Remediation and Insight guidance

Introduction

1 The NMC must take a proportionate approach to fitness to practise referrals.

2 It is important that allegations are properly investigated and proceeded with, and not closed prematurely. However, it is not in the public interest for cases to proceed where there is no real prospect of a substantive panel determining that the nurse's or midwife's fitness to practise is currently impaired.

3 This guidance is intended to assist NMC decision makers at all stages of the fitness to practise process when considering the specific issue of whether concerns arising from allegations have been remedied by the nurse or midwife. It sets out key issues and relevant criteria for consideration to ensure outcomes are appropriate, consistent and robust. This will ensure that the NMC continues to protect the public and that confidence in the nursing and midwifery professions and in the NMC as a regulator is maintained.[1]

4 This guidance is intended to be a living document and will be revised in the future to ensure it continues to reflect best practice.

Fitness to practise proceedings

5 Under Article 22(1)(a) of the Nursing and Midwifery Order 2001 (the Order) a nurse's or midwife's fitness to practise may be impaired by reason of any or all of the following.

5.1 Misconduct.

5.2 Lack of competence.

5.3 A conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence.

5.4 Physical or mental health.

5.5 Not having the necessary knowledge of English.

5.6 A determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the

[1] Article 3(4) Nursing and Midwifery Order 2001 states the over-arching objective of the NMC's Fitness to Practise (FtP) function is to protect the public. Article 3(4A) states that this is achieved by undertaking to: a) protect, promote and maintain the health, safety and well-being of the public; b) promote and maintain public confidence in the professions regulated under this Order; and c) promote and maintain proper professional standards and conduct for members of those professions.

effect that the nurse's or midwife's fitness to practise is impaired, or a determination by a licensing body elsewhere to the same effect.

6 No NMC decision maker, except a Conduct and Competence Committee (CCC) or Health Committee (HC) panel at a substantive hearing or meeting,[2] can determine questions of fact.[3] In some cases, following legal review or advice, factual allegations against a nurse or midwife are considered not capable of proof due to insufficient evidence. Such cases fall outside of the scope of this guidance.

7 At a substantive hearing or meeting, the relevant panel must consider, in light of any of the facts found proven, whether the nurse's or midwife's fitness to practise is impaired. During the course of a case up to the start of a substantive hearing or meeting, the decision maker must decide whether there is a case to answer.[4] This requires the decision maker to be satisfied that there is a real prospect that a substantive panel of the CCC or HC could find the nurse's or midwife's fitness to practise impaired.

8 For further guidance on the 'case to answer' test, please refer to *Guidance for Investigating Committee panels on deciding whether there is a case to answer* (NMC, 2011).

9 At a substantive hearing or meeting, this guidance should only be applied in respect of those facts already found proven by the panel. When decision makers are considering a case before a substantive hearing has commenced, the allegations against the nurse or midwife should be taken at their highest.

Impairment of fitness to practise

10 Allegations brought by the NMC against a nurse or midwife under article 22(1)(a) of the Order focus on whether their fitness to practise is impaired. There is no definition of 'impairment' provided by the NMC's legislative framework. However, the NMC defines 'fitness to practise' as the suitability to remain on the register without restriction.

11 In considering impairment of fitness to practise, it is fundamental that the decision maker considers whether the nurse's or midwife's fitness to practise is currently impaired. This must be a forward-looking exercise, although decision makers should consider past events and behaviour, including the way in which the nurse or midwife concerned has acted or failed to act.[5]

12 The concept of impairment of fitness to practise has been informed by a number of judicial decisions. As a result, there are two key considerations for NMC decision makers.

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[2] Or a panel of the Investigating Committee considering an allegation of incorrect or fraudulent entry onto the register at a substantive hearing or meeting.
[3] See *Henshall v GMC* [2005] EWCA Civ 1520.
[4] For the purposes of the Investigating Committee, see article 26(2)(1)(d)(i) of the Order.
[5] See para. 32 of Sir Anthony Clarke MR's judgment in *Meadow* v *General Medical Council* [2006] EWHC 146 (Admin).

12.1 The NMC must protect the public. Appropriate action should be taken to restrict the registration of a nurse or midwife who presents a risk to the health, safety and/or welfare of the public.

12.2 The NMC must act in the public interest, maintaining confidence in the professions and declaring and upholding proper standards of professional conduct.

13 However, in cases where a nurse or midwife does not pose a risk to the public (including those cases where any previous risk has been appropriately addressed) or where the nature of the allegations do not risk undermining confidence in the profession if not pursued to the point of imposing a sanction, the NMC must adopt a fair and proportionate approach and close the case at the appropriate stage.

