

## Guidance for decision makers in applying the five-year rule

### Purpose of this guidance

- 1 This guidance supports decision makers in applying the 'five-year rule'<sup>1</sup> by setting out the principles relevant in determining:
  - a whether more than five years have elapsed since the most recent events giving rise to the allegation, and if so
  - b whether it would be in the public interest to investigate the allegation.

### Legislative framework

- 2 The five-year rule provides a safeguard against the pursuit of allegations which are more than five years old, unless it is in the public interest to investigate these<sup>2</sup>. It is a Registrar's decision on whether to proceed where an allegation is more than five years old<sup>3</sup>, and in practice they are delegated to Assistant Registrar decision makers<sup>4</sup>.
- 3 Only allegations that a doctor's fitness to practise is impaired<sup>5</sup> will be considered under this guidance. It may be necessary to conduct provisional enquiries to establish

<sup>1</sup> Rule 4(5) of the General Medical Council (Fitness to Practise) Rules 2004 (as amended) ('the rules') provides: 'No allegation shall proceed further if, at the time it is first made or first comes to the attention of the General Council, more than five years have elapsed since the most recent events giving rise to the allegation, unless the Registrar considers that it is in the public interest for it to proceed.'

<sup>2</sup> Section 35CC(5) of the Medical Act 1983 (as amended) ('the Act')<sup>2</sup> and rule 4(5).

<sup>3</sup> The function of the Registrar at this stage is to act as a preliminary filter, ensuring that allegations which are more than five years old are only referred to the case examiners if it would be in the public interest to investigate these.

<sup>4</sup> Assistant registrars are exclusively referred to as decision makers throughout this guidance.

<sup>5</sup> As defined in section 35C(2) and rule 2.

whether there is such an allegation<sup>6</sup>. If there is no allegation, then there is no need to consider the five-year rule.

- 4 It is not for decision makers at this stage to take a view on whether the allegation is likely to be established or whether there is a realistic prospect of it being established. These issues are decided later in the investigation process. However, decision makers can refuse to promote an allegation if they consider it to be vexatious.<sup>7</sup>
- 5 Determining whether the five-year rule applies is a question of objective fact applying the legal framework set out in the rule. Deciding whether to waive the rule is a matter of judgment for the Registrar or the decision makers to whom they delegate their powers under this rule.
- 6 This guidance applies to the application of the five-year rule in cases where the allegation is received or otherwise comes to our attention on or after 31 December 2015.

## Applying the five-year rule: calculating the time that has elapsed

### The date the allegation was made or came to our attention

- 7 The first task for decision makers is to establish the date when the allegation was made to us or otherwise came to our attention. The allegation can only come to our attention once the decision maker has sufficient information to decide that there is an allegation about a doctor's fitness to practise<sup>8</sup>. This means that the date the allegation came to our attention is not necessarily the same date as when we received a complaint or referral if that did not disclose an allegation.
  - a If the allegation is made by a patient, a patient's representative or a public organisation then the date the allegation was received will usually be clear, and the relevant date would be when the allegation was received. If further information is needed, then the relevant date will be when we receive the information which allows us to make a decision on whether the allegation should proceed to an investigation.
  - b If an allegation comes to our attention indirectly (eg media coverage) then the date of publication will usually be the date it came to our attention, provided the

<sup>6</sup> Rule 4(4)

<sup>7</sup> Rule 4(3)(c)

<sup>8</sup> Under rule 4(2)

publication contains enough detail for us to make a decision on whether the allegation should proceed to an investigation<sup>9</sup>.

- c If a potential allegation is referred for a provisional enquiry<sup>10</sup>, then the date the allegation comes to our attention is only once we have enough information to know whether to proceed to an investigation.

