Draft Nursing and Midwifery (Amendment) Order 2017

Correspondence: Government Response to the Report on the Strathclyde Review

Includes 1 Information Paragraph on 1 Instrument

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee’s terms of reference are set out in full on the website but are, broadly, to scrutinise —

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of these specified grounds:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives;

(e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;

(f) that there appear to be inadequacies in the consultation process which relates to the instrument.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Andrews  Lord Hodgson of Astley Abbots  Lord Rowlands
Lord Bowness  Baroness Humphreys  Baroness Stern
Lord Goddard of Stockport  Rt Hon. Lord Janvrin  Rt Hon. Lord Trefgarne (Chairman)
Lord Haskel  Baroness O’Loan

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee’s Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.
Draft Nursing and Midwifery (Amendment) Order 2017

Date laid: 12 January 2017
Parliamentary procedure: affirmative

This Order amends the Nursing and Midwifery Order 2001 (S.I. 2002/253) to remove the statutory requirement for the Nursing and Midwifery Council (NMC) to convene a committee to advise them on midwifery matters; to remove provisions for the local supervision of midwives; and to amend certain fitness to practise functions of the NMC which relate to both nurses and midwives. The Royal College of Midwives has written to the Committee to express some concerns and their letter, with a response from the Department of Health, is published in full on our website. The House may wish to ask the Minister to clarify the timetable and ask whether all the new arrangements will be in place by the time this legislation is due to take effect. The Minister could also be asked whether the new administrative Panel will allow midwives the same degree of proactivity in influencing the NMC’s agenda. We note the Royal College’s concern about the issuing of disciplinary warnings where ‘no case to answer’ has been found, and restate our view that if guidance is intended to direct users on how specific terms should be interpreted or how decisions should be made, it should be laid with the Statutory Instrument and be available to Parliament throughout the scrutiny process.

This Order is drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation.

1. This Order has been laid by the Department of Health (DH) under the Health Act 1999 and is accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). The Royal College of Midwives (RCM) has written to the Committee to express some concerns. Their letter, with a response from DH, is published in full on our website.¹

Background

2. The Order amends the Nursing and Midwifery Order 2001 (S.I. 2002/253) (“the 2001 Order”) to remove the statutory requirement for the Nursing and Midwifery Council (NMC) to convene a committee to advise them on midwifery matters; to remove provisions for the local supervision of midwives; and to amend certain fitness to practise functions of the NMC which relate to both nurses and midwives.

¹ See: http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scruiny-committee/publications/
3. The 2001 Order is the NMC’s governing legislation and sets out the regulatory framework for both nursing and midwifery in respect of education, registration, standards and fitness to practise—the same framework applies to both professions. However the 2001 Order currently contains additional provisions unique to midwifery. These are:

- a role for Local Supervising Authorities (LSAs), and through rules, Local Supervising Authority Midwifery Officers (LSAMOs) and Supervisors of Midwives (SoMs) in discharging supervisory functions for midwifery including determining whether to suspend a midwife from practice; and

- a requirement for there to be a midwifery committee to advise the NMC Council on matters relating to midwifery.

**Removal of Local Supervision structure**

4. The Department of Health argued that there are no parallel provisions for any other regulated health profession and the duplication of local and central supervision and investigation may cause confusion as well as unnecessary expenditure. They added that the Professional Standards Authority for Health and Social Care (PSA) advise that professional representation in regulation erodes the separation between public and professional interests and should form no part of the governance structure of a professional regulator. A number of academic reviews, cited by DH, have concluded that midwifery supervision and regulation should be separate, with the NMC being in direct control of regulatory activity.

5. Transitional guidance is being produced for investigations currently in progress.

6. 84 per cent of the 1424 respondents to the consultation exercise expressed concerns about patient safety and quality assurance if statutory supervision was removed. DH acknowledged these concerns but stated that, although the statutory requirements are being removed, alternative arrangements are being made administratively. A new model of midwifery supervision, focusing on support and development for midwives is being developed in each of the four component countries of the UK in collaboration with a range of stakeholders. The RCM, who are involved in the development, are concerned that this will lead to variations in each country in how the new supervisors are to be trained. The RCM also gave the view that these new arrangements will not be complete by 31 March 2017 when this order is due to take effect, and that only Wales is currently ready. **The House may wish to ask the Minister to clarify the timetable and ask whether all the new arrangements will be in place by the time this legislation is due to take effect.**

**Removal of the Midwifery Committee**

7. Although the statutory requirement for a Midwifery Committee is being taken away, DH stated that the NMC will continue to have a statutory duty to consult midwives and has established a strategic Midwifery Panel to advise the Council. This panel has four country representation and includes the RCM and a lay representative amongst others. As an
additional measure, the NMC has appointed a Senior Midwifery Advisor (Professor Mary Renfrew) to provide expert advice on midwifery issues.

