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Consensual panel determination

Reference: DMA-1 Last Updated: 31/08/2018

We use consensual panel determination to resolve cases by agreement or ‘consent’. It avoids unnecessary full hearings and means that witnesses do not have to attend. It also means that cases are concluded quicker.

When a nurse or midwife indicates that they would like to resolve their case by consent, they must accept the facts of the allegation and that their fitness to practise is impaired. We will then agree what the appropriate level of sanction is with the nurse or midwife.

If we are able to agree on the sanction, we will then prepare a provisional written agreement, using our statement of case as a basic starting point.

The agreement will set out the agreed facts, agreed reasoning on impaired fitness to practise, and the agreed sanction, with reasons.

It is signed by us and the nurse or midwife. We will then list the case for a hearing or meeting for a panel to consider the agreement. The panel makes the final decision about the outcome of the case.

Essential criteria

Reference: DMA-1a Last Updated: 06/07/2018

In this guide

Overview

We will only consider resolving a case by consent after the case examiners have decided that there is a case to answer and have referred the case to the Fitness to Practise Committee, or if the case has been directly referred to the Fitness to Practise Committee. Additionally, the nurse or midwife will have indicated that they accept the facts of the allegation and that their fitness to practise is impaired.

Admission of the facts

A nurse or midwife must accept the facts of the allegation in full. We will not drop serious parts of the factual allegation in exchange for admissions to other parts. If parts of the factual allegation do not increase the overall seriousness of the case or where there is no longer a realistic chance that part of the factual allegation will be proved, we will consider no longer proceeding with that part of the allegation. Where we do not proceed with a factual allegation which was referred by the Case Examiners, the reasons for this must be set out as part of the agreement provided to the panel in accordance with our guidance on Offering No Evidence.

Admission of impairment

As well as admitting the factual allegations, the nurse or midwife must also admit that their fitness to practise is impaired. This shows a level of insight and is essential for a sanction to be agreed and for the case to be resolved by consent. A panel of the Fitness to Practise Committee will make the final decision on impairment and sanction.

The decision making process

Reference: DMA-1b Last Updated: 28/07/2017

In this guide

Our decision making

We first consider whether a nurse or midwife has met the essential criteria. If they have, we also consider if the nurse or midwife has the benefit of legal advice or representation. If there are concerns about whether the nurse or midwife is able to understand the effects of seeking a consensual panel determination, we will try to resolve those concerns, and may recommend that they seek legal advice. If it is not possible to resolve those concerns, it may not be possible to pursue a consensual panel determination.

If the case is (or may be) suitable to resolve by consent, we will reach a provisional view on the appropriate level of sanction. We do this by assessing all the circumstances of the case with reference to our sanctions guidance. We share our view on sanction with the nurse or midwife.

If, after discussing the sanction with the nurse or midwife, we cannot agree on the appropriate level of sanction, the case will proceed to a full hearing or meeting.

If we are able to agree on the appropriate level of sanction, we will then prepare a provisional agreement, which will include the sanction and any interim order that may be required. The nurse or midwife must sign the agreement to confirm that they admit the facts and accept that their fitness to practise is impaired.

At any stage before the provisional agreement is taken to a hearing or meeting, either party may decide they no longer want the case to be determined by consent. If this happens, the case will proceed to full panel determination at a hearing.

Referrer's comments

We will let the referrer know what has been provisionally agreed. We do not always show the referrer the full provisional agreement and we do not give the referrer any confidential information that will be considered by the panel in private. We will ask the referrer to send any comments about the proposal. We do not ask for comments where the referrer is a police force referring a conviction or caution, and neither the force nor its personnel have had a significant and ongoing involvement in the case.

If, after considering the comments, we decide that the provisional agreement is no longer appropriate we will try and reach a new provisional agreement with the nurse or midwife. If we cannot reach agreement, we will list the case for a full hearing.

Where we have reached agreement, the case will be listed for a substantive hearing before a panel. Where the most serious sanction available is agreed, the case may be listed for a meeting.

At the hearing, we may tell the panel what the referrer has said. This is so long as the referrer's comments are relevant and it would be fair for the panel to hear them. In particular, the panel will usually be told if the referrer agrees with the proposed outcome.

A panel's decision making

A panel of the Fitness to Practise Committee will always make the final decision about the outcome of the case. A panel will decide if the sanction agreed between us and the nurse or midwife is appropriate and reasonable in all the circumstances with reference to our sanctions guidance.

A panel can:

- accept the provisional agreement and announce that the allegation is proved and make an order as to the sanction
- reject the provisional agreement and refer the case to a full hearing by a fresh panel
- ask to be addressed on points or issues and then make the decision to accept or reject the provisional agreement as above.