### **The date of the events giving rise to the allegation**

- 8 The decision maker must then go on to identify the most recent events giving rise to the allegation and the date when those events occurred. Where the allegation arises from a single incident, identifying the most recent events will be straightforward – there is only one date.
- 9 A single complaint or referral could contain more than one allegation. There could be separate allegations which rely on different heads of impairment<sup>11</sup>. Or there could be separate allegations, even though they raise the same head of impairment, because they are different in substance. Decision makers must deal separately with each allegation and how the five-year rule applies to each.
- 10 Where the complaint or referral raises a series of separate events which straddle the five-year deadline it may be more complex. This involves analysing the nature of the allegation in question and depending on the circumstances, the five-year rule may or may not be engaged. The circumstances could include, but are not limited to the following:
  - i An allegation made of identical and persistent misconduct evidenced across a number of events relating to different patients, where the latest event took place less than five years ago. This would not engage the five-year rule even if some of the events occurred more than five years ago. For example, an allegation that a practitioner has regularly failed to complete child abuse forms for the last 12 years does not engage the five-year rule because the most recent events giving rise to the allegation are well within the five-year deadline.
  - ii Where distinct allegations have been made in relation to discrete incidents involving the same practitioner, each allegation must be considered separately, even where the same head of impairment applies. For example, one allegation of failure to provide an acceptable level of treatment or care

<sup>9</sup> Under rule 4(2)

<sup>10</sup> Under rule 4(4)

<sup>11</sup> Section 35C(2)

and another of dishonesty on a different occasion in relation to a different patient. It is possible for one allegation to fall inside and another to fall outside the five-year deadline even though they were made by the same person at the same time, against the same practitioner.

- iii Where there are several incidents with a [relevant period](#) around five years, decision makers should seek to identify the extent to which the alleged events are linked by common features and should reasonably be regarded as a whole. The more they are linked, the more appropriate it will be for them to be considered together under the five-year rule. The less they are, the more it will be appropriate for them to be considered separately under the five-year rule. The key factors to be considered include:
  - a the head of impairment that would apply to each incident
  - b the similarity of, and/or connections between the matters alleged
  - c the timing and maker of the allegation
  - d the time interval between each event – the longer the gap(s), the less likely it is that the incidents can properly be regarded as one allegation, and
  - e the nature of the alleged events.

**11** The greater the similarity, the more likely it is to be regarded as a course of conduct giving rise to one composite allegation

#### *Clinical misconduct or performance*

**12** If the allegation relates to multiple clinical failings, then the decision maker will need to carefully consider whether we are dealing with:

- a several separate allegations of misconduct
- b one allegation of persistent misconduct, or
- c one allegation of deficient professional performance.

**13** This will affect whether there is one composite allegation (the latest event being within five years) or several separate allegations, some of which might be older than five years. There is case law in this.

### *Convictions and failure to tell us*

- 14** If a doctor is found guilty of a criminal offence, they have an obligation to tell us without delay in line with *Good medical practice*<sup>12</sup>. This obligation will only be for a short time and cannot continue indefinitely, therefore it should be highly unusual for allegations based on a conviction and a failure to tell us to be in different time periods. Whether it is in the public interest for either allegation to proceed should depend on the conviction. If the conviction is serious enough for the five-year rule to be waived in the public interest, then there may well be a public interest in waiving the rule in relation to the failure to tell us about the conviction as well.

### *The effect of subsequent events*

- 15** It is not uncommon for several similar allegations to be made once one allegation is being investigated. For example, a further complainant makes contact with us about events which occurred more than five years ago during the course of an existing investigation because they have been made aware of the investigation through media coverage. Although there may be a close factual similarity between the allegations (eg they may both be about the same sort of operation), the allegations are made at different times by different patients in respect of different incidents. The decision maker would need to consider further allegations like this separately and decide:
- a** if it amounts to an allegation<sup>13</sup>
  - b** whether the five-year rule is engaged<sup>14</sup>, and if so
  - c** whether the five-year rule should be waived.
- 16** If the five-year rule is waived in relation to a further complaint, then it will be a separate decision as to whether it is joined to the existing allegations.
- 17** Alternatively, decision makers may have to consider an allegation where the principal incident occurred more than five years before the allegation was made but a later incident is said to be an aggravating or relevant factor. For example,
- a** After a revision surgery an allegation is received that an operation carried out more than five years previously fell below expected standards. It is necessary to identify the most recent events giving rise to the allegation, not the most recent events relevant to the allegation.

