

Chair's guide for substantive hearings

Preamble

Purpose of a substantive hearing

- 1 A substantive hearing is called to decide whether the registrant's fitness to practise is impaired and, if so, what sanction, if any should be imposed. The charge will set out the basis upon which fitness to practise is alleged to be impaired, that is, misconduct, lack of competence, health, criminal conviction or caution or the determination of another regulatory body.

Overriding objective

- 2 Article 3(4) of the Nursing and Midwifery Order 2001 states that the "main objective of the Council in exercising its functions shall be to safeguard the health and well-being of persons using or needing the services of registrants." Determining whether a registrant's fitness to practise is impaired is one of the key mechanisms through which this objective is satisfied.
- 3 In conducting a hearing it is incumbent upon the panel to have in mind at all times the need to strike a balance between the interests of justice in achieving a fair outcome in light of the main objective of public protection. Rule 32(4) also makes it clear that the panel should have regard to the public interest in the expeditious disposal of the case.

Hearing management

- 4 The chair should take an active role in managing the hearing to ensure the most efficient use is made of time to enable the case to be concluded within the scheduled time. An appropriate balance must be struck between the interest and fairness to the parties and the public interest in the expeditious disposal of the case. **R v Jisil [2004] EWCA Crim 696**

Arbiters of fact and law

- 5 The panel alone must make decisions on both facts and on the law. Although a panel will hear submissions on points of law from the case presenter and registrants and/or their representatives, and will be given further advice by the legal assessor, it is the panel that must still make its own decision. This means that a panel is not bound to accept the legal assessor's advice.
- 6 Were a panel to simply accept the legal assessor's advice on a point of law having heard legal arguments from parties concerned, then it would in fact be delegating the decision making to the legal assessor. This could potentially compromise the panel's role as the arbiters of law. If the panel does not accept the legal assessor's advice it must give very clear reasons for its decision.

Explaining the hearing to the registrant

- 7 All hearings will follow a three stage process.
 - 7.1 **First:** The facts of the allegations will have to be established. This can be done in two ways: the registrant can admit the facts or the case presenter will call evidence to prove the facts.
 - 7.2 **Second:** Current impairment will have to be determined. This is not something that has to be proved. Determining Impairment is something that the panel will decide in the exercise of its **professional judgment**. Any admissions of impairment by the registrant can be taken into account. But an admission is not determinative of the issue.
 - 7.3 **Third:** If the panel find current impairment, then the final stage will be to determine what if any sanction is to be imposed.

Reasons

- 8 The rules require the panel to give reasons for its decision only on impairment and sanction. However, it is crucial to give reasons for all significant decisions taken. The panel may need to give more detailed reasons for their findings on facts in complex cases **Southall v GMC [2010] EWCA Civ 407**. The parties and anyone else needs to be able to understand how they arrived at their findings.

Refer to:
Determination tool
- 9 Reasons give transparency to the regulatory process, explain to the registrant in sufficient detail the basis of any findings made and enable proper scrutiny by CHRE. Deficient reasons can lead to a panel's decision being appealed to the High Court by either the registrant or by CHRE. The reasons need not be lengthy but should show how, and why, and what particular evidence influenced the panel in coming to its decision

The hearing

Opening the hearing

- 10 Introductions: the chair should establish the names and roles of all the active participants – panel members, legal assessor, panel secretary, shorthand writer and case presenter.

Rule 21(2) Proceeding in the absence of the registrant

It is never appropriate in a public hearing to ask members of the public to identify themselves or their reasons for attending. Such questions have the potential of appearing to discourage public attendance at a hearing

- 11 The chair must identify the registrant – the name and NMC Pin must be confirmed.
- 12 Explain the purpose of the hearing as summarised at paragraph 7 above.

Refer to:
Applications to adjourn

Dealing with the charge

- 13 If there are preliminary issues to consider, the chair may consider whether to deal with those first before asking for the charge to be read out.
- 14 If there are no preliminary issues or these have been dealt with, the chair must ask that the charge is read out by the panel secretary in its entirety.
- 15 The chair must ask whether the registrant objects to the charge on a point of law.
- 16 The chair must enquire as to what if any charges are admitted.
- 16.1 This can be done in a way that is most practicable given that charges could be short and simple or long and complex. Admissions should only come from the registrant or their legal representative.

