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1. Introduction and background

- 1.1. The Nursing and Midwifery Council (NMC) is the healthcare regulator for nursing and midwifery in the UK. It 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.
- 1.2. The roles, functions and many of the processes of the NMC are set out in secondary legislation: the Nursing and Midwifery Order 2001 (as amended), and a series of Rules which sit underneath the Order. The prescriptive legislation within which the NMC operates has restricted its ability to fulfil some of its functions as effectively as it could do. To address this, a number of urgent amendments are now being proposed to both the Order and Rules which will allow the NMC to function more effectively.
- 1.3. This is the first stage in a longer process of developing the legislative framework for the NMC. It follows a commitment in response to the Francis Review by the Prime Minister in February 2013 for “sweeping away the Nursing and Midwifery Council’s outdated and inflexible decision-making processes¹”. This commitment was reaffirmed by the Health Minister, Dr. Daniel Poulter, on 7 January 2014². More significant changes to the NMC’s legislation are expected to be introduced following the Law Commission’s review of all professional healthcare regulators’ legislation.
- 1.4. This consultation sets out a number of small and simple, yet key, proposals for change to the Fitness to Practise Rules and Registration Rules. This is followed by the proposed legal drafting amendments that would give effect to them. The Department of Health is consulting in parallel on new provisions in the Order that

¹ The Prime Ministers speech to Parliament on 6 February 2013, column 282 -

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130206/debtext/130206-0001.htm>

² Hansard – 7 January 2014 – Written statements – Column 204W:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140107/text/140107w0001.htm#14010763000357>

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would allow these Rule changes to be made. Please also refer to that [consultation](#) when considering the proposals set out here. The Department of Health consultation also consults on the additional issue of clarifying the ability of NMC panels to make striking off orders in health or lack of competence cases.

2. NMC proposals

2.1 Case Examiners in the fitness to practise process

Current approach

2.1.1. The NMC's approach to fitness to practise allegations is governed by legislation³. The current approach to handling referrals or allegations made to the NMC about a nurse or midwife's fitness to practise is set out in the diagram below:



2.1.2. Where the NMC receives allegations that a nurse or midwife's fitness to practise may be impaired, these are initially assessed and, if appropriate, an investigation is commenced. A panel of the NMC's Investigating Committee (IC) then decides whether there is a case to answer.

2.1.3. If the IC decides that the individual has no case to answer, the case will be closed. Alternatively, if the IC decides that there is a case to answer, it will refer the case to the Health Committee (HC) or the Conduct and Competence Committee (CCC) for adjudication. The IC may also require relevant parties to submit further information during its decision-making process.

2.1.4. The NMC's current legislation requires a panel of the IC to be made up of at least three people, including at least one registered nurse or midwife (the registrant panel member) and one lay individual. The Chair can be a lay or registrant panel member. The IC is currently made up of a pool of approximately 100 panel members who provide their services to the NMC as independent contractors. The panels are supported by a team of panel secretaries.

Issues with the current approach

2.1.5. One of the key issues with the current approach is that it can be difficult to achieve and demonstrate consistent, quality decision-making among the panel members. This is despite regular training and guidance being provided to them.

³ The Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004; Part V, Articles 21-36 – The Nursing and Midwifery Order 2001.

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The IC are a collection of lay and professional members who do not determine questions of fact. They decide whether there is a case for the nurse or midwife to answer regarding the allegation that their fitness to practise is impaired. There is a high cost in recruiting, training and providing administrative support to so many panel members.

- 2.1.6. In other healthcare regulators, including the General Medical Council (GMC), a similar function is carried out by pairs of lay and professional senior decision-makers, called Case Examiners, rather than a panel. This has introduced a level of expertise and experience which has improved consistency in decision-making and proportionality of approach.
- 2.1.7. The current NMC approach also presents issues in case-handling efficiency and the overall experience for the nurse or midwife against whom allegations have been made. The process set out in the current legislation is expensive, administratively intensive (requiring a number of support staff which includes panel secretaries and a Scheduling Team), lengthy and relies on independent panellists being available.
- 2.1.8. To address these issues, the NMC now wishes to make amendments to its current restrictive legislation to improve the efficiency, quality and consistency of its decision-making at the end of the investigation stage. This is particularly important following the Francis report, and was set out as a priority in both the NMC response to that report and in the NMC corporate plan.