<sup>12</sup> Paragraph 75

<sup>13</sup> Under rule 4(2)

<sup>14</sup> Rule 4(5)

- i If only the original operation was complained of, then this would be the most recent event giving rise to the allegation.
  - ii If the revision surgery and some later treatment in relation to the same symptoms were also complained about, then these later events would be the latest events giving rise to the allegation.
- b A patient's spouse complains about a doctor's failure to investigate and diagnose cancer during a consultation and the patient dies some months later. The latest event giving rise to the allegation would be the date of consultation, not the date of death.
- c If the police or another authority are investigating alleged criminal offences, then:
  - i if the doctor is convicted, the latest event giving rise to the allegation of impairment by reason of conviction would be the date of the conviction
  - ii if the doctor is acquitted or the police decide to take no further action, then the latest event giving rise to the allegation of impairment by reason of misconduct would then be the latest event giving rise to the conduct complained of and investigated by the police
- d Determination cases should be dealt with in the same way as conviction cases.

### **Requirement to identify the actual date**

- 18** The relevant period is the period between the actual date the alleged events took place and the date the allegation was made. Decision makers are therefore required to identify the actual date the events occurred or close as possible, not simply the date upon which the events are alleged to have occurred.
- 19** In establishing the actual date, decision makers can take the fact that a given date as named in the allegation is true. Only where there is reasonable doubt decision makers are obliged to carry out further investigations. Decision makers are not required to double check the details given in every allegation, nor are they obliged to seek the doctor's views.
- 20** The question for decision makers is whether there is anything that indicates that the date(s) in the allegation are not correct. Decision makers should not proceed on the basis that the dates are as alleged if the dates are plainly wrong, or there is some other good reason to take a different approach.

## Carrying out investigations

- 21** The allegations may not include or be clear about the relevant date(s). There may also be inconsistency with the information available to decision makers about the date(s). If so, decision makers should make enquiries with the complainant or an appropriate third party to confirm the relevant date(s) or obtain evidence such as medical records.
- 22** Decision makers can carry out provisional enquiries<sup>15</sup>. A decision maker might require further investigations to be carried out which would help them to determine, for example:
- a** whether the five-year rule is engaged
  - b** what occurred at a previous ventilation of the allegation
  - c** what reasons the complainant could give for the delay in making the complaint, and/or
  - d** the length of the relevant period.
- 23** In some cases, the dates given are close to the five-year limitation period. If decision makers are satisfied it is clear the relevant date falls one side or another of the five-year period, they can exercise their discretion not to carry out any further investigations.

## The relevant period

- 24** Once the decision maker has established both the actual date of the most recent events giving rise to the allegation and the date when the allegation came to our attention, the period between the two should be calculated. This is the 'relevant period'. If the relevant period is five years or less, no issue arises under the five-year rule and the remainder of this guidance has no relevance to the case.
- 25** If the relevant period is more than five years, the decision maker must consider the five-year rule, with reference to the guidance set out below.

## Revisiting decisions as to whether the five-year rule is engaged

- 26** Calculating the relevant period and whether the five-year rule is engaged is a matter of objective fact. Where decision makers have reached a decision on this which later

<sup>15</sup> Under rule 4(4)

transpires to have been founded on a mistake as to the underlying facts, they can correct the error. This may arise at any stage of the fitness to practise investigation. For example, a doctor may provide further information once we inform them of the allegations<sup>16</sup>, or close examination of the evidence by the case examiner may reveal a discrepancy. In such circumstances, the original decision maker must reconsider whether the five-year rule is engaged.

