

Guidance

Case to answer

Introduction

1. This guidance is for use by case examiners¹ when considering whether there is a case to answer following an investigation into a nurse or a midwife who is the subject of a fitness to practise allegation.
2. It is crucial that the case to answer test is correctly applied. There are, after all, clear implications for public protection if the investigation of a fitness to practise allegation concerning a nurse or midwife is prematurely halted. Equally, one should not underestimate the distress and damage to a nurse's or midwife's professional reputation that can be caused by the continued pursuit of a case which is doomed to fail.

Background

3. Following an investigation into an allegation of impaired fitness to practise against a nurse or midwife, case examiners must consider the available evidence and then reach a decision on whether there is a case to answer.²
4. A nurse's or midwife's fitness to practise may be impaired by reason of any of the following.³
 - 4.1 Misconduct.
 - 4.2 Lack of competence.
 - 4.3 A conviction or caution in the UK for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence.
 - 4.4 Physical or mental health.
 - 4.5 A determination by another UK regulatory body to the effect that the registrant's fitness to practise is impaired, or a determination by a licensing body elsewhere to the same effect.
5. Fitness to practise allegations must be referred to the Conduct and Competence Committee (CCC) or Health Committee (HC) if case examiners decide that there is a case to answer. This requires case examiners to assess whether there is a realistic prospect that a panel of the CCC or HC could find the nurse's or midwife's fitness to practise to be currently impaired.

¹ And Investigating Committee panels in the event that case examiners are unable to agree on a decision, see Rule 6C(4) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004

² Rule 6C(1) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004

³ Article 22(1)(a) of the Nursing and Midwifery Order 2001

6. Case examiners do not decide whether the allegation is well-founded. This is a matter for the CCC and HC.

Guidance

Realistic prospect test

7. A case must be referred for adjudication if it raises an issue of fitness to practise and there is a genuine possibility of a future finding of current impairment by reason of that issue⁴. It is not in the public interest for cases to proceed where there is no realistic prospect that a CCC or HC panel will determine that the nurse's or midwife's fitness to practise is impaired.
8. The realistic prospect test applies to both the factual allegations and the question of whether, if found proved, the facts could support a finding that the nurse's or midwife's fitness to practise is currently impaired.

Facts

9. In exercising their limited filtering role, case examiners must first consider whether the factual allegations are capable of proof. However, given that their decision relates to the allegation itself (and not the charges), they are not required to identify particular evidence to support each individual charge or sub-charge or to particularise the charges that will be considered by the CCC or HC.
10. It is important to note that case examiners cannot test the evidence, nor can they resolve conflicts of evidence. This does not mean, however, that they are obliged to refer cases onwards in all cases where there is a factual dispute. This is because case examiners are entitled to assess the overall weight of the evidence and conclude that, on the strength of the information before them, there is no realistic prospect that the CCC or HC⁵ would find the facts proved.
11. All relevant information should be considered by the case examiners, including the nurse's or midwife's representations and any subsequent comments from the maker of the allegation.
12. Particular caution should be exercised in cases where another body has already taken a decision in relation to the same issue, especially where the proposed decision is inconsistent with the previous one. In those circumstances, case examiners should explain in detail why they are departing from the previous decision.
13. Similarly, in cases where alleged systemic failures appear to be relevant to the charges laid against a registrant, case examiners should ensure that they address this specific issue in the reasons for their decision.

⁴ *R v GMC, ex p Toth* [2000] 1 WLR 2209,

⁵ The burden of proving an allegation before the CCC or HC rests on the NMC, and the civil standard of proof (the balance of probabilities) applies.

Impairment

14. When considering whether there is a realistic prospect of a finding of current impairment, case examiners should first assess whether the matters set out within the charges could amount to one or more of the impairment grounds set out at paragraph four.
15. Once a ground of impairment has been established, it is then necessary to consider whether there is a case to answer in relation to current impairment of the nurse's or midwife's fitness to practise. Relevant questions include the following:
 - 15.1 Does the nurse or midwife currently pose a risk to the health, safety or welfare of the public which requires some form of restriction on their registration?
 - 15.2 Is a finding of impairment required in the public interest, to mark the unacceptable nature of the nurse or midwife's behaviour, to declare and uphold proper standards of professional conduct and/or to maintain confidence in the professions?
16. When considering whether the nurse or midwife poses a risk to the health, safety or welfare of the public, case examiners must consider whether the nurse's or midwife's past failings are easily remediable. Case examiners must also assess the degree of insight they have shown, the steps they have taken to remedy the failings, and the risk of reoccurrence in the future⁶.
17. If a case to answer on current impairment is founded on public interest grounds alone, case examiners should explain how the public interest is engaged by the allegation and why further regulatory action is required against the nurse or midwife.

Decisions available to case examiners and the Investigating Committee (IC)

18. Case examiner decisions should be unanimous. If case examiners are unable to agree, the Registrar must refer the matter to a panel of the IC for a fresh decision⁷.
19. Case examiners may decide:
 - 19.1 there is no case to answer and close the case;
 - 19.2 there is a case to answer and refer the allegation to the CCC or HC;
 - 19.3 to recommend that further investigations are carried out to enable them to reach a decision on whether there is a case to answer; and
 - 19.4 to direct the Registrar to refer the matter for interim order consideration.

⁶See *Guidance for decision makers on insight, remediation and risk of reoccurrence* (2014)

⁷Rule 6C(4) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004

20. Case examiners must provide clear and adequate reasons for every procedural and substantive decision. This is important as it enables all relevant parties to understand why each decision has been taken.
21. The reasons must contain an explanation of any decisions to recommend further investigations. Such investigations may include the nurse or midwife undertaking medical assessment. Clear reasons should also be provided for any decision to direct the Registrar to refer the matter for interim order consideration.
22. In assessing whether to recommend further investigation, case examiners should consider whether the further investigation is:
 - 22.1 necessary (and not merely desirable) to enable case examiners to reach a decision on whether there is a case to answer;
 - 22.2 proportionate, bearing in mind the seriousness of the allegations; and
 - 22.3 practical, in terms of the time and resource required to carry out those investigations.
23. In assessing whether to direct the Registrar to refer the matter for interim order consideration, case examiners should take into account:
 - 23.1 the seriousness of the allegations;
 - 23.2 the risk of repetition;
 - 23.3 the length of time since the matters leading to the allegations took place; and
 - 23.4 the nurse's or midwife's current employment status, and specifically whether any current employer is aware of the existing allegations.

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