provisions unique to midwifery. There are three key areas of difference: a statutory midwifery committee to advise the NMC Council on matters relating to midwifery[1]; a duty for the NMC to make rules specific to midwifery practice[2], and a role for Local Supervising Authorities (LSA) in discharging supervisory functions for midwifery[3].

This consultation paper proposes amendments to the NMO to remove this additional tier of regulation for midwives and to abolish the statutory midwifery committee (via an Order under Section 60 of the Health Act 1999 ("the Order")). The Order will also amend the NMO to make changes to the NMC's fitness to practise functions which will provide the NMC with greater flexibility in resolving cases at the end of the investigation stage of the fitness to practise process. The Order will make some other amendments to the NMO to improve the efficiency of

[1] The Order - Article 41

[2] The Order - Article 42

[3] The Order - Article 43

the NMC'S fitness to practise processes and lead to the swifter resolution of complaints and investigations, whilst also improving patient protection and public confidence in nursing and midwifery regulation.

This document provides information on what the proposed amendments are, what they will do and in addition seeks your comments and views on the proposals.

Executive summary

This consultation is being taken forward in accordance with the requirements of Section 60 of the Health Act 1999. Section 60 permits modifications to the regulation of healthcare professionals by means of an Order in Council. The power requires the Secretary of State for Health to consult on draft Orders prior to their introduction into Parliament. Section 60 Orders are subject to appropriate Parliamentary scrutiny through the affirmative resolution procedure. While there are no legislative requirements for this draft order to be laid before the Scottish Parliament, the Northern Ireland Assembly, or the National Assembly for Wales, the policy proposals in this document have the support of Ministers in those countries. Therefore, this consultation is being undertaken on behalf of all four parts of the United Kingdom and the outcome of it will be reported to all UK health ministers. The proposed amendments will apply to all practitioners working in the UK that are required to register with the NMC.

The Order will make a number of amendments to the NMO, the governing legislative framework that sets out the roles, functions and processes of the NMC. The changes to the NMO introduced by this Order will remove the additional tier of regulation applying to midwives by removing provisions relating to the statutory supervision of midwives and removing the Midwifery Committee as a statutory committee of the NMC. It will also improve the efficiency and effectiveness of the NMC's fitness to practise processes.

The NMC will amend the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (SI 2004/1761) ("the Fitness to Practise Rules") as a result of the new powers being introduced by this Order and will also amend the Nursing and Midwifery Order 2001 (Legal Assessors) Order of Council 2004/1763 as a consequence of the amendments to the NMO. The NMC will consult on the proposed changes to its rules in due course. Details of how to take part in the NMC's consultation will be available at www.nmc-uk.org nearer the time.

Introduction

The amendments to the NMO via this Order are intended to achieve three objectives:

1) Remove statutory midwifery supervision provisions

Under its governing legislation, the NMC has a clear regulatory framework which applies to the two distinct professions that it regulates — nurses and midwives. In all key respects this framework applies to both professions in the same way: the setting of standards of education for those wishing to join the register, the conditions of registration (including health, character and language requirements), the standards of conduct and performance for those on the register (set out in the NMC's Code[4]) and the powers and processes to enable it to take action if a nurse or midwife is alleged to be no longer fit to practise. This framework is similar to that used by all the other healthcare professional regulators in the UK.

In addition to this main regulatory framework, 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 not only unnecessary (as midwives are no more inherently dangerous or risky practitioners than doctors, nurses or other healthcare professionals), but that it is also potentially detrimental to public protection as conflicts may arise between the exercise of local supervision and support and the need for appropriate and independent regulatory action.

The changes set out in this document will result in a clear separation of the roles and purpose of the supervision and regulation of midwives. The NMC, as the regulator, will be in direct control of all regulatory activity under its existing framework. In addition, there will be a new non-statutory system of midwifery supervision that will meet the need for clinical supervision of midwives in clinical practice, and peer reviews for those not in clinical practice. This new system of supervision will ensure that good governance and professional performance are maintained.

[4] The Code (NMC, 2015) sets out the professional standards of practice and behaviour for registered nurses and midwives

2) Abolish the statutory Midwifery Committee

At present, the NMC's legislation also has an additional governance requirement relating solely to midwifery. Although the NMC regulates two professions, nurses and midwives, the NMC is only required by its legislation to have a statutory midwifery committee to advise the NMC Council on matters relating to midwifery. It has no similar requirement to have a statutory nursing committee and none of the other healthcare professional regulators have a comparable statutory committee. The government has a policy objective to streamline and rationalise regulatory legislation. Therefore it is considered that it would be appropriate to make this statutory change now at the same time as making changes which are needed to modernise midwifery regulation.