- 27** This inherent power relates only to the question of objective fact as to whether the relevant period is more than five years and whether the rule is engaged. It does not extend to revisiting the question of whether to waive the rule once this decision has been made.
- 28** However, there is an express power that a five-year rule decision can be reviewed in certain circumstances.<sup>17</sup>

## Applying the five-year rule: whether it would be in the public interest to investigate the allegation

### The test

- 29** The decision maker must assess the extent to which the public interest warrants the investigation of the allegation. It is not in the public interest for every allegation to be investigated regardless of how long ago it occurred. The relevant question is 'does the public interest warrant this allegation being proceeded with, despite the fact it is late?'
- 30** The five-year rule requires analysis of competing considerations:
- a** a reasonable time should be allowed for allegations to emerge and what is reasonable will vary from case to case. For example, decision makers may need to consider the effect that certain allegations may have on a person's ability to bring a complaint forward such as sexual misconduct allegations.
  - b** it is in everyone's interests for allegations to be investigated as soon as possible after the events.
- 31** The decision depends on decision makers' judgment. Even if some public interest circumstances are present, it is not always the case that the allegation should

<sup>16</sup> At the rule 7 stage.

<sup>17</sup> Under rule 12

proceed. For this reason, it is necessary for decision makers to identify and analyse the particular public interest factors which apply in a given case.

### **Our overarching objective and the public interest**

- 32** The principles of our overarching statutory objective to protect the public<sup>18</sup> are closely related to the term 'public interest': striving to achieve the objectives set out within our overarching objective is in the public interest. A first step in assessing whether the five-year rule test is met is to measure whether investigating the allegation would achieve the overarching objective.
- 33** The overarching objective has three elements: to protect and promote the health, safety and wellbeing of the public, promote and maintain public confidence in the medical profession, and promote and maintain proper professional standards and conduct for the members of the profession<sup>19</sup>. It is well established that there is a distinction between what is in the public interest, and what is interesting to the public or subject to media interest.



<sup>18</sup> Section 1(1A) of the Act

- 34** There will be some cases, whether by reason of gravity or some other important reason, where it will be in the public interest for an allegation to be pursued notwithstanding the passage of time. This decision requires a balancing exercise to be carried out between:

Interests of the public in ensuring that registrants are properly regulated and fit to practise	AND	The competing public interest in ensuring that the process is fair
High standards should be met by individual doctors		We should meet high standards in upholding standards against doctors
Allegations should be brought to light		Allegations should be resolved justly and fairly

- 35** A person facing an allegation relating to events which took place more than five years ago may be significantly disadvantaged in defending themselves. The extent of that disadvantage may mean that it is not in the public interest for the five-year rule to be waived.
- 36** Decision makers will need to determine whether it will be possible to have a fair and just process in which it will be possible to fairly resolve the issues raised by the allegations. An investigation into the facts of an allegation dating back more than five years will be one which is disadvantaged by the passage of time. Decision makers must weigh up whether the nature of the late allegation is such that it justifies a decision to proceed, notwithstanding the fact that it may be harder for the case examiner to assess the case and for the medical practitioners tribunal to determine accurately whether the allegation is proved on the balance of probabilities.
- 37** Public confidence in the process must inevitably be challenged where matters are dealt with a long time after the alleged matters. The decision maker must ask whether the nature or seriousness of the allegation justifies waiving the five-year rule. Applying this test will allow the decision maker to act in accordance with the public interest in a given case.
- 38** In exercising their discretion, decision makers should consider a range of factors such as those listed below. The weight to be attributed to each of these is to be assessed on a case by case basis. It may be that one or more of the factors below is not material in a given case. This is not an exhaustive list and decision makers should ensure that they have considered all the relevant factors in the particular case; however, these factors will usually be the most significant factors and decision makers should ensure they have considered each of them carefully.