A panel should consider the provisional agreement in the round. If it is concerned by any part of the provisional agreement, such as the sanction agreed, it should let the parties know and ask them to address it on the points raised. It should do this before making any final decision on the provisional agreement.

If a panel considers that they do not have enough information to decide on an appropriate outcome, it should identify what further information it needed, and ask the parties to address it on the issue of further information before reaching a final decision. If the parties have the information needed, or if the panel decides that further information is no longer essential to making its decision, it may accept the agreement or propose an alternative outcome.

If the further information is essential but not available, a panel should reject the provisional agreement and the case will be considered in full by a fresh panel.

A panel may make a finding of no impairment or substitute a different sanction to the one agreed by us and the nurse or midwife. This can only be done if the panel lets the parties know about its proposed course of action and we both agree. Consent by telephone or email is sufficient. Unless this happens, the case will be considered in full by a fresh panel.

Panel’s reasons

If a panel accepts the provisional agreement, it should give reasons for its decision, detailing how the outcome satisfies the need to protect the public and the public interest. The reasons should explain what parts of the provisional agreement it accepts and why. It will also explain what parts, if any, the panel does not accept, and why it considers that an alternative sanction is appropriate.

The reasons should confirm if any alternative sanction has been raised with the parties, and that they have agreed to it. The panel should not amend the provisional agreement, other than to correct obvious typographical errors. The full public decision (provisional agreement and reasons) is published on our website.

If a panel rejects the provisional agreement, it should give reasons for its decision. The reasons should outline the steps taken to explore issues with the parties and the reasons why they decided to reject the provisional agreement.

If the case has to be considered by a fresh panel and where it is fair to do so, the fresh panel may be told by either party that the nurse or midwife has in the past signed an agreed statement of facts.

We will not tell the fresh panel that the nurse or midwife had previously indicated they accepted that their fitness to practise is impaired. The nurse or midwife can tell the fresh panel this if they wish.

Knowledge of any provisional agreement reached between the parties, including knowledge of the provisionally agreed sanction, will not normally be a good reason for the fresh panel to recuse itself from considering the case as it will not consider any irrelevant considerations in its role as a professional panel.

It is also open to the parties at a fresh hearing to enter into a further provisional agreement, taking account of and addressing the reasons why it was rejected by the first panel.

Offering no evidence

Reference: DMA-2 Last Updated: 04/01/2019

In this guide

What is offering no evidence?

We keep all cases under review while we prepare them for the Fitness to Practise Committee. Sometimes, as part of that review, it becomes clear to us that it wouldn't be in the public interest to carry on with all or part of the case. In limited circumstances it may be appropriate for us to use our power to 'offer no evidence'.[1] This means that we'll ask a full panel of the Fitness to Practise Committee to approve our decision not to continue with all or part of the case against a nurse, midwife or nursing associate. We will only offer no evidence in a particular case if it fits with our overarching objective.

We'll only apply to offer no evidence against a nurse, midwife or nursing associate in the following circumstances:

- When a particular part of the charge adds nothing to the overall seriousness of the case.
- When there is no longer a realistic prospect of some or all of the factual allegation being proved.
- When there is no longer a realistic prospect of a panel finding that the nurse, midwife or nursing associate's fitness to practise is currently impaired.

It will be up to the panel to decide whether it agrees that it's appropriate for us to offer no evidence, and not continue with all or part of the case against the nurse, midwife or nursing associate. When we ask a panel to do this, we will open our case and fully explain the background, and our reasons for offering no evidence.

In some circumstances we may apply to offer no evidence on part of the charge in a case where we've agreed a consensual panel determination with the nurse or midwife. If we are doing this we'll make it clear that we want to offer no evidence, and fully explain our reasons, in the text of the draft agreement between us and the nurse, midwife or nursing associate.

Where part of the charge doesn't make the case more serious

If we're satisfied that one or more of the alleged facts against the nurse, midwife or nursing associate doesn't add anything to how serious the case against them is, we may decide to offer no evidence on those parts of the charge. We won't do this unless we're satisfied that the remaining parts of the charge properly reflect the extent of our concerns about the nurse, midwife or nursing associate's fitness to practise, and the evidence about them. We'll need to consider the risk of harm to patients, or the public's trust in nurses, midwives and nursing associates that could arise from what the nurse, midwife or nursing associate is alleged to have done.

