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Substantive order review guidance

Introduction

- 1 A substantive order review is where a panel of the NMC's Conduct and Competence Committee or Health Committee meets to review an order which was imposed on a nurse or midwife's registration at a final (or 'substantive') hearing or meeting. The difference between a hearing and a meeting is that a hearing takes place in public and the nurse or midwife may attend, while a meeting takes place in private and the panel will consider the review on the papers.
- 2 If, following a substantive hearing or meeting, a nurse or midwife receives a suspension or conditions of practice order, then this order must be reviewed by a panel before it expires.¹
- 3 A nurse or midwife who is subject to a caution order, conditions of practice order or suspension order can request that an early review of the order takes place before a practice committee panel. We may also apply for an early review because we have decided that new information means that it would be in the public interest for a practice committee panel to review the existing order.² In certain circumstances it may be appropriate to review a striking off order where new evidence becomes available.³
- 4 The purpose of all substantive order reviews is to consider whether the order currently in place, or a different order, is needed to:
 - 4.1 protect the public from a risk of harm presented by the nurse or midwife
 - 4.2 maintain public confidence in the nursing and midwifery professions
 - 4.3 declare and uphold proper standards of conduct and behaviour.Ensuring that the public and the wider public interest is protected, is the basic statutory purpose of panels considering such reviews.
- 5 This guidance is intended to assist:
 - 5.1 decision-makers involved in substantive order review hearings or meetings
 - 5.2 NMC staff who assess requests from nurses or midwives for a review
 - 5.3 NMC staff who consider information that has been obtained since the last hearing or meeting, and who need to decide whether the request or the information means a practice committee should carry out an early review of a substantive order
 - 5.4 nurses or midwives whose registration is subject to a substantive order.

Standard review of orders before expiry

- 6 Substantive order reviews most commonly take place when conditions of practice or suspension orders have been imposed, because our governing legislation makes clear that these types of orders must be reviewed by a practice committee panel before they expire.
- 7 If a nurse or midwife requests a review shortly before the order is due to expire, the hearing will be treated as a 'standard review before expiry'.⁴ The overriding purpose of this review is to ensure the protection of the public from any remaining risk of harm, and to uphold the wider public interest. Reviews before the expiry of conditions of practice and suspension orders ensure that nurses and midwives who are subject to these orders are only allowed to return to unrestricted practice if a practice committee panel finds that their fitness to practise is no longer impaired.

Decision-making

- 8 Unless the panel decides otherwise, the order of proceedings at a hearing is:
 - 8.1 The case presenter opens the case and directs the panel to any relevant evidence. This may involve witnesses giving evidence in person.
 - 8.2 The nurse or midwife presents any relevant evidence to the panel, which again may involve witnesses giving evidence in person.
 - 8.3 The panel comes to a decision in private and sets out the reasons for its decision.⁵
- 9 When considering impairment, a nurse, midwife or the NMC may have new facts related to the issue of impairment that they wish the panel to consider. In this instance, the onus is on the party presenting these facts, to prove them.⁶
- 10 The panel will clearly set out in writing the reasons for its decision in relation to each issue presented. The first question for the panel is whether the nurse or midwife's fitness to practise remains currently impaired. It is useful to remember that a previous panel will already have made findings about the past effect of the proven allegations on patient safety and the public interest.
- 11 The purpose of the reviewing panel is to decide if a finding of current impairment is necessary to protect the public from any risk of harm (assessing the extent of that current or future risk), maintain public confidence in the professions, or to declare and uphold the proper standards of conduct and behaviour.⁷
- 12 What has happened in the nurse or midwife's practice since the last hearing or meeting in the case is likely to be important, especially the following factors:
 - 12.1 Has the nurse or midwife successfully complied with any conditions imposed? What evidence has the nurse or midwife provided to demonstrate this? What is the quality of that evidence and where does it come from?

