Misconduct

Reference: FTP-2a Last Updated: 02/12/2024

In this guide

The Code sets the professional standards of practice and behaviour for nurses, midwives and nursing associates, and the standards that the public tell us they expect from those professionals.

Nurses, midwives and nursing associates must act in line with the Code. If their conduct falls short of the requirements of the Code, what they did or failed to do could be serious enough for us to take action.

Where concerns are raised, we'll need to consider the allegation to identify whether there is a risk to the public, or whether the behaviour is likely to undermine our professional standards or public confidence in the professions we regulate.

When does poor practice become serious professional misconduct?

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Not all breaches of the Code or issues with practice will be a matter of regulatory concern. We should only take regulatory action where there is evidence of serious professional misconduct.[1]

Many instances of misconduct are better dealt with by employers in the first instance. Employers are closer to the sources of risk to people receiving care and members of the public, and better able to recognise and manage them. If they need to, they can intervene directly and quickly in a nurse, midwife or nursing associate's practice, and do so in a targeted way dealing specifically with the risks.

We only need to become involved if the nurse, midwife or nursing associate poses a risk of harm to people in their care or the public that the employer can't manage effectively (perhaps because the nurse, midwife or nursing associate has left), meaning the nurse, midwife or nursing associate's right to practise needs to be withdrawn or restricted immediately. For example, one-off clinical incidents won't usually require regulatory action if there is evidence that the professional has reflected and learned from their mistake and we consider that the risk of repetition is low.

Some concerns are more serious because they may lead to people receiving care or members of the public suffering harm or losing trust and confidence in the professionals we regulate.

Serious professional misconduct is more likely to occur in professional practice – that is, when a professional is:

- acting in the course of their professional practice, such as providing direct care to individuals, groups or communities, or
- undertaking activities closely related to their professional practice, such as leadership, education, or research.

To determine whether activity is closely related to professional practice, we will look to the nature and setting. For example, the exercise of specific clinical skills, such as infection control or administration of medication, is likely to be closely linked to professional practice, whether or not the professional was performing a nursing or midwifery role at the time.

There may also be other concerns which are related to professional practice or to the nurse, midwife or nursing associate's role as a registered professional. This includes bullying or harassing colleagues (including sexual

harassment), abusing their position as a registered nurse, midwife or nursing associate or other position of power to exploit, coerce or obtain a benefit, failing to maintain clear professional boundaries with people receiving care, and dishonesty about qualifications or employment history. A more extensive list can be found in our guidance on how we determine seriousness.

Fitness to practise is about keeping people safe, rather than punishing nurses, midwives and nursing associates for past mistakes. Even where there has been serious harm to people receiving care as a result of a clinical error, provided there is no longer a risk to those receiving care, and the nurse, midwife or nursing associate has been open about what went wrong and can demonstrate that they have learned from it, we will not usually need to take action.

Some concerns about harm to people receiving care will be so serious that they can't be addressed. In cases like this, we will usually only need to take action if it's clear that the nurse, midwife or nursing associate deliberately chose to take an unreasonable risk with the safety of people in their care.

We may also need to take action if the incident suggests a deep-seated attitudinal issue that could put people receiving care at risk of harm or where the incident is so serious that it requires action on the grounds of maintaining professional standards or upholding public confidence in the professions we regulate. Where behaviour suggests deep-seated attitudinal issues that could put people receiving care at risk, it is less likely that the nurse, midwife or nursing associate will be able to remediate and take steps to address the underlying concerns. When we are looking at safety incidents which relate to people receiving care involving nurses, midwives or nursing associates, we will always look carefully at the context in which they were practising. Even poor practice by a nurse, midwife or nursing associate might actually have happened because of underlying system failures.

In these circumstances, taking regulatory action against a nurse, midwife or nursing associate may be unfair, and may not stop similar incidents happening again in the future or keep people safe.

Please see our guidance on how we determine seriousness for more information.