3) Make some improvements and efficiencies to the NMC's fitness to practise processes

The number of fitness to practise referrals the NMC receives is a key driver of its costs and continues to increase. Where the NMC has powers to do so, it has already taken measures to improve its efficiency and effectiveness in managing its fitness to practise processes. These proposed changes will enable it to make further improvements and deal with cases in a more appropriate and proportionate manner whilst not compromising public protection. They will also enable the NMC to better balance its resources between its fitness to practise work and its other core functions: education, standards, registration and revalidation.

What are the proposals?

A summary of the proposals is set out below. The proposed amendments to the NMO and their rationale are discussed in more detail in pages 13–32 of this consultation document.

- Removal of the Midwifery Committee
- Removal of NMC's duty to make rules as to midwifery practice
- Removal of the local supervision of midwives
- Giving Case Examiners and the Investigating Committee 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. The NMC will also be given powers to make rules in this regard, for example, to make provision for the consequences of a breach of undertakings.

- Giving Case Examiners and the Investigating Committee power to issue a warning or advice to a registrant at the end of the investigation stage where there is no case to answer but the NMC have some concerns about a registrant's past practice or conduct.

- Replacing the Conduct and Competence Committee and the Health Committee with a single Fitness to Practise Committee.

- Removing the requirement for the NMC to specify in rules the size of its Practice Committees.

- Extending the time limit, from three months to six months, for second and subsequent reviews of interim orders.

- 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.

- 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 terminate an interim order, to replace an interim suspension order with an interim condition of practice order or vice versa, where appropriate.

- 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 a recommendation arising from the Law Commissions' of England and Wales, Scotland and Northern Ireland review of health and (in England) social care professional regulation published on 2 April 2014 and was accepted in the four UK country response published on 29 January 2015. The requirement to notify a registrant's employer, where known, will remain.

Consequential changes

The Order also amends the Nursing and Midwifery Council (Midwifery and Practice Committees) (Constitution) Rules 2008 (which are set out in the Schedule to S.I. 2008/3148) and will revoke the Nursing and Midwifery Council (Midwives) Rules 2012 (which are set out in the Schedule to S.I. 2012/3025) as a consequence of the amendment of the NMO in respect of the removal of the Midwifery Committee as a statutory committee and the removal of the provisions relating to the supervision of midwives.

Removal of Statutory Midwifery Supervision

The NMC's current legislation provides for local supervising authorities that oversee a system of local supervision of midwives. Through this supervisory system, which dates back to 1902, some concerns about midwives can be investigated and resolved locally by other midwives (who have been appointed as supervisors of midwives) without reference to the NMC. This additional tier of statutory supervision for midwives is not a feature of the regulation of any other health and care profession in the UK.

The effect of this approach is that midwives are regulated in part by other midwives (through the LSA structure). Following the Shipman Inquiry[5], all other registered healthcare professionals are subject to regulation which involves trained independent lay people as an important public protection against conflicts of interest.

The current regulatory approach to midwifery supervision was a significant factor in the poor response to failings in midwifery care at Morecambe Bay University Hospitals NHS Foundation Trust. The Parliamentary and Health Service Ombudsman[6] (PHSO) and a Department of Health investigation led by Dr Bill Kirkup[7] both produced reports following Morecambe Bay that were critical of the additional tier of midwifery regulation from a public protection perspective. In addition, the NMC commissioned the King's Fund to undertake an independent review of midwifery regulation which substantiated these criticisms and endorsed the call for urgent change. The PHSO and the King's Fund both concluded that the issues raised by Morecambe

[5] http://webarchive.nationalarchives.gov.uk/20090808154959/http:/www.the-shipman-inquiry.org.uk/reports.asp

[6] http://www.ombudsman.org.uk/__data/assets/pdf_file/0003/23484/Midwifery-supervision-and-regulation_-recommendations-for-change.pdf

[7] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408480/47487_MBI_Accessible_v0.1.pdf

Bay were not isolated pockets of poor practice but indicative of a structural problem with statutory supervision.

The King's Fund supported the PHSO recommendation that the supervision and regulation of midwives should be separated, and the NMC as the regulator should be in direct control of all regulatory activity. Furthermore, the King's Fund found no evidence to support the proposition that the unique layer of midwifery regulation provided any additional public protection and it recommended that it should be removed from the NMC's legislation. This recommendation was accepted by the NMC's governing body (the Council) and supported by the Kirkup report.

The Secretary of State for Health accepted the recommendations of the Kirkup Report in full and committed to bringing forward proposals to amend the NMC's legislation[8].

To meet the recommendations accepted by the NMC and the government that the supervision and regulation of midwives should be separated, Articles 42 and 43 of the NMO will be removed.

