

# Decision making factors for interim orders

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## Overview

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There are two steps that the panel must follow when deciding whether an interim order may be necessary to protect the public, otherwise in the public interest, or in the nurse, midwife or nursing associate's own interests.

First of all the panel must be satisfied that, on the face of the information presented, there's sufficient evidence of a case against the nurse, midwife or nursing associate. This is sometimes referred to as finding a 'prima facie case'.

Different considerations apply at this stage if the interim order applied for has the effect of restricting freedom of expression – we deal with this separately in our guidance below.

If the panel is satisfied that there's evidence of a concern, they should then go on to consider whether or not an interim order is necessary in light of this evidence, taking into account any information put before them by the nurse, midwife or nursing associate<sup>1</sup>.

A panel may decide that an interim order is necessary on more than one ground (for example an order may be necessary to protect patients, and may also be in the nurse, midwife or nursing associate's own interests), but each of the three interim order grounds has separate considerations, which the panel must carefully assess.

## Evidence of the concerns

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The first thing the panel must consider is whether there's enough evidence of a concern about the nurse, midwife or nursing associate.

The interim order panel can't make findings of fact and is not deciding whether there's a '[case to answer](#)', which is a decision for the Case Examiners after a full investigation.

In order to take action the panel only needs to be satisfied there's sufficient evidence to support the concern, even though this may later be disproved.

The panel should consider the nature and strength of the evidence. This means looking at both the evidence that supports a particular fact or version of events, and any evidence that contradicts or undermines it.

Unlike a final substantive hearing, witnesses do not normally attend to give evidence and the panel will make a decision on the papers<sup>2</sup>, taking into account representations from both the NMC and the nurse, midwife or nursing associate.

When assessing the overall strength of the evidence, the panel will need to consider a number of factors, including:

- The source of the evidence. Where the evidence comes from may affect whether it's reasonable for us to rely on it when deciding whether to impose an interim order.  
Evidence which comes directly from an identifiable source is likely to be more reliable than evidence from an indirect or unknown source. If the evidence is disputed, it will rarely be fair to rely on anonymous or multiple hearsay as the only basis for imposing an interim order.  
Where the police have charged someone with a criminal offence, this may be sufficient for the panel to go on to consider the need for an interim order, even where the underlying material isn't available to us.<sup>3</sup>
- The accuracy of the information and whether it's sufficiently clear for the registrant to understand the basis for concern. If all of the available evidence is vague or tenuous, the registrant may not be able to respond to it beyond a bare denial and so it may not be fair for us to rely on it;
- The nature of any evidence which supports / corroborates the concerns being raised. Although the panel can't make a decision on the facts of any disputed allegation, it can discount evidence that's inconsistent with objective or undisputed evidence, or which is clearly unreliable.<sup>4</sup>

Having considered these factors, and anything else relevant, if the panel is satisfied there's enough evidence to make out a concern, they should go on to consider whether, in light of this, one or more of the three grounds for imposing an interim order applies.

## Freedom of expression and Interim Orders

As we have said above, different considerations will apply if the interim order has the effect of restricting freedom of expression directly or indirectly. It could therefore apply to interim conditions or interim suspension.

If a Panel is considering imposing an interim order which might impact a nurse, midwife or nursing associate's freedom to express themselves they must first need to be satisfied that at a full hearing the NMC is likely to succeed in establishing that a finding of impairment should be made for expressing the views that the interim order is seeking to restrict.<sup>5</sup>

So, what is meant by "likely to succeed"? This depends on the circumstances of the individual case, but generally a panel should be slow to make an interim order if we have not satisfied them that it is "more likely than not" that the NMC will succeed.<sup>6</sup>

How will an NMC Panel approach this part of an interim order application in practice? The Panel will focus on what information they have before them at the time of the Interim Order application and consider what is the most likely outcome based on what they know at that point. They are not being asked to speculate on what might happen in the future on matters which are not before them. For example, if the NMC doesn't have any evidence to indicate that the registrant has taken steps to strengthen their practise then the Panel is not being asked to consider how likely it is they will do so before a substantive hearing.

They will in practice be asking themselves "If I was hearing the case today what would be the likely outcome, on the basis of what I know today?" This would involve them considering the following:

- (1) "Is it likely that the NMC would succeed in establishing the facts of the case in respect of the allegations relating to freedom of expression?" (this will usually be a higher evidential threshold than the prima facie test we apply to interim orders that don't restrict freedom of expression) and if so then;
- (2) "Is it likely that the NMC would succeed in establishing that those facts amount to misconduct?" and if so then;
- (3) "On the basis of what I know today would I be likely to find the professional's fitness to practise impaired?"

These are the requirements we must satisfy when we are applying for an interim order that has the effect of restricting freedom of expression in order to comply with section 12(3) of the Human Rights Act 1998. We have separate guidance on freedom of expression which can be found [here](#).

