Decision making factors for interim orders

Reference: INT-2 Last Updated: 25/03/2026

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Overview

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The test that a panel uses when deciding whether to impose an interim order is found in A.31(2) of the NMC Order 2001. The panel may make an order if they are satisfied that:

a) it is necessary for the protection of members of the public; or

b) it is otherwise in the public interest; or

c) it is in the interests of the person concerned.

The panel's role involves conducting a risk assessment in the light of the three grounds above. The panel is asking themselves "In this particular case, what would be the risk or risks involved in allowing this person to keep practising without restriction?"

A panel only needs to be satisfied that one of the statutory grounds applies for an interim order to be imposed, but a panel may decide that they are satisfied that more than one of the three grounds above applies in a particular case (for example an order may be necessary to protect people receiving care, and may also be in the nurse, midwife or nursing associate's own interests). Where more than one ground is being advanced as being relevant in an interim order application, the panel should carefully assess the merits of each ground individually and reach a conclusion on whether each ground is made out in that particular case. We have set out below some guiding principles to assist panels when conducting this assessment of risk.

Guiding Principles for Interim Order Consideration

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It is important that panels consider each individual case on its own circumstances and merits. They will need to identify and weigh up the risks specific to that case and decide whether they are satisfied that one or more of the three grounds is met. If they are satisfied that one or more grounds is met, they will then need to consider what type of interim restriction is appropriate for that particular case.

The panel should have in mind the following principles when making their decision:

(a) Evidence of the concern

As part of their consideration of the case as a whole, it will be necessary for the panel to look at the evidence which relates to the concerns we have about the professional's fitness to practise. While there is no evidential threshold in the NMC Order, there needs to be some evidential basis for the concern in order for the panel to then go on to decide what risks the concern presents, and whether they need to take any action in relation to those risks.

So how should the panel approach this part of their consideration? The panel would need to be satisfied that the evidence is cogent, and is not fanciful, not frivolous, not obviously contradicted by other evidence or entirely misconceived.

The panel will need to examine the evidence before it critically and keep the following in mind in doing so:

- The interim order panel cannot and must not attempt to make findings of fact.
- 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. This could include any written accounts about the concerns raised, or any video footage relevant to the alleged incidents. 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.[1]
- The source of the evidence. Where the evidence comes from may affect whether it's reasonable for the panel to rely on it when deciding whether to impose an interim order.
- The accuracy of the information and whether it's sufficiently clear for the professional to understand the basis of the concern. If all of the available evidence is vague or tenuous, the professional 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.
- Whether the nurse, midwife or nursing associate has seen or been given an opportunity to see the evidence given to the panel so that they are able to give a fully informed response to the interim order request. If the nurse, midwife or nursing associate has not seen the evidence, the panel would need to carefully consider the reasons why and whether it is fair to take that evidence into account as part of their decision. The normal process will be for all the evidence relied on to be shared with the professional concerned. Circumstances where it may be fair to proceed without the evidence being shared could include, for example, situations where the nurse, midwife or nursing associate has voluntarily absented themselves from a hearing and relevant new evidence comes to light either at or very close to the hearing.

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

b) The nature and seriousness of the concern, and associated risks:

The panel will need to assess the nature and circumstances of the fitness to practise concern or concerns, so that they can understand the gravity of what is alleged to have happened in that specific case.

Having established the seriousness of what is said to have happened, the panel can then focus on the implications going forward in terms of risk. The panel will consider the potential risks of allowing the nurse, midwife or nursing associate to continue to practise without restriction while the NMC investigate the concerns alleged against the nurse, midwife or nursing associate, whether or not those concerns are ultimately found to be true.

The panel should have regard to the following when assessing each case:

- Whether there is a direct link between the concern and the nurse, midwife or nursing associate's clinical practice
- How much harm the alleged conduct has already caused, or could have caused, to the public. This could include physical, mental, emotional or financial harm
- How likely it is that the conduct would be repeated if some form of restriction was not put on the nurse, midwife or nursing associate's practice
- The nurse, midwife or nursing associate's past or current fitness to practise history
- Whether there are existing restrictions in place imposed by the police (bail conditions), an employer or another regulator (see further guidance below on interim orders and criminal offences and restrictions imposed by employers or other regulators)
- How likely is it that there would be serious damage to public confidence in the professions, if their practice was not restricted while the concerns were investigated
- If they are considering an order in the nurse, midwife or nursing associate's own interests, how likely it is that the person concerned would suffer harm if their practice was not restricted.

