

# **Modernising Fitness to Practise**

Changes to the Fitness to  
Practise Rules 2004

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### Introduction

- 1 The Nursing and Midwifery Council (NMC) is the independent nursing and midwifery regulator for England, Wales, Scotland and Northern Ireland. We exist to protect the public. We set standards of education, training, conduct and performance so that nurses and midwives can deliver high quality healthcare throughout their careers.
  
- 2 Our functions are set out in the Nursing and Midwifery Order 2001 (the Order). The Order is supported by a series of rules which detail how we will carry out our functions. We have worked with the Department of Health on proposals to improve efficiencies to our fitness to practise processes whilst maintaining public protection. On 21 April 2016 the [Department consulted](#) on changes to the Order. These changes would:
  - 2.1 Enable nurses or midwives to agree undertakings with us
  - 2.2 Enable Case Examiners to close cases by issuing a warning or by giving advice
  - 2.3 Merge the Conduct and Competence Committee and Health Committee into a single Fitness to Practise Committee
  - 2.4 Remove the limit on the number of panellists we can appoint to allow greater flexibility to recruit new panel members as needed
  - 2.5 Allow panels imposing conditions of practice and suspension orders to direct that a subsequent review of the order is not required
  - 2.6 Remove our statutory obligation to hold hearings in the UK country in which the nurse or midwife is registered
  - 2.7 Schedule all reviews of interim orders at six monthly periods
  - 2.8 Give courts hearing applications to extend or revoke interim orders the power to replace one type of interim order (conditions of practice or suspension) with another
  - 2.9 Remove our statutory requirement to notify specified persons when a case is referred to a practice committee

- 3 We are now seeking views on the changes to the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 which will implement these powers. This consultation seeks views on the changes to Case Examiners' powers to give advice, issue warnings and recommend undertakings. We are also seeking views on our approach to implementing our expanded power to review no case to answer decisions which is linked to advice, warnings and undertakings.
- 4 The remaining changes do not require substantive amendments to the Fitness to Practise Rules and therefore we are not seeking views on these changes within this consultation. We will produce guidance to assist Case Examiners with their new powers and the wider changes consulted upon by the Department of Health, including the factors to be taken into account when determining the location of hearings. We will be consulting on this guidance and will also be seeking feedback on our approach to health cases under the new Fitness to Practise Committee in early 2017.

### **Making fitness to practise more proportionate**

- 5 As part of our duty to protect patients and the public we investigate concerns about the conduct or practice of nurses and midwives who fall short of our standards. To enable us to continue to meet our aim of public protection, our fitness to practise processes must be effective and proportionate. In March 2015 we introduced Case Examiners to improve the efficiency and quality of decision making at the end of an investigation into a nurse or midwife's fitness to practise. We are now seeking legislative change to give Case Examiners expanded powers to conclude cases, alongside our hearings process. We believe these changes will better enable us to protect patients and the public more quickly. These changes will also bring us broadly into line with some of the other healthcare regulators who already operate more proportionate fitness to practise models.
- 6 Case Examiners review the evidence from our investigation and decide if the concerns relating to the nurse or midwife's practice or conduct should be sent to a hearing for consideration by a panel<sup>1</sup>. This is a 'case to answer' decision. In 2014/15, 1,032 cases were assessed as having a case to answer and sent for consideration by a panel of the Conduct and Competence or Health Committee.<sup>2</sup>
- 7 Case Examiners' new disposal powers will enable them to conclude certain types of cases without the need to send the case for further consideration by a panel. This change is urgently required as we believe a significant number of cases currently sent for panel consideration at a hearing could be dealt with more proportionately, and at an earlier stage. Our proposals to give Case Examiners new disposal powers will allow us to meet our aim of protecting the public and

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<sup>1</sup> Cases can also be concluded at a private meeting where the nurse or midwife is not in attendance and the case is decided on the papers. 46 cases were concluded at a private meeting during April 2014 - May 2015.

<sup>2</sup> The Nursing and Midwifery Council, Fitness to Practise annual report 2014-2015, Investigating Committee Outcomes p20

reserve our final adjudications process for the most serious cases and those where there is an actual dispute over what happened.

