

EXPLANATORY MEMORANDUM TO
THE NURSING AND MIDWIFERY COUNCIL (CORONAVIRUS) (AMENDMENT
NO. 2) RULES ORDER OF COUNCIL 2020

2020 No. 821

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This Order, which is made under the Nursing and Midwifery Order 2001 (S.I. 2002/253), approves amendments to Rules made by the Nursing and Midwifery Council ("NMC").
- 2.2 The amendments ensure that the NMC's processes can continue during the period of the Covid-19 pandemic. Amendments are made to the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as contained in S.I. 2004/1761), the Nursing and Midwifery Council (Education, Registration and Registration Appeals) Rules 2004 (as contained in S.I. 2004/1767), and the Nursing and Midwifery Council (Practice Committees) (Constitution) Rules 2008 (as set out in S.I. 2008/3148) to correct technical errors contained in Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 (as contained in S.I. 2020/364). The Order also removes the sunset clause contained in the S.I. 2020/364.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 This instrument is being made in accordance with the NMC's powers, as set out in the Nursing and Midwifery Order 2001, to make rules in accordance with its core

regulatory functions. Further detail as to the various enabling provisions used is set out below.

7. Policy background

What is being done and why?

- 7.1 The Joint Committee on Statutory Instruments considered the Nursing and Midwifery Council (Emergency Procedures) (Amendment) Rules 2020 (S.I. 2020/364) at its meeting on 6 May 2020.
- 7.2 The Committee subsequently made the following points:
- (1) In relation to rule 2, explain—
 - (a) What powers are relied on to sub-delegate the setting of the times at which the amendments made by this instrument come into effect and cease to have effect; and
 - (b) How anyone affected by the amendments made by this instrument will know whether the Secretary of State has advised the Registrar of the matters under article 9A(1)(a) of the 2001 Order or that the emergency notified under that article has ended.
 - (2) Clarify which enabling powers are relied on to make rule 5(2).
- 7.3 The Department wrote back to the JCSI and the subsequent report can be found at the following link
<https://committees.parliament.uk/publications/1016/documents/8038/default/>
- 7.4 This instrument makes further amends to the NMC's Rules to reflect the points raised by the JCSI and to ensure that the NMC is able to adapt its current operating procedures to respond to the Covid-19 emergency.

Removal of sunset clause

- 7.5 We do not think a sunset provision is required as it would be difficult to put a suitable date upon a sunset provision due to the uncertainty around the Covid pandemic in particular the risks around a second wave.

Correction of technical errors

- 7.6 A number of technical errors have been corrected in this SI. These are:
- Renumbering of the current rule 2B of the Education, Registration and Registration Appeals Rules and the current rule 2B of the Fitness to Practise Rules.
 - Revoke rule 5 (constitution of practice committee) and remake the amendments in rule 5 under paragraph 17(1) of Schedule 1 to the 2001 Order

Public attendance at hearings

- 7.7 The emergency amendments made in S.I. 2020/364 allow for hearings to be conducted using audio or video conferencing facilities. The NMC have subsequently asked us to remove Rule 19(5) which was added in the March changes. The purpose of the original amendments to Rules 19(1) and 19(5) was to allow the NMC to conduct hearings using video conferencing both in public and, if that is not possible, in private.

7.8 However, the unintentional effect of Rule 19(5) has been to dis-apply *all* of Rule 19 to video/audio ('virtual') hearings – which has effectively made the Rules silent on when or how hearings should be conducted in private.

7.9 Subsequently, the removal of Rule 19(5) will enable the NMC to interpret their procedures in line with the overall legislative purpose of the Order (i.e. that the default position is for public hearings unless prescribed otherwise), in line with common law principles of fairness and open justice, and in a way which is compatible with human rights legislation (which includes Article 6 rights to a fair trial and public hearing, and Article 8 (qualified) rights to respect for private and family life). It would also mean that there is no distinction between virtual and physical hearings in terms of the rules around when a hearing can go into private or public session. The NMC has confirmed that they now have the technical ability to allow sufficient public access and will be addressing in guidance all of the practical issues surrounding the application of these powers to virtual hearings.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The NMC will make consolidated versions of the rules available on its website.

10. Consultation outcome

10.1 The NMC has consulted in accordance with article 47(3) of that Order.

10.2 The NMC has discussed the proposed changes with representative bodies however such consultation has been limited and less extensive than would normally be the case due to the worldwide health pandemic.

10.3 The NMC has committed to holding a public consultation on the use of these powers by 31 March 2021 and will undertake not to use these powers beyond that date if such a consultation has not taken place by then.

11. Guidance

11.1 The NMC will update its guidance as to how it will exercise its additional powers. This updated guidance will be published at www.nmc-uk.org at the same time as the Order comes into force.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because the SI relates to measures to maintain the NMC's essential regulatory operations throughout the duration of the worldwide health pandemic.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 As the amendments will only be in place for a specific length of time no monitoring or review provisions have been made in this instrument.

15. Contact

- 15.1 Elaine Plumb at the Department of Health and Social Care Telephone: 0113 254 5998 or email: elaine.plumb@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Mark Bennett at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Secretary of State at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.