Article 42 Rules as to midwifery practice

The Nursing and Midwifery Council (Midwives) Rules 2012 ("the Midwives Rules") are concerned with the practice of midwives and their supervision by Local Supervising Authorities ("LSA"). The rules include provision relating to the requirements for a midwife to notify the LSA of their intention to practise in the LSA's area, midwives' record-keeping obligations, the duty of the LSA to appoint a midwifery officer and supervisors of midwives, the LSA's duty to publish its procedure for reporting and investigating adverse events relating to midwifery practice or allegations of impairment of fitness to practise and the suspension action that the LSA may take against a midwife that it intends to refer to the NMC.

Removing Article 42 of the NMO will remove the NMC's duty to make such rules regulating the practice of midwifery. The Midwives Rules (and the standards made under them) will be revoked.

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[8] https://www.gov.uk/government/news/jeremy-hunt-announces-new-measures-to-improve-safety-across-nhs

In anticipation of the new non statutory system of supervision the NMC will be considering its pre-registration midwifery education standards and make amendments where necessary.

Article 43 Local Supervision of Midwives

There are four UK Local Supervising Authorities (LSA). In England, the LSA is NHS England, in Wales it is Healthcare Inspectorate Wales, in Scotland it lies with the Health Boards and in Northern Ireland the Local Supervising Authority is the Public Health Agency. The removal of Article 43 of the NMO will remove the statutory basis of the LSAs and the regulatory functions they fulfil. This would remove midwifery supervision from the NMC's legal framework. This fulfils the government's commitment to separate regulation and supervision.

This change does not mean the end of midwifery supervision, which is much valued by the profession. It means that in future supervisors will not be involved in regulatory investigations and sanctions — their role will be focussed on the aspects that midwives value most — support and development. On the 22nd January 2016, the Department of Health and the four Chief Nursing Officers published plans[9], developed in collaboration between UK Chief Nursing Officers (CNO), NMC, Royal College of Midwives and the Chair of the LSA Midwifery Officer Forum for the continuation of supervision as a vehicle for professional support and development. Each UK CNO has convened a task force to deliver this new system and meetings are being held to design the new system which will affect all midwives (NHS and independent) in each country and building on the systems and processes for good governance and professional performance already in place.

The principles of the new system for midwifery supervision as a professional are that:

- it maintains and improves quality and thereby protects the public
- for those midwives in clinical practice, the system should be framed as clinical supervision (which need not espouse any one particular model of clinical supervision) and peer review for those midwives not in clinical roles

[9] https://www.gov.uk/government/publications/changes-to-midwife-supervision-in-the-uk

- a system of midwifery supervision is a vital aspect of contemporary midwifery practice and needs supervisors of sufficient expertise and experience to support the midwife in practice
- midwifery supervision should be at least an annual event and also be proactively accessed at times when support and advice are needed on a 24 hour, 365 days of the year basis
- midwifery supervision is a proactive, developmental and supportive partnership between a midwife and the supervisor and links to effective clinical governance
- supervisors may or may not be in managerial roles or the supervisee's line manager, but do need to be practising midwives themselves
- supervisors are adequately prepared and experienced enough to be both critical and supportive
- supervisors are selected by heads of midwifery and peer feedback should be used to inform the selection process
- alignment with the NMC Code (2015) is essential
- alignment with the NMC revalidation process is essential and will be the same process for all its registrants
- the NMC should hold only information about practising midwives that contributes to protection of the public; it is therefore unlikely that the Local Supervising Authority Midwifery Officer (LSAMO) database (hosted and maintained by NHS England for the UK) will need to be kept for regulation purposes — on this premise, keeping or transferring the database is a matter for negotiation by the affected parties
- employers ensure that all their practising midwives are subject to supervision
- all practising midwives seek supervision even if they are self-employed or do not work regularly for one employer consistently
- any new system must not be more costly than the present system
- for the majority of midwives who are employed, there should be clarity about the legitimacy and distinctiveness of supervision as a facet of professional good practice and appraisal as a responsibility of the employer.

Anticipated benefits

It is expected that the removal from the NMO of the provisions concerning the statutory supervision of midwives will have several key benefits:

- The NMC will have control of the regulatory investigation and sanction of midwives, enhancing public protection through the well-established principle of independent oversight and accountability.

- When things go wrong, there will be greater clarity about who needs to take action for service users and midwives themselves.

- There will be a new non-statutory system of midwifery supervision that will meet the need for clinical supervision for midwives in clinical practice and peer review for practising midwives who are not in clinical practice. This new system will ensure good governance and professional performance continue.

- There will be some cost savings arising from the cessation of regulatory activity that does not add to public protection.

Q1 - Do you agree that this additional tier of statutory supervision for midwives should be removed?

The Midwifery Committee

At present, although the NMC regulates two professions, nurses and midwives, the NMC is required by its legislation to have a statutory midwifery committee to advise the NMC Council on matters relating to midwifery. It has no similar requirement to have a statutory nursing committee.