- 8 These new powers are set out in more detail below.

## **Undertakings**

- 9 Case Examiners will be able to recommend undertakings where the concerns about the nurse or midwife's practice indicate they are a current risk to patients, but the risk can be safely managed and addressed with appropriate restrictions in place. Undertakings will be an agreement between us and a nurse or midwife that they will comply with certain measures or restrictions, such as retraining or working under supervision, to manage risks in their practice. Undertakings may be appropriate for cases where the concerns include repeated failings in specific areas of practice, or health conditions which are serious enough to affect the ability of a nurse or midwife to provide safe care.
- 10 Undertakings will only be recommended after Case Examiners have found a case to answer, and when they are satisfied that undertakings can be identified which fully address the risks in the case. Undertakings will not be recommended where the concerns are so serious there is a real prospect of a panel imposing a striking-off order. These types of cases will be referred for panel consideration.
- 11 Under our proposals, undertakings will have the aim of enabling nurses and midwives to return to unrestricted practice. This will be achieved by the nurse or midwife completing specified steps, within identified timeframes, to address the risks they pose to patients. We will monitor compliance with undertakings (as set out below) to enable Case Examiners to assess the information and determine whether undertakings should remain, whether they require variation, or if the undertakings should be lifted.

## **Agreement of undertakings**

- 12 Case Examiners will only recommend undertakings after they have seen the nurse or midwife's response to our investigation. Undertakings will only be suitable where the nurse or midwife accepts the incidents of concern took place and acknowledges that areas in their practice need to be managed to ensure patient safety.
- 13 Where undertakings are recommended we will write to the nurse or midwife inviting them to agree to comply with the undertakings within 28 days. We will extend this period if further time is needed to address any issues concerning the workability of the proposed undertakings.

- 14 If the nurse or midwife does not confirm that they are willing to agree the undertakings within the defined time period, the concerns will be referred for a hearing.

**Question 1 – Do you agree with our approach as to when Case Examiners should recommend undertakings?**

**Monitoring compliance with undertakings**

- 15 Where a nurse or midwife agrees to comply with undertakings, Case Examiners will stop their initial consideration of the case. A dedicated review team will then monitor the nurse or midwife's progress in completing the steps specified in undertakings.
- 16 Based on information from the review team, we will refer cases to Case Examiners when it appears that they may need to decide to lift the undertakings, propose variations, or refer the case for a hearing if there has been a failure to observe undertakings.

**Lifting undertakings when concerns have been remedied**

- 17 Where Case Examiners are satisfied the evidence of compliance with undertakings shows the nurse or midwife is no longer a risk to patients, they will direct that the undertakings are lifted and the case will be closed.

**Variation of undertakings**

- 18 When reviewing the nurse or midwife's progress in complying with undertakings, Case Examiners may decide the undertakings should be changed, and will invite the nurse or midwife to comply with varied undertakings. This could happen where it appears that the undertakings have become unworkable, but alternative undertakings can be identified to manage the risk in the case.
- 19 If the nurse or midwife does not agree to comply with the varied undertakings, the case will be reviewed by the Registrar, who will consider whether the undertakings remain the appropriate way to deal with the case. As part of this review, the nurse or midwife will have the opportunity to tell the Registrar why they did not agree to the varied undertakings.
- 20 Here the Registrar will be able to make any decision that was originally open to Case Examiners when they first considered the case. This could involve sending the case for panel consideration, or recommending suitable alternative undertakings to be agreed with the nurse or midwife, or confirming the original undertakings. In making this decision, the Registrar will be able to consider any

points the nurse or midwife has made about why the varied undertakings were not suitable.

### **Failure to observe undertakings**

- 21 If we receive information that indicates a nurse or midwife has not complied with undertakings, Case Examiners will assess this information and consider the nature of the failure to comply. Case Examiners will then consider whether the original undertakings should remain, or recommend variations to undertakings. We believe this represents an appropriate way of addressing minor changes in the nurse or midwife's practice such as changes in line management or ward in which they work. Where Case Examiners determine there had been a serious breach of undertakings, or a persistent failure to comply with undertakings, they will have the power to refer the original allegation that resulted in the agreement of undertakings to a hearing.

