

# General approach

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## Proportionality

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We will formulate proportionate charges which agree with our statutory functions of protecting the public and upholding the public interest, including the maintenance of public confidence in the professions and the regulatory body, and declaring and upholding proper standards of conduct and behaviour. **Right-touch regulation** emphasises the need to identify, quantify and understand risk, assess whether regulation is the right way to address the risk, and be proportionate and targeted in regulating the risk (applying only the right amount of 'regulatory force', having regard to the desired outcome of public protection).

We will make decisions about whether to include a particular factual assertion within a charge on the basis of the available evidence. The only factual assertions which should be included are those which can be proved on the basis of admissible evidence. Relevance and fairness are the criteria for determining whether any evidence should be admitted at a hearing. The more serious the charge, the stronger the evidence will need to be to prove it.<sup>1</sup>

Over-charging a case (including factual assertions which are unnecessary or oppressive) adds unnecessary complications to a hearing, and may be procedurally unfair.

For example, alleging dishonesty where a nurse, midwife or nursing associate has denied allegations of misconduct during an investigation conducted by an employer may be considered oppressive, particularly if the nurse, midwife or nursing associate continues to deny the conduct at the hearing. Such conduct can in any event be taken into account by the panel at the impairment and sanction stages of the fitness to practise hearing, whether or not it has been included in the charge.<sup>2</sup>

There may nevertheless be instances when it will be appropriate to include within the charge an assertion related to the nurse, midwife or nursing associate's response, when faced with allegations of misconduct or lack of competence. An example of this might be where the nurse, midwife or nursing associate has sought to deliberately cover up their conduct or its effects, or to implicate a colleague. In such cases the evidence may support a charge of dishonesty. In any event such conduct would (if supported by evidence) constitute a serious departure from professional standards, such as to justify its inclusion in the charge.

Under-charging a case (in the sense that the seriousness of the allegation is not reflected in the charge, for example because a particular factual assertion has been left out) means we may not have properly fulfilled our duty to protect the public and uphold the public interest. It may also lead to the High Court finding that the panel's decision has been unduly lenient and/or procedurally irregular.

## Particulars of the charge

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A charge must adequately capture the seriousness and extent of the allegation. It should specify how and why a nurse, midwife or nursing associate's conduct falls below the standard to be expected of a registered professional. It must contain enough detail to enable both the nurse, midwife or nursing associate and the panel to be aware of the seriousness and extent of the issues to be determined, and to enable the nurse, midwife or nursing associate to prepare their defence.

At the same time, the charge should be worded as clearly and simply as possible, avoiding unnecessary background narrative. As a general guide, it is the conclusion to be drawn from the evidence (that the nurse, midwife or nursing associate hit patient A) that should be charged, rather than what a particular witness observed (the nurse, midwife or nursing associate was seen hitting patient A).

It is generally enough to describe a clinical failing without referring to any document (such as a trust policy) which may be relied upon as evidence of the nurse, midwife or nursing associate's obligations or standard of care required. Similarly, it is not necessary to refer to the sections of **the Code** which could be referred to by the panel when determining misconduct.

Narratives describing any facts leading up to or following the conduct in question, including description of contextual factors which do not in themselves describe misconduct, lack of competence or any other conduct which can form a ground of impairment, should be left out of the charge. Where it is necessary to include such facts in order to make the charge clear, they should be described as concisely as possible.

If there are relevant contextual factors that the panel need to be aware of these should be set out in the opening statement for the case. If the panel are making the decision at a meeting, they should be set out within the written statement of case. A factor will be relevant if it would have a material impact on the outcome of the case. It should be set out in the statement of case or opening statement whether a contextual factor is agreed between parties or whether it is in dispute and will need the panel to make a finding on it.

In cases where the regulatory concern relates to an exercise of professional judgement under the Code, it will be necessary to set out which aspects of the nurse, midwife or nursing associate's decision-making went wrong. For example, a charge that a nurse, midwife or nursing associate did not attempt cardiopulmonary resuscitation would need to specify why this was inappropriate, such as because it was not in line with the best available evidence, policies or guidelines or in the best interests of the patient. Where the regulatory concern is that it is not possible to identify whether the nurse, midwife or nursing associate exercised their professional judgement appropriately because inadequate records were made this should be charged separately.

