

Agenda item:	6
Report title:	Changes to the threshold for investigating criminal matters
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Action:	To consider

Executive summary

We are seeking approval to expand the limited range of criminal matters that we do not investigate under the fitness to practise procedures. The proposed changes are intended to ensure that our investigations are proportionate in that we only investigate low level criminal behaviour that may raise a fitness to practise concern.

We will not, however, change our reporting guidance for doctors to ensure that the Registrar retains the discretion to open an investigation if there are aggravating features to the offence which raise a question about the doctor's fitness to practise.

Recommendation

The Strategy and Policy Board is asked to agree that we will no longer investigate the following unless there are aggravating circumstances:

- a** speeding offences
- b** the offence of urinating in public

Background

- 1 There are very few criminal matters that we do not promote to a full investigation. As part of our ongoing work to review thresholds, we have considered whether there is additional scope to close more cases involving low level criminality at the triage stage. This would be consistent with our aim to ensure we only carry out a full investigation where necessary, enable us to focus our resources on the most serious cases and help reduce the stress caused to doctors by an investigation if it is unlikely to result in our taking action.
- 2 The following criminal matters can currently be closed at triage with no further action:
 - Any road traffic offence for which a Fixed Penalty Notice (FPN) was issued.
 - Speeding offences where the doctor was not driving at excessive speed resulting in an automatic ban and there are no other aggravating circumstances.
 - Minor motoring offences where there are no aggravating circumstances, including traffic light offences, talking on a mobile phone while driving, not wearing a seatbelt and careless driving (which is distinct from dangerous driving).
 - Penalty notices for disorder (PND) at the lower tier penalty level.
- 3 All other types of offence (irrespective of the method of police disposal) are promoted to a full investigation under stream one. This has resulted in doctors being investigated for several months after receiving a PND for relatively low level offences such as urinating in public. This is no longer consistent with our aim to resolve issues at the earliest opportunity when it is appropriate to do so.
- 4 However, we must keep in mind our overarching objective to protect patients and promote and maintain public confidence in the medical profession. The Assistant Registrar should therefore retain discretion to open an investigation if there are aggravating factors suggesting the doctor's fitness to practise is impaired.

Proposed changes to thresholds

- 5 The proposals below will enable the Registrar to dispose of specified minor criminal matters promptly where these do not raise an issue regarding the doctor's fitness to practise and an investigation is not necessary or desirable.
- 6 The first recommendation is that we will no longer investigate any pure speeding offences (regardless of whether the doctor received a conviction, caution or FPN.) We currently investigate speeding if the offence involved excessive speed resulting in an automatic ban. It is proposed that we no longer investigate any offences solely relating to speeding for the following reasons:

- A conviction or other criminal sanction for speeding would not normally in itself raise an issue of impaired fitness to practise requiring investigation even if the doctor received a ban. If there are aggravating factors relevant to the speeding offence, such as a collision or the potential for an accident, the Police will charge the driver with a more serious offence such as dangerous or reckless driving. These more serious types of driving offence will continue to be investigated.
 - Cases arising from a speeding conviction/FPN/caution where the doctor received a ban/was travelling at excessive speed are usually closed with no further action. From January 2013 until September 2016, there were 17 stream one investigations relating to speeding offences. Of these, 4 were concluded by the case examiners with no action, 12 were concluded with advice and 1 doctor received a warning.
- 7 The second recommendation is that we no longer investigate any conviction or other method of criminal disposal solely for the offence of urinating in public. This is proposed due to the minor nature of the offence and will bring our guidance into line with that of the Registration and Revalidation Directorate who do not investigate if this offence is declared by a doctor when applying for registration. Between 2013-2016, we opened 6 stream one investigations for the offence of urinating in public. All were closed by the case examiners with no action and only three of the doctors received advice.
- 8 If the two recommendations are approved, the Registrar will retain discretion to open an investigation if there are specific aggravating factors or other fitness to practise concerns. Draft guidance for Assistant Registrars on what may constitute an aggravating factor is at Annex A.

Legal advice

- 9 The Medical Act 1983 (as amended) requires the Registrar to open an investigation if there is an allegation that a doctor's fitness to practise is impaired by reason of a conviction or caution. However, we have obtained legal advice confirming that the Registrar does have discretion not to investigate a conviction or caution if they believe it is incapable of amounting to an allegation that the doctor's fitness to practise is impaired. As convictions/cautions solely relating to the low level offences of speeding and urinating in public do not result in action on doctors' registration following investigation, these would fall into the definition of being incapable of amounting to an allegation that the doctor's fitness to practise is impaired.

