

Impairment

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In this guide

What does impairment mean in our regulatory proceedings?

Will a finding that some or all the charges are proven always result in a finding of impairment?

What factors are relevant when deciding whether a professional's fitness to practise is impaired?

Are these factors the only factors which will be considered?

Are the consequences of the professional's conduct a relevant factor?

Providing reasons for a decision on impairment

What does impairment mean in our regulatory proceedings?

[Back to top](#)

The Fitness to Practise Committee must decide whether a professional's fitness to practise 'is impaired'¹. Impairment is not defined in the legislation. However, over the years there have been many legal cases which have developed the concept of impairment and the factors that should be considered when deciding whether a professional's fitness to practise is impaired.

The question that will help decide whether a professional's fitness to practise is impaired is:

"Can the nurse, midwife or nursing associate practise kindly, safely and professionally?"

If the answer to this question is yes, then the likelihood is that the professional's fitness to practise is not impaired.

Before the Committee decides whether a professional's fitness to practise is impaired, they will have to make decisions on:

- what facts they find proven; and
- whether those facts prove the charges against the professional

Will a finding that some or all the charges are proven always result in a finding of impairment?

[Back to top](#)

No. The Fitness to Practise Committee's role is to consider whether the professional's fitness to practise is *currently* impaired. It's not the aim of fitness to practise proceedings to punish a professional for past events. Fitness to practise proceedings are a way for us to establish whether the professional is able to practise kindly, safely and professionally. There might be many situations where something that the professional did in the past gave cause for concern, but the Committee is satisfied that those concerns have now been put right. If the professional's present way of working no longer raises concerns, such as those based on the safety of people receiving care or in the public interest, then the likelihood is that they can practise kindly, safely and professionally. This will mean their fitness to practise is unlikely to be impaired².

What factors are relevant when deciding whether a professional's fitness to practise is impaired?

[Back to top](#)

□ A decision about whether a professional's fitness to practise is impaired is always dependent on the individual circumstances surrounding each concern. The Fitness to Practise Committee will look at a range of different factors. A decision about impairment will very rarely be based on one factor alone. Rather, a holistic approach will be taken so that anything that's relevant is considered.

A large part of the assessment of whether a professional's fitness to practise is impaired will involve considering both:

1. The nature of the concern

Consideration of the nature of the concern involves looking at the following factors:

Whether the professional has in the past acted and/or is liable in the future to act so as to put a person receiving care at unwarranted risk of harm

Fitness to practise is about managing the risk that a professional poses to people receiving care or members of the public. When making a decision on impairment, the Fitness to Practise Committee will consider whether people receiving care were harmed or put at risk of unwarranted harm. The Committee will also need to consider whether there's a risk of unwarranted harm to people receiving care in future³. This includes considering whether the concern suggests there may be an attitudinal issue such as displaying discriminatory views or behaviours or knowingly taking unreasonable risks with patient safety.

Whether the professional has knowingly taken an unreasonable risk with patient safety is a matter for the panel, taking into account all of the evidence presented at the substantive hearing. Here are some factors that could potentially support such a conclusion:

- Past incidents or formal warnings for similar conduct;
- Relevant comments or warnings from colleagues;
- Whether there were clear, well established and unambiguous processes in place which were not followed;
- Knowingly undertaking work when not competent/outside of the scope of competence;
- Something said by the professional before, during or after the incident suggesting that they were aware that they weren't acting in the patient's best interests;
- Conduct with an ulterior motive (e.g. timesaving, personal gain);
- Long-term or repeated misconduct;
- How obvious the risk of harm was and whether there is an alternative explanation.

Where any previous harm or previous risk of harm has been appropriately addressed by the professional, and any risk of future harm is remote, this could favour a finding of no impairment depending on the other circumstances of the concern. However, where a likely risk of harm to people receiving care exists, a finding of impairment will always be required.

Whether the professional has in the past breached and/or is liable in the future to breach a fundamental tenet of the profession

The fundamental tenets of the nursing, midwife and nursing associate professions are standards which are outlined in

The Code

. The Code is structured around four themes:

- Prioritising people
- Practising effectively
- Preserving safety
- Promoting professionalism and trust

In deciding whether fitness to practise is impaired, the Fitness to Practise Committee will need to consider whether any part of the Code has been breached or is liable to be breached in the future. Any breach would be considered alongside other relevant factors. Not all breaches of the Code require a finding of impairment but where a breach of the Code involves breaching a fundamental tenet of the profession, the Committee would be entitled to conclude that a finding of impairment is required. The finding of impairment would be

required to mark the profound unacceptability of the behaviour, emphasise the importance of the fundamental tenet breached, and to reaffirm proper standards or behaviour⁴.

Whether the professional has in the past acted and/or is liable in the future to act dishonestly

The Code states that professionals must act with honesty and integrity⁵. Dishonesty can take many different forms, including:

- breaching a professional duty of candour to be open and honest when things go wrong,
- covering up or falsifying records,
- obstructing, victimising or hindering a colleague, member of staff or the public who wants to raise a concern,
- encouraging others not to tell the truth, or otherwise contributing to a culture which suppresses openness about the safety of care.

More information can be found in our guidance on

[dishonesty](#)

Context of the error/conduct involved in the concern

When considering whether the proven charges amount to impairment, the Fitness to Practise Committee will consider the context in which things have happened. There are three areas of

[context](#)

which will be important for consideration.