We have separate guidance on conduct which we take particularly seriously in our screening guidance and insight and strengthened practice which the panel may find helpful to consider when thinking about seriousness, or how likely it is that incidents may reoccur.

c) Proportionality and applying the test:

When the panel has established the risks they think are involved in a particular case they will then need to weigh those risks up against the nurse, midwife or nursing associate's interests.

Considering the interests of the nurse, midwife or nursing associate includes considering their right to practise

unrestricted, damage to their 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).

The panel conducts this balancing exercise with the three grounds of the interim order test in mind. When considering the three grounds, the panel would need to bear in mind the following:

- 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 people receiving care, colleagues or other members of the public if an order is not made.

- 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 the public, so the threshold for imposing an interim order solely on this ground is high[3]. The High Court has made it clear that some criminal charges are so serious that the nurse, midwife or nursing associate should not be allowed to continue practising while they await trial, even where those charges are unrelated to professional practice[4]. For further discussion of the concept of 'public interest' please see our Impairment guidance.

- It is a significant step to place restrictions on a nurse, midwife or nursing associate's practice on the basis that it is in that person's own interests. The panel would have to very carefully assess the risk of harm to that individual, including the likelihood and seriousness, and balance that against any other competing interests the person might have.

If the panel concludes that an interim order is required in a particular case, it will then need to give careful consideration to what kind of restriction is required, bearing in the mind that any interim order should be proportionate to the risk identified in that particular case.

Restrictions imposed by employers or other regulators

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Restrictions imposed by employers

In some cases we may become aware that there are already some restrictions that have been put in place by the nurse, midwife or nursing associate's employer in order to try and address the concerns that have been referred to the NMC. If there are such restrictions in place, then the significance of those local restrictions to our assessment of risk is likely to be very much dependent on the individual circumstances of the case.

What is important is that in each individual case we make our own assessment of risk and decide what action, if any, is necessary for us to take in respect of that risk on an interim basis. Any local restrictions would need to be considered very carefully, and the panel should not simply decide that those local restrictions automatically negate the need for interim restriction by the NMC.

In some circumstances we may take the view that the local restrictions are comprehensive and robust, and that their impact therefore is to reduce the risk of further concerns in respect of that specific registrant. For example, in a case where the regulatory concern is focused on the registrant's health, the local restrictions and support being provided by the employer may provide us with some reassurance that the health condition is being managed well locally.

However, in other circumstances we may take the view that the local restrictions currently in place are not sufficient to mitigate the risks involved in the particular case. For example, there may have been further concerns with the registrant's practice despite those restrictions being put in place, or the restrictions themselves may not to be adequate to mitigate concerns regarding risk. The local restrictions may only be sufficient to cover some of the concerns raised, or may only apply if the registrant remains in one particular employment setting.

In some circumstances the local restrictions may in fact help us to identify the risk involved in a case, and the steps that we need to take to mitigate those risks while the case is progressing through our fitness to practise process. For example, if local restrictions on medication administration have been unsuccessful or the registrant has not complied with those local restrictions this may suggest that more robust restriction is required.

Restrictions imposed by the other regulators

There may be circumstances when we become aware that another regulatory body has imposed restrictions which

have an impact on the registrant we are investigating. Again, the relevance of those restrictions to our own assessment of risk is likely to be very much dependent on the facts of the individual case.

For example, we may be investigating a nurse, midwife or nursing associate in respect of findings of another regulatory body overseas and become aware that the registrant has either had their practise restricted in some way by that regulatory body, or has been removed from their register. If that is the case, we would need to carefully consider any public protection or public confidence implications that those overseas restrictions might present if we allowed the registrant to practise unrestricted in the UK whilst we conducted our own investigations.

Interim Orders and Criminal offences

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In addition to the guiding principles above, this section provides supplementary guidance in relation to interim orders where there is a concern linked to criminal offending or suspected criminal offending by the nurse, midwife or nursing associate.

There are different circumstances in which we receive referrals which raise concerns that a nurse, midwife or nursing associate has been involved in some form of criminal offence. The referral may suggest that a professional on our register:

- has been charged with a criminal offence and is facing criminal proceedings in court,
- has already been convicted of a criminal offence and is either awaiting sentence or has already been sentenced,
- has been arrested for an offence and is under investigation, but has not yet been charged with anything, or
- is under investigation but has not in fact been arrested.