Refer to:
Objection on a point of law

Where the registrant has not attended, the chair must enquire if the registrant has made any admissions in writing. Any written admissions must be signed and dated and correspond to the charges as set out in the notice of hearing. The registrant will already have been sent a 'case management form' which has the charges set out so that any admissions can be recorded. The registrant will also have been sent out a 'response to notice of hearing' form which also has the charges set out and where any admissions can be recorded.

The panel must exercise caution in finding charges proven by admission where any admissions appear to be equivocal or qualified.

- 17 The chair must then enquire as to whether the registrant admits that their fitness to practise is impaired.
- 18 The chair must announce that any facts that have been admitted are found proved.

After the charge has been dealt with

- 19 Ask the NMC case presenter to open the facts.
- 20 Even where all the facts have been admitted, and thereby found proved, you must ensure that the case presenter opens the facts. In order to deal properly with the remaining stages, impairment and sanction, you will need a full understanding of the circumstances that give rise to the facts of the charge.
- 21 The case presenter may set out an opening note. This is not evidence but a summary of the case to assist the panel in understanding the evidence that will follow.
- 22 The case presenter will then present the NMC's evidence in support of its case. The case presenter can present facts on any allegation and evidence should still be presented in relation to any admitted facts. This will enable the panel to fully understand the implications thereof which is crucial to their considerations of

impairment and if necessary, sanction. This will include calling witnesses to give oral evidence, reading witness statements and referring to exhibits. The manner in which evidence is called will depend on the particular circumstances of the case.

Rule 31 states that the test of admissibility of evidence is that it is “fair and relevant” and subject to that test a committee “may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings.”

Procedure when the presenter calls witnesses

- 23 Ensure each witness is first sworn in.
- 24 The case presenter will question the witness.
- 24.1 The registrant or their representative can cross examine.
- 24.2 The case presenter has the opportunity to re-examine.
- 24.3 The panel then have the opportunity to question the witness.
- 24.4 The registrant/representative may ask any questions arising out of the panel’s questions.
- 24.5 The case presenter may finally ask any questions arising out of the panel’s questions.

**Refer to:
Evidence: Evidence in chief and
use of witness statements
Expert evidence**

Procedure once the case presenter has no more evidence to present and they have closed their case

- 25 Having heard the evidence the panel **may** of their own volition wish to consider whether or not:
- 25.1 The case presenter has presented sufficient evidence to establish a case to answer on the facts, only in relation to any facts not admitted by the registrant as those admitted will already have been recorded as being found proved.
- 25.2 The facts as set out are sufficient to lead to a finding of impairment.

In which case the panel will invite submissions, firstly from the registrant and then the case presenter. The panel will invite the legal assessor to advise them. The panel will then rise to consider their decision.

- 26 **Or** the registrant or their representative may make the application that there is no case to answer on either or both of the limbs above, i.e facts and impairment.

In which case the panel will invite submissions from first the registrant and then the case presenter. The panel will invite the legal assessor to advise them. The panel will then rise to consider their decision.

The rules of procedure do not require a panel to consider this point of their own volition and invite the registrant to make a submission of no case to answer in every case.

The registrant's case – their defence to the facts alleged – their case on the factual background to any admissions

- 27 If the registrant is unrepresented or represented by someone who is not legally qualified, they will need guidance and/or assistance at this stage on the following:
- 27.1 Explain that this is their opportunity to present their case.
 - 27.2 That they can either make submissions on the facts or that they can give evidence under oath.
 - 27.3 That if they make submissions then the case presenter cannot question them, but if they give evidence under oath then they can be questioned by the case presenter. That being questioned by the case presenter may involve their evidence being challenged.
 - 27.4 That evidence given under oath can potentially carry greater weight.
 - 27.5 That if they intend to call other witnesses, then the registrant will be expected to give their evidence first if they want to give it under oath.