Proposal and expected benefits

- 2.1.9. It is proposed that Case Examiners would decide whether or not there is a case for the nurse or midwife to answer regarding an allegation that their fitness to practise is impaired. Currently, the Registrar needs to inform the nurse or midwife that an allegation has been made, provide details of that allegation and invite representation from them within 28 days. The Registrar would be permitted to request further representations or undertake any further investigations that would be appropriate to assist the Case Examiners in carrying out their functions.
- 2.1.10. The NMC proposes to use a small team of professional (registered nurse or midwife) and lay Case Examiners. A pair of Case Examiners (one lay and one professional) would make a joint decision on each case. They would consider, based on the information and evidence that has been provided, whether the nurse or midwife has a case to answer.
- 2.1.11. Where the Case Examiners agree there is a case to answer, the allegation would be referred to either the HC or CCC. The Registrar would notify both the nurse or midwife and the party making the allegation of this (if any), together with the reasons provided by the Case Examiners in making their decision.
- 2.1.12. Where the Case Examiners agree there is no case to answer, the Registrar would notify both the nurse or midwife and the party making the allegation (if any) of this, together with the Case Examiners' reasons for making that decision. The Registrar would also state that this decision may be considered in

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any future allegation against the nurse or midwife for a period of three years from the date of the decision.

- 2.1.13. Where the two Case Examiners fail to agree whether there is a case to answer, they would be required to inform the Registrar who would refer the case to the IC. It is expected that this would only happen in exceptional circumstances. The IC is therefore expected to have a significantly reduced role in relation to case to answer decisions, but would have a greater role in interim order decisions.
- 2.1.14. The Registrar would be able to refer cases to the IC where one or both of the Case Examiners believed an Interim Order⁴ (IO) should be considered. The proposed amendments would allow the IC to make IO's throughout the fitness to practise process until the final hearing or meeting has commenced. The IC could review IO's it has made until the final determination of the case. This is to ensure that, if new information is received which suggests that an IO is necessary for the protection of the public after a case has been referred to another Practice Committee but before the Committee has started to consider it, the IC still has the power to make an IO.
- 2.1.15. The IC would also retain its role as the panel which determines all allegations relating to fraudulent or incorrect entries on the NMC's register.
- 2.1.16. As well as the GMC having a well-established Case Examiner role, the General Optical Council is also in the process of introducing one. The introduction of Case Examiners will provide a more proportionate approach to the investigation of allegations while maintaining independence in decision-making. It will achieve greater consistency in quality decision-making, while improving the NMC's ability to handle more cases over a shorter period. This will support the NMC's main regulatory function of protecting the public while making the process shorter and more effective for nurses and midwives.

2.2 Reviewing no case to answer decisions

Current approach

- 2.2.1 Under the NMC's current legislation, when a decision is made by a panel of the IC that there is no case for a nurse or midwife to answer against an allegation of impaired fitness to practise, the NMC does not have the power to review that decision of its own volition or at the request of an interested party⁵. The IC may only review decisions to correct small accidental and administrative errors which do not substantially affect the rights of the parties involved. Therefore, the only method of addressing an inappropriate IC decision is if a third party commences judicial review proceedings.

⁴ A temporary measure (suspension from practice or conditions of practice) that the NMC is able to place on a nurse or midwife whilst considering a fitness to practise allegation against them. The measures available are set out in Article 31 of the Nursing and Midwifery Order 2001 (as amended) and Rules 2 & 8 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended).

⁵ *R (on the application of B) v Nursing and Midwifery Council* [2012] EWHC 1264 (Admin),

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Issues with the current approach

- 2.2.2 The current approach prevents the NMC from acting efficiently or in the public interest in order to protect the public. Where a case against a nurse or midwife has been closed and new evidence about the same allegations comes to light, the NMC cannot reconsider the case to either investigate further or re-commence regulatory action. Similarly, where a decision is made by a panel of the IC which the NMC considers to be flawed, there is no power for this to be re-considered under the current legislation.
- 2.2.3 This restricts the NMC's ability as a regulator to fulfil its duty to protect the public, since even where the decision-making process was in some way flawed, it is difficult to take action to address this without a successful judicial review (and the inevitable time and expense this process involves) from a third party. The lack of a power to review IC decisions is also inconsistent with the powers of other healthcare regulators⁶.