8. However, 91 per cent of the 1424 respondents to the consultation exercise disagreed with the potential loss of representation for midwives and felt it was inappropriate for midwives and nurses to be treated as one profession. The RCM stated that the statutory midwives committee was set up when the NMC was established to ensure that there was proper balance in its considerations in recognition of the fact that the NMC’s membership was 60 per cent nurses and 40 per cent midwives.

9. We note that section 2 of the EM describes the role of the Midwifery Committee as: “to advise the Council at the Council’s request, or otherwise, on matters affecting midwifery and who the Council must consult on the exercise of its functions in so far as they affect midwifery.”[emphasis added]. This suggests that the current committee can put matters on the agenda rather than simply responding to the NMC’s requests. The House may wish to ask the Minister to clarify whether the new administrative Panel will allow midwives the same degree of proactivity in influencing the NMC’s agenda.

Amendments to fitness to practise processes for nurses and midwives

10. To bring the NMC fitness to practise processes up to date and to improve their efficiency, DH is proposing a number of changes which will cover both nurses and midwives. These include:

- Giving the Investigating Committee (and through rules, the Case Examiners) the power to agree undertakings with a registrant at the end of the investigation stage if it is determined that this would provide satisfactory protection for the public.

- Giving the NMC powers to make rules, for example, for the consequences of a breach of undertakings.

- Giving the Investigating Committee (and through rules, the Case Examiners) power to issue a warning or give advice to a registrant, when the investigation concludes there is no case to answer, but the NMC has some concerns about a registrant’s past practise or conduct.

- Removing the requirement for the NMC to specify an upper limit on the total pool of panellists appointed to Practice Committees, which will give greater flexibility.

- Extending the time limit, from three months to six months, for second and subsequent reviews of interim orders both to reduce the number of hearings the NMC has to hold and allow time for improvement.

- Removing the mandatory requirement to hold a fitness to practise hearing in the country of the registrant’s registered address.

A warning following a finding of ‘no case to answer’

11. The RCM was generally supportive of these changes with the exception of the proposal that where a verdict of ‘no case to answer’ is brought the regulator can still issue a warning. This also struck the Secondary Legislation
Scrutiny Committee as unusual—if someone is cleared of an allegation, then logically there should be no further action.

12. Paragraph 22 of the IA perhaps explains the intention more clearly:

“The NMC introduced case examiners in March 2015 to make decisions as to whether there was a case to answer at the end of the initial investigation into a registrant’s fitness to practise. There is currently no power for case examiners to consider other alternative means of resolving cases in a proportionate way, such as giving a warning, agreeing undertakings with the registrant, or providing advice. As a result, many cases go to hearings when they could have been dealt with in a more proportionate manner at an earlier stage. Currently undertakings and warnings are applied at the end of a full investigation, and if case examiners agree that there is a case to answer, then all of these cases must be referred to the Conduct and Competence Committee or the Health Committee for a full hearing.”

13. DH added that this provision is consistent with the arrangements for the General Medical Council (GMC), General Dental Council (GDC) and the General Optical Council. The RCM disputed this because GMC and GDC procedures allow the registrant a right of repeal within reasonable timescale.

14. In its supplementary evidence DH said that it is not their intention to issue a warning in all ‘no case to answer’ cases:

“A warning will only be issued if it is considered that past conduct represents a serious breach of professional standards and the Code. ...The NMC are in the process of producing guidance for Case Examiners and the Investigating Committee on their new powers which will include detail on the threshold for issuing a warning. The guidance will provide that warning cannot be issued in cases where the facts of the allegation are disputed by the registrant. They plan to share the draft guidance with stakeholders in the coming weeks.”

The supplementary evidence also described how such warnings will be published and a system where the Registrar can be asked to review cases where the Registrar considers the decision may be flawed or a review of the decision would be in the public interest or necessary to prevent injustice to the registrant.

Conclusion

15. We note that the wording of paragraph 4(e) of Schedule 1 is permissive so that a warning does not need to be given on all occasions but we also note that the instructions for the policy to be followed when deciding whether to issue such a warnings is to be set out in non-statutory guidance. This is a concern that we have raised before: if guidance is intended to direct users on how specific terms should be interpreted or how decisions should be made, it should be laid with the Statutory Instrument and be available to Parliament throughout the scrutiny process. It would be even better if the key factors to be considered in such decisions were clearly set out on the face of the instrument.
CORRESPONDENCE

Government Response to the Report on the Strathclyde Review

16. On 19 December, the Constitution Committee, the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee sent a joint letter to the Rt Hon. David Lidington MP, Leader of the House of Commons and Lord President of the Council, in response to the Government Response to the Strathclyde Review. This was published in the Secondary Legislation Scrutiny Committee’s 19th Report: “Joint response to the Government Response to the Strathclyde Review and related Select Committee Reports by the Constitution Committee, the Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee”.