- 12.2 Does the nurse or midwife show insight into their failings or the seriousness of any past misconduct? Has their level of insight improved, or deteriorated, since the last hearing?⁸
 - 12.3 Has the nurse or midwife taken effective steps to maintain their skills and knowledge?
 - 12.4 Does the nurse or midwife have a record of safe practice without further incident since the last panel hearing?
 - 12.5 Does compliance with conditions or the completion of required steps demonstrate that the nurse or midwife is now safe to practice unrestricted, or does any risk to patient safety still remain?
- 13 If the panel decides that some restriction on the nurse or midwife's practice remains necessary because their fitness to practise is currently impaired, then they will decide what sanction, if any, to impose. The NMC's [Indicative Sanctions Guidance](#) will apply to this decision making.

Powers of practice committee panels on standard review before expiry⁹

- 14 Panels dealing with cases on a standard review before expiry may:
- 14.1 extend the existing order¹⁰
 - 14.2 make a striking-off order,¹¹ a suspension order, a conditions of practice order, or a caution order.
 - 14.3 allow the order to expire.
- 15 Any change to the order, or extension of the order, will not take effect until the existing order expires. This outcome is appropriate in the majority of cases where the nurse or midwife's fitness to practise remains currently impaired and a further period of restriction is necessary.
- 16 Implementing an immediate change to the order, rather than waiting for the change to occur once the existing order has expired, is only necessary in exceptional cases.¹²
- 17 In cases based on health, lack of competence, or not having the necessary knowledge of English, a panel cannot make a striking-off order where that nurse or midwife has been on a substantive conditions of practice order, a substantive suspension order, or a combination of the two, for less than two years. Any time spent on an interim order does not count towards the two year period.¹³

Early review on request or where required by new information

- 18 A nurse or midwife can ask for a practice committee panel to review their order (caution, conditions of practice and suspension) at any time during the life of the order.¹⁴ We may also decide to carry out an early review of an order if we receive

new information about the current fitness to practise of a nurse or midwife, and we consider that a different order, or no continuing order is now required.

Decisions to schedule early reviews

- 19 In general, when we receive requests for an early review from a nurse or midwife we will arrange a review hearing.¹⁵ However, we will not accept such requests when:
 - 19.1 The nurse or midwife has requested a review because they are generally dissatisfied with the outcome of a previous hearing. In this instance, nurses or midwives can appeal to the High Court (in England and Wales), the Court of Session in Scotland, or the High Court of Justice in Northern Ireland.¹⁶
 - 19.2 There does not appear to be any relevant new information for the practice committee panel to consider.
- 20 If we receive information that changes the appropriateness of the original order then we will schedule a review. The information received could mean that a less serious, or conversely, a more serious order is needed to manage any risk to patients or the wider public interest the nurse or midwife may present.
- 21 Examples of cases where we are likely to schedule a review are:
 - 21.1 we receive information which suggests that the nurse or midwife is acting in breach of the order
 - 21.2 problems in the nurse or midwife's practice which led to the order being imposed have recurred, worsened, or the nurse or midwife's fitness to practise appears to have otherwise deteriorated
 - 21.3 conditions of practice have become unworkable and a review is required to allow the nurse or midwife to continue to practice while ensuring ongoing public protection
 - 21.4 the nurse or midwife has complied with any conditions in the order, and/or has taken effective steps to address the problems in their practice which led to the order being imposed.
- 22 If an early review hearing is scheduled, we will send the nurse or midwife a letter of 'notice' informing them of this. We will make clear in the notice that the hearing is being held under the powers of early review, and we will explain what the powers of the practice committee panel are.

