

## Part B – Assessing suitability for a Provisional Enquiry

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## Purpose

- 1 This guidance is intended to support decision makers in the Triage team to assess whether a concern is suitable for a provisional enquiry and should be passed to the PE team\*.
- 2 It firstly outlines general circumstances where a PE may be appropriate and circumstances where it may not. The guidance then provides a tiered approach to determining suitability which focuses on factors that may exclude a concern from the PE process. Where there are references to key factors, we mean things that are important to the decision maker's overall consideration of whether a provisional enquiry is appropriate. Decision makers should proceed through the tiered approach, answering the questions set out and following next steps.

## PE suitability – general circumstances

- 3 Generally, allocation to a PE stream will be suitable where one of the following applies.
  - a An allegation appears serious but the information we hold suggests aspects may be confused or based on a misperception or there may not be reliable evidence available to support it.
  - b An allegation relates to a single clinical incident or a single clinical concern.
  - c An allegation relates solely to a doctor's health and we need more information about their condition.
  - d An allegation which relates to the doctor's practice and/or conduct in a clinical setting arose during the Covid-19 pandemic and the circumstances of the pandemic are likely to be a key factor in explaining the doctor's actions

AND

  - e obtaining one or two discrete and easily obtainable pieces of information will clarify whether the concern raised amounts to an allegation that a doctor's current fitness to practise is impaired.

Allocation to a PE stream is also likely to be suitable if the doctor has raised a public interest concern and the referring organisation or person is, or is linked to or works for, the organisation about which the doctor raised concerns. A PE will be suitable in order to explore if independent corroboration of the allegations can be obtained and can require obtaining more detailed information than other types of PE.

\* Allocating a provisional enquiry to the correct stream is covered under [Part C](#) of the overarching guidance.

## PE unsuitability – general circumstances

- 4 A PE is likely to be unsuitable in the following general circumstances. These are explained in more detail later in the guidance.
- a We have clear information from the complainant that relates to probity issues or otherwise raises a question about the doctor's fitness to practise. For example, the concern relates to a type of case that carries a presumption of impaired fitness to practise such as violence or discrimination on the basis of a protected characteristic.
  - b The concerns are about a doctor's health but there is sufficient evidence to suggest their condition is being appropriately managed.
  - c The concerns are such that we would ordinarily close the case as they do not raise an issue of impaired fitness to practise.
  - d Where identical or very similar concerns are being raised to those already being investigated about the same doctor, it may be more appropriate to link the new complaint to the existing investigation, rather than deal with it as a separate provisional enquiry. In these cases, the decision maker should refer to the relevant section below on linked cases.
  - e The incident giving rise to the new concern(s) predates another concluded case about the doctor and the same concerns have already been determined by case examiners or a medical practitioners tribunal (MPT). A PE will be suitable however if the previous case related to similar concerns but was closed on an evidential basis or technicality without a full determination being reached. For example, a non-decision at triage.

If however the new information may necessitate a formal review of the previous case examiner decision or any rule 4 decision not to investigate, the decision maker should consider if it is appropriate to refer the original case to the Rule 12 team\*.

- f The concerns cannot be corroborated by independent evidence as the complaint is based on the complainant's word against that of the doctor. A PE will not generally be appropriate if there is no potential third party evidence available to support or refute the concern.
- g The concerns relate solely to systemic issues rather than allegations about a doctor's fitness to practise.

\* This guidance explains the criteria for a rule 12 review

## Tiered approach to suitability

- 5 Decision makers should follow the approach below to determine whether a concern is suitable for a PE. It sets out questions for decision makers to answer and then outlines the next steps depending on the outcome. A flow chart summarising the decision making process can be found [here](#).

### Is a question raised about a doctor's fitness to practise?

- 6 Decision makers should firstly consider whether or not the issues relate to an individual doctor's fitness to practise. For example, the enquiry should be closed and the complainant signposted to the appropriate body if they relate:
- i. solely to systemic issues such as resources or administrative processes within a healthcare organisation or;
  - ii. solely to a health condition that is being appropriately managed and is not affecting a doctor's fitness to practise such as where the doctor has successfully undergone detox for alcohol and is at low risk of relapse.
- 7 For a concern to be suitable for a PE, it should be capable of amounting to an allegation that the doctor's fitness to practise is impaired as set out in section 35C(2) of the Medical Act 1983\*. If there is enough information to close a matter at triage ie without access to the PE process we would otherwise have closed it because the information is not sufficient to raise an issue of impaired fitness to practise, the PE process should not be used to obtain more information or validate a closure decision.
- 8 The PE process is only suitable for those enquiries that, based on the available information, raise issues that are likely to meet the investigation threshold but obtaining further information may allow us to swiftly and safely conclude that no issue of current impairment is raised. This is because our enquiries have clarified an aspect of the allegation, confirmed that the allegation is not supported by evidence or confirmed that the risk of repetition is low.

### *Possible outcomes*

- If the concern clearly does raise a question about a doctor's fitness to practise and/or involves behavioural misconduct or probity issues → promote to an investigation UNLESS the doctor has raised public interest concerns. Where this is the case, proceed to the question below.

\*This is on the grounds of misconduct, deficient performance, a caution/conviction/determination, knowledge of English or adverse physical or mental health.

