
The cancellation of referrals to a Fitness to Practise panel under Rule 28

Introduction

1. This guidance sets out the factors that should be considered when deciding whether to cancel a referral to a Fitness to Practise panel.
2. Rule 28(1) of the Fitness to Practise rules provides for the cancellation of cases that have been referred to a Fitness to Practise panel or the Interim Orders panel. Cancellation may be agreed, before the opening of the panel, in the following circumstances:
 - a. evidence becomes available that suggests that the practitioner's fitness to practise is not impaired;
 - b. in the case of proceedings under Part 7, evidence becomes available that suggests an issue does not arise as to whether the Interim Orders Panel should make or review an interim order¹; or
 - c. it appears that for some other reason, the hearing before the Panel should not be held.
3. The decision to cancel referral to a panel may be made either by the President or by a member of the Investigation Committee. In practice, the decision is referred to one of the qualified chairmen from the Investigation Committee pool. Where referral to a panel is cancelled, we are required under the rules to inform both the doctor and the complainant of our decision and the reasons for it.
4. The question of cancellation may arise following a decision by the case examiners or the Investigation Committee to refer the doctor to a Fitness to Practise panel. The issue of possible cancellation may arise either from an application by the doctor's defence, or because it has become apparent to those investigating the concerns that referral to a panel may no longer be sustainable.

¹ This guidance does not consider the cancellation of referrals to the IOP.

Factors to be considered

5. Although the criteria for cancellation in rule 28 are drafted in very wide terms, cancellation of a referral is not intended as an avenue for appeal against an earlier decision by a case examiner or the Investigation Committee to refer a doctor to a FTP panel. Cancellation will normally only be appropriate where the overall circumstances have in some way altered since the decision to refer. This might be, for example, because new evidence throws a different light on the issues or because it becomes clear that a key witness is no longer willing to give evidence

Realistic Prospect Test

6. The decision-maker must keep in mind the 'realistic prospect' test which is applied by the case examiners and the Investigation Committee when considering whether it is necessary to refer a doctor to a FTP panel. The decision-maker must be satisfied that the circumstances have changed in such a way since the decision to refer, that the realistic prospect test is no longer met. The realistic prospect applies both to factual allegations and to the question whether, if established, the facts would demonstrate that the practitioner's fitness to practise is impaired to a degree justifying action on registration. (See the realistic prospect test guidance for a more detailed exploration of the test and its application.) The application of the realistic test, in the context of cancellations, is considered further in paragraphs 9 to 21 below.

7. The majority of cancellations are likely to be agreed because it becomes clear that it will not be possible to meet the evidential requirements of the realistic prospect test. However, there may also be cases where new evidence (such as an expert report) indicates that the concerns are not sufficiently serious to meet the realistic prospect test.

8. There is no power under rule 12 to review a decision to cancel a referral to a FTP Panel or to resurrect a case thereafter. Any decision should be carefully considered and justified.

Rule 28(1)(a)

9. Rule 28(1)(a) provides that a referral may be cancelled where evidence becomes available that suggests that the practitioner's fitness to practise is not impaired.

10. New evidence may take the form of additional expert evidence, witness statements or other evidence that was not available at the time of the decision to refer. Cancellation of the referral will be appropriate where the additional evidence indicates clearly that the doctor's fitness to practise is not impaired.

11. The realistic prospect test guidance explains that whilst case examiners and the Investigation Committee are entitled to assess the weight of the evidence, they should not normally seek to resolve substantial conflicts of evidence. Where there is

new evidence that conflicts with earlier evidence, the decision-maker should not seek to resolve any substantial conflict of evidence. Referral to a Fitness to Practise panel will normally still be appropriate in these circumstances.

12. The guidance on the realistic prospect test makes it clear that if there is any doubt about whether to refer the complaint forward, the case examiners or Investigation Committee should lean in favour of referral. A similar approach should be taken when deciding whether to cancel a referral.

13. If the decision maker considers that there is a realistic prospect of establishing that the doctor's fitness to practise is impaired, they should not consider any evidence in mitigation unless there are quite exceptional circumstances. Evidence in mitigation is a matter for the Fitness to Practise panel to consider at the sanction stage.

14. When the decision maker cancels a referral as a result of new evidence, the reasons for the decision should make clear what the new evidence is and what effect this has on the previous decision to refer. This should be explained by reference to the realistic prospect test.

Rule 28(1)(c)

15. Rule 28(1)(c) provides that cancellation of a referral may also be agreed if it appears that for some other reason, the hearing before the Panel should not be held. Rule 28(1)(c) is drafted in very general terms and may potentially cover a wide range of circumstances.

16. There will be instances where it becomes apparent that it is not going to be possible to establish the case evidentially at a hearing. This might be because a complainant withdraws their complaint or refuses to give evidence or to co-operate with the investigation. Similarly, there may be cases where the evidence of a potential witness can be definitively rebutted or where their version of events is found to be so inconsistent as to be unreliable to a degree that the realistic prospect test can no longer be met.

17. The lawyer leading the investigation will normally advise on these issues. Where the issues relate to difficulties in obtaining evidence from certain sources, the advice should cover in full any alternative sources of evidence (eg. Other witnesses or corroborative evidence, admissions made by the doctor to the GMC or in other fora.) Legal advice may need to cover issues such as whether there would be any merit in seeking to subpoena a potential witness or whether there are any other possible avenues for investigation.

18. Similarly, there may be cases where additional legal advice, for example in the form of counsel's opinion, indicates that there is no realistic prospect of establishing impaired fitness to practise evidentially or that the allegations are less serious than previously thought.

19. In considering whether to cancel a referral, the decision-maker should be mindful that FTP panels have broad powers to admit evidence under rule 34(1) and (2) where it is fair and relevant, notwithstanding that it may not be admissible in criminal proceedings.

20. The Medical Act does not require a complaint to be brought by a complainant or a public body (section 35CC). It is not appropriate to cancel simply on the basis that a complaint has been withdrawn, without consideration of whether the GMC should proceed in the public interest.

21. When considering cancelling a referral, the decision maker should bear in mind that they have the power to adjourn for further information, reports or legal advice.

Representation

22. The (draft) guidance to the Fitness to Practise rules provide that before it is decided whether to cancel the hearing, representations will be sought from the practitioner and the maker of the allegation. The decision-maker will need to consider carefully any representations received which argue that cancellation should not be agreed. The decision-maker should bear in mind that there is a public interest in the ventilation before a FTP panel of complaints which do have a realistic prospect of establishing impaired fitness to practise.

Legal advice

23. In most cases, the decision maker will be provided with legal advice, to assist with the decision in relation to a cancellation application.

Reasons for decision

24. In all cases the decision-maker must give reasons for any decision to cancel a referral to a panel. The decision should briefly summarise the allegations against the doctor, as often this is necessary in order to adequately understand the cancellation decision. The reasons should make clear the grounds for cancelling the referral. Where relevant, the reasons for cancellation should refer to any additional evidence that has been taken into consideration or any factors that indicate that there is unlikely to be sufficient evidence to establish impaired fitness to practise. The reasons should also refer to any legal advice that has been taken into account.