Acting in the public interest

14 In addition to ensuring the public are protected, the NMC must also act in the public interest, maintaining confidence in the professions and declaring and upholding proper standards of professional conduct.

15 The courts have been clear that when considering current impairment of fitness to practise, decision makers should remember that a finding of impairment serves an important purpose in marking the inappropriate nature of the nurse's or midwife's behaviour, declaring and upholding proper standards of professional conduct and maintaining confidence in the professions.[6]

16 In cases where the nurse or midwife has demonstrated insufficient insight (explained below at paragraphs 28–39), a finding of impairment also provides a means of forcibly bringing to the nurse's or midwife's attention the unacceptability of their actions and emphasising that it must not be repeated.

17 A finding of no impairment prevents the NMC from taking any further action to mark the nurse's or midwife's behaviour or otherwise act to maintain confidence in the professions.

Protecting the public

18 Given that a finding of no impairment ends the NMC's proceedings against a nurse or midwife, no sanction will be imposed and the nurse or midwife will be permitted to continue practising without any restriction on their registration. Decision makers should therefore consider, in light of the facts alleged or found proven, what risk, if any, they pose to the public.

19 However, decision makers typically consider the question of current impairment of fitness to practise some considerable time after the matters which gave rise to the factual allegations took place. The issue of remediation must therefore be considered, taking into account the following factors.

19.1 Is the conduct complained of remediable? (See paragraph 22 for definition.)

[6] See para. 74 of Cox J's decision *in Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council, Paula Grant* [2011] EWHC 927 (Admin)

19.2 Has it in fact been remedied?

19.3 Is it highly unlikely that the conduct will be repeated?

20 These factors do not form a determinative test as to whether the nurse's or midwife's fitness to practise is impaired. However they are key points for consideration, particularly in those cases where a finding of impairment is not otherwise required in the public interest as discussed at paragraphs 14–17.

Is the conduct complained of remediable?

21 Decision makers should always consider the full circumstances of the case when considering whether or not the conduct in question can be remedied, even where the behaviour is of the sort normally considered to be particularly serious.

22 Decision makers should first consider whether the concerns can be remedied, that is, whether steps can readily be taken by the nurse or midwife to remedy an identified problem in their practice.

23 It may be very difficult, if not impossible, to 'put right' the outcome of the failing or behaviour, particularly where it has resulted in patient harm. Decision makers should instead focus on whether the conduct complained of, and the risks to the public arising from this, have been remedied.

24 In addition, decision makers should take into account the NMC's role in acting to maintain confidence in the professions through declaring and upholding proper standards of professional conduct. In some cases, the behaviour of the nurse or midwife will fall so far short of what is acceptable and risks undermining public confidence in the professions, that it is simply not capable of being 'remedied', even where a direct or ongoing risk to the public cannot be readily identified. Similarly, where the behaviour in question is indicative of problems with a nurse's or midwife's attitude, such concerns can be inherently difficult to remedy. Examples of such allegations may include:

24.1 criminal convictions that result in a custodial sentence;

24.2 inappropriate personal or sexual relationships with a patient, service user or other vulnerable person, or other sexual misconduct;

24.3 dishonesty, particularly where serious and sustained over a period of time and/or linked to the nurse's or midwife's practice;

24.4 violence; and

24.5 neglect or abuse of patients or service users, whether physical or verbal.

25 In such cases, it will be difficult for a nurse or midwife to demonstrate that they have remedied the concerns. For example, it is unlikely that such behaviour will be satisfactorily addressed by participating on a training course or through supervision at work.[7]

[7] See para. 51 of Sales J's judgment in *Yeong v General Medical Council* [2009] EWHC 1923 (Admin)

26 However, some behaviour may be easier to remedy, particularly where isolated in nature. Examples of this sort of behaviour may include:

26.1 medication administration errors;

26.2 poor record keeping;

26.3 failings in respect of a discrete and readily identifiable aspect of clinical practice; and

26.4 allegations that arise from incidents that took place a significant amount of time ago. The passage of time can provide the opportunity for concerns to be addressed, particularly where the nurse or midwife has continued to practise safely in the interim.

Has the conduct been remedied?

27 Where decision makers consider that past failings can be remedied, the next step is to consider whether they have, in fact, been remedied. To effectively remedy past failings, a nurse or midwife must:

27.1 demonstrate insight into the past behaviour, acknowledging why it is a cause of concern and recognising a need to act differently in the future;

27.2 show that sufficient remedial steps have been taken to remedy the concerns; and

27.3 provide evidence of both of the above.

Demonstrating insight

28 Before effective steps can be taken to remedy concerns, the nurse or midwife must recognise the problem that needs to be addressed. Therefore insight on the part of the nurse or midwife is crucially important.