The removal of the statutory Midwifery Committee is derived from the three UK Law Commissions' review of the regulation of health and (in England) social care professions which considered streamlining of processes across regulators. The Law Commissions concluded that all statutory committees, with the exception of fitness to practise and appointment committees should be abolished. The four UK country response[10] published on 29 January 2015 deferred this issue concerning midwifery, and the statutory status of the Midwifery Committee, pending the wider consideration of midwifery reform. Now that we are consulting on the implementation of that wider reform, we are also consulting on whether to remove the statutory Midwifery Committee. Having a statutory committee to represent a profession to the professional regulator is unique to the regulation of midwifery as a profession in the UK. Healthcare professional regulation has been moving away from the model of professional self-regulation to a model of independent professional regulation for many years. A key aspect of independent professional regulation is ensuring sufficient separation of function between the strategic governance roles of the Council and operational decision-making in individual cases (principally in the areas of registration and fitness to practise). A statutory Midwifery Committee performing a representational role is not consistent with this approach.

Amending article 3(9) of the NMO would remove the statutory midwifery committee from the NMC's governance structures. This 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 its Order to take into account the views of those it regulates and others when exercising its functions. Article 3(14) similarly places it under a duty to consult with affected groups when establishing standards and guidance. 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 already appointed a senior professional midwifery adviser and has established a non-statutory

[10] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_8995.pdf

Midwifery Panel to ensure it continues to engage with midwives and benefit from midwifery expertise.

Q2 - Do you agree that the current requirement in the NMC's legislation for a statutory Midwifery Committee should be removed?

Warnings, advice and undertakings

In March 2015 the NMC introduced case examiners to decide whether there is a case to answer at the end of an investigation into an allegation about a nurse or midwife's fitness to practise. Two case examiners (one lay and one a registered nurse or midwife) consider all the evidence gathered during the investigation. If they decide that there is no case to answer, the case will be closed. If they decide that an allegation indicates that the registrant's fitness to practise may be impaired, they must refer the case to the relevant Practice Committee for consideration at a hearing. Following the hearing the Practice Committee can issue a range of sanctions, including imposing conditions on the individual's registration. Where case examiners cannot agree on whether there is a case to answer, the case is referred to the Investigating Committee (IC) who will determine if there is a case to answer.

There are no powers contained within the NMC's legislation that allow the IC or case examiners to agree 'undertakings' with a registrant or issue 'warnings' or give 'advice' to a registrant.

Warnings

Warnings will be given at the end of the investigation stage where the case examiners or IC consider that there is no case to answer in respect of the allegation of impaired fitness to practise. This means that a fitness to practise hearing is not necessary, but there may be aspects of the registrant's past practice or conduct that cause some concern.

Warnings could be given, for example, in a case where the registrant's accepted conduct at the time of the incident giving rise to the allegation might indicate impaired fitness to practise but the investigation shows that any clinical risk has been fully remedied by the registrant. The only remaining basis for regulatory action would then be to maintain public confidence in the professions or to declare and uphold proper standards so a warning might be an appropriate outcome. Equally, a low-level criminal conviction such as shoplifting, or a non-clinical misconduct case where the facts are not in dispute and insight and remediation had been fully demonstrated by the registrant may be suitable for warnings.

If the IC or case examiners issue a warning they must clearly set out the details and the reasons for issuing the warning. Warnings will be in the public domain, and will be published by the NMC.

Advice

Advice would be issued by case examiners or the IC when an investigation reveals a concern but the IC or case examiners consider that the allegation should not be referred to the Fitness to Practise Committee however, if the behaviour in question were repeated, it might lead to further regulatory investigation being required.

If case examiners or the IC give advice they would inform the registrant of the details of the advice and the reasons for issuing it. This would not be published.

Undertakings

If the IC or case examiners decide that an allegation indicates that the registrant's fitness to practise may be impaired they would have the power to agree undertakings with the registrant. Undertakings are a formal binding agreement between the regulator and the registrant that the registrant will undertake activities such as training or operate under supervision.

This will mean that some cases which are currently referred to a Practice Committee may not need to be, if it is determined that the agreement and satisfactory fulfilment of undertakings would lead to the resolution of a case in a way that protects the public and addresses the concern about the professional. Rules will provide that undertakings could not be agreed where the IC or case examiners consider that if the case was referred to the Fitness to Practise Committee, that Committee might make a striking-off order.

Undertakings are designed to address alleged deficiencies in a registrant's practice. By agreeing the undertakings the registrant will be acknowledging this deficiency. If the registrant does not agree the undertakings proposed by the case examiners or IC, the allegation will be referred for adjudication before a Practice Committee as with any other case.

An example of a case where undertakings could be applied is where it is alleged that a registrant is deficient in a particular clinical skill, and the registrant agrees to complete specific retraining. Similarly, if a case involved an allegation that a registrant's health was affecting their fitness to practise, it may be possible to agree undertakings that would address any risks posed to the public and to the registrant themselves as a result of the health condition.