17. Mr Lidington has now replied to the joint letter. His reply is included in full in Appendix 1.

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INSTRUMENT OF INTEREST

Draft Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017

18. The Department for Business, Energy and Industrial Strategy (BEIS) has laid these draft Regulations with an Explanatory Memorandum (EM) and Impact Assessment. In the EM, BEIS explains that the Regulations implement a European Directive concerning claims for damages resulting from a breach of European anti-trust prohibitions. The aim is to make it easier for consumers and businesses to claim for damages or full compensation following harm caused by, for example, cartels and concerted practices or abuse of a dominant position in a market place. BEIS says that the Directive being implemented is closely based on the regime in the UK, which has a well-established and well-understood canon of case law and procedure in relation to claims for competition damages. To protect this regime and create minimal disruption for businesses and consumers, the Regulations make changes to the UK law only to implement the areas which are not covered by existing case law or procedure.

19. We obtained additional information from BEIS about the time taken to implement the Directive, the approach being followed, and the implications for third party litigation funding. We are publishing that information at Appendix 2.
INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft instruments subject to affirmative approval

Bereavement Support Payment Regulations 2017
Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017
Immigration and Nationality (Fees) (Amendment) Order 2017
National Health Service Commissioning Board (Additional Functions) Regulations 2017

Instruments subject to annulment

SI 2016/1241 Local Government Pension Scheme (Wandsworth and Richmond Fund Merger) Regulations 2016
SI 2016/1255 Plant Health (Fees) (England) (Amendment) Regulations 2016
SI 2016/1268 Non-Domestic Rating (Rates Retention) (Amendment) Regulations 2016
SI 2017/1 Immigration (European Economic Area) (Amendment) Regulations 2017
SI 2017/3 Compulsory Purchase of Land (Vesting Declarations) (England) Regulations 201
SI 2017/7 Public Lending Right Scheme 1982 (Commencement of Variation) Order 2017
SI 2017/8 Plant Health (England) (Amendment) Order 2017
APPENDIX 1: GOVERNMENT RESPONSE TO THE STRATHCLYDE REVIEW

Letter from the Rt Hon. David Lidington MP, Leader of the House of Commons and Lord President of the Council to, the Rt Hon. the Lord Lang of Monkton, Chairman of the Constitution Committee, Baroness Fookes, Chairman of the Delegated Powers and Regulatory Reform Committee and the Rt Hon. the Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee

Thank you for your joint letter of 19 December regarding the Government’s response to the Strathclyde [Review] and related Select Committee reports (Cm 9363).

I would emphasise that the Government’s position has remained unchanged throughout this process. Our aim has always been to try and strike the right balance between recognising and upholding the vital role the House of Lords plays in scrutinising legislation and ensuring that the elected House has the final say. We recognise that the House of Lords is highly effective in its scrutiny of statutory instruments and the exercise of other delegated powers. But as I said in the House of Commons on 17 November, we also note that there is no mechanism for the elected House to have the final say when they are considered, and agree with Lord Strathclyde’s conclusion that on statutory instruments, as with primary legislation, the will of the elected House should prevail. However, the Government does not intend to introduce legislation at this time.

As the Leader of the Lords set out in her Statement on 17 November, the Government are therefore reliant on the discipline and self-regulation that the Lords imposes upon itself. As she also made clear, we are pleased that the House of Lords has clearly signalled the importance on working constructively together in a spirit of partnership in scrutinising the legislative programme. Yet were that to break down, we would have to reflect on our decision. Both the Leader of the Lords and I are of one mind on this issue.

I would like to once again welcome the thorough and reflective consideration given to Lord Strathclyde’s recommendations by your committees. The Government agrees that an appropriate balance should be struck between the legislative content of primary versus secondary legislation, which is why there are robust processes in place within Government to consider which powers should be delegated. Within Government, before any Bill is introduced to Parliament or published in draft, the Parliamentary Business and Legislation Cabinet sub-committee must first have considered the nature of the delegated powers, whether the powers are appropriate and are subject to the right level of parliamentary oversight. Once a Bill is introduced in the Lords, we take the scrutiny performed by the Delegated Powers and Regulatory Reform Committee very seriously, providing a delegated powers memorandum in each case, and implementing the recommendations made by the Delegated Powers and Regulatory Reform Committee in the majority of cases. That, combined with the scrutiny of the Joint Committee on Statutory Instruments and Secondary Legislation Scrutiny Committee perform when the actual statutory instruments are laid after Royal Assent, mean that there is a rigorous framework in place to scrutinise and challenge the delegation of powers to Ministers at every stage. This is in addition to the broader legislative scrutiny applied by committees such as the Constitution Committee.
Finally, the Government does not agree with the assessment that, when asking Lord Strathclyde to undertake this review, its remit was erroneously set. In both cases, primary and secondary legislation is put before both Houses for their consent, and in both cases we believe that it should be the elected House that is able to have the final say.