Procedure when the registrant calls witnesses

- 28 Ensure each witness is first sworn in.
- 29 The registrant will question the witness.
- 29.1 The case presenter can cross examine.
 - 29.2 The registrant has the opportunity to re-examine.
 - 29.3 The panel then have the opportunity to question the witness.
 - 29.4 The case presenter may ask any questions arising out of the panel's questions.
 - 29.5 The registrant may finally ask any questions arising out of the panel's questions.

Procedure once the registrant has no more evidence to present

- 30 Once the registrant has no more evidence to present:
- 30.1 Invite the case presenter to make any final submissions they wish to make.
 - 30.2 Invite the registrant to make any final submissions they wish to make.
 - 30.3 Invite the legal assessor to provide any legal advice relevant to making findings on facts.

- 30.4 Invite the parties to comment on the advice given by the legal assessor.
- 30.5 The panel must deliberate on the facts in private together with the legal assessor and the panel secretary.
- 31 The panel must announce its findings on facts and give reasons for its decision.
- 32 The panel must ensure that the reasons on findings of fact include reference to any facts admitted and found proved, setting out where appropriate the relevant background and context. Detailed reasons for their findings on facts may need to be given in more complex cases where the reasoning may not be obvious and needs some elucidation.

Impairment of fitness to practise

- 33 At this stage the panel will have to consider whether in light of the facts found proved, the registrant's fitness to practise is **currently** impaired by reason of either their misconduct, their caution or conviction, their lack of competence or their health.
- 34 In respect of misconduct and lack of competence the panel must first determine in the exercise of its judgment, that the facts found proved amount to misconduct or a lack of competence. This is because not all failures, omissions or acts will necessarily amount to misconduct or a lack of competence.
- 35 Parties are able at this stage to present further evidence specifically related to the issue of current impairment and can include evidence of:
 - 35.1 Any re-training or evidence of clinical practice specifically related to the subject of the factual allegations.
 - 35.2 Evidence demonstrating a lack of remediation.
 - 35.3 Professional references addressing areas of practice relevant to the factual allegations.
 - 35.4 Purely personal mitigation is not relevant to the impairment stage.

This list is not exhaustive. Only indicative.

- 36 Parties can also call further witness evidence specifically in respect of current impairment.

Procedure at the impairment stage

- 37 The case presenter will have the opportunity to either call evidence and/or make any final submissions on impairment.

Note, if the registrant is going to present evidence or give further evidence, then the case presenter will not make any final submissions until that evidence has been completed.

- 38 The registrant will make their final submissions on impairment.
- 39 Invite the legal assessor to give any legal advice relevant to making findings on impairment.
- 40 Invite the parties to comment on the advice given by the legal assessor.
- 41 The panel must consider the allegation in private together with the legal assessor and the panel secretary.
- 42 The panel must announce its findings on impairment (including any relevant misconduct and lack of competence) and give reasons for its decision.

The reasons must include reference to any case law that the panel has been invited to consider, setting out its relevance to the panels findings. They should also specify whether remediation was taken into account and if so whether it was felt that the evidence was strong enough to conclude that the failings had been remedied – or not as the case may be. Remediation evidence should be clearly referred to with reasons why the panel felt it was or was not persuasive.

Sanction

- 43 At this stage the panel will have to consider whether in light of its findings on current impairment what if any sanction to impose.

**Refer to:
Indicative sanctions guidance**

Procedure at the sanction stage

- 44 The chair must invite the parties to make representations as to any relevant factors which may affect the panel's decision on sanction.
 - 44.1 Parties are able at this stage to present further evidence specifically related to the appropriate sanction. Evidence may be of any previous history, mitigating circumstances or aggravating circumstances or other relevant factors which may affect the panel's decision on the sanction, if any, to be imposed. Any testimonial evidence the registrant adduces or personal mitigation should be considered at this stage.
- 45 Invite the legal assessor to give any legal advice relevant to making findings on sanction.
- 46 Invite the parties to comment on the advice given by the legal assessor.
- 47 The panel must deliberate in private together with the legal assessor and panel secretary.
- 48 The chair must announce the decision on sanction in public, giving reasons.
- 49 There is no statutory requirement to publish the outcome of a hearing that has resulted in a finding of no impairment, or a finding of impairment where no

sanction is imposed. However there is a provision that, where a panel has concluded that an allegation is not well founded, it shall make a declaration to that effect where the nurse or midwife asks it to, or it may make such a declaration where the nurse or midwife consents