Where the charge needs to assert the use of sexually explicit language or swear words, it may or may not be necessary to set out the language used. In some cases, a generic charge simply asserting that sexually explicit language was used to communicate may be enough to notify the nurse, midwife or nursing associate of the seriousness of the allegation. If more detail is needed, for instance in a case based on the sending of sexually explicit text messages, and the language used may be capable of more than one interpretation, the precise words used may be set out in a separate, private schedule.

It is only necessary to specify the nurse, midwife or nursing associate's place of employment or professional role at the time during which the alleged conduct took place if this helps to make the charge easier to understand, or is relevant to the seriousness of the charge. For example:

- if the allegation concerns patient neglect in a care home, the fact that the nurse, midwife or nursing associate was employed as a manager in that care home will be relevant to the charge.
- if the charge is of dishonesty concerning previous disciplinary proceedings brought against a nurse, midwife or nursing associate by a number of different employers.
- if the conduct in question has taken place in more than one setting. For example, the fact that a nurse, midwife or nursing associate is said to have sexually harassed colleagues or patients in more than one place of employment is relevant to the seriousness of the allegation as a whole.
- in a lack of competence case where it is necessary to describe where a formal capability assessment took place. See the **lack of competence** section for examples.

Including the places of employment in the charge in these particular circumstances brings out the full seriousness of the allegation and makes the charge easier to understand.

The dates on which the alleged conduct took place are always relevant to the charge, and wherever possible should be specified in relation to each incident. If it is not possible to specify dates then the charge should make this clear, for example by stating:

*“On an unknown date between [date] and [date]...”*

## **Repeated conduct**

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It is important not to overload a charge with assertions that add nothing to the overall seriousness of the allegation. The criteria for determining whether to include a particular assertion within the charge will be the seriousness of the conduct in question. This will be based on whether it has created or could create a risk or actual harm to patients, or whether it could impact on public confidence in the professions and the regulator. For example:

- in a charge concerning an inappropriate relationship between a nurse, midwife or nursing associate and a patient, it may not be necessary to particularise every inappropriate interaction between the nurse, midwife or nursing associate and patient that has taken place, since such a level of detail may not be needed to prove the full seriousness of the charge.
- on the other hand, the fact that any sexual misconduct has been repeated (particularly if against a number of different people) is relevant to any allegation. It should be particularised as fully as is necessary to enable a fitness to practise panel to properly consider any public interest considerations, including risk to the public, as well as the reputation of the profession and the NMC.

In a serious dishonesty case where the evidence is strong and the level of public interest high, it may not be necessary to include more minor incidents in the charge, if these do not add to its overall seriousness. Repeated dishonesty will however always make any misconduct more serious, particularly where it has taken place in different contexts or against different persons or bodies. The fact that serious dishonesty has been repeated should therefore be reflected in the charge.

Where clinical errors are repeated it will be important for this to be reflected in the charge in order to demonstrate the potential risk to the public. In many instances however, more minor errors will not add to the overall seriousness of the charge and will not need to be included. Where serious errors are very high in number it may be necessary to include these in a schedule.

## **Drafting charges where the nurse, midwife or nursing associate has not complied with undertakings**

Where undertakings were agreed with the nurse, midwife or nursing associate but the nurse, midwife, or nursing associate doesn't comply with those undertakings; the case examiners may decide to revoke the undertakings and refer the concern to the Fitness to Practise Committee.

In these circumstances, the charges drafted should relate to the original regulatory concern rather than the failure to comply with undertakings<sup>3</sup>. We'll usually use evidence of the professional's non-compliance with the undertakings to show the Committee that they're not currently fit to practise.

There may be some cases where the failure to comply with the undertakings is so serious that it warrants referral to the Fitness to Practise Committee in addition to the charges relating to the original regulatory concern. For example, where the nurse, midwife, or nursing associate deliberately ignores the undertaking, and patient safety is put at risk.

For more information about failure to comply with undertakings, please see our [guidance on undertakings](#).

1 See *Re H (Minors)* [1996] 2 WLR 8 per Lord Nicholls

2 *Nicholas-Pillai v General Medical Council* [2009] EWHC 1048 (Admin), paragraphs 19-21

3 See Rule 6E(7) of the Fitness to Practise Rules