Stage one: should we start a review?

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What we're able to review

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The Registrar (or one of our Assistant Registrars who also make decisions on behalf of the Registrar) is able to review and reopen a no case to answer decision as long as it was made after 9 March 2015. The Registrar is also able to review:

- a decision to recommend undertakings
- a decision to recommend variations to undertakings
- a decision to remove undertakings and not to consider the allegations any further.

A request can be made to review the whole of a decision or part of a decision. The whole of the decision does not have to be called into question for a review to take place.

The Registrar is not able to review a decision when a nurse, midwife or nursing associate is not on our register.

When we receive a request to review, we will check that the nurse, midwife or nursing associate is still on our register. If the nurse, midwife or nursing associate has lapsed from our register between the time that the decision was made and the power to review request was received, we cannot review the decision and the reviewable decision will remain in place. We'll make a note of the request against the lapsed registration on our register in case the nurse, midwife or nursing associate applies to be readmitted in the future.

Time limit for starting a review

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The Registrar cannot start a review of a decision more than one year after the date of that decision, unless there are exceptional circumstances.[1]

When the Registrar is assessing whether there are exceptional circumstances, they should consider:

- the seriousness of the allegation
- the period of time since the one year time limit expired
- the reasons (if any are provided) why the review request was not made sooner.
- if it's likely that relevant evidence will no longer be available,
- if the allegations relate to a single incident or a wider pattern of behaviour
- the continuing risk to the public and/or public interest, and
- if the allegations raise an important/new/developing area of practice or principle of law

Exceptional circumstances should not be defined too narrowly. This allows for each case to be considered fairly and with flexibility. The Courts have held that exceptional… "describes a circumstance which is such to inform an exception, which is out of the ordinary course, or unprecedented, or very rare but it cannot be one which is regularly or routinely encountered".[2]

Who can request a review

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Anyone can request a review, but generally requests come from:

- the person or organisation who originally referred the allegation
- the nurse, midwife or nursing associate themselves
- a third party who was somehow connected with the events that led to the referral (for example, a patient, colleague or an employer)
- a member of our staff.

Grounds for a review

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The Registrar can review all of or part of the decision if they have reason to believe:[3]

- the decision may be materially flawed, or
- there is new information which the decision makers did not have which may have meant a different decision was made.

In both cases, the Registrar will only review the decision if they think it is in the public interest or is necessary to prevent unfairness to the nurse, midwife or nursing associate.

The relatively low threshold applied for deciding to review reflects that the Registrar may not have much information to assist them at this stage as they will not have representations from all parties nor will they have had the chance to carry out any further investigation.

The request to review the decision must specify if the request is made on the grounds of new information or material law and provide detail to the Registrar in support of this. We will not refer requests to review a case to the Registrar if the review request is only an expression of general unhappiness with the decision. This is because the Registrar can only decide to review decisions if the grounds for review have been satisfied.

Material flaw

A decision can be flawed[4] in its reasoning or content, or as a result of the process that was followed in the decision being made. For example, a decision could be flawed by:

- applying the wrong legal test
- reaching a conclusion that the available evidence does not support or relying on evidence which is not relevant or failing to take account of relevant evidence
- not carrying out an investigation properly
- all relevant evidence not being supplied to the decision maker
- inaccurate information being supplied to the decision maker
- failing to give adequate reasons
- failing to comply with certain procedural requirements.

The whole decision does not need to be flawed, just an element of it. The Registrar will need to look at what happened during the investigation and how the decision makers came to their decision.

If the Registrar decides that the decision may be flawed, they will then consider if the flaw is a material one.

The Registrar will consider how the flaw may have affected the decision in order to decide if the flaw is material. If the flaw could have led to a different outcome, then it is likely that the flaw is a material flaw.

New information

New information[5] is any information that we did not have when the case examiners or Investigating Committee made a decision. The Registrar should consider if the new information could have affected the decision if it had been available at that stage.

This ground raises two questions.

- Has any new information been supplied or identified?
- If the information was available at the time of the decision, could it have made a difference to the decision?

