

## Consensual panel determination guidance

### Introduction

- 1 Resolving cases by consent is one of our case management tools. We believe that it has the following benefits.
  - 1.1 It encourages early engagement in the process by the nurse or midwife concerned.
  - 1.2 It avoids unnecessary full hearings, which frees up resources for other cases.
  - 1.3 It means that witnesses are not required to attend unnecessarily, reducing stress and inconvenience to them.
  - 1.4 It enables cases to be concluded quicker.
  
- 2 However, it is essential that a case is only resolved by consent where it would be in the public interest<sup>1</sup>.

### Essential requirements

- 3 We will only consider resolving a case by consent where a proper assessment has been made of the nature, scope and viability of the allegation. This means either that:
  - 3.1 case examiners have considered the allegation and found that there is a case to answer; or
  - 3.2 the allegation concerns a criminal conviction and has been referred directly to the Conduct and Competence Committee (CCC); or
  - 3.3 the allegation has been referred directly to the Health Committee (HC).

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<sup>1</sup> 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.

and

- 3.4 The nurse or midwife is willing to admit the allegation, facts and impairment, in full. More details about this essential requirement are set out below.

## **Full admissions**

- 4 Subject to paragraph five, the nurse or midwife must admit the allegation in full. There will be no plea bargaining. We will not drop serious charges which are supported by evidence in exchange for admissions from the nurse or midwife.
- 5 The only circumstances where we will not pursue particular factual allegations as part of a consensual panel determination are when:
  - 5.1 the factual allegations in question add nothing to the overall seriousness of the case; and
  - 5.2 the circumstances existing at the time the decision is made mean there is no longer a realistic prospect that the factual allegation will be proved.
- 6 As well as admitting the factual allegations, the nurse or midwife must also admit that their fitness to practise is impaired. Although in every case, this is a matter of judgment for the panel, it is particularly important in cases that are to be resolved by consent. An admission of impairment demonstrates a level of insight that is essential for a case to be resolved by consent.

## **The process**

- 7 When a case is referred to the CCC or HC, we will send the nurse or midwife concerned a notice of referral. We will also send a standard directions response form. The nurse or midwife has 28 days to reply to the standard directions.
- 8 In the same form, we will ask the nurse or midwife if they want to discuss the possibility of resolving the case by consent.
- 9 We will review the responses given by the nurse or midwife, and assess whether the case will be suitable for resolving by consent.
- 10 In deciding this, we will consider whether the case meets the essential requirements. We will also consider whether the nurse or midwife concerned has the benefit of legal advice or representation. If there are concerns about whether the nurse or midwife is able to understand the implications of seeking a consensual panel determination, we will seek to resolve those concerns, and may recommend that they seek legal advice. If it is not possible to resolve those concerns, it may not be possible to pursue a consensual panel

determination.

- 11 If the case is not suitable, but the nurse or midwife has indicated that they want to discuss the possibility of a consensual panel determination, we will contact them to explain why it cannot proceed. We will keep a record of all discussions and decisions.
- 12 If we consider that the case is or may be suitable to resolve by consent, we will assess all of the circumstances in light of the *Indicative Sanctions Guidance to Panels* (NMC, 2012). We will reach a provisional view on the appropriate level of sanction and notify the nurse or midwife of our provisional view in writing.
- 13 We will then discuss the case with the nurse or midwife. If we are unable to agree on the appropriate level of sanction, the case will proceed to full panel determination.
- 14 If we are able to agree on the appropriate level of sanction, we will then prepare a provisional agreement, which will include the sanction and any interim order. We will require the nurse or midwife to sign the agreement to confirm they admit the facts and accept impairment.
- 15 Following this, the case will be put before a panel. If the parties have agreed that the most serious sanction available given the nature of the charges should be imposed, the case may be considered by a panel at a substantive meeting. For all other sanctions, the case must be listed for a substantive hearing. As with all our other cases, the charge in a conduct case will be published on our website before the hearing.
- 16 If the hearing is before the CCC, it will take place in public, unless the panel decides that all or part of the hearing should be in private. If the hearing is before the HC, it will take place in private, unless the panel directs that it should be in public.
- 17 At any stage before the hearing or meeting, either party may decide they no longer want the case to be determined by consent. If this happens, the case will proceed to full panel determination.