Equality and diversity

- 10 Reducing the number of low level criminal matters which are promoted to full investigations would not have a negative impact on any groups with protected characteristics. It is designed to be an improvement by reducing the number of investigations that will subsequently result in no action and this may lead to greater

benefit for groups that are over-represented in cases involving criminality such as male doctors and BME doctors.

Next steps

- 11** If approved by the Board, the changes to the threshold will be implemented by the end of February and our guidance will be updated to reflect the change.

6 – Changes to the threshold for investigating criminal matters

6 – Annex A

Guidance for decision makers on closing criminal cases at triage

Introduction

- 1 The purpose of this guidance is to provide advice to staff on the factors to be taken into account when closing criminal cases at triage. Although a limited number of criminal matters can be closed at triage, the Assistant Registrar (AR) retains discretion to open an investigation if there are aggravating factors which raise a question about the doctor's fitness to practise.
- 2 The initial threshold for investigation of a doctor's fitness to practise is set out in section 35C(2) Medical Act 1983 ('the Act') which states:

35C. Functions of the Investigation Committee

(1) This section applies where an allegation is made to the General Council against -

- (a) a fully registered person; or*
- (b) a person who is provisionally registered,*

that his fitness to practise is impaired.

(2) A person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of -

- (a) misconduct;*
- (b) deficient professional performance;*
- (c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;*
- (d) adverse physical or mental health;*
- (da) not having the necessary knowledge of English (but see section 2(4));*
- (e) a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his*

fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect.

The test to be applied at the triage stage is 'whether the allegation appears to raise a question as to whether fitness to practise is impaired.'

- 3 A doctor's fitness to practise can be impaired by reason of a "conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England or Wales, would constitute a criminal offence." Rule 5 of the General Medical Council (Fitness to Practise) Rules 2004 contains specific provisions for the management of cases which result from a conviction, police caution or a determination from another regulatory body. Under Rule 5(1), any conviction resulting in a custodial sentence (whether suspended or not) is referred directly to a Medical Practitioners Tribunal (MPT). Although Rule 5(1) allows for any conviction to be referred directly to an MPT, in practice we will refer all non-custodial convictions to the case examiners for a decision under rule 8 once the necessary investigation information has been obtained. This is done under Rule 5(2).
- 4 Our [reporting guidance](#) also requires doctors to notify us of the following in addition to criminal charges, convictions and cautions:
 - Fixed Penalty Notices at the upper tier
 - Public Notices for Disorder
 - Bind overs
 - Community resolutions
 - Discretionary disposals
 - Formal adult warnings
 - Cannabis warning
 - Anti-Social behaviour orders
- 5 The matters listed above are investigated as an allegation of misconduct against the doctor under Section 35(2)(a) of the Act as they are alternative methods of disposal by the police for low level offences.

Criminal cases which can be closed at triage

- 6 With the exception of the matters detailed in paragraph 7 below, all convictions, cautions and other methods of police disposal are promoted to full investigations.
- 7 The following criminal matters are considered incapable of amounting to an allegation of impairment and are closed at triage with no further action:
 - Any road traffic offence for which a Fixed Penalty Notice (FPN) was issued.
 - Offences solely relating to speeding where there are no aggravating circumstances

- Minor motoring offences where there are no aggravating circumstances, including traffic light offences, talking on a mobile phone while driving, not wearing a seatbelt and careless driving (which is distinct from dangerous driving). There is not currently a definitive list of “minor motoring offences” and Assistant Registrars will need to use their discretion as to whether an offence falls into this category.
 - All penalty notices for disorder (PND) at the lower tier penalty level
 - Any penalty notices for disorder (PND) at the upper tier which are not on the list of specified offences at annex A (which will continue to be investigated). However, doctors are still required to report these to us under our guidance [Reporting criminal and regulatory proceedings within and outside the UK](#). This will enable the AR to consider if there are any aggravating factors requiring an investigation to be opened.
 - Any conviction, caution or other method of police disposal for the offence solely of urinating in public unless there are aggravating factors requiring an investigation to be opened.
- 8 As our policy is to close a range of minor offences at triage unless there are aggravating circumstances, this guidance is intended to help Assistant Registrars assess if there are aggravating factors which require an investigation to be opened even if the underlying matter has been approved for closure.