29 Insight can include:

29.1 the ability to step back from the situation and consider it objectively;

29.2 recognising what went wrong;

29.3 accepting their role and responsibilities at the material time;

29.4 appreciating what could and should have been done differently; and

29.5 understanding how to act differently in the future to avoid reoccurrence of similar problems.

30 Decision makers should not simply consider whether a nurse or midwife has shown ‘any’ insight or not. A nurse or midwife may demonstrate some insight, but there may still be a public interest in their registration being restricted.

31 Similarly, where a nurse or midwife denies the allegations made against them, including where they continue to do so after the findings of a panel, decision makers should not automatically conclude that this prevents 'any' insight being demonstrated. While a nurse or midwife may fail to have insight into the particular incident(s) which occurred, they may be able to demonstrate 'some' insight by showing an understanding of the need to take steps to minimise the risk of similar events occurring in the future, and the steps that might be taken to achieve this.

32 A considered approach to the issue must therefore be taken, considering whether any insight demonstrated by a nurse or midwife is 'sufficient' to allay the specific concerns arising from their past behaviour. The sufficiency of insight required will therefore vary depending on all the circumstances of the case.

33 All registered nurses and midwives must comply with the duty of candour which arises from the requirements set out in *The Code: Standards of conduct, performance and ethics for nurses and midwives* (NMC, 2008) (the Code) and *Raising concerns – Guidance for nurses and midwives* (NMC, 2013)[8].

34 Compliance with this professional duty includes that nurses and midwives must:

34.1 Be honest, open and truthful in all their dealings with patients and the public.

34.2 Never allow organisational or personal interests to outweigh the duty to be honest, open and truthful.

34.3 Act with integrity and give a constructive and honest response to anyone who complains about the care they have received.

34.4 Act without delay and raise concerns if they experience problems that prevent them from working within the Code. Also act without delay and raise concerns if they or a colleague, or any other problems in the care environment, are putting patients at risk of harm. 'Doing nothing' and failing to report concerns is unacceptable.

34.5 Explain fully and promptly what has happened and the likely effects if someone in their care has suffered harm for any reason. 'Near misses', where a nurse's or midwife's act or omission puts a patient at risk of harm, must also be escalated as a point of concern.

34.6 Cooperate with internal and external investigations.

35 Compliance with this professional duty and the requirements it places on nurses and midwives in their practice should be taken into account when decision makers consider issues of insight and remediation.

36 Although decision makers must always consider each case on its own facts and circumstances, the following non-exhaustive criteria can be taken into account when considering sufficiency of insight.

[8] http://www.nmc-uk.org/Nurses-and-midwives/Raising-and-escalating-concerns/

36.1 Did the nurse or midwife cooperate with their employer or any other local-level investigation into the concerns (if such an opportunity was available to them)?

36.2 Did the nurse or midwife accept the allegations against them when first raised by their employer?

36.3 Did the nurse or midwife, of their own volition, draw any failings or inappropriate conduct to the attention of their employer?

36.4 Did the nurse or midwife 'self-report' to the NMC when such a referral may otherwise have not been made by a third party?

36.5 Does the nurse or midwife admit the allegations against them, and have they done so since an early stage in the NMC's proceedings?

36.6 Has the nurse or midwife demonstrated insight from an early stage in the NMC proceedings, including acceptance of responsibility for any failings or inappropriate behaviour?

36.7 Does the nurse or midwife acknowledge:

36.7.1 The harm, or risk of harm, to patients?

36.7.2 The harm, or risk of harm, to public confidence in the profession?

36.7.3 The extent to which their actions deviated from proper standards?

36.7.4 Their own responsibility for the incident/problem, without seeking to blame others or excuse their actions?

37 Decision makers should be cautious before attaching weight to assertions of insight in cases where the nurse or midwife has, until recently, denied the allegations or failed to accept responsibility for their actions. Equally, however, decision makers should recognise that there may be situations where earlier admissions were not possible, for example, due to lack of relevant information being provided to the nurse or midwife.

38 While a willingness to apologise for mistakes or failings should be encouraged, there is no requirement for the nurse or midwife to make admissions at an early stage and decision makers should be sensitive to circumstances which may prevent a nurse or midwife from offering a clear apology. Offering an apology may be perceived as an admission of guilt, which could have implications for any separate legal proceedings.

39 Similarly, cultural differences or the use of English as a second language may also affect the nurse's or midwife's ability to provide a reflective statement, and how they frame their 'insight', including whether an apology is offered. While an apology may be expected in certain circumstances, it may not necessarily be a pre-requisite for demonstrating insight.