**39** Decision makers should also avoid adopting a 'balance sheet' approach where they consider the number of factors weighing in favour and the number weighing against the allegation proceeding. They need to engage fully with each relevant factor and come to a rational conclusion about whether it weighs in favour or against the allegation proceeding in the public interest. Decision makers should not avoid properly considering a factor in their decision simply because it does not favour their overall conclusion.

### **Factors for consideration**

**40** Decision makers' reasons should refer to the wording of rule 4(5) and identify the public interest factors which lead to the conclusion that the five-year rule should or should not be waived.

**41** In doing so, decision makers should consider the following factors:

- i** the length of the relevant period (beyond five years)
- ii** the reason(s) for the lapse in time
- iii** the extent to which relevant evidence is no longer available due to the lapse of time
- iv** the gravity of the allegation
- v** the number of incidents alleged (as distinct from the gravity of the allegation itself): is there a pattern of misconduct or a single episode
- vi** the extent of any continuing unwarranted risk to the public and/or to public confidence in the medical profession, and
- vii** the extent to which the allegation has been ventilated before other public/adjudicatory bodies such as the police, the coroner, the criminal or civil courts, other regulatory bodies and the practitioner's employer and the outcome of that ventilation.

**42** Overall, the decision makers must consider all factors. They are likely to have a cumulative impact, with no single one being decisive; however, the following key factors are likely to be very important considerations:

- a** the gravity of the allegation
- b** the extent of any continuing unwarranted risk to the public and/or to public confidence in the medical profession, and

- c the potential for a just and fair hearing based on available evidence.

#### *The length of the relevant period (beyond the five years)*

- 43** It is relevant to consider the length of the relevant period and the extent of the delay beyond the five years. It cannot be said that a short delay beyond five years weighs in favour of the allegation proceeding; however, a long delay beyond five years will usually weigh against there being a public interest in the allegation proceeding.
- 44** If other factors below weigh in favour of the allegation proceeding, particularly the key factors, then decision makers should be cautious about concluding that it is not in the public interest overall for the allegation to proceed.

#### *The reasons for the lapse of time*

- 45** Decision makers should take into account the reasons given by the complainant for why the allegation was not made sooner. They should consider if there is any explanation for the delay to explain why no complaint was made over the whole period of delay. In doing so, they should consider all the relevant factors, including:
- a the extent of the lapse of time after the complainant knew or should reasonably have known the relevant/essential facts supporting the allegation
  - b whether there have been problems in clarifying the relevant/essential facts, and
  - c the extent to which the relevant/essential facts/evidence have been concealed by the practitioner or a third party
  - d the nature of the allegation(s) and the impact it may have on the complainant's ability to complain within the five-year period such as those involving traumatic events, and
  - e whether the maker of the allegation has protected characteristics<sup>20</sup> which have contributed to the delay.
- 46** It will be necessary to consider any particular vulnerabilities, language barrier or cultural issues and the impact these may have had on the timing of the making of the allegation. For example, if a complainant has a disability or was a child at the time that the alleged events took place.

<sup>20</sup> The nine protected characteristics under the Equality Act 2010 are: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

- 47** People will react differently to traumatic events such as experiencing sexual abuse and sometimes a 'trigger' event may prompt the complainant to make a serious allegation some years after the event(s) occurred.<sup>21 22</sup> These trigger events are logical reasons which may explain a delay in allegations being made. The explanation for delay might be prejudicial to the doctor against whom the allegation is made, but that is not in itself a reason for the allegation not to proceed in the public interest. Complainants may not know at the time of events that the actions or behaviour of a doctor would amount to misconduct or may be concerned about not being believed.
- 48** Decision makers should therefore exercise caution in deciding that the lapse of time on its own, or to a significant extent, weighs against waiver in the public interest in these types of cases.
- 49** At the five-year rule stage, decision makers should not decide whether the allegation is likely to be true and they should not assume that a prompt referral or equally a delay gives an indication of the truthfulness of the allegations.
- 50** Decision makers should be aware that complainants may not know that they do not need to collect all the necessary evidence prior to making a complaint; however, this is not a good reason for failing to make a complaint in a timely manner. For example, where they have waited for the conclusion of a civil claim arising out of the same facts.
- 51** Having made enquiries as to why the complaint was not made sooner, decision makers must not simply recite the explanation given in their decision. They must analyse it fully to establish what it means in the context of the five-year rule and the public interest test. Does it truly lend support to the waiver of the five-year rule?