Powers of practice committee panels on early reviews¹⁷

- 23 When holding an early review, the panel has the power to:
 - 23.1 confirm the order
 - 23.2 extend, or further extend, the period for which the order has effect

- 23.3 reduce the period for which the order has effect¹⁸
 - 23.4 replace the order with a striking-off order¹⁹, a suspension order, a conditions of practice order, or a caution order. Any replacement order will be in place for the remainder of the term of the order being reviewed
 - 23.5 revoke the order or revoke any condition imposed by the order
 - 23.6 vary any condition imposed by the order
 - 23.7 vary any condition imposed by the order, and extend, or further extend, the period for which the order has effect.
- 24 The crucial differences between the panel's powers on an early review and a standard review on expiry are:
- 24.1 Any action taken in respect of an order on an early review takes effect immediately, rather than when the current order expires.
 - 24.2 When replacing one kind of order with another, for example, conditions of practice with suspension, the replacement order will only have effect for the remaining period of the order being reviewed.²⁰

Exceptional cases: changing orders with immediate effect at a standard review on expiry

- 25 Sometimes, during the course of a standard review of a substantive order new information comes to light which indicates a significant and immediate risk to the public, or a need to act to protect the interests of the nurse or midwife. In these circumstances, a panel may consider replacing the existing order with a different one that starts immediately, rather than when the current order expires. While this is a course of action that a panel may take, it is only appropriate in exceptional cases.
- 26 This guidance explains when it is appropriate to change an order with immediate effect, and the powers available to a panel in such circumstances.

Cases that could require immediate action

- 27 Exceptional cases will involve a **significant** and **immediate** risk to the public, or it will be proportionate to act in the interests of the nurse or midwife. For example:
- 27.1 A nurse or midwife, states that they have been practising in breach of conditions, or that their insight into former behaviour has drastically deteriorated.
 - 27.2 A nurse or midwife, who had previously been suspended, demonstrates to the panel that they are now able to practice with restriction. They have been offered a job to start the next day, but cannot accept employment while their registration is suspended.

- 28 If a nurse or midwife's concern is that the current order is too restrictive, the panel should consider the public interest in allowing the order to reach an end, to properly mark the misconduct, or to address the risks identified.
- 29 Where a panel has identified significant public protection concerns, it should assess what the real and immediate risk is, and whether the public is adequately protected for the few weeks left to run. For example, where a nurse or midwife is on a conditions of practice order, but the public is adequately protected because the nurse or midwife is not currently employed and is subject to stringent conditions, such as direct supervision, there is no need for an immediate change to a suspension order.

Powers of a practice committee panels in exceptional cases

- 30 Given that exceptional cases begin as standard reviews, there will only be a short period of time left on the order before it expires.²¹ Any change to the order will take effect immediately. However, the change will only apply to the remainder of time left on the order being reviewed. This is why the power to change orders with immediate effect is generally limited to an early review,²² where the remainder of the term is long enough for the change of order to have an impact.
- 31 In the majority of exceptional cases, a significant and immediate risk to the public will have been identified, and given this, a panel may want the new order to continue for longer than the remainder of time left on the order. In these circumstances a panel has the following powers:
- 31.1 vary any condition imposed by the order²³ and extend, or further extend the period for which the order has effect under their [powers of early review](#)²⁴
- 31.2 replace the order with a caution order, a conditions of practice order, a suspension order or a striking-off order.²⁵ Then, extend the order using their powers under the [standard review procedure](#).²⁶
- 32 Under the powers of an *early* review a panel may vary any conditions of an existing order and then extend the life of that order. In an early review, a panel may also decide to replace the existing order with a completely new one. However, any new order imposed at an early review will only be effective for the remaining length of time of the original order and it cannot be extended beyond this time using the powers of early review.²⁷ To extend the order, a panel should use its powers under the *standard* review procedure.²⁸
- 33 If a panel decides to use its powers of early review during a standard review hearing, that is to take immediate action, it should:
- 33.1 begin by noting that the review hearing was commenced as a standard review before expiry under art 30(1)
- 33.2 decide, and explain clearly, the exceptional circumstances which require them to take immediate action under article 30(2)

33.3 produce a clear record of their reasoning to be available as part of their written decision.

34 Sometimes, the panel will decide to replace the existing order with new one. In these instances, it must be careful to ensure that there is enough time for this new order to be reviewed again before it expires, as the nurse or midwife must be given 28 days' notice of this further review. So, if the decision to replace the order is being made when there is less than four weeks left to run on the original order, the nurse or midwife, or their representative, will need to 'waive' their right to this notice period. If they do not, the decision to replace the order will not be workable. This is because if the new order is not reviewed before it expires, it will lapse and the nurse or midwife will no longer have any restriction on their practice.