Concerns outside professional practice

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Nurses, midwives and nursing associates should keep to the standards and values set out in the Code and consider the requirement to “uphold the reputation of [their] profession at all times” to help maintain the public’s trust and confidence.[2]

When considering their behaviour outside professional practice, nurses, midwives and nursing associates should be mindful, in particular, of the need to:

- act with honesty and integrity at all times, treating people fairly and without discrimination, bullying or harassment (20.2)
- be aware at all times of how their behaviour can affect and influence the behaviour of other people (20.3)
- keep to the laws of the country in which they are practising (20.4)
- treat people in a way that does not take advantage of their vulnerability or cause them upset or distress (20.5)

Sometimes the way a nurse, midwife or nursing associate conducts themselves outside their professional practice can be serious professional misconduct and will require us to act. We will take action when a professional’s conduct:

- either indicates deep-seated attitudinal issues which could pose a risk to the public in professional practice, or
- is capable of undermining public trust and confidence in the profession, raising fundamental questions about the nurse, midwife or nursing associate’s ability to uphold the values and standards set out in the Code.

As a professional regulator we would be unlikely to investigate if a nurse borrowed a small sum of money from a friend and subsequently failed to pay them back. However, if the scenario involved exploitation of someone in their care or the professional had committed a crime and received a sentence of imprisonment for such behaviour (for example, fraud), we are more likely to take action.

We recognise that our involvement in behaviour outside professional practice has the potential to engage a nurse, midwife or nursing associate’s right to respect for private and family life.[3] However, these rights are not absolute. Concerns outside professional practice can involve diverse situations, settings and relationships, including the

relationship between a professional and their partner or child. For example, domestic abuse could involve a range of behaviours, such as harassment and sexual misconduct, which could raise fundamental questions about a professional's ability to uphold the standards and values set out in the Code.

Guided by our statutory objectives and close attention to the seriousness of the case, we will always consider whether any regulatory action that may interfere with a professional's right to respect for private and family life is necessary and proportionate in the circumstances.

We will only interfere with disputes in someone's private or family life or make requests for information when it is necessary and proportionate to do so to protect the public, uphold professional standards or maintain public confidence in the professions we regulate.

Just because a matter is of concern to us, that does not mean that we will be able to progress the case. Such cases often involve evidential challenges. Our Case Examiners will only refer a concern to a panel hearing where the evidence available means that there is a realistic possibility the Fitness to Practise Committee would find the incidents did happen.

More information about the different evidential tests that we apply throughout our fitness to practise process can be found in our screening, case examiner and our decision making guidance. For more information on how we approach evidence, please refer to our guidance on evidence.

Risk of Harm

In some circumstances, the way a professional conducts themselves outside professional practice could indicate deep-seated attitudinal issues which could pose a risk to colleagues and people in the professional's care.

Professionals must be able to work with and care for the public, including those who are vulnerable. They exercise skills, have access to personal and sensitive information and materials, and undertake responsibilities that give them access to people who are vulnerable to abuse. Professionals need to be able to provide care for a diverse range of people and to work as part of diverse teams. Discriminatory attitudes can have a direct impact on the quality of care provided.[4]

To determine whether conduct outside professional practice could impair fitness to practise, we will consider all the facts involved. Examples of important factors include:

- the duration or frequency of the conduct in question
- the professional's relationship or position in relation to those involved
- the vulnerabilities of anyone subject to any alleged conduct.

Long-term or repeated misconduct is more likely to suggest risk of harm, together with conduct involving imbalances of power, cruelty, exploitation and predatory behaviour. We will assess how likely the nurse, midwife or nursing associate is to repeat similar conduct or failings in the future, and if they do, if it is likely that people in their care could come to harm, and in what way.

Broadly speaking, the following behaviours are *more likely* to suggest a risk of harm to the public and impaired fitness to practise, regardless of where they take place:

- A person discriminates against another person under the Equality Act 2010 if they treat them less favourably than they would treat others because of a protected characteristic. Discriminatory behaviours of any kind can indicate a risk to people who use health and care services, as well as the trust and confidence the public places in nurses, midwives, and nursing associates.