*The extent to which relevant evidence is no longer available due to the lapse of time*

- 52** Often, at the point of considering the five-year rule, decision makers will not know all the details of what evidence will be available and they should not make assumptions about what may not be available. However, in some cases decision makers will be made aware of obvious evidential problems. Decision makers should ensure they identify anything already known to be absent before considering whether this might result in real prejudice to the doctor. Decision makers are not required to carry out a full evidence gathering process as this will come at a later stage. Where significant

<sup>21</sup> *A Report by Baroness Vivien Stern CBE of an Independent Review into how rape complaints are handled by public authorities in England and Wales*, Home Office, 2010, p29.

<sup>22</sup> *In the matter of the late Jimmy Savile*, report to the Director of Public Prosecutions by Alison Levitt QC, January 2013, para 191.

evidence needed to prove the allegation is absent it will rarely be in the public interest for the allegation to proceed.

**53** Relevant considerations for decisions makers might be:

- a** whether medical records or other documents will still exist. Decision makers are entitled to take a common-sense approach to NHS records retention, in line with the relevant NHS policy.
- b** whether the allegation will turn solely or largely on oral evidence (because no contemporaneous records were made). If it does, then decision makers should go on to consider what effect the delay is likely to have on the recollections of witnesses, including the doctor. Generally, the longer the delay, the more a witness' memory is likely to be affected. If they are unlikely to be able to remember key events, then this may mean that relevant evidence is no longer available.
- c** whether witnesses will be available to give oral evidence. If decision makers know that witnesses will not be available, then this means that their evidence is no longer available. For example, if they were deceased or could not be traced.

*The gravity of the allegation*

**54** Not all allegations received by the GMC are necessarily grave. Before considering the five-year rule, decision makers are entitled to dismiss an allegation<sup>23</sup>:

- a** on the ground that it is not an allegation; or
- b** which they consider to be vexatious.

**55** We receive a wide spectrum of allegations, from the less serious to the most serious, such as fraud, dishonesty, sexual misconduct, breach of confidentiality or serious failure to provide acceptable care<sup>24</sup>. Decision makers are entitled to have regard not only to the nature of the allegation(s) but also to the facts and circumstances which underlie them. In the context of the five-year rule test, it is likely to be the more serious allegations that proceed in the public interest and cases involving allegations relating to risks to patients and/or the public.

<sup>23</sup> Under rule 4(3)

<sup>24</sup> For guidelines on gravity, in the context of sanctions, see the GMC's Sanctions Guidance.

- 56** It is important to consider seriousness in the context of the types of complaints we receive and investigate, not the context of the expected standards. It may also be appropriate to consider the impact on the patient/complainant:
- a** guarding against proceeding with the allegation based solely on the individual's private interests
  - b** bearing in mind that the impact on a given individual may increase the public interest in a case being fully investigated.
- 57** The gravity of the allegation and consequences might mean that it is in the public interest for the case to be investigated, but decision makers will always have in mind the question of whether this can be justified in light of the lateness of the complaint. For example, the fact that there has been a tragic outcome does not mean that is necessarily in the public interest for the five-year rule to be waived because the outcome may not reflect the gravity of the allegation against the doctor.