A criminal charge may well provide cogent evidence of a concern, particularly if we are satisfied that the decision to charge and prosecute the person was made following a robust consideration of the evidence.[5] However, we do not always need to wait until a person has been charged before applying for an interim order, and in appropriate cases we may decide that a case should be put before a panel for interim order consideration prior to charge.

Our decision will be based on the information available to us, including the seriousness of what is being investigated, and any implications that has in respect of public safety or public confidence. In cases of the utmost seriousness, the panel may be satisfied that there is cogent evidence of a serious risk, even on the basis of limited information.

For example:

- We receive information from the police that a midwife is being investigated for theft. The police will not reveal any further information at this stage, including what the theft is about or the status of the criminal investigation. Without additional information, this is unlikely to be a basis upon which we could suggest there is cogent evidence of a concern which requires interim order consideration.

- We receive information from the police that a nurse has been arrested in connection with an assault at work, but has been immediately released whilst the police conduct further investigations. They won't tell us any information about the venue, people involved or the nature of the assault as they are yet to take statements from possible witnesses. Without additional information, this is unlikely to be a basis upon which we could suggest there is cogent evidence of a concern which requires interim order consideration.

- We receive information from the police that a nurse has been arrested in connection with allegations of serious sexual assault at work but has been immediately released whilst the police conduct further investigations. The police have imposed bail conditions on the person to keep away from their place of employment and not to attempt to contact any members of staff or patients. They are due to go back to the police station in two weeks' time. The police cannot release any detailed information at present as they are concerned that this could potentially prejudice their investigation. However, they are prepared to tell us that the allegations are in respect of at least two vulnerable adult patients with learning difficulties and, in the words of the officer investigating the case, involve "very intimate touching" of the people concerned. This information alone could provide cogent evidence of a concern which requires interim order consideration.

- We receive information from the police that following a two-year investigation, a nursing associate has been arrested for participating in a paedophile network where images and videos of child patients have been circulated. Even without any further information these allegations are incredibly serious and have implications in respect of both the safety of people receiving care and public confidence. This information alone could provide cogent evidence of a concern which requires interim order consideration.

- We receive information that a nurse has been arrested, interviewed and released by the police in relation to an investigation into multiple allegations of murder of elderly patients in various care homes. The police refuse to disclose any further information about the alleged offences. Even though the information is extremely limited, the offences being investigated clearly raise very serious

issues in relation both to the safety of people receiving care and public confidence. As such this information alone could provide cogent evidence of a concern which requires interim order consideration.

n some circumstances the police or the Criminal Court may impose bail conditions on a professional which they have to eep to while the criminal proceedings are in progress. The imposition of bail conditions (especially bail conditions elating to clinical practice) could be an indicator that an interim order should be considered, on grounds both of public rotection and public interest.

Discrimination and Interim Orders

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We are clear that no form of discrimination should be tolerated within health and social care.

n addition to the guiding principles above, this section provides supplementary guidance in relation to interim orders nked to concerns of discrimination, or misconduct closely linked to discriminatory views.

We are likely to apply for an interim order in cases of this kind where the evidence in relation to the allegations uggests a risk of harm to the public[6] that makes an interim order necessary on public protection grounds

A panel should assess risk according to the specific circumstances of each case. Factors which could strengthen the eed for an interim order in cases involving discrimination include:

The existence of a criminal charge or conviction for a hate crime

A criminal charge or conviction for a hate crime is itself capable of increasing the public interest in taking action.

Discriminatory language

We view the use by professionals of discriminatory language seriously. It is likely to undermine public confidence in the rofessions and may indicate a deep-seated discriminatory attitude; for that reason it may impair a professional's itness to practise. Before imposing an interim order a panel needs to weigh up the available evidence about the risk hat such conduct poses. This might include whether the discriminatory language was said to a patient or in the context f care; whether there is evidence which shows whether a professional has treated a patient or category of patients ess favourably due to their (perceived) protected characteristic; and whether in all the circumstances there is a real risk o patients which makes it necessary to restrict the professional's practice while we investigate the allegation.

The use of discriminatory slurs, making of threats, or the use or endorsement of violence based on protected characteristics

Whilst not all discriminatory language or conduct will include these features, such conduct can be particularly damaging o public confidence or trust, and form strong evidence for the existence of deep-seated discriminatory attitudes that ould put the public at risk[7].

