Decision making factors

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Proportionality

Fitness to Practise Committee panels are under a legal duty to act proportionately when they impose sanctions. Any interference with a nurse or midwife’s right to practise in their chosen profession will engage their right to respect for private and family life, which is protected by Article 8 of the European Convention on Human Rights.¹

For this reason, any interference with the nurse or midwife’s ability to practise must be no more than necessary to satisfy our overarching objective of public protection. It must strike a fair balance between the rights of the nurse or midwife and the public interest.²

Acting proportionately means that panels of the Fitness to Practise Committee make their decision by considering all the sanctions available to them. They assess the factors in the case which mean the nurse or midwife’s fitness to practise is currently impaired, and start by considering whether the least restrictive sanction would be sufficient to protect the public interest in light of those factors. If the least restrictive sanction is not sufficient, they work up through the available sanctions in ascending order of severity, until they find the order that is sufficient to protect the public interest. This is the case whether the finding of impairment was made because of a risk of harm to patients, the maintenance of public confidence, or the need to declare and uphold proper standards.

Panels reasons should explain why it is not necessary to impose a more severe sanction than the one they have chosen, and to refer to the next most severe sanction to satisfy themselves that the sanction they have chosen is proportionate and correct.

Aggravating and mitigating factors

Fitness to Practise Committee panels always have careful regard to any evidence of mitigation when they are deciding which sanction, if any, to impose.

Mitigation can be considered in three categories:

- evidence of the nurse or midwife’s insight and understanding of the problem, and their attempts to address it. This may include early admission of the facts, apologies to the complainant or the person(s) affected, any efforts to prevent reoccurrence or any efforts to correct the difficulties.
- evidence of the nurse or midwife’s observance of the principles of good practice. This may include a demonstration of keeping up to date with their area of practice, or their previous good character or history.
- personal mitigation, such as periods of stress or illness, personal and financial hardship, level of experience at the time in question, level of support in the work place (the list is not exhaustive).

In regulatory proceedings, where the purpose of sanctions is to protect the public and not to punish nurses and midwives, personal mitigation tends to be of less relevance than it does in the punishment of offenders in the
criminal justice system. In individual cases, sanctions may have a punitive effect, but this is not their purpose.

Mitigation evidence may be presented by way of references and testimonials. The Fitness to Practise Committee applies the guidance on remediation and insight when assessing how useful these documents are to their decision making in an individual case.

As well as considering the mitigating features of the case, the panel will need to consider any aggravating features of the case, such as:

- any previous regulatory or disciplinary findings
- abuse of a position of trust
- lack of insight into failings
- direct or indirect patient harm (or conduct that could foreseeably cause harm), which includes failures in safeguarding
- a pattern of misconduct over a period of time.

### Previous interim orders and their effect on sanctions

Nurses or midwives are often subject to orders restricting or suspending their right to practise while their case is being investigated. When making their decision on sanction, panels of the Fitness to Practise Committee will often be made aware that an interim order was in place before the hearing, which may be a factor they need to take into account.

The fact that a nurse or midwife has been under an interim order may show that their opportunity to remedy risks in their practice by working as a nurse or midwife has been limited.

Evidence of compliance with and good progress under an interim order may be relevant to an assessment of the nurse or midwife’s insight and the risk that they may present to the public in the future. Similarly, any evidence that the nurse or midwife did not fully comply with an interim order may be relevant to the panel’s assessment of the nurse or midwife’s insight and attitude, and whether the nurse or midwife is likely to comply with any order made.

The fact that a nurse or midwife was previously under an interim order, and for how long are relevant background factors in deciding on a proportionate length of sanction. However, it would not be appropriate simply to deduct or discount the length of time for which the nurse or midwife was previously restricted or suspended under an interim order from a proposed sanction. Interim orders have a separate and distinct role from sanctions, in that their focus is on addressing risk on an interim basis before any finding of impairment of fitness to practise. If a panel identifies a current risk to public protection as part of that impairment decision, a risk of patient harm may follow if the 'time served' under an interim order was reflected in a shortened period of sanction.

This consideration is particularly strong where a sanction is being imposed because a nurse or midwife presents a current risk to patients. If the Fitness to Practise Committee first identified the appropriate period of suspension or conditions of practice needed to protect patients, and then reduced that period by way of applying a ‘discount’, the order is likely to be insufficient to achieve its purpose of public protection.

1 See R (Wright) v Secretary of State for Health [2009] UKHL 3
2 Huang v Secretary of State for the Home Department [2007] UKHL 11