- 50 In these circumstances, the chair of the panel will ask the nurse or midwife concerned if they want the decision to be published, or if they consent to the publication of the decision. If they do require publication of the decision, or consents to it, the decision will be published on the website.
- 51 Where the nurse or midwife does not attend the hearing, the information leaflets sent out in advance will inform them of their right to have a decision of no impairment, or impairment but no sanction, published. If the nurse or midwife makes a written or telephone request for any such decision to be published, the decision will be published on the website.
- 52 In any case where no impairment is found, or no sanction is imposed but the nurse or midwife concerned has not requested or consented to the publication of that decision, then all reference to the case will be removed from the website after the hearing.

Consideration of an Interim Order

- 53 A decision on sanction does not come into effect until 28 days after the notice of decision has been sent. If an appeal is lodged in that time, the sanction does not come into effect until the determination of the appeal.
- 54 Therefore, at this stage the panel **must always** consider whether it is appropriate to make an interim order to cover the appeal period and the outcome of any appeal. Any interim order imposed should be consistent with the substantive order.
 - 54.1 The chair must invite representations from the parties: the case presenter will make submissions first, followed by the registrant.
 - 54.2 The panel must take into account any submissions before making their decision.
 - 54.3 Invite the legal assessor to give any legal advice relevant to imposing an interim order.
 - 54.4 Invite the parties to comment on the advice given by the legal assessor.
 - 54.5 The panel must deliberate in private together with the legal assessor and the panel secretary.
 - 54.6 The chair must announce the decision in public, giving reasons.

Proceeding in the absence of the registrant

NMC Fitness to Practise rules

- 55 Rule 21(2) confers a discretion upon a practice committee hearing an allegation into a registrant's fitness to practise to proceed in the absence of the registrant in certain circumstances. Consideration of this must be a two stage process. Firstly, the panel must be satisfied that the registrant has been served with a notice of hearing in accordance with the rules.
- 56 Rule 34(1) provides:
- “**34.—**(1) Any notice of hearing required to be served upon the registrant shall be delivered by **sending** it by a postal service or other delivery service in which delivery or receipt is recorded to, or by leaving it at—
- (a) her address in the register; or
 - (b) where this differs from, and it appears to the Council more likely to reach her at, her last known address, the registrant's last known address.”
- 57 Notice shall be treated as having been served on the day after it was sent. The rule does not require that the papers are **received** by the registrant.
- 58 Secondly, if the panel is satisfied that the notice has been properly served it must then consider whether to exercise its discretion to proceed in the registrant's absence.
- 59 The panel must demonstrate by the language in its decision that it has gone through the two stages and appreciates that the discretion to proceed in the registrant's absence is to be exercised with the utmost care and caution.

Case law

- 60 The key principles derived from the authorities can be summarised as follows. The registrant has a right to be present when the case against her is put forward and to be in a position where she can cross examine or challenge the evidence. However a registrant may also voluntarily absent themselves and a hearing may proceed in their absence. Lack of funds to pay a legal representative would not normally justify an adjournment. A registrant may attend in person.
- 61 An established authority that is often referred to in these circumstances is a criminal case that identifies relevant factors. In **R. v Jones (Anthony William), R. v Purvis (Paul Nigel), R. v Hayward (John Victor) (No.2) [2002] UKHL 5** Lord Bingham of Cornhill stated:

“The discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution.”

“When deciding whether or not to proceed in the defendant's absence the judge should have regard to all the circumstances, including;

- (a) nature and circumstances of the defendant's behaviour in absenting himself,
- (b) whether an adjournment would resolve the matter,
- (c) the likely length of such an adjournment,
- (d) whether the defendant, though absent wished to be represented or had waived his right to representation,
- (e) whether the defendant's representatives were able to receive instructions from him and the extent to which they could present his defence,
- (f) the extent of the disadvantage to the defendant in not being able to present his account of events,
- (g) the risk of a jury reaching an improper conclusion about the absence of the defendant,
- (h) the general public interest that a trial should take place within a reasonable time,
- (i) the effect of the delay on the memories of witnesses,
- (j) where there was more than one defendant, and not all had absconded, the undesirability of having separate trials.”