It is considered that undertakings are a more proportionate and targeted way of dealing with less serious cases than referring the case for a full hearing, when the decision of the Practice Committee panel would be likely to result in a substantially similar outcome to undertakings. In these circumstances, sending the case for a hearing before a Practice Committee panel would only increase the time, cost and anxiety involved. The resources saved from this approach will be diverted into dealing with serious cases more quickly.

Any undertakings agreed with a registrant (save for those relating solely to any personal health condition) would be in the public domain, and would be published by the NMC. The agreement to, and compliance with, undertakings by the nurse or midwife will also ensure that public protection is maintained.

Conclusion

We propose providing the IC and case examiners with these powers because it will improve the effectiveness and efficiency of the NMC's fitness to practise processes. It will also provide a more proportionate response to allegations of impairment of fitness to practise while maintaining public protection and will align the NMC's position with some of the other healthcare regulators such as the General Medical Council who already have similar powers to issue advice or warnings and agree undertakings and the General Dental Council who will have these powers on 13 April 2016.

The NMC will make Rules setting out the process for managing breaches or variations in undertakings. In addition, the NMC will issue guidance to support case examiners in determining when 'undertakings', 'warnings' or 'advice' are appropriate to ensure public safety is not compromised.

Q3. Do you agree that, when the Investigating Committee or the Case Examiners determine that there is no case to answer but there are some concerns as to past practice or conduct, the Investigating Committee and case examiners should have the power to issue a warning or advice to a nurse or midwife?

Q4. Do you agree that, where the Investigating Committee or the case examiners determine that there is a case to answer in respect of an allegation, the Investigating

Committee and the case examiners should have the power to agree undertakings with a nurse or midwife?

Single fitness to practise committee

Under the NMC's current legislation there are three Practice Committees, the Investigating Committee, the Conduct and Competence Committee (CCC) and the Health Committee (HC). The CCC and the HC adjudicate in cases where the IC or case examiners consider there is a case to answer in respect of an allegation that a registrant's fitness to practise is impaired.

The CCC and the HC are made up of a panel of nurses or midwives and lay members. Panels decide whether a nurse or midwife's fitness to practise is impaired and, if so, what, if any, sanction is required to protect members of the public, and/or uphold public confidence in the professions. When making this decision, panels look for the level of conduct and competence expected of a nurse or midwife ordinarily working at that level of practice. They also consider the NMC's standards and guidance that nurses and midwives are expected to apply.

The CCC considers cases where a nurse or midwife's fitness to practise is alleged to be impaired due to:

- misconduct;
- lack of competence;
- a criminal offence;
- not having the necessary knowledge of English, or
- a finding by any other health or social care regulator or licensing body that fitness to practise is impaired.

The HC considers cases where a nurse or midwife's fitness to practise is alleged to be impaired by physical or mental ill health.

CCC panel hearings are held in public to reflect the NMC's accountability to the public. The panel may agree to hold parts of or all of the case in private, to protect the anonymity of the alleged victim, or if confidential medical evidence is disclosed, or where the private interest of a party or witness outweighs the general public interest in the hearing taking place in public. Because of the confidential nature of the medical evidence being considered, HC panel hearings are held in private.

The existence of two committees that can decide on whether or not there is impairment of fitness to practise can cause delays and additional hearing days. For example, in cases being considered by the CCC, it may to come to light that there is potential underlying health issue, and the case then needs to be transferred to the HC resulting in increased cost and inefficient disposal of cases and additional stress for a nurse or midwife who is already coping with health issues. Failure to engage with a health investigation can also result in cases being transferred from the HC to the CCC. In cases of transfer between the CCC and HC delay is caused by additional notice periods and the need to investigate different regulatory concerns afresh sometimes at a late stage in the fitness to practise process.

We propose to make an amendment to the NMO that will replace the CCC and the HC with one single Fitness to Practise Committee. 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 thereby reducing unnecessary delay and improving the fairness of the process by ensuring all cases are heard by one committee. There will be no change to the current practice of hearings being held in private if medical evidence is being considered.

The NMO also states that the NMC must make rules with regard to the constitution of each Practice Committee. It also provides that those rules must include provision with regard to the Practice Committee's size and membership. Panellists from the Practice Committees preside over fitness to practise cases and play a very significant role in protecting the public. Practice Committee panels are made up of nurses or midwives and lay members. Usually there will be three panel members deciding on any given case. We propose to remove the requirement that rules must specify the size of Practice Committees which will give the NMC greater operational flexibility in meeting the future needs of its FtP proceedings, without it having to amend its rules, should the size of its Practice Committees need to be increased. This will mean that the NMC is no longer required to set an upper limit to the total pool of panellists appointed to each Practice Committee.