No realistic prospect of proving the facts of the case

It's not in the public interest for us to pursue factual charges against a nurse, midwife or nursing associate if there isn't enough evidence to prove them. Offering no evidence because there isn't enough evidence to prove the facts, so that there's no longer a realistic prospect, will only be appropriate if:

- the state of the evidence has changed since case examiners made a finding of case to answer
- it has become apparent that the case examiners' decision was made on an incorrect basis
- the charge relies on the evidence of a witness who cannot attend a hearing, and an application to rely on their statement as hearsay evidence has been rejected
- the case was referred directly to the Fitness to Practise Committee, and since then, our investigation has shown that it is no longer in the public interest to continue with the allegation or part of the allegation.

No realistic prospect of fitness to practise being impaired

We'll only consider offering no evidence because there's no realistic prospect of the panel deciding that the nurse, midwife or nursing associate's fitness to practise is currently impaired if:

- it's become clear that the case examiners' decision was made on an incorrect basis, or
- new evidence about the nurse, midwife or nursing associate's current fitness to practise has emerged, for example evidence of remediation.

The passage of time may be a relevant change in circumstances. However, the nurse, midwife or nursing associate would need to show that they have worked in a professional capacity, using their registration. They would need to produce evidence showing that they've addressed the issue with their practice, from which it's clear that offering no evidence would meet the aims of our overarching objective.

Informing the referrer about a decision to offer no evidence

If we've decided to offer no evidence, we'll tell the person who first referred the nurse, midwife or nursing associate to us about this, if we can do so without risking any unfairness or prejudice at a future hearing (which could happen, for example, if that person was a witness in the case).

If that person is a witness in the case, we will decide what information we can give them. Our general approach is that we should give them as much information as we possibly can, while making sure the future hearing is fair. Ideally, we'll be able to explain our reasons for offering no evidence fully. We'll always tell them that the panel might decide to reject our application, and proceed with the charge of its own accord.

If the person who first referred the nurse, midwife or nursing associate to us provides us with any comments about our decision we will place these before the panel if they are relevant, and if it would be fair to do so.

There will be cases where it won't be possible for us to fully explain our decision to offer no evidence before the hearing. If this is happens, we will let the person who referred the concerns to us know, before the hearing, that we have decided to offer no evidence. We will then give them a full explanation for our decision after the hearing.

Offering no evidence: the panel's decision making process

At the hearing, before the charges are read out, we will tell the panel that we intend to offer no evidence to all or part of the charges. This means that when the charges are read out, the panel won't ask the nurse or midwife for a response to the charge(s) we're offering no evidence on, until it has heard and decided our application.

When we offer no evidence, we'll invite the panel to consider the steps we've taken to obtain the evidence relevant to the facts, the nature of the evidence, and what evidence was considered by the case examiners. Our case presenter will give the panel a full opening statement so the panel clearly understands the case, and why we are offering no evidence on all or part of the charges. Often, the case presenter will provide a written opening of the case which fully and fairly summarises the evidence to the panel. In some situations the case presenter may decide it is more helpful for the panel to be provided with copies of some or all of the evidence to help it reach its decision.

We will always make the panel fully aware of the steps we took during the investigation, including any problems we encountered, and what we did about them. When we do this, we consider that we have a duty of good faith to fairly explain how serious the allegations were, and why we no longer intend to pursue them.

In very rare cases, the charges we want to offer no evidence on might be so serious that they would make it unfair for the same panel to go on and hear the rest of the case. If that happens, we will arrange for a separate panel to deal with the full hearing.

The panel will ask the nurse, midwife or nursing associate if they have anything they wish to say to the panel about our application. The panel will be given legal advice before they make a decision on our application.[2]

If the panel is not satisfied with the application to offer no evidence, it can still call evidence of its own motion.[3]

When it is considering whether to call evidence on its own, the panel may find that our guidance on directing further investigation [LINK] during a hearing is helpful. If necessary, the panel would have to adjourn the hearing (or refer the case to hearing if it is at a meeting) to make sure witnesses can attend and give evidence. In some cases it may be appropriate for the panel to decide that this evidence will be heard by a different panel if this would be fairer to all parties.

What happens after the panel's decision?

If the panel does not approve of us offering no evidence, and either calls evidence on its own or directs us to carry out further investigation, the hearing will proceed (possibly after an adjournment to allow us time to investigate or arrange for witnesses to attend).

If we have offered no evidence on the whole of the charge against the nurse, midwife or nursing associate, and the panel agrees with our application, the panel will decide that the allegation is not well founded, and give its reasons. That will bring the case against the nurse, midwife or nursing associate to an end, and no findings will be made against them. The charge can only then be re-opened if there is a successful appeal to the courts against the panel's decision.

If we have offered no evidence only on parts of the overall charge against the nurse, midwife or nursing associate, and the panel agrees with us, the panel will provide reasons for its decision. It can then amend the charge[4] to remove those parts of the charge on which it has approved our application to offer no evidence. The nurse, midwife or nursing associate will not then have to answer those parts of the charge, and they will no longer form part of the allegation against them.