### **The panel's determination**

- 18 A panel of the CCC or HC will always make the final decision about the outcome of the case.
- 19 In order to decide whether the sanction agreed by the parties is appropriate and within the realm of reasonable decisions, the panel will consider the agreed statement of facts and apply the *Indicative Sanctions Guidance to Panels* (NMC, 2012)
- 20 The panel should consider the provisional agreement in the round. It should not announce facts and impairment proved unless and until it has also confirmed its position on sanction in accordance with the process set out

below. If, having been through the process, it decides to reject the agreement, it should not make findings of fact or impairment.

- 21 If the panel is concerned by the proposed finding of impairment or sanction proposed (either because it appears too severe or too lenient) it should seek to communicate its concerns to the parties. The panel will invite submissions on the proposed finding of impairment or sanction proposed and any other sanction the panel is considering. It should do this before making any final decision on the provisional agreement.
- 22 If the panel wishes to make a finding of no impairment or substitute a different sanction to that agreed by the parties, it may do so only if both parties are made aware of the course proposed by the panel, and consent to it. It is not necessary for both parties to be physically present. Consent by telephone or email is sufficient.
- 23 If the parties cannot be made aware of the panel's proposed course, or if they do not consent, the panel will reject the provisional agreement and the case will be considered in full by a fresh panel.
- 24 The panel may also reject the provisional agreement if it considers essential information is not available to decide on an appropriate outcome.
- 25 If this happens, the panel should identify what further information it requires, and invite the parties to make submissions before reaching a final decision. If the parties are able to provide the required information, or if having heard submissions, the panel decides that additional information is not essential to determine whether the outcome is appropriate, it may accept the agreement or propose an alternative outcome.
- 26 If the further information is not available, and the panel considers it is essential, they will reject the provisional agreement and the case will be considered in full by a fresh panel.
- 27 Where, having gone through the processes outlined above, the panel has decided to reject the provisional agreement, it must give reasons outlining the steps that were taken to explore issues with the parties, and the reasons why the panel decided to reject the provisional agreement.
- 28 Where the case has to be considered by a fresh panel, the fresh panel may be told by either party that the nurse or midwife has in the past signed an agreed statement of facts, if this would be fair. It is also open to the parties to enter into a further provisional agreement, taking account of and addressing the reasons why it was rejected by the first panel.

- 29 Knowledge of any provisional agreement reached between the parties, including knowledge of the provisionally agreed sanction, will not normally be good reason for the fresh panel to recuse itself from considering the case. As a professional panel fully aware of the process for consensual panel determinations, it will be able to disregard any irrelevant considerations.
- 30 We will not seek to tell the fresh panel that the nurse or midwife had previously indicated they accepted impairment. The nurse or midwife can tell the fresh panel this if they wish.
- 31 If the panel decides to accept the provisional agreement, or where the parties have agreed on an alternative sanction, it will announce that the allegation is proved and make an order as to the sanction.
- 32 The panel will give reasons for its decision, detailing how the outcome satisfies the need to protect the public and the public interest. These reasons will explain what parts of the provisional agreement it accepts and why. It will also explain what parts, if any, the panel does not accept, and why it considers that an alternative sanction is appropriate.
- 33 The reasons will confirm if any alternative sanction has been raised with the parties, and that they have agreed to it. The panel should not seek to amend the provisional agreement, other than to correct obvious typographical errors. The decision, incorporating the provisional agreement and the panel's reasons will be published, except for any parts which the panel directs should be private.

## **Referrer's involvement**

- 34 Depending on the case, the person who referred the allegation will be kept informed about what is happening, and will have the opportunity to let the NMC know what they think. The only circumstances in which this will not be the case are where the referrer is a police force referring a conviction or caution, and neither the force nor its personnel have had a significant and ongoing involvement in the NMC case.
- 35 In all other circumstances, when we have reached a provisional agreement with the nurse or midwife on the appropriate outcome, we will let the referrer know what has been provisionally agreed. The referrer will not necessarily be shown the full provisional agreement, and will not be provided with any confidential information that will be considered by the panel in private (such as information about the nurse or midwife's health). We will ask the referrer to submit any comments about the proposal.
- 36 We will take account of any comments submitted by the referrer, and as a result, may decide the provisional agreement is no longer appropriate. If this happens, we will let the nurse or midwife know. Further discussions may take place in an attempt to reach a new provisional agreement. If no further agreement is reached, the case will proceed to full panel determination.

- 37 When the panel is presented with the provisional agreement at the hearing, it may be told what the referrer has said, provided that the referrer's comments are relevant and it would be fair for the panel to hear them. In particular, the panel will usually be told if the referrer agrees with the proposed outcome.

**Effective from 9.3.15**

**Updated version approved by the FtP Director on 24.06.16**

**Effective from 26.09.16**