Proposal and expected benefits

- 2.2.4 It is proposed that where Case Examiners or a panel of the IC decides there is no case to answer, the Registrar would be able to carry out a review of that decision if the Registrar:
- a. had reason to believe the decision was materially flawed in whole or in part, and it would be in the public interest to review the decision; or
 - b. had reason to believe that new information may have led to a different decision in whole or in part, and it would be in the public interest to review the decision.
- 2.2.5 It is proposed that (other than in exceptional circumstances) any such review must be commenced by the Registrar no later than one year after the original decision of the Case Examiners or IC.
- 2.2.6 Where the Registrar decides that a review of the no case to answer decision should take place, they would notify the nurse or midwife, the maker of the allegation and any other interested party as the Registrar saw fit, that a review would be taking place. The Registrar would seek representations from those persons and would have the ability to carry out any investigations that they considered appropriate in order to reach a decision.
- 2.2.7 If, on the basis of the information available and investigations undertaken, the Registrar decided that the original decision should not stand, then the Registrar may substitute all or part of the decision or refer the case to the Case Examiners for reconsideration. The Registrar would be required to notify the nurse or midwife, the maker of the allegation and any other interested party of that decision and the reasons for it.
- 2.2.8 If, on the basis of the information available and investigations undertaken, the Registrar decided that the original decision should stand, the Registrar would be

⁶ See Rule 12 of the General Medical Council (Fitness to Practise) Rules 2004 (as amended).

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required to notify the nurse or midwife, the maker of the allegation and any other interested party of that decision and the reasons for it.

2.2.9 This would allow the NMC to take direct action and give further consideration to closed cases which give rise to sufficient public protection or public interest concerns. This is important if the public are to have confidence in the NMC as an effective regulator and, in turn, for confidence in the nursing and midwifery professions to be maintained. The proposed approach also provides a number of safeguards for the benefit of those who may be affected by such a review.

2.3 Changes to the composition of a registration appeal panel

Current approach

2.3.1 Under the NMC's current legislation, any decision to refuse an application for registration or readmission to the register, or to refuse the renewal of an existing registration, may be appealed⁷ (a registration appeal).

2.3.2 Such an appeal will be considered, either at a meeting or a hearing, by a panel appointed by the Council (a registration appeal panel). The current legislation requires each registration appeal panel to include a serving Council member as the Chair and, where the health of the person making the appeal is an issue, a registered medical practitioner (RMP).

Issues with the current approach

2.3.3 The Council has a formal and defined role within the governance structure of the NMC, including holding the Registrar and executive to account. It is essential that the independence of the Council is maintained by ensuring that there is a clear separation between the Council's oversight functions and the operational functions of the Registrar and executive. Not doing so gives rise to a potential conflict of interest between the functions of the Registrar and the Council. This concept, and the need to address it, has been highlighted by recent case law developments⁸.

2.3.4 Furthermore, the current requirement for a registration appeal panel to include a RMP in cases where health issues arise, is inconsistent with previous legislative amendments removing such a requirement from NMC fitness to practise processes⁹.

Proposal and expected benefits

2.3.5 It is proposed that Council members should no longer play any part in a registration appeal panel. The role of the Chair would be filled by a person who is

⁷ See Article 37 of the 2001 Order and Rules 18-33 of the 2004 Registrations Rules.

⁸ [2011] EWCA Civ 1168 – The judgment of Rix LJ in *R (on the application of Darsho Kaur) v. (1) Institute of Legal Executives Appeal Tribunal and (2) The Institute of Legal Executives* - paragraph 49

⁹ Amendment Order 2008 No 1485 -

http://www.legislation.gov.uk/ukxi/2008/1485/pdfs/ukxi_20081485_en.pdf

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already appointed to act as a Chair of a Practice Committee. The quorum¹⁰ of the registration appeal panel would remain the same, as would the balance between lay and professional members.

