

## Operational guidance

# Cancelling hearings under Rule 33

## Introduction

- 1 This guidance is mainly for use by our case presenters when applying for a hearing to be cancelled under Rule 33.<sup>1</sup> It applies to cases that have been referred to the Conduct and Competence Committee (CCC) or Health Committee (HC).
- 2 Rule 33 allows a Chair of the Conduct and Competence Committee (CCC) or Health Committee (HC) to direct that a hearing should be cancelled and the case closed in appropriate cases.
- 3 Where there is insufficient evidence to prove the factual allegations, it may be appropriate for us to offer no evidence on a case. For guidance on this process see *Offering no evidence*, (NMC 2015).

## Guidance

- 4 A decision to cancel a hearing should only be made when it is in the public interest to do so. The public interest includes:
  - 4.1 The protection of the public.
  - 4.2 Declaring and upholding proper standards of conduct.
  - 4.3 Upholding confidence in the professions and the NMC.
- 5 Rule 33 should be used where there is no public interest in a case proceeding to a hearing. There are three circumstances where its use may be appropriate:
  - 5.1 Where the nurse's or midwife's registration would have lapsed but for the fitness to practise proceedings, they do not intend to practise in the future, and there is no public interest in pursuing the allegation.
  - 5.2 Where, in a serious case, evidence is not available to prove the factual charges but could be available in the future.
  - 5.3 When there is some other compelling reason for not holding a hearing (see paragraph 15 below).

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<sup>1</sup> Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (as amended)

- 6 An application under Rule 33 must be made at a preliminary meeting before a Chair of the relevant committee. The referrer must be given the opportunity to comment on the application.

### **Allowing a nurse's or midwife's registration to lapse**

- 7 A nurse's or midwife's registration cannot lapse while they are subject to fitness to practise proceedings. In some cases it is only the existence of the allegations that keeps the nurse or midwife on the register. In these cases, if the hearing is cancelled, the registration will automatically lapse. The nurse or midwife cannot therefore practise, and poses no risk to public protection.
- 8 In fact, the nurse or midwife may pose more of a risk by being kept on the register without having renewed and without having declared that she has complied with continuing professional development requirements.
- 9 In such cases it is important to be satisfied that the nurse or midwife will not apply for readmission to the register once the hearing has been cancelled. Therefore, before the preliminary meeting, they must sign a declaration stating that they will not practise as a nurse or midwife in the future. This declaration should be supported by evidence. This could include evidence of retirement or ill-health.
- 10 Another essential requirement is that there is no public interest in pursuing the allegations to a conclusion. This is important as, when a nurse or midwife is allowed to lapse their registration, there will be no public record of the fitness to practise allegation. It follows that it will not be appropriate to cancel a hearing where the absence of a public marker against a nurse or midwife could give rise to a risk of harm to the public. Relevant factors would be:
  - 10.1 Whether the nurse or midwife has been the subject of concluded proceedings relating to the incident(s) giving rise to the allegations, for example proceedings before another regulator. If they have, there is less likely to be a public interest in pursuing the allegations.
  - 10.2 Whether there is evidence that the nurse or midwife will not be working in any health or social care settings or with vulnerable adults or children in the future. In the absence of such evidence, there is likely to be a public interest in pursuing the allegation. However, this will also depend on the nature of the allegation. This factor is likely to be less relevant where the allegation does not relate to patient interaction or care.
- 11 Before signing the declaration that they will not seek to return to the register, the nurse or midwife will be informed that if she breaches the declaration and applies for readmission, she may be subject to a further allegation of misconduct. In addition, the original allegations will be reopened and concluded (see below).

### **Evidential difficulties**

- 12 Where a deficiency in the evidence makes proving factual allegations difficult, the normal course is to offer no evidence. For further information see *Offering no evidence*, (NMC 2015). However, where the allegations in a case are very serious, and the public interest outweighs the nurse's or midwife's interest in

matters being brought to a final conclusion, we may, exceptionally, seek to cancel the hearing under Rule 33.

- 13 For example, if a witness has made an allegation of a serious sexual assault against a registrant, but then becomes too unwell to give evidence within a reasonable period of time, we may be unable to prove the allegation. If there is a chance that the witness might recover in the future and be able to give evidence, the public interest may require that the hearing be cancelled under Rule 33.
- 14 In these circumstances, the case presenter will make clear to the nurse or midwife and the panel Chair the full circumstances of the case and the possibility of the case being reopened in the future (see below).

### **Other reasons**

- 15 There may be other compelling reasons where it is no longer in the public interest to hold a hearing, for example where a nurse or midwife is terminally ill. Any such grounds must be supported by appropriate evidence.

### **Status of allegations following a decision to cancel a hearing under Rule 33**

- 16 Rule 33 does not contain a test to be applied when considering whether to cancel a hearing, nor does it state the consequences of the matter being closed. This provision should be compared with other provisions about the closure of fitness to practise cases:
  - 16.1 Under Rule 6C (1), case examiners are required to decide if there is a case to answer in respect of an allegation of impaired fitness to practise. Some additional provisions require the notification and publication of a decision to find no case to answer.
  - 16.2 Article 29(3) provides for the HC or CCC to make orders where it considers that an allegation is well founded.
- 17 Both of these tests imply the final determination of an allegation. In contrast, the absence of a test in Rule 33 means that closure under this provision is not necessarily the final determination, because the practice committee has not made any findings on the merits of the allegation.
- 18 Therefore, if a nurse or midwife is readmitted to the register having been allowed to lapse, or if there is new evidence that remedies the previous deficiencies in the evidence, we may reopen the allegation.
- 19 This will be made clear to the nurse or midwife before any decision is made to cancel a hearing under Rule 33.

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