The registrant has not attended due to ill health

62 When a registrant alleges that she can not attend a hearing due to ill health this should not automatically result in an adjournment. It is essential to exercise care and to give thorough reasons. Relevant considerations include:

- 62.1 Is the alleged ill health supported by medical evidence?
- 62.2 Is the medical evidence credible and reliable?
- 62.3 To what extent does the medical evidence assist the panel in deciding whether the ill-health is of a nature that would prevent the registrant from taking part in a hearing?
- 62.4 Does the medical evidence address what if any steps could be taken to facilitate the participation of the registrant in their hearing?
- 62.5 Does the medical evidence give any indication to the likely time frame in which the registrant will be fit to participate?

Applications to adjourn

NMC Fitness to Practise rules

Rule 32

“Postponements and adjournments

32.—(1) The Chair of the Practice Committee may, of her own motion, or upon the application of a party, postpone any hearing of which notice has been given under these Rules before the hearing begins.

(2) A Practice Committee considering an allegation may, of its own motion or upon the application of a party, adjourn the proceedings at any stage, provided that—

- (a) no injustice is caused to the parties; and
- (b) the decision is made after hearing representations from the parties (where present) and taking advice from the legal assessor.”

Relevant factors when considering adjournments

63 In considering whether or not to allow an adjournment the panel should have regard to rule 32(4) and shall amongst other matters, have regard to all of the following:

63.1 The public interest in the expeditious disposal of the case.

63.2 The potential inconvenience caused to a party or any witnesses to be called by that party.

63.3 The impact of any delay upon the proceedings including the recollection of witnesses.

63.4 Fairness to the parties in being able to properly and sufficiently present their cases.

64 The panel will be aware that a decision to adjourn a case should take account of the following factors:

64.1 The main objective of the NMC in exercising its functions is to safeguard the health and wellbeing of persons using or needing the services of registrants (3(4) The Nursing and Midwifery Order 2001).

64.2 Scheduling a new hearing date will need to take account of availability of panel members and can result in a period of several months before the hearing can be resumed.

64.3 There is considerable expense involved in facilitating a hearing that is ultimately borne by registrants.

- 64.4 As well as causing delay to the case at hand, a resumed hearing will cause delay to other cases that might have been heard on the resumed hearing date.

Common reasons for applications to adjourn a hearing

Insufficient notice

- 65 For substantive hearings the registrant is entitled to a statutory minimum notice of 28 days. If that notice period is not complied with the registrant has a sound case for an adjournment.
- 66 The registrant may submit that the notice was not reasonable. What amounts to reasonable notice will depend on the individual circumstances of the case at hand. Relevant considerations will include:
- 66.1 Has the registrant engaged with the process so far – for example, has the case management form been completed? If the registrant has not previously engaged it may be considered less likely that the registrant would attend on an adjourned date.
- 66.2 Has the registrant been served with all the relevant evidence in the case in good time? It should be the case that all evidence has been served on the registrant well before notice of the hearing is sent so the registrant should have had ample time to prepare his case and raise any issues with the NMC's case.

Witnesses are not available

- 67 On occasions that witnesses are unable to attend, either for the NMC or for the registrant the following should be considered when deciding whether or not to adjourn a hearing:
- 67.1 What is the nature of the witness evidence: what is its relevance? For example, where the hearing is at the fact finding stage, but the evidence to be called is primarily mitigation evidence relevant to sanction.
- 67.2 Why the witness has not attended and what steps have been taken to secure their attendance.
- 67.3 Is there an identifiable fault on the part of the party seeking an adjournment and the extent to which that will impact upon the overall fairness of the proceedings?
- 67.4 Can the evidence of the absent witness be dealt with by way of a witness statement?
- 67.5 Is it practicable to secure the witness evidence by video-link or telephone conference?
- 67.6 Can the hearing proceed nevertheless with other witnesses before a final decision needs to be made on adjourning?