- Sexual misconduct is unwelcome behaviour of a sexual nature, or behaviour that can reasonably be interpreted as sexual, that degrades, harms, humiliates or intimidates another. It can be physical, verbal or visual. It could be a pattern of behaviour or a single incident. As a healthcare regulator, it is not our role to pursue or punish potential criminal activity in place of the police. However, sexual misconduct outside professional practice could indicate deep-seated attitudinal issues which could put the public at risk, as well as raise fundamental questions about the professional's ability to uphold the standards and values set out in the Code. Whether regulatory action is required will be considered on a case-by-case basis. In some circumstances we may need

to investigate such concerns arising outside professional practice where there is no criminal conviction.

Example 1

> The conduct here falls within the definition of sexual misconduct. Even though it occurred outside professional practice, the nature of these acts, together with the reasons provided by the professional, could indicate deep-seated attitudinal issues capable of posing a risk to colleagues and people in the professional's care.

Example 2

> While the concerns relate to behaviour outside professional practice, sharing explicit messages with others about the sexual abuse of children suggests a sexual interest in children which could pose a risk to the public in the course of professional practice. Such expression could also seriously undermine public trust in the profession. This concern is capable of impairing fitness to practise and is likely to result in regulatory action.

- This could include a range of acts, or failures to act which result in serious physical, sexual or emotional harm.

Example 1

> The serious and repeated abuse of someone in the professional's care could indicate a risk to people who receive care, whether through direct abuse or the failure to properly safeguard people in their care/children or vulnerable adults.

- Depending on the particular facts, violent behaviour can be serious enough to indicate a risk to the public and seriously undermine public confidence in the professions we regulate, irrespective of where it occurs. This includes in a domestic setting. Factors to consider include the nature of violence or abuse (for example, violence towards a child or vulnerable adult is likely to impair fitness to practise; discriminatory features or motivation will also be significant), the harm caused, and its frequency.

Example 1

> Whilst the conduct occurred in a domestic setting, the professional's treatment of their spouse involves serious violence and could suggest potential risk to those within their care, as well as seriously

undermining public confidence in the profession. Healthcare professionals are entrusted to safeguard others and evidence demonstrates that people directly affected by domestic abuse will often seek their support. In addition, the discriminatory words could suggest a deep-seated attitudinal issue towards women and girls that could impact the standard of care provided.

Example 2

Whilst this is not behaviour we would condone, it is not the kind of behaviour that is likely to require us to take action to restrict someone's ability to practise. The situation could be different, for example, if there was more serious violence, a link to discrimination, the professional received a sentence of imprisonment or, depending on the facts, was alleged to have conducted a prolonged campaign of violence or intimidation against a vulnerable neighbour.

Public confidence

Nurses, midwives and nursing associates hold an important position of trust. They are responsible for caring for and protecting people when they are at their most vulnerable, and for acting as an advocate on their behalf. Due to their unique position, members of the public expect nurses, midwives and nursing associates to uphold the rights of those they care for and to act in their best interests at all times. They must work, and be trusted to work, with and alongside diverse groups of people without discriminating unfairly against them or exploiting them. Failure to uphold these expectations could seriously undermine the public's trust and confidence in the profession and could make the public reluctant to access health and care services.

We are likely to take action to uphold public confidence where a nurse, midwife or nursing associate's conduct raises fundamental questions about their ability to uphold the standards and values set out in the Code.

Many behaviours which are likely to indicate a risk to people who use health and social care services are also likely to justify regulatory action on the grounds of upholding public confidence and maintaining professional standards. Examples include expressing discriminatory views or behaviours, sexual misconduct (including assault or harassment), serious violence (including in a domestic setting) and abuse or neglect of children and/or vulnerable adults.

Example 1

Nurses midwives and nursing associates are expected to provide person-centred, non-discriminatory care to people of all backgrounds. While the concerns relate to behaviour outside professional practice, the underlying behaviours could indicate a risk to people in the professional's care. Discriminatory behaviours also raise fundamental questions about the professional's ability to uphold the values and standards set out in the Code. A failure to take any action is likely to impact the public's trust and confidence the profession.