As with any other interim order decision, the panel must, in addition to these matters, indicate on what grounds they are putting the interim order in place (i.e. it is necessary to protect the public, is otherwise in the public interest, or is in the nurse, midwife or nursing associate's own interests).

If the NMC is applying for interim conditions some of which restrict freedom of expression, and some of which do not (for example a requirement to undergo further training or supervision) the additional requirements of section 12(3) of the Human Rights Act 1998 will only apply to those proposed interim conditions that restrict freedom of expression.

If a Panel is considering an interim order application where s.12 of the Human Rights Act 1998 is engaged, then they must also be alive to the specific notice provisions of the Act if the person is neither present nor represented at the IO hearing. These provisions can be found at s.12(2) of the Human Rights Act 1998.

## Necessary to protect the public

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For an interim order to be considered necessary for the protection of the public, it is not enough for the panel to consider that an interim order is merely desirable, the panel must be satisfied that there is a real risk to patients, colleagues or other members of the public if an order is not made.

Three factors are especially important to this consideration:

- This will depend on how much harm the alleged conduct has already caused, or could have caused, to the public. Cases that involve dishonesty, sexual misconduct, or where the actions of the nurse, midwife or nursing associate may have caused the death of a patient are usually considered more serious.
- If the concerns are serious and it seems they are likely to be repeated, then this significantly increases the risk of harm to members of the public.
- There may be other relevant factors a panel needs to consider in a particular case to decide whether to make an interim order on public protection grounds.

A panel will weigh up the seriousness of the regulatory concern and the likelihood of it being repeated if an interim order were not in place.

The seriousness of the concerns and risk of repetition are then assessed with reference to the particular circumstances of each case. An assessment of the harm that was caused, or could have been caused, to the public by the alleged conduct will be vital when [considering seriousness](#). This could include physical, mental, emotional or financial harm.

A panel must also consider how likely it is that the concerns could arise again in the future if the nurse, midwife or nursing associate's practice was not restricted. This will be crucial in assessing the level of risk the nurse, midwife or nursing associate presents to members of the public.

A panel may find the guidance on [insight and strengthened practice](#) helpful in assessing how likely it is that incidents may recur.

## Otherwise in the public interest

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As part of their assessment of risk, a panel will consider all the elements of what constitutes the public interest.

One element is promoting and maintaining public confidence in nurses, midwives or nursing associates. It would be relatively rare for an interim order to be made only on the grounds that an order is otherwise in the public interest, if there is no evidence of a risk of harm to patients, so the threshold for imposing an interim order solely on this ground is high.

A panel would have to be satisfied that public confidence in the profession could be seriously damaged by the nurse, midwife or nursing associate continuing to practise without restriction while their case is being investigated, and where necessary, prepared for a hearing.

In which case the panel should set out the nature and seriousness of any damage to the reputation of the professions that would result if an order was not made.

Then it would weigh the likelihood of serious damage to public confidence in the professions if the nurse, midwife or nursing associate were allowed to continue to practise, against the interests of the nurse, midwife or nursing

associate; this will ensure their decision is proportionate.

Considering the interests of the nurse, midwife or nursing associate includes considering their right to practise unrestricted, damage to their own professional reputation, and their ability to address any concerns through demonstrating safe practice (although this may be less relevant in cases that do not relate to the nurse, midwife or nursing associate's clinical ability).

## In the nurse, midwife or nursing associate's own interests

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In some cases there may be some evidence that the nurse, midwife or nursing associate's work is adversely affecting their health and there is potential for this to impact their ability to practise safely.

Panels need to be aware of this as where this evidence exists it may suggest that an interim order is in the interests of the individual to protect their health.

1 *George v GMC* [2003] EWHC 1124 Admin

2 Fairness at the interim stage doesn't require formal witness evidence to be presented. *Perry v NMC* [2013] EWCA Civ 145 at paragraph 33

3 A criminal charge is likely to be sufficient where we're satisfied that the decision to charge required a robust consideration of the evidence. See *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 where Mr Justice Davis held that the regulatory body and the appeal board were right to proceed on the basis that the Crown Prosecution Service had concluded that there was sufficient substance in the matter to justify charges being brought. See also *R (on the application of Walker) v GMC* [2003] EWHC 2308 (Admin). Where we're not satisfied that the decision to charge required a robust consideration of the evidence, or where there is police involvement but no criminal offences have been charged, this is unlikely to be a sufficient basis to apply for an interim order on its own; in those cases we will consider if there is underlying evidence which satisfies the test required for an interim order.

4 *Perry v NMC* [2013] EWCA Civ 145 at paragraph 20

5 The root of these considerations is s.12 of the Human Rights Act 1998. See *White v GMC* [2021] EWHC 3286 (Admin) where the application of s.12 was specifically considered in the regulatory context of interim orders.

6 See *Cream Holdings Ltd v Bannerjee* [2004] UKHL 44 judgement of Lord Nicholls of Birkenhead at paragraphs 19-22 (and in particular para.22)