Documentary evidence is not available

68 In the normal course of events parties will have had sufficient opportunity to obtain and serve any documentary evidence that they rely on. It is not the function of the panel to engage in an inquiry into the evidence that they may wish to see. The hearing process is adversarial and the evidential burden is on the NMC to prove its case. This means that the case must be decided only on the evidence before the panel. Exceptionally, it may come to light at a hearing that further documentary evidence may be fair and relevant to consider. In this instance enquiry should be made as to whether it is practical and proportionate for further documentary evidence to be obtained in the course of the scheduled hearing. If not, it is unlikely that an adjournment will be justifiable in light of the factors identified above and the case should be decided on the evidence such as it is.

Lack of or late disclosure

69 The NMC must disclose all the evidence that it relies on in good time before the hearing in order that the registrant can respond to the case against them. If there is an application from the registrant or the NMC to adjourn on the basis of late disclosure enquiries should be made as to exactly when the evidence was disclosed, what it consists of and whether given the timelines, nature and extent of the evidence there has been any prejudice to the party making the application.

70 In the event that any further material is sought to be relied on by either party the NMC or the registrant and/or their representatives should have a fair opportunity to consider further disclosure. In some cases, disclosure from a third party may arrive late. For example, original medical evidence might become available for inspection only at the start of a hearing when produced by a witness. In these circumstances the panel should aim to progress with the hearing if this can be done without unfairness or prejudice. There are likely to be natural breaks in the hearing when parties can consider late disclosure without causing undue delay.

Lack of or late representation

71 Correspondence with registrants throughout the investigation and in the notice of hearing will ordinarily have included information and advice regarding the need to secure representation. The panel should make enquiries as to the previous correspondence sent to the registrant in considering whether lack of or late representation is a justifiable reason for an adjournment.

Objections on a point of law

72 At any stage of the proceedings objections on a point of law can be raised by either party, the panel will have to consider the strength of the objection and announce their findings. Objections on a point of law can include:

72.1 Charges.

72.2 Admissibility of hearsay evidence.

72.3 Admissibility of previous incidents of misconduct or lack of competence.

72.4 Inappropriate questioning of witnesses or registrants.

72.5 Allowing witness statements to stand as evidence in chief.

This list is not exhaustive, only indicative

Procedure

73 The panel must invite representations from the parties; the party raising the objection will first make any submissions followed by the responding party.

74 The panel must then invite parties to respond to the submissions, again the party raising the objection will first make any submissions followed by the responding party.

75 Invite the legal assessor to give any legal advice relevant to making findings on objections on a point of law.

76 Invite the parties to comment on the advice given by the legal assessor.

77 Considering objections on a point of law is something that the panel will decide in the exercise of its professional judgment.

78 The panel must deliberate in private together with the legal assessor and the panel secretary.

79 The chair must announce the decision in public, giving reasons. If the legal assessor's advice is not accepted the panel must specify why.

Evidence

Evidence-in-chief and use of witness statements

NMC Fitness to Practise rules

Rule 22

- 80 The first essential point to note is that when a witness attends and is called to give evidence by either party they must take an oath, or affirm, before giving evidence at any hearing (rule 22(1)).
- 81 Pursuant to rule 22(3) the stages of any witness' evidence shall be in the following order:
- 81.1 First the witness will be examined by the party calling them.
 - 81.2 They may then be cross examined by the opposing party.
 - 81.3 Then they may be re-examined by the party calling them.
 - 81.4 Finally the witness can be questioned by the committee.

Other relevant legislation

The Civil Procedure Rules (CPR)

- 82 CPR 32.2 states that any fact which needs to be proved at trial shall be "by their oral evidence".
- 83 However, CPR 32.5 states that when called to give evidence "his witness statement shall stand as his evidence in chief."