Aggravating Factors

- 9 Before closing any of the matters listed at paragraph 7 above, the AR should consider if there are any known aggravating factors underpinning the offence. These will only be relevant if those aggravating factors raise a question about the doctor’s fitness to practise which is sufficiently serious to amount (if proven) to impairment.
- 10 The list below provides examples of aggravating factors that could raise a question about a doctor’s fitness to practise although this is not exhaustive:
- Alcohol or illegal drugs were a factor in the criminal behaviour. If this is the case, further information may need to be sought to establish if the doctor may have an underlying addiction. Specialist health advice can be obtained as part of a provisional enquiry under rule 4(4) which will help determine if a full investigation is necessary.
 - There was a religious or racial motivation behind the underlying criminal conduct. For example, if a doctor received a FPN or PND for urinating in public but had urinated on a sensitive religious or cultural site. Although urinating in public has been approved for closure at triage, the aggravating circumstances of the offence may make it appropriate for an investigation to be opened or further enquiries undertaken under rule 4(4). This is likely to be a very rare scenario as the doctor

would usually be charged with a more serious offence such as racially or religiously aggravated disorder.

- The underlying circumstances of the offence raise a safeguarding concern suggesting the doctor may pose a risk of harm to children and/or vulnerable adults. For example, an upper tier PND can be issued for the offence of buying or attempting to buy alcohol for a person under 18. Further information is likely to be required to establish whether the circumstances of the offence raise a question about the doctor's fitness to practise. Enquiries should be made under rule 4(4) in the first instance so a decision can be made about whether the threshold for a full investigation is met.
- There has been negative media coverage of the offence to the extent that public confidence in doctors generally might be undermined if we did not investigate.

Seeking further information

- 11** It will not be necessary to routinely seek further information about a criminal matter that has been approved for closure in order to verify that there are no aggravating features. This would involve disproportionate effort and resources in view of the minor nature of the offences approved for closure. However, where we already have information suggesting the underlying circumstances may raise a fitness to practise concern, we must consider whether an investigation should be opened or additional evidence obtained under rule 4(4).

Annex A– Penalty Notices for Disorder (PND) and Fixed Penalty Notices (FPN) which the Registrar will not have discretion to close at triage

The following offences resulting in a PND at the upper tier will still require investigation as they may raise health concerns or probity issues

Drunk and disorderly in a public place	s91 of the Criminal Justice Act 1967
Possession of a controlled drug of Class B – cannabis/cannabis resin (may only be given on one occasion)	S5(2) and Schedule 2 of Misuse of Drugs Act 1971
Theft (under £100 retail/commercial only)	s1 of the Theft Act 1968
Sending false messages/persistently using a public electronic communications network in order to cause annoyance, inconvenience or needless anxiety	s127(2) of the Communications Act 2003

We will still investigate the following as they have a safeguarding element

Sale of alcohol anywhere to a person under 18	s146(1) of the Licensing Act 2003
Supply of alcohol by or on behalf of a club to a person aged under 18	s146(3) of the Licensing Act 2003
Buys or attempts to buy alcohol on behalf of a person under 18	s149(3) of the Licensing Act 2003
Buys or attempts to buy alcohol for consumption on relevant premises by person under 18	s149(4) of the Licensing Act 2003
Delivery of alcohol to person under 18 or allowing such delivery	s151 of the Licensing Act 2003

We will also still investigate the following offences resulting in an FPN which are set out in Part 11 of the Anti-Social Behaviour etc (Scotland) Act 2004:

Section 78 of the Licensing (Scotland) Act 1976 (c. 66)	Riotous behaviour while drunk in licensed premises
Section 79 of the Licensing (Scotland) Act 1976 (c. 66)	Refusing to leave licensed premises on being requested to do so
Section 50(1) of the Civic Government (Scotland) Act 1982 (c. 45)	Being drunk and incapable in a public place

Section 50(2) of the Civic Government (Scotland) Act 1982 (c. 45)	Being drunk in a public place in charge of a child
Sections 201 and 203 of the Local Government (Scotland) Act 1973 (c. 65)	Consuming alcoholic liquor in a public place