Discriminatory conduct within professional practice

Discriminatory behaviour is capable of harming the public or undermining confidence in the professions we regulate wherever it occurs and whoever it is directed towards. That is why we always take it seriously.

However, when considering interim orders in particular, it is important to note that (i) evidence of discrimination against eople who use services is a strong indication both that a professional could pose an immediate risk to the public and hat their continued practice without restriction is likely to undermine public confidence in the profession; discrimination hat involves poor care is likely to necessitate an interim order. (ii) in some circumstances, discriminatory behaviour owards colleagues in professional practice can have a serious effect on workplace culture, and therefore patient afety, if it is not dealt with[8]. We will always focus closely on the specific conduct and its relationship to a person's ractice as a registered professional.

EXAMPLE

> We receive concerns where the evidence suggests that a professional holds deep-seated discriminatory attitudes towards Muslims that could directly and negatively impact the care they provide to Muslims in their care. We would be likely to apply for an interim suspension order in these circumstances.

Multiple incidents

Although a single incident of discrimination may require consideration of an interim order, repeated incidents may be a trong indication of deep-seated discriminatory attitudes and a real risk of repetition, and therefore strengthen the case or an interim order.

nterim Orders and not having the necessary knowledge of English

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In addition to the guiding principles above, this section provides supplementary guidance in relation to interim orders where there is a concern linked to the professional not having the necessary knowledge of English.

When a case involves language concerns the following factors should be considered:

- The severity of any actual or potential clinical risk or harm caused to people receiving care, which is related to the alleged lack of knowledge of English
- The results of any language assessment taken by the nurse, midwife or nursing associate, and
- any refusal or persistent failure to undergo an assessment.

If they have decided that an interim order is required, panels should always assess whether workable and proportionate conditions can be applied to deal with the risks presented by the nurse, midwife or nursing associate's knowledge of English.

In doing this, the panel should bear in mind our power to direct the nurse, midwife or nursing associate to take a language test and provide us with the results by a specific date[9].

Panels considering Interim Orders for cases where English Language is a concern may find our guidance "not having the necessary knowledge of English" to be helpful.

Freedom of expression and Interim Orders

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There are some very specific considerations which will apply if an interim order has the effect of restricting freedom of expression directly or indirectly. These considerations therefore apply to both 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.[10]

So, what is meant by "likely to succeed"? This depends on the circumstances of the individual case, but generally a panel should be *"exceedingly slow"* to make an interim order if we have not satisfied them that it is "more likely than not" that the NMC will succeed. However, there may be some cases where it is appropriate for the panel to depart from this general approach and consider a lesser degree of likelihood. For example, this could be the right approach to take in circumstances where the potential adverse consequences of the person continuing to express the views are particularly grave.[11]

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 professional has taken steps to strengthen their practice 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 now?" 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?" 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).

f 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.

f 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 interim order hearing. These provisions can be found at s.12(2) of the Human Rights Act 1998.

nterim orders and incorrect or fraudulent entry allegations ("IEFE" allegations)

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n cases of concerns about the legitimacy of the nurse, midwife or nursing associate's entry in the Register, the nvestigating Committee can make an interim order while the concerns are being resolved.

n addition to the guiding principles above, our guidance on Fraudulent and Incorrect Entry allegations contains supplementary guidance in relation to interim orders which are being considered for these types of concern.

1 Perry v NMC [2013] EWCA Civ 145 at paragraph 20
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 See Shiekh, R (on the application of) v General Dental Council [2007] EWHC 2972 (Admin)
4 See NH v The General Medical Council [2016] EWHC 2348 (Admin), a case involving charges of false imprisonment and assault
5 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).
6 By its very nature, discrimination raises the possibility of differential treatment. The Professional Standards Authority's September 2022 report Safer Care for All highlighted the impact that discrimination can have on patient safety. In the PSA's 2023 report Perspectives on discriminatory Behaviours in health and care, members of the general public and health service users themselves highlighted the risk of mental and physical harm due to discrimination.
7 Discriminatory slurs are insults based on protected characteristics or membership of a group
8 For example, see p.30 of the PSA's report Safer Care for All
9 Rule 6B(3B) of the Fitness to Practise Rules 2004
10 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.
11 See Cream Holdings Ltd v Bannerjee [2004] UKHL 44 judgement of Lord Nicholls of Birkenhead at paragraphs 19-22 (and in particular para.22)