

# How case examiners decide there is a case to answer

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## What cases examiners need to consider

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Once our investigations team has completed their investigation into the concerns about a nurse, midwife or nursing associate, our case examiners decide whether or not a nurse, midwife or nursing associate has a case to answer. They also decide what happens to the case. For example, if they decide the nurse, midwife or nursing associate has no case to answer, case examiners can still issue a warning, or give advice.

They can recommend that we need to do further investigation before they can decide whether or not there is a case to answer.

In deciding whether there's a case to answer or not, case examiners need to consider whether there's a realistic possibility that the Fitness to Practise Committee would decide, using the evidence we've gathered so far, that:

- the incidents in the case did happen, or that the issues (such as a health condition) are still present
- the nurse, midwife or nursing associate's fitness to practise is currently impaired.

Case examiners do not decide whether the case against the nurse, midwife or nursing associate is proved, whether or not the incidents in the case happened, or whether or not the nurse, midwife or nursing associate is fit to practise. These decisions should only be taken by the Fitness to Practise Committee.

## Considering if facts are capable of being proved

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Case examiners have to decide if there's enough evidence to make it a realistic possibility that the Fitness to Practise Committee would decide that the incidents or issues in the case did happen.

When making their decision, case examiners will carefully look at all of the relevant information and evidence collected so far, along with anything the nurse, midwife or nursing associate has told us about the facts of what happened, and any evidence they've given us.

At this stage, we'll usually have shared the nurse, midwife or nursing associate's comments about the issues with the people involved, and given them a chance to respond, so they'll also look at any comments from the patients, families or loved ones, or members of the public involved in the case.

If our concerns about a nurse, midwife or nursing associate's fitness to practise are about more than one area of practice, or more than one incident or issue, case examiners will consider the information and evidence about each incident or issue separately.

However, they won't always need to comment on each individual piece of evidence about each separate issue in their decision, because the case to answer decision is about our concerns about the nurse, midwife and nursing associate's fitness to practise as a whole, rather than individual factual scenarios.

It isn't the case examiners' role to make final decisions about whether the incidents or issues in the case did or didn't happen. They can't test the evidence and they don't decide whose evidence they would choose if there is a disagreement between two witnesses. However, they look carefully at the overall weight, or impression, of the

evidence as a whole.

Where a witness, who can provide relevant evidence, is reluctant to engage, case examiners should be slow to discount this evidence unless they're satisfied that there are no further reasonable steps we could take which might encourage the witness to engage.

There are a variety of reasons why a potential witness may be reluctant to engage, such as:

- concerns over being able to manage their personal responsibilities if required to attend a hearing
- concerns about the cost of attending a hearing, or
- concerns over their memory of the precise details of the incident.

We can support witnesses in a number of ways. We'll always seek to discuss any concerns the witness may have about engaging or attending a hearing and will explain our hearings process.

We'll also consider if there are any measures or adjustments we can offer which might support the witness in feeling able to participate. Our website has further [information for witnesses](#) and the [support we can offer](#).

Case examiners shouldn't find a case to answer based on a witness' evidence where the prospect of that witness engaging might be remote or fanciful. Case examiners must be satisfied that there have been reasonable proactive steps taken to encourage and support the witness to attend before concluding there is little prospect of a witness engaging. What is reasonable will vary according to the circumstances.

If they decide that there isn't enough evidence to make it a realistic possibility that the Fitness to Practise Committee would decide that the incidents or issues did happen, they won't find a case to answer.

## **Considering whether the nurse, midwife or nursing associate's fitness to practise may be currently impaired**

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Case examiners have to consider whether there's a realistic possibility that the Fitness to Practise Committee would decide that the nurse, midwife or nursing associate's fitness to practise is currently impaired.

This will include considering any relevant [contextual factors](#). The circumstances that an incident(s) happened in may be relevant to the assessment of risk and whether there's a realistic possibility that the Fitness to Practise Committee may find the nurse, midwife or nursing associate currently impaired.

When making their decision, case examiners ask themselves two questions.

- Is the nurse, midwife or nursing associate currently a risk to the health, safety or wellbeing of the public, meaning their practice needs to be restricted in some way?
- If not, is it a realistic possibility that the Fitness to Practise Committee would need to take restrictive action to [promote public confidence or professional standards](#) for nurses, midwives and nursing associates?

## **How case examiners assess risk to patients or members of the public**

Case examiners will look at how much risk of harm to patients was caused by the nurse, midwife or nursing associate in the past. They'll also ask how serious the possible harm was, and whether there would be similar risks if the incidents or issues happened again.

Case examiners will consider our guidance on [insight and strengthened practice](#) when deciding whether there's a realistic possibility of the issues or incidents happening again. Important questions to ask in this case include:

- will it be easy for the nurse, midwife or nursing associate to address the concerns that led to their fitness to practise concerns?
- how much insight have they shown?
- what steps have they taken to address the failings?
- what is the risk of the failings happening again?

We should try to avoid sending cases to the Fitness to Practise Committee if the nurse, midwife or nursing associate accepts our concerns, and they can be addressed.

Where there's no dispute about the facts, we think the best way of dealing with cases about clinical incidents, or

areas of practice that cause risk, is usually for the nurse, midwife or nursing associate to accept the concerns in the case and look at how this can be addressed.

Case examiners can recommend [undertakings](#) for us to agree with the nurse, midwife or nursing associate which should address the problems raised in their practice.

## How case examiners approach public confidence and professional standards

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We need to make sure that only the most serious cases where the concerns haven't been addressed go through to the Fitness to Practise Committee at the end of an investigation. If a nurse, midwife or nursing associate poses no risk to the safe care of patients, they will only have a case to answer if there may be a need for the Committee to take restrictive regulatory action to promote and maintain professional standards, or public confidence in nurses, midwives and nursing associates.

This means case examiners won't send cases where there's no risk to patients or service users to the Committee unless the nurse, midwife or nursing associate's right to practise may need to be restricted (including temporary or permanent removal from the register) because their past conduct raises fundamental concerns about their trustworthiness as a registered professional.

## What do cases that may need restrictive action look like?

It will be more difficult to address concerns about past clinical incidents and there may be a need for restrictive action, if the evidence about the incident shows there's an underlying concern about the nurse, midwife or nursing associate's attitude towards people in their care. We explain more about what this might look like in our [seriousness guidance](#).

Restrictive action may also be needed to promote and maintain public confidence or professional standards where there is a concern about professionalism, which could include, among other things, dishonesty, bullying or harassment.

Away from work, concerns about professionalism could also follow if the nurse, midwife or nursing associate has been convicted of a [specified offence](#), or received a sentence of imprisonment.

## The value of reflection and insight

When making decisions about whether there is a case to answer where the concerns may be difficult to address, case examiners pay close attention to our guidance on [insight and strengthened practice](#).

They take into account the quality of the nurse, midwife or nursing associate's reflection, the steps they have taken to try and address the concerns, and what the evidence tells them about how likely they would be to repeat the conduct.

## No case to answer and warnings

Case examiners may decide that the nurse, midwife or nursing associate does not have a case to answer where there is a serious concern that has the potential to impair their fitness to practise but there is no realistic prospect of such a finding because of the quality of their reflection and insight.

We explain when case examiners may issue a warning to the nurse, midwife or nursing associate after they've decided there's no case to answer in our [guidance on warnings](#).