Sufficient remedial steps

40 What amounts to 'sufficient' remediation will depend on the facts of any particular case including the nature of the alleged failings or behaviour. Sufficiency will depend on the scale of the concerns. For example, the reassurance required by a decision maker may be less for a single clinical incident in an otherwise unblemished career as opposed to where a number of clinical errors have taken place. This may be particularly relevant where the errors span a period of time and persisted despite being brought to the nurse's or midwife's attention, or where other remedial steps failed to prevent a reoccurrence.

41 A number of key principles should be taken into account when considering steps taken by a nurse or midwife to remedy identified concerns.

41.1 The steps must be relevant, directly linked to the nature of the concerns.

41.2 The steps must be measurable. For example, where the nurse or midwife asserts they have been on a training course, information should be provided to enable the decision maker to understand the scope of the course, the topics covered and the results of any assessments.

41.3 The steps must be effective, addressing the concerns and clearly demonstrating that past failings have been objectively understood, appreciated and tackled.

42 Sufficient and appropriate remedial steps may include the following.

42.1 Attending a training course. Decision makers should assess whether the course content is relevant to the concerns in the case and whether the course was sufficiently comprehensive, ideally including a practical element and some form of assessment, with results available.

42.2 Developing and successfully completing an action plan.

42.3 Successfully completing a period of supervised practice targeted at the concerns arising from the alleged behaviour.

42.4 Periods of employment during which the nurse or midwife has undertaken similar actions to those which gave rise to the original allegations. Decision makers should look for clear evidence that the employer was aware of the areas of concern within the nurse's or midwife's practice and what has been observed or assessed regarding these.

43 Periods of unemployment (whether past, present or in the future) or periods working without having had the opportunity to demonstrate that the problematic task(s) can be successfully completed without difficulty, will typically be of little relevance.

44 Decision makers should only rely on the evidence that is actually available at the time they consider the case. They must not speculate about what other information might be available.

45 However, if a case is being considered in advance of a substantive hearing or meeting, and the evidence of remediation is insufficient, decision makers should consider whether further steps could be taken to secure engagement from a nurse or midwife. For example, if a nurse or midwife has stated that they have attended a course or undertaken additional training, the NMC could request evidence of this.

46 The weight to be placed upon any evidence provided by a nurse or midwife must be considered. In particular:

46.1 A reflective piece can be considered 'evidence', although the decision maker should consider at what stage in the proceedings it was produced.

46.2 Testimonials from a manager or supervisor should carry more weight than those from friends or colleagues. References or testimonials should be:

46.2.1 signed by the author

46.2.2 dated

46.2.3 on letter-headed paper

46.2.4 clear that the author is aware of the full details of the allegations against the nurse or midwife, and of the nurse's or midwife's acceptance of the charges

46.2.5 relevant to the issues being considered by the decision maker; and

46.2.6 accompanied by contact details so the NMC is able to verify the contents.

46.3 Evidence of training courses should be carefully considered. Decision makers should look at the duration of the course and the amount of time/focus placed on topics which address the relevant concerns. Courses with a practical element and formal assessment (with results available), can carry more weight than courses completed online or those without any means for the nurse or midwife to demonstrate understanding.

46.4 Little, if any, weight should be placed on character references and testimonials that do not provide informed comment on the nurse's or midwife's clinical practice, skills or competence.

Is it highly unlikely that the conduct will be repeated?

47 To assess the likelihood of conduct being repeated, decision makers will consider the extent and sufficiency of any insight of the nurse or midwife, together with the sufficiency of any steps to remedy concerns.

48 Decision makers will consider whether there has in fact been any repetition. When doing this, they should take into account whether the nurse or midwife has been practising in a similar environment to where the conduct took place. If they have, and have therefore been exposed to occasions when there was a risk of conduct

being repeated, then the absence of repetition will be significant. If they have not been practising in a similar environment (whether because restrictions have been placed on their practice or for any other reason), the absence of repetition will be of little or no relevance.

49 Additionally, decision makers can also take into account the full circumstances of the case. The likelihood of the conduct being repeated in the future may be reduced where:

49.1 The nurse or midwife has demonstrated sufficient insight and has taken appropriate steps to remedy any concerns arising from the allegations.

49.2 The behaviour in question arose in particularly unique circumstances. While this does not excuse the nurse's or midwife's behaviour, this may suggest that the risk of repetition in the future is reduced.

49.3 The nurse or midwife has an otherwise positive professional record, including an absence of any other concerns from past or current employers and of any previous action by the NMC or other regulatory body.

49.4 The nurse or midwife has engaged throughout the NMC's processes.

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