1 PSA v NMC & X [2018] EWHC 20 (Admin) para 55-57
2 Legal advice is likely to refer to the case of PSA v NMC & X [2018] EWHC 70 (Admin). This case also makes clear at paragraph 56 that R v Galbraith [1981] 1 WLR 1039 is not relevant to this type of application.
3 Rule 22(5) of the Rules
4 Under rule 28(1) of the Rules

Abuse of process

Reference: DMA-3 Last Updated: 21/02/2019

In this guide

What is an abuse of process?

It's a claim that the case has been unfairly progressed and should be stopped. This can be made by a registrant or raised by a panel.

This guidance explains the circumstances in which it may be appropriate for a panel to use its power to stop a case as an abuse of process.

A nurse or midwife can make an abuse of process application at any stage of the panel's decision-making process. They can make the argument about the whole case against them, or about part of the case. Equally, a panel may decide on its own that there has been an abuse of process.

If the nurse or midwife makes the application, they will only succeed if they can show that it's more likely than not that the alleged abuse of process can't be properly rectified in any other way than to stop the case.

How does the panel decide if there is an abuse of process?

The panel can decide there is an abuse of process if:

- it will be impossible for the nurse or midwife to have a fair hearing, or
- continuing with the case would, in all the circumstances, offend the panel's sense of 'justice and propriety'.[1]

In deciding whether there has been an abuse of process which means the case should be stopped, the panel will consider whether the alleged abuse of process (such as delay, or a failure to disclose evidence) has caused serious prejudice or unfairness to the nurse or midwife.

In accordance with its overarching public protection objective, the panel will also consider whether there are ways of putting right the serious prejudice or unfairness, so that the nurse or midwife can have a fair hearing without stopping the case.

See some examples of the various types of abuse of process arguments that have been considered by the courts, below.

Abuse of process arguments

Unreasonable delay

The nurse or midwife's right to a fair hearing under human rights legislation includes a right to having their case

heard within a reasonable time, [2] so the length of any delay is a relevant consideration for the panel.

For our purposes, the relevant time runs from when we first notified the nurse of midwife that we were sending their case for an investigation.[3]

The panel will only use its power to stop all or part of a case due to delay, in exceptional circumstances. This could be where there is real prejudice to the nurse or midwife which means that a fair hearing would be impossible because of the delays.

In an argument about delay, the panel will hear submissions from the nurse or midwife, and from us, on the circumstances leading up the application.

These will include the chronology of events, any possible reasons for delays, the way the nurse or midwife engaged with our process, and what any external third parties did or failed to do.

Unreasonable delay will be a possible abuse, if the period of the delay gives grounds for 'real concern'.[4]

In considering this, it will be relevant to consider the effect of the delay on the proceedings and any unfairness it could cause to the nurse or midwife.[5]

If the delay affected the memory or availability of witnesses or documentary evidence, these may be factors the panel takes into account in deciding whether the delay means it's no longer possible for the nurse or midwife to have a fair hearing.

It will also be relevant to consider the stage the hearing has reached, and what steps we could take to lessen the effect of the delay and make sure a fair hearing is still possible.[6]

If the panel could make a direction, or the parties could take a particular course of action to put the unfairness right, it will be important to explore those options before the panel decides that the hearing should be stopped as an abuse of process.

The complexity of the case or delay caused by a nurse or midwife will not be a reason to stop all or part of the proceedings.[7]

Incomplete or non-disclosure of information

When we are investigating a nurse or midwife's fitness to practise, we need to provide them with enough information to understand the case against them, and to allow them to respond to our concerns.

One relevant factor to consider may be what level of disclosure is 'reasonable' in the circumstances.

Sometimes, where the nurse or midwife cannot reasonably be expected to gather relevant material themselves, we may need to help with this.

However there's no general duty on us, the regulator, to gather evidence on behalf of the nurse or midwife,[8] which would of course determine what evidence we'd have in our possession and what we'd therefore be able to disclose.

For more information about this, see our guidance on disclosure.

Increasingly, we ask the nurse or midwife to tell us about the context around what happened, and we do this early on in our investigation.

In deciding what disclosure is reasonable, it will be relevant to consider how the nurse or midwife initially responded when we asked them to tell us about relevant issues back when we started investigating.

If they refused to engage with our investigation at that stage, it is less likely to be reasonable to expect us to gather information on their behalf, about the same issues, if the case gets as far as a Fitness to Practise Committee panel.

This question will be relevant to whether the nurse or midwife has suffered prejudice or unfairness.