**Question 2 – Do you agree that where a nurse or midwife fails to comply with undertakings, Case Examiners should be able to send the original allegation for a hearing?**

### **Publication of undertakings**

- 22 The proposed changes to the Order will require us to publish decisions by Case Examiners to agree undertakings with a nurse or midwife. When undertakings are agreed, the nurse or midwife's entry on our register will be amended to show they are subject to undertakings. The details of the undertakings will be published, alongside a short summary of the incidents which led to the undertakings being agreed. Due to the confidential nature of health related undertakings, only the fact that undertakings have been agreed, and not the content of the undertakings, will be published in these circumstances.

**Question 3 – Do you agree with our approach to publishing undertakings?**

### **Warnings**

- 23 In cases where a nurse or midwife does not present a current risk to patients and the past concerns are not such that the most restrictive sanctions are required, we propose that warnings will be appropriate to declare to the nursing and midwifery professions, and the wider public, that past conduct represented a serious breach of professional standards and the Code. Under the existing model, Case Examiners have no choice but to refer such cases onwards for consideration by the Conduct and Competence Committee given that there is currently no way of marking their concerns publicly. We do not envisage warnings being issued where the concerns solely relate to the nurse or midwife's health.

## **Engagement from nurses and midwives**

- 24 Case Examiners will only consider issuing a warning after they have reviewed the evidence gathered during our investigation, and after reviewing any response the nurse or midwife has chosen to send, together with any evidence or supporting statements demonstrating insight and remediation. Warnings will only be issued where the nurse or midwife accepts the incidents which cause us concern.
- 25 We do not propose that a nurse or midwife would have an opportunity to formally 'accept' the warning. However, there would have to be a clear acceptance of the concern by the nurse or midwife, and the concern would need to have been remediated, before a warning could be issued.
- 26 Under our proposals, nurses and midwives will have the opportunity to comment on the allegation before Case Examiners consider the case in line with our current processes following our investigation. This will also provide an opportunity for nurses and midwives to make representations as to whether a warning is an appropriate outcome

**Question 4 – Do you agree with our proposals that warnings may be issued where the past concerns are serious, but the nurse or midwife has demonstrated full remediation and does not pose a current risk to patients?**

## **Publication of warnings**

- 27 The proposed changes will require us to publish decisions by Case Examiners to issue a warning. We propose to publish the fact that Case Examiners have issued a warning for a period of 12 months on the nurse or midwife's registration. This entry will include a short summary of the facts which the nurse or midwife has accepted. We consider this publication period is proportionate and reflects the difference between warnings and caution orders, which can be imposed by a panel at a hearing for a period of between one and five years.

**Question 5 – Do you agree with our approach to publishing the content of warnings?**

## **Advice**

- 28 If Case Examiners decide there is no case to answer, they may decide to give written advice to the nurse or midwife when closing the case. Advice will remind nurses and midwives to reflect on their professional obligations and areas of the Code that are relevant to the concerns that were investigated.
- 29 Advice may be suitable for concerns that amount to a minor breach of professional standards under the Code. As with warnings, advice will not be given where the nurse or midwife disputes the incident(s) which cause us concern. It is unlikely that advice would be given in cases which only involved concerns about a nurse or midwife's health, or knowledge of English.

- 30 Advice will be issued privately to the nurse or midwife, separately from the Case Examiners decision, which will also be private. The content of the advice will not be made public and will not be disclosed to referrers. However, we will inform the referrer of the fact that the case was closed with advice.
- 31 Currently, Case Examiners may take into account previous no case to answer decisions when considering if there is a case to answer relating to new concerns, if this falls within a period of three years since the original no case to answer decision. We are proposing to treat cases closed with advice, or a warning, in the same way. This means previous decisions to issue warnings, or give advice, could not be taken into account by Case Examiners after three years have passed since the original decision.