*The number of incidents alleged (as distinct from the gravity of the allegation itself): a pattern of misconduct or a single episode*

- 58** It may be relevant to consider other allegations made by different people at different times against the same practitioner, but this will be dependent on the specifics of the cases. In the case of Gwyn, it was noted that when there are similarities between cases it is normally desirable that a single medical practitioners tribunal should hear all the available evidence. But it was also noted that this is not the five-year rule test and that it is the task of the case examiners, not the decision maker, to decide which allegations should reach a medical practitioners tribunal<sup>25</sup>. A similarity between two or more allegations does not in itself justify allowing a late allegation to proceed.
- 59** For example, the late allegation may be linked to existing allegations, all of which are already under our investigation. Investigating the late allegation may be the only way to give a full picture. However, this will depend upon the circumstances of the investigation. Not every allegation forming part of a series of linked allegations must proceed further.
- 60** If the practitioner already has a hearing before a medical practitioners tribunal, or has already been found to be impaired, there may be little public interest in pursuing a lower level (connected or unconnected) additional late allegation. Where an investigation into separate allegation(s) is well progressed, it will be necessary to consider very carefully whether the public interest warrants delay to that investigation to incorporate the new matter. The key is therefore balancing whether the public

<sup>25</sup> Gwynn, R (on the application of) v The General Medical Council [2007] EWHC 3145 (Admin)

interest demands that there be no further delay to the investigation, against whether that delay can be justified because the public interest demands that the late allegation proceed as it may make a difference to the outcome of the overall investigation. This may depend on:

- a** what (if any) interim order or other restriction is in place
- b** the stage which the existing investigation has reached
- c** the extent of any delay to the investigation which has occurred already
- d** the extent of any likely delay caused by considering the late allegation recently received
- e** an assessment of each allegation independently and a comparison to the allegations already being investigated, to assess whether:
  - i** the new allegation, although similar, adds significant weight to the case against the doctor (ie it is likely to make a difference to the outcome of any hearing)
  - ii** the new allegation raises a new issue which adds a different dimension to the case, which might justify a different outcome.

**61** It may assist decision makers to consider the type of allegation which has been made. An allegation of deficient professional performance will comprise of a composite allegation, evidenced by examples of specific failings. Allegations of misconduct are more likely to be separate matters. Decision makers should look at the number of allegations and consider whether there are common themes. Deficient professional performance is a standard of performance which is unacceptably low, as judged on a fair sample of the doctor's work. By contrast, a single act or omission will almost always fall to be considered as misconduct rather than deficient professional performance.

*The extent of any continuing unwarranted risk to the public and/or to public confidence in the medical profession*

**62** A key consideration here will be whether the practitioner is still practising within the relevant specialty or at all. If the allegation relates to an abuse of trust with a patient, then the doctor's specialty, their access to patients, the nature of their contact with patients and their working environment will be relevant factors to consider. If the allegation relates to an abuse of trust with a colleague, then the doctor's working environment will still be relevant.

- 63** In some cases, the doctor will have previous disciplinary history with us, either in the form of proven or unproven allegations. Not all will be relevant. Decision makers must guard against relying on unfounded allegations when seeking to quantify any continuing risk. However, in some cases they may consider previous allegations when determining the question of whether it would be in the public interest to proceed with the allegation. See the *Guidance for decision makers on when to take a doctor's fitness to practise history into account*.
- 64** When assessing continuing risk, decision makers should take into account any restrictions in place on the doctor's registration and whether this guards against the risk presented by the new allegation.
- 65** Decision makers should consider any continuing unwarranted risk to the public, for example a risk to patient safety if the allegation is not investigated or a risk to the public if the misconduct could be repeated. They should also consider any continuing unwarranted risk to public confidence in the profession if the allegation was not investigated.