The panel is responsible for regulating its own proceedings, and has various powers to require us and the nurse

or midwife to exchange relevant information. The panel can consider whether to order adjournments, or give directions to obtain evidence, to see whether the issue that is alleged to cause an abuse of process, can be resolved without stopping the case altogether.

The panel can also ask for further information as to why the evidence is incomplete, to satisfy itself as to whether we have acted improperly, or whether the information has simply been lost.

In circumstances where there is evidence of impropriety in us not disclosing information to the nurse or midwife, potentially this could mean there is an abuse of process.

If the evidence before the panel remains incomplete, the panel can also consider its powers to decide what evidence is admissible, as a way of avoiding possible injustice.

It's possible that refusing to admit some of our evidence, because it would be unfair without also seeing or hearing the missing evidence, (which could provide important context), could avoid any injustice or unfairness.

Retracting a promise

Another possible ground for an abuse of process application is that we made a promise or gave the nurse or midwife an assurance, and later retracted it.

Some examples of this might be promising not to proceed with investigations about a particular concern, or promising that we would keep particular information private. There may be other kinds of promise or assurance that it would be an abuse of process to retract.

In some circumstances it wouldn't be an abuse of process for us to investigate and take action about a fitness to practise concern that we've previously told a nurse or midwife that we won't be proceeding with.

For example, there could be new information or evidence that we weren't aware of when we made the first decision that shows we need to take action to prevent the nurse or midwife putting patients or members of the public at risk of harm.

The panel should consider this when trying to assess whether there is unfairness or injustice to the nurse or midwife.

It is relevant that we have specific powers to revisit decisions under our rules[9] and in case law[10] which include decisions made at any stage of our fitness to practise.

When considering promises or assurances we gave to the nurse or midwife, the panel can, if it needs to, ask for information about:

- what assurances we gave
- the level of officer or decision maker
- when in our process we gave the assurance.

Equally, it may also be relevant to consider whether the nurse or midwife could reasonably have relied on the assurance.

For example, if we stated we would not take action about a particular incident we were investigating, but the nurse or midwife then disclosed another more serious concern, would it be reasonable for the nurse or midwife to assume that we would not investigate the new concern?

Possible unfairness or injustice after promises made to nurses or midwives might be able to be resolved by amending charges or some other action to cure the possible unfairness.

As always, the panel is able to consider any reasonable options to remedy any possible unfairness, before deciding that abuse of process is made out and that the case should be stopped.

Bad faith or serious breach of professional duty

Sometimes, if one of our officers or decision makers acts in bad faith, this could cause an abuse of process, if that

bad faith causes prejudice or unfairness to the nurse or midwife, meaning they can't have a fair hearing, or that to proceed would be an injustice.

An application based on bad faith will need to include specific examples and evidence of how the nurse or midwife says we've acted in bad faith, or one of our officers breached their professional duty. It will also need to explain how the nurse or midwife says the fairness of our process has been affected.

1 R v Maxwell [2011] 1 WLR 1837
2 Article 6(1) European Court of Human Rights
3 Deweer v Belgium (1980) 2 E H R R 439 - time begins - Attorney – General's Reference (No 2 of 2001) [2004] 2 AC 72 HL – "time runs from the earliest time when the defendant was officially alerted to the likelihood of criminal proceedings being taken against him or her, which would normally be when he or she was charged or served with a summons"
4 Dyer v Watson [2004] 1 AC 379
5 Okeke v Nursing and Midwifery Council [2013] EWHC 714
6 R (Gibson) v General Medical Council and another [2004] EWHC 2781 (Admin) 'mere unreasonable delay, absent prejudice'
7 Haikel v General Medical Council [2002] UKPC 37
8 R (Johnson) v Nursing and Midwifery Council [2008] EWHC 885 (Admin)
9 Under rule 7 of the Fitness to Practise Rules. To find out more, see our guidance on reconsidering closed cases
10 Which allows us to revisit a decision if there has been a fundamental mistake of fact: R (Jenkinson) v Nursing and Midwifery Council [2009] EWHC 1111; Fajemisin v General Dental Council [2013] EWHC 350; R (Chaudhuri) v General Medical Council [2015] EWHC 6621.

Directing further investigation during a hearing

Reference: DMA-4 Last Updated: 04/01/2019

In this guide

Why should a panel order us to investigate further?

In every case that goes to the Fitness to Practise Committee we need to make sure that we have given the panel all the relevant evidence. The panel can needs to understand the background, consider all the relevant facts, and make a fair and fully informed decision that best Can protects the public.

If this hasn't happened, and there is important evidence available, that is missing, or that we haven't put before the panel, the panel can direct us to get that further evidence. The panel should not consider itself to be 'bound' by that lack of the evidence to find a charge not proved, it should take a more proactive role than a judge in a criminal trial, and where necessary intervene to make sure that cases are properly presented, and request the further evidence.