**Question 6 – Do you agree with our proposals on when Case Examiners may give advice?**

**Reviewing Case Examiner decisions**

- 32 When we introduced Case Examiners in March 2015, we also introduced a power for the Registrar to review no case to answer decisions<sup>3</sup>. The Registrar carries out a review when evidence suggests the original decision was materially flawed, or where new information that could have led to a different decision has become available, and a review will be in the public interest.
- 33 Under the proposed changes consulted upon by the Department of Health the following Case Examiner decisions will be subject to the power to review:
- 33.1 recommending that undertakings should be agreed
  - 33.2 deciding that undertakings should no longer apply
  - 33.3 giving a nurse or midwife advice as part of a no case to answer decision
  - 33.4 issuing a warning as part of a no case to answer decision
- 34 Under our proposals, a decision to give advice, or issue a warning, will be a reviewable decision if there is evidence to suggest the decision was materially flawed, or new information is available that could have led to a different decision, and a review is necessary to prevent injustice to the nurse or midwife, or is in the public interest.
- 35 The current 12 month time limit for reviews of Case Examiner decisions (unless there are exceptional circumstances) will remain.
- 36 Where the Registrar considers there is evidence that a decision by Case Examiners to issue a warning was materially flawed, or new information is now available that could have led to a different decision, the warning as published on the nurse or midwife's register entry will be amended to show the decision to issue the warning is under review.

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<sup>3</sup>See Rule 7A of the Nursing and Midwifery (Fitness to Practise) Rules 2004



- 37 Currently, decisions that a nurse or midwife has no case to answer can be reviewed by the Registrar if they were materially flawed, or new information has become available which could have led to a different decision, and a review is in the public interest.

**Question 7 – Do you agree that the Registrar should also be able to review decisions to give advice, issue warnings, and recommend or lift undertakings, using these principles?**

**Question 8 – Where a Case Examiner decision is materially flawed, or new information which could change the decision has become available, do you agree that in addition to a new decision being in the public interest, ‘preventing injustice to a nurse or midwife’ should become a new factor which would point towards a new decision being made?**

## **Equality and Diversity**

- 38 As a public body the NMC has a duty to advance equality of opportunity, eliminate discrimination, harassment and victimisation and foster good relations between people who share a relevant protected characteristic and those who do not.<sup>4</sup>
- 39 The protected characteristics are:
- 39.1 Age
  - 39.2 Disability
  - 39.3 Gender reassignment
  - 39.4 Marriage and civil partnership
  - 39.5 Race
  - 39.6 Religion or belief
  - 39.7 Sex
  - 39.8 Sexual orientation
  - 39.9 Pregnancy and maternity

**Question 9 – Will any of these proposals have a particular impact on people who share these protected characteristics (including nurses, midwives, patients and the public)? If yes, would this impact have a positive or negative effect?**

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<sup>4</sup> S149(1) Equality Act 2010

**Question 10 – How we can we amend the proposals to advance equality of opportunity and foster good relations between groups?**

**Transitional provisions**

- 40 We are keen to ensure we can implement the changes to our Fitness to Practise Rules as soon as possible when they come into force. To enable this, we are proposing the new rules should apply to all existing cases from the date the rules come into force, unless a hearing has started and the charges have been read out. This will mean that cases that had not yet been considered by Case Examiners will be considered under the new rules.
- 41 Hearings where the charges have been read out, but have not concluded on the date the new rules come into force, will continue to be considered under the existing rules. In this situation, the existing rules will apply up to the point at which the panel makes its decision on sanction. Any further consideration of the case (at a review of any substantive order, for example) will be considered under the new rules.
- 42 Cases that have been referred to the Conduct and Competence Committee or Health Committee before the coming into force date would be treated as though they had been referred to the Fitness to Practise Committee. Hearings that were postponed, with the charge not having been read out, before the coming into force date, will resume before the Fitness to Practise Committee, under the new rules.

**Question 11 – Do you agree with our proposed transitional provisions?**

**Draft Rules**

**Question 12 – Do you have any comments on the draft Rules?**