Q5. Do you agree that the Conduct and Competence Committee and Health Committee should be replaced by a single Fitness to Practise Committee which will deal with allegations of impairment of fitness to practise on all grounds?

Q6. Do you agree that the requirement for the NMC to specify in rules the size of its Practice Committees is unnecessary and should be removed?

Location of hearings

The NMC's current legislation requires that all preliminary meetings and hearings of Practice Committees at which the registrant is entitled to be present must be held in the UK country of the nurse or midwife's address as it appears on the NMC's register (even where this is an old address and the nurse or midwife has perhaps moved to another country and omitted to notify the NMC of their change of address). There is similar provision in connection with appeal hearings against decisions of the Registrar.

This provision can have unintended consequences in terms of inconvenience and unnecessary cost. For example, if a registrant has kept their registered address in Scotland but was working for a period in a setting in the South of England when the incident under investigation took place then all the hearings in that case would have to take place in Scotland even though the events took place in England. This often has the result that the registrant and witnesses are required to travel a long distance to attend a hearing in another country, which results in inconvenience for them and administrative burden and additional and unnecessary expense for the NMC.

The requirement can also mean that in cases where the nurse or midwife has never engaged with any stage of a fitness to practise investigation (and may have indicated to the NMC they have no desire to do so), the NMC is still required to expend resource making arrangements for panellists, NMC staff and witnesses to attend hearing locations in the country in which the nurse or midwife is registered, even where there is no prospect of the nurse or midwife attending the hearing.

We propose to remove this mandatory requirement and to give the NMC flexibility to schedule hearings in the most convenient and cost effective location for all those involved in the hearing. The NMC will put in place guidance to ensure that the discretion on where hearings are held is exercised fairly.

Q7. Do you agree that the statutory requirement regarding the location of preliminary meetings and hearings of Practice Committees and hearings of appeals against the Registrar's decisions should be removed providing flexibility to hold these hearings in the most convenient location for all parties?

Interim order reviews

Interim orders temporarily suspend or restrict the nurse or midwife's practice while their case is being investigated. Interim orders may be imposed because the allegations against the nurse or midwife are so serious that some form of restriction (either an interim conditions of practice order or an interim suspension order) is necessary to protect members of the public, is otherwise in the public interest, or is in the nurse or midwife's own interest. Orders may be imposed for up to 18 months. The investigation continues while the interim order is in effect.

The current legislation requires an interim order to be reviewed six months after it has been enforced and then at three month intervals for all subsequent reviews. We are proposing to amend the NMO so that all interim order reviews are held at six month intervals because it is considered that this time frame is more proportionate to all parties involved; both for the NMC in terms of reducing the number of hearings which do not assist in terms of case progression, and for the nurse or midwife in terms of attending hearings or supplying further information to the NMC. Making this change will not result in longer investigations because the resources being saved by the NMC from scheduling three monthly reviews can be diverted to progressing cases more quickly. The provision in the NMO that requires a Practice Committee to review an interim order where new evidence relating to that order becomes available will remain unchanged.

A Practice Committee panel can only impose an interim order for a maximum period of 18 months. If the case is still ongoing at 18 months and a further interim order extension is required then the NMC must apply to the court to further extend the order. Such applications are often made where there are lengthy criminal cases ongoing. The court can extend the interim order for up to 12 months. However, the interim order as extended must be first reviewed six months after the court's extension (if it had not already been subject to a six month review by a Practice Committee); otherwise and subsequently at three monthly intervals. It is proposed that the subsequent interim order review is extended to six months intervals to align the processes for managing all interim order reviews. If the court is concerned that the case is taking too long it has the power to extend the interim order for a shorter period of time.

Q8. Do you agree that all interim order reviews, including those where the court has granted an extension, should be held at six month intervals?

Interim order appeals

A nurse or midwife can make an application to the High Court in England and Wales and the High Court of Justice in Northern Ireland, or the Court of Session in Scotland for their interim order to be revoked or varied. At present the court has power to terminate an interim suspension order or to revoke or vary any condition imposed by an interim conditions of practice order. In some cases the court considers that the Practice Committee panel's decision is wrong and that an interim suspension order should be replaced with an interim conditions of practice order (or vice versa), however the court currently has no power to make this change.

This current situation can leave a potential public protection gap in cases where an interim conditions of practice order is in place but the court considers an interim suspension order is more appropriate to protect the public. It can also create unfairness to nurses and midwives where, for example, an interim suspension order is in place but the court considers that conditions on their practice would be sufficient to satisfy public protection concerns. Therefore to address these concerns we propose to amend the NMO to give the court the powers to replace an interim suspension order with an interim conditions of practice order (or vice versa) where it considers the original decision is wrong. The court will continue to have the power to terminate an interim suspension order and to revoke or vary any condition imposed by an interim conditions of practice order.

We also propose to give the court the same powers to replace an interim suspension order with an interim conditions of practice order (and vice versa) in respect of the NMC's applications to the court to extend an interim order.