Review of striking-off orders

35 A striking-off order lasts five years, and a nurse or midwife who has been struck off the register, may not apply to go back on the register until this time has passed ('restoration'²⁹). An exception to this rule is when they are seeking a review because new evidence, relevant to the order, has become available since the order was made.³⁰ The right to request a review of a striking-off order should not be confused with the right to appeal. A nurse or midwife has 28 days, on receiving a panel's decision, to appeal. An application for a review of a striking-off order can be made at any time during the life of an order.

36 When we receive an application to review a striking-off order, we carefully consider the merits of the application. If the evidence submitted as part of this application is evidence that was not available at the time of the original hearing, and could have made a real difference to the panel's final decision, then we will refer the application to the relevant practice committee.³¹

37 Applications referred to a practice committee panel for review will follow the same procedure as set out for restoration hearings.³² Reviews will be considered in a private meeting unless the nurse or midwife has indicated that they would like to appear before the practice committee panel to argue their case.³³

Distinguishing material for review of orders and information suggesting new allegations

38 In advance of a review, if the information we receive about the practice of a nurse or midwife suggests that there has been further misconduct, poor practice or difficulties caused by health or lack of knowledge of English, since the order was put in place, we have to decide whether a panel should be made aware of the new allegation as part of the review, or whether we should treat the information as a new referral. If we decide to treat the information as a new referral we will refer it to our screening team. Screening will consider whether there should be a new investigation into the nurse or midwife's fitness to practise. Generally, we would make the reviewing panel aware of the new information when:

38.1 It relates to the existing order, for example it suggests that there may have been a breach of conditions of practice.

- 38.2 The original case arose due to clinical or competence concerns, and the new information suggests that errors or poor practice similar to those previously proved have occurred again.
- 38.3 It relates to health, for example it suggests that the nurse or midwife's health condition (already established before a practice committee) has deteriorated.

Breach of substantive orders

- 39 When we receive information that we consider amounts to a breach of a substantive order, we will arrange an early review. Where a nurse or midwife accepts the breach and the facts of the breach, the panel will record this and review the substantive order in light of the new information. Where the breach is not accepted, the panel will conduct a fact finding exercise to decide whether or not there has been a breach of the order. The panel will then conduct a review of the order once they have decided whether the order has been breached.³⁴

Reviews where an interim order is in place

- 40 Where the new information has led to a new referral, and an interim order is in place, we will inform the panel of the interim order.³⁵ Where the new matters are not admitted, a panel will apply caution in how it considers those matters in the review.
- 41 Difficulties may arise where the interim order is more restrictive than the substantive order being reviewed. A panel will still undertake a full review of the substantive order and the nurse or midwife's current fitness to practise, so that the public, and the wider public interest, are protected. In such cases a substantive order should not be changed just to mirror the interim order.

Approved by Director of Fitness to Practise 16 November 2016

Effective from 12 December 2016

¹ Article 30(1) of the Nursing and Midwifery Order 2001 ('the Order')

² Article 30(2) of the Order

³ Article 30(7) of the Order. See also [paragraph 35](#) of this guidance.

⁴ We will usually schedule standard reviews within eight weeks of the date of expiry of the order. This will allow us time to reschedule the hearing if circumstances prevent the review from going ahead. Generally, any change to the order on an 'early' review can only have effect for the time remaining before the order expires (article 30(4)(d)), so if a request for an early review is received less than three months before the expiry of the order, we will treat the resulting hearing as a 'standard' review.

⁵ Rule 25(2) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (the rules))

⁶ This is a neutral burden of proof. A party must prove that fact on the balance of probabilities i.e. it is more likely than not that the fact occurred in the way stated.