The person requesting the review should explain what the new information is and why the new information is likely to change the decision. If the person requesting the review has the new information then they should provide this. If they

don't provide the new information they need to explain why and what steps they have taken to obtain this. New information which amounts to a new allegation is usually treated as a new referral.

Deciding if a review would be in the public interest or necessary to prevent injustice to the nurse, midwife or nursing associate

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If either one or both of the grounds for review (see above) are met, the Registrar will consider whether it is in the public interest for there to be a review or if a review is necessary to prevent injustice (unfairness) to the nurse, midwife or nursing associate. At this stage the Registrar does not need to consider the possible outcome of the review of the decision.

Public interest

Our focus is to protect the public. When the Registrar is thinking about the wider public interest, they will consider how the decision will impact on public protection, maintaining public confidence and upholding standards of conduct and behaviour.

In considering this, the Registrar will take into account the following points:

- Would a failure to review the decision leave the public at real risk of harm from the nurse, midwife or nursing associate?
- Does the nurse, midwife or nursing associate currently pose a risk to the health, safety or wellbeing of the public, which requires some form of restriction on their registration?
- Is the regulatory concern about clinical issues which are so serious that they can't be addressed, meaning we need to take action to uphold public confidence?
- If the regulatory concern is not about professional practice, has the nurse, midwife or nursing associate done something that raises fundamental questions about their ability to uphold the standards and values set out in the Code, meaning we need to take action to uphold public confidence?

Necessary to prevent injustice to the nurse, midwife or nursing associate

This consideration is only likely to be relevant where a nurse, midwife or nursing associate has been given advice or issued with a warning as part of the case examiners no case to answer decision or undertakings have been recommended which the nurse, midwife or nursing associate cannot accept.

The Registrar will consider:

- the seriousness of the regulatory concern, and
- the need to promote and maintain public confidence and proper professional standards and conduct.

They will then assess whether the decision is proportionate to these factors.

The Registrar may identify grounds for a review which have not been identified by the person requesting the review. The Registrar is not limited to the scope of the request and could find a case to answer in a case where a nurse, midwife or nursing associate is requesting a review of the decision to impose a warning or advice.

Once a case has met the criteria in stage one, we count the review as having started.

Letting people know there will be a review

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The Registrar must[6] notify the following parties of any decision taken to review a decision.

- The nurse, midwife or nursing associate
- The referrer (person who originally referred the concerns to us)
- Any other person who the Registrar thinks has an interest in being informed, such as the person requesting the review.

The Registrar should provide the above parties with any new information[7] that has been obtained, if it's appropriate to disclose this to them. In practice, there could be sensitive information that is not appropriate to disclose to anyone other than the nurse, midwife or nursing associate. The Registrar must be careful as to what information in particular is

appropriate to be disclosed to the referrer.

The Registrar must also seek representations from the parties.[8] Therefore, when we write to inform the parties of the review we invite them to send us written representations about this by a set date; 21 days are usually allowed for representations.

If the Registrar decides not to review a decision, we will inform the person who requested the review that the decision will remain in place.

Deciding if further investigation is needed

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Once the Registrar decides to review a decision, we are able to carry out any investigative work that the Registrar feels is necessary to help them decide if a fresh decision is necessary.[9] No investigative work should be carried out before this decision is taken.

The Registrar may have to deal with new information which comes to light during the further investigation. The Registrar's powers to investigate as part of a review are not intended to be used for a case to be reinvestigated. The Registrar will decide at the end of the further investigation if they have sufficient information to start stage two of the review.[10]

We will complete our further investigation in cases where this has been identified as necessary before asking for parties to make any representations. We will disclose any new information obtained to the nurse, midwife or nursing associate whose case is being reviewed and will consider if it is appropriate to disclose this to other parties (as outlined above under "letting people know there will be a review").

1 Rule 7A (10)
2 Lord Bingham CJ in R v Kelly (Edward) (No.2) (2001) EWCA 1751
3 Rule 7A(2)(a-b)
4 Rule 7A(2)(a)
5 Rule 7A(2)(b)
6 Rule 7A(3)(a)
7 Rule 7A(3)(b)
8 Rule 7A(3)(c)
9 Rule 7A (5)
10 Rule 7A(6)(a-b)