Two areas of context are directly linked to the reasons why proven events occurred. These are:

- Personal factors relating to the professional
- The professional's working environment and culture

These areas are important for the Fitness to Practise Committee to consider because they may have adversely affected the professional's ability to practise safely and professionally. By the time the Fitness to Practise Committee considers impairment, where these contextual factors no longer exist or they have been appropriately managed, the professional might be able to demonstrate that they are currently able to practise kindly, safely and professionally.

The third area of context is the learning, insight and steps the professional has taken to strengthen their practice. Where we have evidence to suggest that a professional cannot practise safely and professionally, we will communicate this to the Fitness to Practise Committee. Where the professional disagrees, they can influence the Fitness to Practise Committee's decision by providing any information that would suggest they have taken steps to address any concerns or risks. For example, the professional may wish to provide:

- evidence of further relevant training or supervision
- information relating to reflection and understanding of the issues raised in the proven allegations
- insight regarding the proven allegations
- details of steps taken to address the concerns raised by the proven allegations
- evidence from others as to current skills and fitness to practise

For further information, please see our guidance on

[insight and strengthened practice](#)

It is important that we're aware of any relevant information as early as possible, to assist with suitable resolution of the case. Where the professional has taken steps to address their behaviour, it's important that they engage with the regulatory process so that the Fitness to Practise Committee is aware of these steps. Further guidance for professionals on how to do this is available under guidance on

[engaging with your case](#)

Whether it's highly unlikely that the conduct will be repeated

It might be easier for the Committee to be satisfied that conduct will be highly unlikely to be repeated if it is an isolated incident and no other factors described exist. If this is the case, then this would suggest that the professional can practise kindly, safely and professionally, resulting in a finding of no impairment.

Conversely, if the panel identifies a deep-seated attitude affecting care, such as knowingly taking unreasonable risks with patient safety, the concern is likely to put people at risk of harm going forward even if there was only one identified incident of misconduct.

2. The public interest

Consideration of the public interest will require the Fitness to Practise Committee to decide whether a finding of impairment is needed to:

- uphold proper professional standards and conduct
- maintain public confidence in the profession⁶

In upholding proper professional standards and conduct and maintaining public confidence in the profession, the Fitness to Practise Committee will need to consider whether the concern is easy to put right. For example, it might be possible to address clinical errors with suitable education and training.

However, there are types of concerns that are so serious that, even if the professional addresses the behaviour, a finding of impairment is required either to uphold proper professional standards and conduct or to maintain public confidence in the profession.

Examples of this are:

- A professional involved in a sexual relationship with someone in their care in breach of the PSA's guidance on clear sexual boundaries
- Conduct which has led to a conviction for a

specified offence or sentence of imprisonment

or conduct which otherwise raises fundamental questions about the person's ability to uphold the values and standards set out in the Code. This could include sexual misconduct, or the abuse or neglect of children or vulnerable adults

- Deliberately causing harm to people receiving care or deliberately taking risks with their safety
- Discriminatory behaviours such as racism, sexism, homophobia or any other types of discrimination.

These examples are not listed in order of importance. They are all examples of serious conduct where the panel would need to consider whether a finding of impairment is required because of the public interest. More examples can be found in our guidance on

misconduct

Even where there might not be a risk of future harm to people receiving care, a finding of impairment may still be required in the public interest to mark the profound seriousness of the conduct which has taken place. For example, where people receiving care are aware that the professional caring for them has a recent criminal conviction involving violence, deception or hate crime, this could instil a lack of confidence in the professional's care and the profession more generally.

Are these factors the only factors which will be considered?

[Back to top](#)

No. The above list is not a list of every single factor that the Fitness to Practise Committee will consider when deciding whether a professional's fitness to practise is impaired. A Fitness to Practise Committee may consider other factors that are relevant to the case that they are deciding. Each case has its own individual facts and circumstances, which is why the above factors are a guide.

Are the consequences of the professional's conduct a relevant factor?

[Back to top](#)

No. Sometimes a professional's conduct might have serious consequences, such as death or serious injury. In these circumstances, a finding of impairment will only be appropriate if the professional's conduct alone requires a finding of impairment. For example, a finding of impairment will not be appropriate in the public interest where the consequences of the professional's conduct are serious but the professional's conduct itself would not require a finding of impairment. Fitness to practise proceedings are not a means of punishing professionals but are a way to ensure that the professionals on our register can practise kindly, safely and professionally.

Providing reasons for a decision on impairment

[Back to top](#)

Where the Fitness to Practise Committee reaches a decision on impairment, they should clearly articulate their reasons for coming to their decision. The reasons should include a comprehensive explanation of the factors they have considered and their conclusions in relation to those factors.

It is essential that the Fitness to Practise Committee demonstrates that they have considered the future risk that the professional poses to people receiving care and the public interest. Where there is a finding of impairment, the reasons for that finding should be clear. Likewise, where the Committee finds the allegations proven, but reaches a decision of no impairment, they will clearly need to explain why a finding of no impairment is in the public interest.

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

2 Cohen v GMC [2008] EWHC 581 (Admin), para 63

3 CHRE v NMC (Grant) [2011] EWHC 927 (Admin), para 76

4 Yeong v GMC [2009] EWHC 1923 (Admin)

5 The Code, article 20.2 and 21.3

6 The Nursing and Midwifery Order 2001 Article 3(4A)