*The extent to which the allegation has been ventilated before other public/adjudicatory bodies such as the police, the coroner, the criminal or civil courts, other regulatory bodies and the practitioner's employer and the outcome of that ventilation*

- 66** The question of previous investigation of an allegation will be relevant to the public's confidence in the profession. Normally, the more alternative ventilation there has been, the less compelling is the argument for us to consider the allegation. This will not be the case where:
- another body has made findings critical of the practitioner and/or
  - another body has recommended that we should become involved and/or
  - there is a perceived need to protect the public from a practitioner who continues to practise.
- 67** We should consider any decisions made by other agencies (such as the police or social services) who have already carried out an investigation into the allegation in question; however, our objectives and aims are different from those of other bodies. For example, it may be the case that a police investigation into a doctor's behaviour results in the Crown Prosecution Service giving advice that no further action should be taken. This does not, and should not, preclude us from carrying out our own investigation. Decision makers must establish the outcome of any alternative investigation/ventilation and the substantive reasons for that outcome. For example, if the police decided not to charge the doctor with any offence and to take no further action, why was that? It is important to bear in mind that the standard of proof in

criminal courts is beyond reasonable doubt, whereas the civil standard of proof (the balance of probabilities) applies in our proceedings.

## Seeking the views of the doctor

- 68** Decision makers do not have to seek the doctor's comments before making a decision as to whether or not the five-year rule is engaged and whether to waive the five-year rule. However, it may be appropriate to do so where there are reasonable grounds to believe that the doctor might provide relevant comment and/or information relating to the decision, rather than responding to the allegation in general. For example, a doctor may be able to provide documentation that is relevant to:
- a** the dates of the relevant events
  - b** whether the complainant was in a position to raise the allegation in a timelier way.
- 69** This is within the discretion of decision makers, and the fact that the doctor may have been able to provide further information does not mean that decision makers acted unreasonably in failing to obtain the doctor's comments before making a decision.

## Duty to notify/give reasons

- 70** Where decision makers make a decision under the five-year rule that an allegation should not proceed, they are required to notify both the doctor and the complainant (if any)<sup>26</sup>.
- 71** Where decision makers decide that the five-year rule is engaged they are required to give reasons for that decision and for their subsequent decision as to whether or not it is in the public interest for the allegation to proceed.
- 72** Where decision makers establish that the five-year rule is not engaged they should make a note of their decision making process, including the reasons for the decision. Although this decision will not be communicated to the doctor, it may be that in the future, the doctor asks for reasons for the decision that the five-year rule year is not engaged and we should be able to supply them. Clearly, decision makers only need to record these reasons where an allegation might be said to potentially raise an issue under the five-year rule. For example, if they need to decide whether there are a number of separate allegations which straddle the five-year period or whether there is one composite allegation.

<sup>26</sup> Rule 4(3)(b)

## Legal Advice

- 73** Decision makers should seek legal advice before finalising any decision:
- a** where they are unsure whether the five-year rule applies
  - b** or where there is a preliminary view that the five-year rule should be waived.

## Checklist

- 74** A checklist for decisions under rule 4(5) is available.

## Provisional enquiries

- 75** The provisional enquiries team carry out preliminary investigations<sup>27</sup> to confirm the nature of an unclear allegation or to establish whether a complaint is likely to amount to an allegation as defined by the rules<sup>28</sup>. Only if decision makers decide to promote an enquiry from the provisional enquiry team to a full investigation is there an allegation. If so, then decision makers will need to decide whether the five-year rule is engaged and if so, whether the five-year rule should be waived.
- 76** However, decision makers should consider whether an enquiry in the provisional enquiry team may, if it amounts to an allegation, engage the five-year rule. If it might, then whilst carrying out enquiries<sup>29</sup> into the nature of the allegation, decision makers should at the same time consider carrying out enquiries into factors relevant to the five-year rule. This will avoid the delay in having to make two sets of enquiries. For example, if a complainant raises a complaint which is unclear, and which also seems to be older than five years, then decision makers should ask the complainant for the reasons for the delay in bringing the complaint to our attention at the same time as asking for further information about the potential allegation. Or if the dates of the events are unclear then this should be clarified by the provisional enquiry team.

This was last updated in February 2020.

<sup>27</sup> Under rule 4(4)

<sup>28</sup> Rule 2

<sup>29</sup> Under rule 4