- 2.3.6 This would maintain a clear separation of duties between the operational and governance functions of the NMC to ensure impartiality and avoid any suggestion of perceived or actual bias. This would bring the NMC in line with legal principles recently set out by the higher courts. It is also expected that registration appeal panel hearings would be dealt with more swiftly by not having to rely on the availability of a limited number of trained Council members.
- 2.3.7 The proposed amendments also include removing the current requirement for a registration appeal panel to include a RMP where the health of a person making an appeal is an issue. This requirement is inconsistent with previous legislative amendments removing such a requirement for the HC in considering allegations of impaired fitness to practise. This ensures that all medical opinion is transparent and that a clear separation of functions is maintained; no medical evidence or advice would be given by a panel member responsible for making a decision on a case.
- 2.3.8 The overall aim of these proposed changes is to reinforce the impartiality of panels, ensure decision-making is more transparent, and by doing this, enhance public protection and maintain public confidence in the professions and the NMC as a regulatory body.

2.4 Requesting and verifying information

Current approach and issues

- 2.4.1 Under the current legislation the NMC does not have a general power to request and verify the information in all types of registration application. Instead, the powers available vary depending on the type of registration application being made. In an application for admission (or re-admission) to the register, the current legislation allows the NMC to request and verify the information in the application. However the legislation does not currently provide such a power for the process of renewing registration.
- 2.4.2 In addition, the NMC will soon be required under EU law¹¹ to ensure that all registered nurses and midwives have an appropriate indemnity arrangement in place for their practice. This is set out in the Department of Health consultation and government response '*Indemnity or insurance for regulated healthcare professionals*¹²'. As a result, the NMC will have a role in monitoring compliance with this new requirement. The NMC therefore requires, and is seeking, amendments to its legislation to give it the ability to ask for and verify certain information in order to comply with the new requirements in the Department of

¹⁰ a fixed minimum number and type of members of a legislative assembly, committee, or other organisation who must be present before the members can conduct valid business

¹¹ Article 2 - EU Directive 2011/24/EC - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:en:PDF>

¹² <https://www.gov.uk/government/consultations/protecting-patients-from-negligence>

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Health consultation. The NMC currently does not have the ability to comply with those requirements.

Proposals and expected benefits

- 2.4.3 The proposed amendments will provide the NMC with consistent powers targeted at the collection and verification of evidence, information or documentation provided by individuals regarding all registrations applications (including admission, re-admission and renewal) which will support public protection.
- 2.4.4 It is proposed that the Registrar will be given the ability to request from the nurse or midwife upon application, readmission or renewal of registration:
- a. evidence that they have, or will have when they are practising, appropriate cover in place under an indemnity arrangement;
 - b. details of the nature and scope of the nurse or midwife's practice;
 - c. the name and address of any person or organisation by whom the nurse or midwife is employed or intends to be employed, or for whom the nurse or midwife provides services, or intends to provide services; and,
 - d. other documents and information that the Registrar may reasonably require for the purpose of verifying that the nurse or midwife has, or will have when they are practising, appropriate cover in place under an indemnity arrangement.
- 2.4.5 These amendments will enable the NMC to take appropriate steps to monitor compliance with the new EU and Department of Health requirement for nurses and midwives to have an appropriate indemnity arrangement and therefore provide an appropriate level of public protection. Without these amendments the NMC will be prevented from taking measures to ensure appropriate and proportionate monitoring of compliance with this new requirement.

3. Responding to the consultation and next steps

- 3.1. To respond to this consultation, please complete the [survey questions](#). The survey will be open for responses to be submitted **by 12th June 2014**, and is the preferred method of response.
- 3.2. A separate document setting out all of the consultation questions can be found in a template on our website [here](#). You may, instead, complete the template form and submit it to consultations@nmc-uk.org **by 12th June 2014**.
- 3.3. During the consultation period, the NMC will be holding a stakeholder engagement event for invited guests to present the proposals set out in this consultation and the legal drafting that would give effect to them. It will also be an opportunity for the NCM to answer any questions that stakeholders may have prior to responding.
- 3.4. Feedback provided in the consultation responses will then be analysed. The NMC will work with the Department of Health to finalise the approach and present the conclusions. The NMC Rule changes, subject to successful consultation, will then be presented before Council for approval once the Order changes set out by the Department of Health have taken effect (subject to the completion of a successful

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parliamentary process). The Rules will then be presented to Privy Council for approval before being laid in Parliament. It is anticipated that the Rule amendments will come into effect in late 2014 or early 2015.

4. Annex A: Legal drafting

Legal drafting that would give effect to the proposals set out in the consultation document above can be found [here](#).