The panel can use its powers to require people to attend hearings or produce relevant documents[1], or its powers to adjourn the case, as it needs to.

When should a panel direct further investigation?

There are a number of reasons why a panel may direct us to carry out further investigations. These include:

- New information has come to light that neither we nor the nurse or have seen, which could undermine our case, support our case, or support the case of the nurse or midwife.
- The information currently before a panel is obviously incomplete or does not cover all the areas of concern. One example of this could be missing pages from patient notes, or from some other important document.
- Further information is essential to clarify or expand on evidence already obtained

If it is clear to the panel that evidence exists that it needs to make its decision, but we have not provided it with that evidence, it should consider whether to adjourn the hearing to allow us to gather that evidence. In making this decision the panel should consider the following:

- Whether the evidence is important to an issue it has to decide.
- Whether the evidence needs to be tested, perhaps through asking questions of witnesses.
- Whether the panel can consider its decisions and reach a satisfactory conclusion without this evidence.
- Our overarching duty to protect the public, and the panel's duty make a decision that satisfies the overarching objective in a fair and proportionate way.
- The overall fairness of the proceedings. As well as the nurse or midwife's right to a fair hearing, this also includes fairness to the people involved in the events the case is about, and fairness to us in exercising our statutory function of protecting the public.
- The public interest in the expeditious disposal of the case and the potential inconvenience caused by any delay to the registrant and any witnesses.[2]

If after considering all of the above the panel considers that the further evidence is needed help it decide an important issue in the case and will help it make a decision that best protects the public, it should order us to carry out the further investigation.

1 Rule 22 (5) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ('the Rules')
2 Rule 32 (4) Nursing and Midwifery Council (Fitness to Practise) Rules Order of the Council 2004

Evidence

Reference: DMA-5 Last Updated: 04/01/2019

In this guide

Overview

One of the Fitness to Practise Committee's most important functions is to resolve disputes between the NMC and the nurse or midwife. Unless the nurse or midwife admits the charges against them, or agrees with our evidence, the panel will need to decide what happened. They do this using the evidence that is put before them.

If we can't agree any part of our case, we will attempt to prove it by putting evidence before the panel. The nurse or midwife is also able to put evidence before the panel in support of their position.

Admissibility of evidence

The only evidence that may be provided to the panel is evidence which is relevant to one of the issues the panel needs to decide. It also needs to be fair to the people involved in the case, including patients, family members and loved ones, the nurse or midwife, us as a regulator, that the panel considers that evidence.

Evidence *may* be unfair where it cannot be challenged.

For example, this could be where the person who gives the evidence cannot be questioned, where it relates to a subjective opinion as opposed to an objective (although possibly disputed) fact, or where it relates to decisions reached by other tribunals or fact-finding organisations.

Who decides what evidence is admissible

The panel making decisions about the issues in the case will also decide what evidence is admissible.
This will usually mean that we provide that evidence to the panel. As professional adjudicators, we consider that if the panel members decide the evidence is actually inadmissible, they can put the information out of their minds when making a decision about what happened.[1]

Weight

When considering how disputes of fact are decided by the panel, a useful analogy is a set of weighing scales. Into one pan of the scales goes all the evidence that's supportive of a fact, and into the other goes all the evidence that's unsupportive. When we talk about the 'weight' of evidence, we mean how far a piece of evidence moves the scales.

Some evidence may be obviously reliable and is therefore likely to carry substantial weight, for example documents created in the course of business, official records, audio/visual recordings.

The weight of other evidence may depend on what the panel decides about whether a witness or piece of

evidence is credible. In those circumstances the panel will need to carefully consider issues like:

- whether the evidence is 'inherently plausible'
- whether it's supported by other evidence
- consistency with previous accounts
- how likely the person giving the evidence is to be mistaken

Credibility of witnesses

When considering the credibility of witnesses, the panel will keep in mind that minor inconsistencies can generally be explained by the effect the passage of time has on memory. The demeanour of a witness is actually often the least useful barometer by which to determine whether their account is accurate.[2]

It's also important to remember that if a witness is giving evidence about what did and did not happen, the fact that they may not be a clinical specialist, or don't have healthcare expertise, will not make them less able to remember what happened. It also won't mean that their evidence about what happened will be of less value than evidence given by a clinical or healthcare specialist.

Hearsay

In general terms, hearsay is any evidence which is not given orally by a witness with direct experience of the matter they are giving evidence about, and which is being given to prove an issue in dispute.
Evidence given by telephone and video link is not hearsay evidence. To the extent that there are limitations on evidence given by remote means that is a matter of weight (see above).