⁷ *Council for Healthcare Regulatory Excellence v (1) NMC; (2) Grant* [2011] EWHC 927 (Admin) [2011] EWHC 927 (Admin)

⁸ We have published guidance on remediation and insight which is available at http://www.nmc.org.uk/globalassets/sitedocuments/ftp_information/remediation-guidance.pdf

⁹ Article 30(1) of the Order

¹⁰ The panel cannot extend a conditions of practice order by more than three years at a time or a suspension order by more than one year at a time. See article 30(5) of the Order.

¹¹ Subject to the requirement for two years' continuous restriction before a striking-off order can be imposed in cases based on health, lack of competence. See [paragraph 17](#).

¹² Guidance on the powers available to panels in such exceptional cases is provided [at paragraph 30 of this guidance](#).

¹³ For example, if a nurse or midwife has been made subject to two 12 month suspension orders (one following on immediately from the first), a panel cannot make a striking-off order at the second review before expiry. This is because the nurse or midwife will not have been on a substantive order for a total period of two years when the panel is carrying out the review hearing, as the review hearing takes place before expiry of the second 12 month suspension order.

¹⁴ See article 30(2). Striking off orders can be reviewed under Article 30(7). See [paragraph 35 for guidance](#).

¹⁵ Article 30(2) provides that the relevant practice committee 'may' review the order on the application of the person concerned, or otherwise.

¹⁶ Article 30(10) of the Order

¹⁷ Article 30(2) of the Order

¹⁸ But in the case of a caution order not so that it has effect for less than one year beginning with the date on which the order was made at a substantive hearing or meeting.

¹⁹ Subject to the requirement in cases based on lack of competence, lack of knowledge of English, or health, that a conditions of practice and/or suspension order must have been in place for a continuous period of at least two years.

²⁰ Article 30(4)(d). When the replacement order is then listed for a standard review before expiry the reviewing panel can make an assessment as to whether or not the order needs to be extended.

²¹ We will usually schedule standard reviews before expiry within eight weeks of the date of expiry of the order.

²² Article 30(2) of the Order

²³ Article 30(4)(f) of the Order

²⁴ Article 30(4)(b) of the Order

²⁵ Article 30(4)(d) of the Order

²⁶ Article 30(1)(a) of the Order

²⁷ See Article 30(4)(d) of the Order: *shall have effect for the remainder of the term of the order it replaces*.

²⁸ This interpretation is not precluded by the wording of the Order. If a panel were to use article 30(2) (power of early review) to replace and extend the order, then a nurse or midwife could be placed on an order for a longer than allowed (See article 29(5) for time periods of orders.) This is because the review would have been started as a standard review before expiry, so there would be time left to run on the order at the time of the review. Any replacement order will run until the term of that order expires (Article 30(4)(d)). If a panel then extends the order using article 30(2), provisions (b) and (d) could conflict with one another. For example, a panel replacing a conditions of practice order (which has six weeks left before it expires) with a suspension order, could then extend the order by a further 12 months. This would mean that the order will in fact run for over 12 months, which is longer than allowed for a suspension order. Also, in such circumstances, the next reviewing panel may question whether the order is still in force, as the wording of article 30(2) (4)(d) states that any replacement order shall only have effect for the remainder of the term of the order it replaces. In such cases panels should still conduct a review of the substantive order where it is clear that the intention of the previous panel was for the replacement order to run for longer than the period left before the expiry of the original order.

²⁹ Article 33 of the Order

³⁰ Article 30(7) of the Order

³¹ Whether new evidence may be admitted is subject to the same questions of law as in other proceedings under the Order.