Q9. Do you agree that the court should have additional powers to replace an interim suspension order with an interim conditions of practice order (or vice versa)?

Substantive order reviews

A Practice Committee panel will adjudicate on cases and 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 will impose whichever of a striking-off order, a suspension order, a conditions of practice order or a caution order that it considers necessary to protect the health and wellbeing of the public or the reputation of the professions, or to maintain public confidence in them.

The NMO requires the Practice Committee panel to review every conditions of practice or suspension order it imposes, to monitor compliance with any conditions and to review whether a restriction on the nurse or midwife's practice remains necessary and extend or vary the order where appropriate. We agree that there is a clear need for panels to review substantive orders to ensure public protection.

Practice Committee panels sometimes impose a substantive order (usually a short period of suspension) in cases where although the nurse or midwife's practice does not present a current risk of harm to members of the public, the suspension is otherwise necessary to declare and uphold the standards of professional conduct to be expected. In cases of this nature, where the substantive order was imposed by the Practice Committee panel solely on public interest grounds, it is considered that the requirement to carry out a review hearing is not necessary. It can lead to wasted resource because there is no continuing public protection risk for the panel to re-assess.

Examples of cases where orders are imposed ‘solely on public interest grounds’ include serious clinical incidents, where the nurse or midwife no longer presents a current risk to patient safety, (because of steps taken by them to remedy deficiencies in their practice), nevertheless a period of suspension is required to mark the seriousness of the original incident.

It is proposed that a more proportionate approach would be to allow Practice Committee panels (i.e. the Fitness to Practise Committee panels under the proposals in this order to replace the CCC and HC with a single Fitness to Practise Committee) to direct whether an order should not be reviewed before its expiry. In the absence of such a direction, the default position would continue to be that the order would be reviewed by the Fitness to Practise Committee Panel.

The NMC intend to produce guidance for the Fitness to Practise Committee panels to determine when it would be appropriate not to impose a review hearing. The NMC will continue to have the power to review substantive orders at any time either of its own volition or on the application of the person subject to such an order.

Q10. Do you agree that it is not necessary for the Practice Committee panel to review all conditions of practice or suspension orders but instead should have the discretion to direct whether an order needs to be reviewed before the expiry of that order?

Notice requirements

The NMO requires the NMC to make rules which include provisions requiring the NMC to notify specified persons, including governments of the four countries, when an allegation is referred to the CCC or to the HC for a hearing.

It is considered that this requirement is unnecessary as no finding of impairment has yet been made and therefore there are no public protection implications. It is also administratively burdensome due to the high number of hearings held by the NMC per year. Therefore it is proposed that the requirement to include such a provision in rules should be removed from the legislation. The requirement for the rules to provide that the NMC should give such notification to the registrant's employer, where known, will remain.

It should be noted that the NMC already has a power to disclose fitness to practise information to any person where it considers that it is in the public interest to disclose which is a more proportionate approach to disclosure.

Q11. Do you agree that the requirement to notify specified persons, including governments of the four countries, when an allegation is referred to a Practice Committee panel for a hearing should be removed?

Costs and benefits analysis

During the development of our proposals we have considered the costs and benefits and the possible impact they might have. We believe the direct costs and benefits arising from the measures outlined above will mainly affect the NMC, Approximately 17% of nurses and midwives operate in the private sector, therefore 17% of the impacts that have been identified which fall on to the NMC are considered as impacts on business.

Most of the costs and savings will apply to the NMC, which have been calculated on a best estimate, best case (most optimistic) and worst case (most pessimistic) scenario. The best estimate has been calculated on the introduction of undertakings which will result in an improvement in the overall cost efficiency, and costly full hearings will be reserved for more serious cases where there is a public interest concern. We estimate that this power will lead to a saving of £2.5 million in year one, rising to £5.6 million in year two; this is based on the increased number of cases being closed before they reach the more costly adjudication stage. Year one will see less than half of the potential savings due to the fact that there is a time lag before cases actually get to a hearing. Therefore, a significant number of cases during the first year of implementation of this power will not be subject to these new powers, of which the NMC expect a vast majority to have been heard within six months. The following years (from year two onwards) will realise the full benefits of £5.6 million as all cases will then be subject to the new powers.

The best case and worst case scenarios have been calculated by adjusting for the estimate for the percentage of cases that will go to the full adjudication stage following the introduction case examiners. The best case assumes that only 20% of fitness to practise cases will progress to a full adjudication stage, leading to an ongoing annual saving of £6.9 million from year two onwards, whereas the worst case assumes that 30% will progress to this stage leading to an ongoing annual saving of £4.3 million from year two onwards.