Example 2

> Nurses, midwives and nursing associates are responsible for the care and protection of the vulnerable. Whilst the concerns relate to behaviour outside professional practice, the failure to safeguard and protect a child is serious enough to raise fundamental questions about the professional's ability to uphold the values and standards set out in the Code and undermine public trust and confidence in the profession.
>
> In situations such as this, we will always carefully consider the context to understand how it may have contributed towards the professional's behaviour – for example considering whether a professional was subject to coercive control by an abusive partner.

Example 3

> This serious and repeated violence raises fundamental questions about the ability of the nurse, midwife or nursing associate to uphold the standards and values set out in the Code. We are likely to consider these concerns further.
>
> Domestic abuse does not always involve violence. It can also take the form of controlling, coercive, threatening or degrading behaviour, including sexual misconduct. Depending on the facts, all of these behaviours are capable of undermining public confidence in the professions we regulate.

Misconduct that could also be a crime

If an allegation has not been reported to the police or relevant third party, this will not prevent us from investigating it, provided it could amount to serious professional misconduct.
We will exercise some caution when bringing cases of this kind, particularly when the conduct occurred outside professional practice. It is not our role to fill any perceived gaps in the criminal justice system. When deciding whether to investigate concerns that could have been reported to the police, but have not, we will carefully consider:

i) whether an investigation is necessary to fulfil our statutory duties; and
ii) whether it would be more appropriate for the concerns to be considered by the police or another third party organisation such as the Family Court.

For example, if we received a referral where it is alleged that a sexual assault against a person receiving care had taken place, but the person concerned did not wish to report it to the police, we would still look into this. Where a professional is alleged to have carried out a sexual assault outside their professional practice, but the person subject to the assault does not wish to report it to the police, we would carefully consider whether there was any proper basis for us to take any regulatory action.

Example

> As the behaviour here could constitute serious sexual misconduct and potentially involves serious and repeated violence, it is likely to suggest a risk of harm to the public or is likely to undermine public trust and confidence in the professions. We would be likely to refer this matter for investigation and will consider carefully whether there is a realistic prospect of the allegations being proved at a panel hearing.

If the information we receive about a nurse, midwife or nursing associate's conduct potentially discloses a criminal offence or suggests a safeguarding risk to children or vulnerable people, we may determine that it is in the public interest to share information with the police or relevant third parties.[5] This is discussed in more detail in our information handling guidance. If the police or third party organisations decide to investigate the relevant conduct, we will decide whether we need to delay our consideration of the matter pending the outcome of that investigation.

If we believe that another organisation is best placed to investigate the concern, we will always let the referrer know why we believe this to be the case. If the referrer does not wish to report the matter to the police or progress an investigation with another organisation, we will decide whether to open our own investigation applying our usual screening test. Where a matter is referred for investigation, our Case Examiners will, once our investigation is concluded, consider whether there is a realistic prospect of the allegations being proved at a panel hearing, taking into account all the available evidence.

We need to be kind and fair to everyone involved in our regulatory process. Even when we proceed to investigate, such concerns will not always progress to a final hearing. We don't have the same extensive powers or specialist expertise as the police to investigate behaviour and therefore there may be limits to the evidence we are able to obtain. For example, we do not have access to forensic testing and data regarding the geographic location of mobile phones, nor are we able to search, seize evidence or compel someone to be interviewed.

Where we feel we're able to progress with a case, we will explain to the referrer any potential issues we're likely to face taking the case forward. The referrer can then make an informed decision about whether they wish to continue assisting us. We will look at how we can support people through our processes which includes identifying and signposting to external agencies when needed.

1 Meadow v General Medical Council [2006] EWCA Civ 1390; Roylance v General Medical Council [2000] 1 A.C. 311

2 The NMC Code, Standard 20

3 See Article 8 of the Human Rights Act 1998

4 A person discriminates against another person under the Equality Act if they treat them less favourably than they would treat others because of one or more of a protected characteristic. It includes discrimination on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and / or sexual orientation. The Professional Standards Authority's September 2022 report Safer Care for All highlighted the impact that discrimination can have on the safety of people receiving care. In the PSA's 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.

5 For example, other organisations who are responsible for safeguarding children or vulnerable adults, or who may be involved in safety investigations which relate to people receiving care, or in preventing or detecting criminal activity.