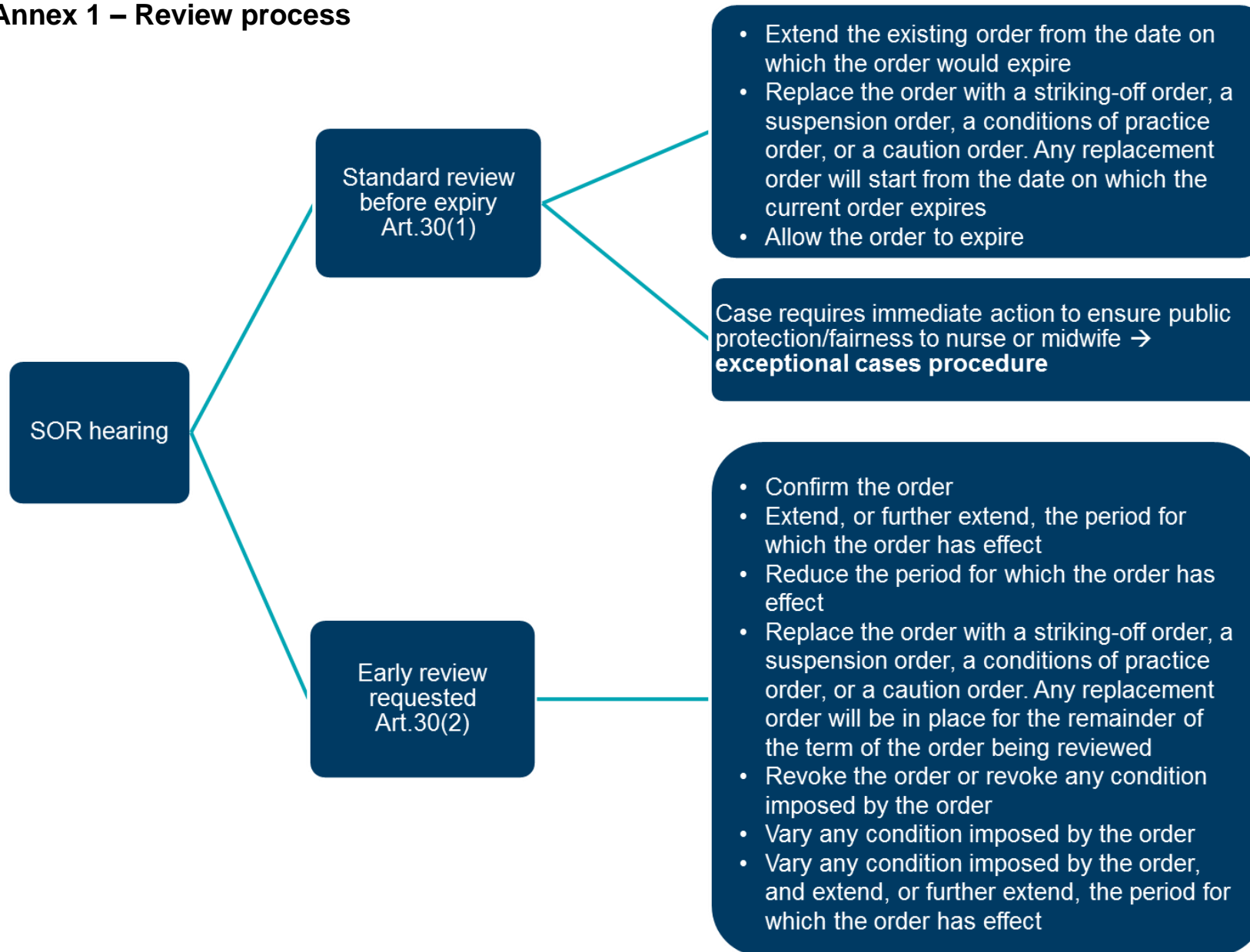
³² Article 33(4) to (8) of the Order

³³ As set out by article 33(4) in accordance with the rules at article 32(2)(b), (g), (i), (j), (k), (m), (n) and (o)

³⁴ Where a breach is so serious we will treat the new information as a new referral, taking into account the wider public interest concerns. However, in most cases, substantive order review panels are equipped to deal with any breach of a substantive order. See paragraph 25.328 of [The Fifth Report to the Shipman Inquiry](#), where Dame Janet Smith referred to review hearings as, “extremely important, as they are the ‘teeth’ behind the sanctions other than erasure.”

³⁵ Presenting all appropriate information to substantive order review panels ensures that the public, and the wider public interest, is protected.

Annex 1 – Review process



Annex 2 – Exceptional case procedure