Most commonly, hearsay evidence will involve a witness reporting what they were told about something in issue by another individual who is not themselves a witness, or a statement being placed before a panel without the maker of the statement giving oral evidence.

Hearsay evidence is not in-admissible just because it is hearsay in our proceedings. However there may be circumstances in which it would not be fair to admit it, for example where it is the sole and decisive evidence in respect of a serious charge and it isn't 'demonstrably reliable' and not capable of being tested.[3]

Hearsay statements will usually carry less weight than oral evidence because it cannot be tested. Hearsay evidence may also be inadmissible where the weight which could be given to it in the circumstances of the case is zero, even where there is other evidence that could 'corroborate' (or support) it.[4] Although it's not possible to provide a complete list of situations where this could happen, one example is where the evidence of a crucial witness is hearsay, and the fact that the nurse or midwife can't challenge it is so unfair that nothing else in the hearing process can avoid the unfairness.

No case to answer

There may be situations where, at the close of our case, the nurse or midwife feels that we just haven't put forward enough evidence to mean they still have a case to answer.

There will be no case for a nurse of midwife to answer where, at the close of our case, there is:

1. no evidence
2. some evidence, but evidence which, when taken at its highest, could not properly result in a fact being found proved against the nurse or midwife, or the nurse or midwife's fitness to practise being found to be impaired.

The question of whether there is a case to answer turns entirely on our evidence. Evidence which might form part of the nurse or midwife's case will not be taken in to account.

Where the strength or weakness of our evidence depends on the weight it should be given, a submission that there is no case to answer is likely to fail. That issue is best considered after all the evidence has been heard.[5]

Further evidence

Our overarching objective is the protection of the public. Because of this, the panel has a responsibility to ask us

to obtain further evidence if they are concerned that there are gaps in the evidence which will prevent them from properly performing their function.

1 For an example of the Court of Appeal commenting on a panel's ability to do this, see R. (on the application of Chief Constable of Thames Valley) v Police Appeals Tribunal [2016] EWCA Civ 1315
2 See for example, R v Turnbull [1977] QB 224; Suddock v NMC [2015] EWHC 3612 (Admin); and R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 1391:

> [36] … it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J…:
>
> "I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

3 Thorneycroft v Nursing and Midwifery Council [2014] EWHC 1565 (Admin)
4 The Professional Standards Authority v (1) The Nursing and Midwifery Council (2) Jozi [2015] EWHC 764 (Admin)
5 R v Galbraith [1981] 1 WLR 1039
6 The Professional Standards Authority v (1) The Nursing and Midwifery Council (2) Jozi [2015] EWHC 764 (Admin)

Making decisions on dishonesty charges

Reference: DMA-6 Last Updated: 12/10/2018

In this guide

Dishonesty and inferences

When making decisions on charges involving dishonesty, panels of the Fitness to Practise Committee must decide whether or not the conduct took place, and if so, what was the nurse or midwife's state of mind at the time.[1]

Any dispute over whether a nurse or midwife behaved dishonestly usually means that the panel's findings will depend on what conclusions they can draw about the nurse or midwife's state of mind from the basic facts.

To help the panel focus on the central issues and be able to express this in their reasoning, it needs to consider the following:

- What the nurse or midwife knew or believed about what they were doing, the background circumstances, and any expectations of them at the time
- Whether the panel considers that the nurse or midwife's actions were dishonest, or
- Whether there is evidence of alternative explanations, and which is more likely.

How we approach evidence about a nurse or midwife's state of mind

Making decisions about a nurse or midwife's state of mind when they did or said something which we say is dishonest, or kept silent about something we say it was dishonest to keep silent about[2], will usually mean the panel needs to ask itself some questions.

What the panel must consider to reach its decision

What were the background facts or circumstances and what did the nurse or midwife know or believe at the time?

As part of drawing conclusions about the nurse or midwife's state of mind, the panel must consider what the evidence says about the background facts or circumstances, and what the nurse or midwife knew or believed about what they were doing.[3]

There may be evidence about what was expected of the nurse or midwife in the particular circumstances.

This doesn't mean that the panel should hear evidence about the nurse or midwife's own standards of honesty or their own beliefs about what the prevailing standards of honesty in society are. This is not relevant to deciding whether or not the nurse or midwife behaved dishonestly.[4]

Were the nurse or midwife's actions dishonest?

The question of what is honest or dishonest in a particular set of circumstances, is a question for the panel to determine by applying what it understands the standards of ordinary, decent people to be.

The law assumes that people from all walks of life can easily recognise dishonesty when they see it[5], and that in most situations it is not difficult to identify how an honest person would behave.[6]

Is there evidence of an alternative explanation? Is the alternative more likely?