I hope that this is helpful in clarifying the Government’s position.

12 January 2017
APPENDIX 2: DRAFT CLAIMS IN RESPECT OF LOSS OR DAMAGE ARISING FROM COMPETITION INFRINGEMENTS (COMPETITION ACT 1998 AND OTHER ENACTMENTS (AMENDMENT))
REGULATIONS 2017

Additional Information from the Department for Business, Energy and Industrial Strategy

Q1: The Impact Assessment refers to a deadline for implementation of the Directive of 27 December 2016. The Explanatory Memorandum does not explain why, after a consultation process carried out between 18 January and 6 March 2016, the Department laid the Regulations only on 20 December 2016. Why was there a nine-month delay between completing the consultation process and laying the Regulations?

A1: We consulted on an approach to implementation which elicited some strong responses from the competition law community. Competition law practitioners were keen to retain as much of the existing case law in this area as possible and felt that the Government’s proposed approach (to copy out the Directive) would jeopardise the effective operation of the UK’s well-established regime without adding anything of value for either claimants or defendants. As a result of the strong opposition, the Government took the decision to change the way in which we are seeking to implement the Directive to preserve as much of the existing regime as possible. This required complex legal drafting to ensure that we are fully implementing the Directive whilst retaining the key features of the UK regime.

Q2: The Explanatory Memorandum says:

“The Directive only applies to claims for damages following breaches of Article 101, 102 of TFEU or national competition law when applied in parallel with those Articles … However, due to the close links between Article 101 and 102 and Chapter I and Chapter II of CA 98, respondents to our consultation unanimously supported it also applying to claims for damages following breaches of Chapters I and II, even when it is not applied in parallel to Articles 101 and 102.”

Can you offer a straightforward explanation of which changes made by these Regulations are required to implement the Directive, and which changes serve other purposes?

A2: All of the provisions of the Regulations are required to implement the Directive, though not all provisions of the Directive are implemented through the Regulations as some are covered in case law or Court rules. Though we have technically gone beyond the requirements of the Directive (“gold-plated”), we have not sought to do so on individual measures. Instead, the “gold-plating” relates to the scope of the new measures. The Directive only requires its provisions to apply to cases brought following breaches of European competition law. We have applied the same regime to cases brought following breaches of only UK competition law (i.e. with no European dimension) as respondents to the consultation felt that this would result in a more efficient system with lower risk of satellite litigation around which rules apply.

It has traditionally been the case that the UK has adopted a ‘copy-out’ approach to implementing Directives, where we can point to legislative change for each provision in a Directive. The lighter-touch referred to in the explanatory memorandum is a departure from this approach. We have decided that, rather
than directly transposing every measure through legislation, we would rely on existing UK legislation, case law or court rules as far as possible (in line with the consultation feedback we received as described above in answer to Question 1). This ensures that we still implement the Directive fully, but that we retain many years of well-understood case law.

Q3: In the wake of the changes made by the Consumer Rights Act 2015, there has been a significant growth in third party litigation funding (TPLF). While these Regulations may essentially serve to align implementation of the Directive with the existing UK regime, they may open up greater potential for TPLF actions. Are these Regulations likely to make TPLF actions easier, and thus more likely? If so, does BEIS have a view on any possible expansion of TPLF actions?

A3: The Regulations will make all cases easier to bring, so we expect a moderate increase in the number of all types of cases. This could mean an increase in TPLF cases, but we do not imagine that this will be out of proportion to other cases or above the increase following the changes brought in by the Consumer Rights Act. We have not changed the rules relating to TPLF and third-parties seeking to bring cases will still need to be approved by the relevant court before they can do so. The likelihood of an increase in TPLF cases will be governed largely by the type of decisions made by the competition authorities and whether they have broad application to large numbers of consumers or to specific businesses.

16 January 2017
APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 24 January 2017, Members declared the following interests:

Draft Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017

Lord Hodgson of Astley Abbotts

Non-executive Chairman, Cash Management Solutions Ltd and Cash Management Solutions payments intelligence Ltd (global outsourced cash management provider). Companies which, from time to time, provide services to retailers who may or may not be involved in class competition actions.

Public Lending Right Scheme 1982 (Commencement of Variation) Order 2017(SI 2017/7)

Lord Janvrin

Board Member, British Library.

Attendance:
The meeting was attended by Lord Goddard of Stockport, Lord Hodgson of Astley Abbotts, Lord Janvrin, Baroness O’Loan, Lord Rowlands and Baroness Stern.