In addition to the potential savings outlined above there are also significant non-monetised benefits from removing the additional tier of midwifery regulation and in introducing a more efficient fitness to practise process by providing better protection to the public and improving confidence in the NMC. However, we intend to gather further evidence on any potential impacts

introducing these measures will create as part of this consultation exercise. Following this consultation our assessment will be reviewed to take account of the consultation responses.

Q12. Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:

An increase
A decrease
Stay the same
Unsure
Please explain your answer

Equality

The Department of Health and the NMC are covered by the Equality Act 2010, and specifically, the Public Sector Equality Duty.

The Duty covers the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race (includes ethnic or national origins, colour or nationality), religion or belief (includes lack of belief), sex and sexual orientation.
There are three parts to the Duty and public bodies must, in exercising their functions, have due regard to them all. They are:

- the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

- remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
- encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low. The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular to the need to:

- tackle prejudice, and
- promote understanding

Q13: Do you think that any of the proposals would help achieve any of the following aims:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010?
- advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?
- fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?

If yes, could the proposals be changed so that they are more effective in doing so?

If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

The draft Order

The draft Order that will be made under Section 60 of the Health Act 1999 is attached at annex A to this document.

Q14. Do you have any comments on the draft Order?

Summary of Questions

Q1. Do you agree that this additional tier of regulation for midwives should be removed?

Q2. Do you agree that the current requirement in the NMC's legislation for a statutory Midwifery Committee should be removed?

Q3. Do you agree that, when the Investigating Committee or the Case Examiners determine that there is no case to answer but there are some concerns as to past practice or conduct, the Investigating Committee and case examiners should have the power to issue a warning or advice to a nurse or midwife?

Q4. Do you agree that, where the Investigating Committee or the case examiners determine that there is a case to answer in respect of an allegation, the Investigating Committee and the case examiners should have the power to agree undertakings with a nurse or midwife?

Q5. Do you agree that the Conduct and Competence Committee and Health Committee should be replaced by a single Fitness to Practise Committee which will deal with allegations of impairment of fitness to practise on all grounds?

Q6. Do you agree that the requirement for the NMC to specify in rules the size of its Practice Committees is unnecessary and should be removed?

Q7. Do you agree that the statutory requirement regarding the location of preliminary meetings and hearings of Practice Committees and hearings of appeals against the Registrar's decisions should be removed providing flexibility to hold these hearings in the most convenient location for all parties?

Q8. Do you agree that all interim order reviews, including those where the court has granted an extension, should be held at six month intervals?

Q9. Do you agree that the court should have additional powers to replace an interim suspension order with an interim conditions of practice order (or vice versa)?

Q10. Do you agree that it is not necessary for the Practice Committee panel to review all conditions of practice or suspension orders but instead should have the discretion to direct whether an order needs to be reviewed before the expiry of that order?

Q11. Do you agree that the requirement to notify specified persons, including governments of the four countries, when an allegation is referred to a Practice Committee panel for a hearing should be removed?

Q12. Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:

- An increase
- A decrease
- Stay the same
- Unsure
- Please explain your answer

Q13: Do you think that any of the proposals would help achieve any of the following aims:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010?
- advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?
- fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?

If yes, could the proposals be changed so that they are more effective in doing so?

If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

Q14. Do you have any comments on the draft Order?

Responding to this consultation

Consultation process

This document launches a consultation to remove the additional tier of regulation for midwives and on a number of proposals that aim to make the NMC's fitness to practise processes more effective and efficient. It therefore seeks to amend the Nursing and Midwifery Order 2001. This consultation document seeks comments and views on the draft Order 'The Nursing and Midwifery (Amendment) Order 2016'. The consultation is being run, as far as is practical, in accordance with the Cabinet Office Code of Practice on Consultations (reproduced below). The closing date for the consultation is Friday 17th June 2016.

There is a questionnaire on the GOV.UK website which can be printed and sent by post to: NMC S60 Consultation, Professional Standards, 2N09, Department of Health, Quarry House, Quarry Hill, Leeds LS2 7UE.
Completed questionnaires can also be sent electronically by e-mail to: HRDListening@dh.gsi.gov.uk
Alternatively you may also complete the online consultation response document at: http://consultations.dh.gov.uk
It will help us to analyse the responses if respondents fill in the online consultation response document but responses that do not follow the structure of the questionnaire will be considered equally. It would also help if responses were sent in Word format, rather than in pdf format.

Criteria for consultation

This consultation follows the Government Code of Practice, in particular we aim to:

- Formally consult at a stage where there is scope to influence the policy outcome;
- Consult for a sufficient period;
- Be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- Ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- Keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;
- Analyse responses carefully and give clear feedback to participants following the consultation;

- Ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at: www.bis.gov.uk/policies/better-regulation/consultation-guidance

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter: (www.dh.gov.uk/en/FreedomOfInformation/DH_088010).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Summary of consultation responses

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the GOV.UK website (www.gov.uk/dh).