It is important that the panel considers whether there is another, innocent explanation for the nurse or midwife's conduct, which points away from them having behaved dishonestly.[7] It can be useful to ask whether their mind was engaged with what they were doing, or could they simply have made an innocent or careless mistake?

The panel must address this question by identifying evidence for any other explanations, not by speculating.

As a regulator, the burden and standard of proof mean that, for an allegation to be proved, we have to satisfy the panel that it is more likely than not, that it happened.

In a case about dishonesty, where there is evidence of different explanations for why the nurse or midwife might have done something, the question is which explanation is more likely?

1 Uddin v General Medical Council [2012] EWHC 2669 (Admin)
2 Under the professional duty of candour, nurses and midwives must be open and honest with patients when something that goes wrong with their treatment that could cause harm or distress. This means that nurses and midwives must tell the patient (or, where appropriate, the patient's advocate, carer or family) when something has gone wrong. Keeping silent when something has gone wrong is a breach of this professional duty.
3 Royal Brunei Airlines v Tan [1995] 2 AC 378, see 389C-E; Barlow Clowes International v Eurotrust International [2006] 1 WLR 1376, para 16; approved in Ivey v Genting Casinos (UK) Ltd [2017] UKSC
4 See Ivey at para 74, overruling the 'second leg' of R v Ghosh [1982] QB 1053.
5 Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67 para 53; further Ivey (para 48) restates that judges do not and must not attempt to define dishonesty, citing R v Feely [1973] QB 530.
6 See Royal Brunei Airlines as cited in footnote 2.
7 Uddin v General Medical Council, see footnote 1; R v Feely [1973] QB 530 as discussed in Ivey at para 67.

Voluntary removal at hearings

Reference: DMA-7 Last Updated: 04/01/2019

In this guide

Nurses and midwives can apply for voluntary removal during a hearing before the Fitness to Practise Committee, but we only consider them if the hearing reaches a particular stage, and in doing so, we'll take into account the panel's view about the application.

When will we consider a voluntary removal application during a hearing?

We accept applications by nurses and midwives for voluntary removal at any time after case examiners have decided they have a case to answer. However, if the nurse or midwife applies once their case before the Fitness to Practise Committee has started, we will only consider their application if the panel finds the facts proved, and decides that the nurse or midwife's fitness to practise is impaired. This means:

- We won't tell the panel that the nurse or midwife has applied for voluntary removal unless and until the hearing reaches this stage.
- If the hearing has adjourned before the panel has made decisions about facts and fitness to practise, the hearing must continue at another time until the panel has reached that stage.
- We won't allow voluntary removal if a nurse or midwife has another fitness to practise case against them that has a final substantive order in place, or has another case that has not yet reached a case to answer decision.

Consideration of voluntary removal application

The Registrar must seek the advice of the panel before she considers an application.[1] After making its decision on facts and fitness to practise, the panel will then need to inform the Registrar whether it does or doesn't recommend voluntary removal. The Registrar will always be the one who decides whether voluntary removal is granted or not.

- If the nurse or midwife has another case and the case examiners have decided there is a case to answer, we will inform the panel of that allegation, for it to take into account when deciding on its recommendation.
- If a panel recommends voluntary removal, the Registrar will consider the application and make a decision.
- If voluntary removal is granted, it will be effective immediately, unless there is an interim order which will then need to be revoked. The panel will take no further action at the sanction stage.
- The register will show the nurse or midwife has been voluntarily removed. This will remain on the latest hearings and sanction page on our website for four months.
- If the registrar doesn't grant voluntary removal,[2] the panel will make a decision on imposing a sanction. We will publish this on our website in accordance with our publication guidance.

1 In accordance with rule 14(2A) of the Registration Rules
2 It is the Registrar's decision, but because our Rules say that the panel's recommendation has to be taken into account, usually the Registrar will need to explain why they did not follow the panel's recommendation.

Deciding on incorrect or fraudulent entry

Reference: DMA-8 Last Updated: 12/10/2018

When it considers an allegation of incorrect or fraudulent entry[1], the Investigating Committee's focus is on deciding whether it is more likely than not that our registration, renewal or readmission decision was made based on information that was incorrect or fraudulent.

The Investigating Committee will assess how the nurse or midwife was accepted onto, or remained on our register, in the first place, rather than assessing their current practice.

In doing this, it considers whether the information about the person's character, qualifications, practice hours or other entry requirements was correct at the time it was submitted.

Because the Committee's focus is the validity of the original registration, renewal or readmission decision, evidence about the person's current work or ability to provide care is unlikely to be relevant.

When making these decisions, the Investigating Committee should consider the guidance about incorrect or fraudulent entry allegations.

1 Rule 5 of The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 ('the Rules') sets out the procedure to be followed.