Relevant factors when considering evidence-in-chief

- 84 It is important to bear in mind that the first stage above, the 'evidence-in-chief' of the witness, is not the stage of evidence at which the witness' evidence is being tested or challenged: **it is the stage at which the evidence is being adduced.**
- 85 The witness' evidence can and should be tested by questions put in cross-examination.
- 86 The first stage can be undertaken by the witness having taken the oath, or affirmed, being asked to verify their statement by the party calling them, and then when they have done so, reading aloud the witness statement prepared either by them or on their behalf. This applies to any witness, whether called by the NMC or the registrant.
- 87 The NMC will in most cases adopt this approach to adducing evidence in chief.

- 88 There are some occasions when it may be preferable for a witness to give their evidence-in-chief by question and answer. These may include, but are not limited to:
- 88.1 Where there is a factual dispute confined to one person's account as against another's.
 - 88.2 Where the evidence of the witness is short and uncomplicated.
 - 88.3 Where the evidence relates to events such that the panel would benefit from detailed description in oral evidence at all stages, for example a description of an altercation or assault.

Expert evidence and opinion evidence

NMC Fitness to Practise rules

89 The first consideration in relation to the admissibility of evidence should be rule 31 of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ('the rules').

90 Rule 31(1) states:

“Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place).”

Other relevant legislation

91 In England and Wales, the admissibility of expert evidence in civil proceedings is governed by the Civil Evidence Act 1972. This states:

“3.— Admissibility of expert opinion and certain expressions of non-expert opinion.

- (1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.
- (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.
- (3) In this section “relevant matter” includes an issue in the proceedings in question.

The admissibility of evidence in Scottish cases is governed by a different set of legislation. Chairs are advised to seek the advice of the Legal Assessor in relation to this issue

Case Law

92 The principle or contention that a professional called to give evidence on facts will inevitably and appropriately give evidence based on her professional experience and expertise as no professional can justify or explain their actions other than by reference to their expertise and experience has been confirmed in **ES v Chesterfield and North Derbyshire Royal Hospital Trust [2003] EWCA Civ 1284**.

- 93 In relation to NMC proceedings the panel may well consider that a nurse or midwife witness, suitably qualified, is capable of giving opinion evidence of procedures within their experience and expertise related to the allegations set out against the registrant.

Relevant factors when considering expert or opinion evidence

- 94 Expert evidence is evidence which is outside the knowledge and experience of the panel, upon which an expert is competent to give evidence.
- 95 Evidence which does not fall within this description is not 'expert evidence'.
- 96 Frequently matters will be discussed in evidence before a panel which are complicated and technical. Because each panel will feature a registrant member, this will mean that often, despite the technical nature and complexity of the evidence, it is nonetheless within 'the panel's' knowledge and experience and is not as such 'expert evidence'.
- 97 There will be occasions when a witness is properly considered to be an expert witness.
- 98 Key considerations are:
- 98.1 It is a basic principle that there is no property in a witness. The effect of this is that the mere fact that one party has obtained a statement from a witness and the witness is likely to be called to give evidence for that party, does not prevent the other party from taking a statement from or calling that witness. Accordingly it will be relatively rare for there to be any need for there to be more than one expert witness involved in an NMC case.
- 98.2 The Civil Procedure Rules, whilst they do not strictly govern NMC proceedings should be given regard to. In particular rule 35.3:
- “(1) It is the duty of experts to help the court on matters within their expertise.
- (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.”
- 98.3 It is permissible for an expert witness to give evidence on 'the ultimate issue' in the case. Even though the expert's evidence may be the sole determining evidence it is nonetheless, in principle, admissible.
- 98.4 In a case in which more than one expert witness gives evidence, it is open to the panel to accept, reject or prefer the evidence of one expert witness over another. Where this is so, it is important that the panel gives clear and detailed reasons for that being the case.
- 98.5 Because of the specialist nature of expert evidence, where one party intends to rely on the evidence of an expert witness it is very important for that party to give sufficient notice of that intention to the other party. It is

open to the panel to refuse to admit evidence having given consideration to the requirements of 'relevance and fairness' contained within rule 31, if insufficient notice has been given by the party seeking to rely on the expert evidence.

- 98.6 An expert should not be called as a witness by either party unless they have prepared a written report.