- If it appears, on the face of it, that a question is raised about a doctor's fitness to practise but further information is needed to clarify this → proceed to questions below.
- If the concern does not raise a question about a doctor's fitness to practise → close the enquiry.

### Is the allegation unclear?

- 9 Once it is established that the concern raised is about a doctor's fitness to practise, the decision maker should then ask if the specific details of the allegation are unclear. This could be in relation to details of the incident(s) being very vague or missing, for example dates, location or identification of individuals that were present.

#### *Possible outcomes*

- If the allegation is clear → proceed to the section below.
- If the allegation is unclear, we should use the further information process as set out in the triage manual to clarify if a PE is needed or if the enquiry can be closed. This would involve approaching the complainant to identify relevant doctors, obtain any missing documents or seek clarification of places and dates as third parties would not be contacted at this initial stage. If the decision maker has exhausted all options for obtaining further information from the complainant, an allegation that involves aspects that are confused or may be based on a misperception may still be suitable for the PE process. This will depend on the information that is potentially available from third parties regarding the specific circumstances of the concern and its seriousness. If there is no further information available to assess, the enquiry will usually be closed as a non-decision.

### Factors that may exclude an enquiry from the PE process

- 10 Once it has been established that a potential question is raised about a doctor's fitness to practise, there are a range of factors that may exclude an enquiry from the PE process. If one or more of these factors apply, the decision maker should promote or close the enquiry as it is not suitable for a PE.

#### Links to open cases – is there an open investigation about the same doctor?

- 11 Firstly, the decision maker should determine if there is an open investigation in respect of the same doctor. Where the matters raised in the new concern are identical or very similar to an existing case, it will usually be appropriate to promote it to an investigation and allocate it to the same Investigation Officer. A possible exception is where the doctor has raised public interest concerns and appropriate next steps in these enquiries should be considered on a case by case basis.

- 12** If the new allegations are unrelated to the existing case, the decision maker should consider the new concern on its own merit to determine whether it is suitable for the PE process.
- 13** Where a case is at a critical point eg it is about to go to a medical practitioners tribunal, or a tribunal has already started, it may not be possible to join the cases. If a new concern cannot be joined to an existing case, the decision maker must still consider the impact that the open case has on the current allegation. For example, it would not be appropriate to consider an allegation within the SCI PE or SCC PE process if we have an ongoing case that relates to clinical concerns raised by a different patient. However, if the new concerns arose during the Covid-19 pandemic a PE – Further Information may still be appropriate. Decision makers should assess whether the circumstances of the pandemic are likely to be a key factor in explaining the doctor’s actions, for example if the doctor was working outside of their speciality. Where this is the case, a provisional enquiry will be suitable. If the decision maker determines, once further information about the circumstances has been received, that they do not explain the doctor’s actions then the usual considerations set out above should be applied.

#### *Possible outcomes*

- If the new concerns are similar or identical to those in an open investigation the information should be referred to the case officer (be that an Investigation Officer or a Legal Adviser) for an Allegation of Impairment decision.
- If there is an open investigation relating to identical or very similar allegations, but it is not feasible to join the new enquiry to it ➡ proceed to the section below as the new enquiry may be suitable for the PE process. The decision on whether or not it should be joined to the open investigation will be made by a legal adviser or an AR in the Investigation team. Decision makers should bear in mind however that the open case may impact on the new enquiry’s suitability for some PE streams notably SCI and SCC.
- If there is an open investigation about the same doctor but the new allegations are unrelated ➡ proceed to section below.
- If there is not an open investigation about the same doctor ➡ proceed to the next section below.

#### *Previously concluded cases - have the matters raised in the new enquiry already been determined by case examiners or a medical practitioners tribunal?*

- 14** The decision maker should consider whether the matters raised have already been determined by case examiners or a medical practitioners tribunal. For example, they relate to identical allegations about the same patient or it is a new complaint about a doctor’s inappropriate use of a specific surgical technique but the doctor has already

since the events that led to the current concern remediated those same concerns through undertakings agreed after a performance assessment.

#### *Possible outcomes*

- If yes ➡ close the enquiry.
- If yes but the original case was closed with no action due to a lack of supporting evidence or another technicality ➡ proceed to the next section. If the previous investigation into the same concerns was closed at the rule 4 or rule 8 stage, it would be appropriate to consider whether it now meets the criteria for a rule 12 review.
- If the concern has not previously been determined by case examiners or a medical practitioners tribunal ➡ proceed to the next section.

*Availability of evidence - Is there independent evidence potentially available from a third party to support or refute the concern? This could include medical records and an expert opinion obtained through a provisional enquiry.*

- 15** The decision maker should consider whether there is independent evidence available to support or refute the facts of the raised concern. A PE will not be suitable if the only available information is the differing accounts of the complainant and doctor. This is because conflicts of witness testimony cannot be resolved through an initial enquiry.
- 16** A PE will also not be appropriate if the decision maker considers that the concern can only be resolved through establishing the credibility of the parties involved. An example of this is where the doctor denies being verbally abusive towards a patient and no witnesses were present.

#### *Possible outcomes*

- If no independent evidence is available to support or refute the concern or witness credibility is a key issue ➡ promote to an investigation.
- If independent evidence is available to support or refute the concern ➡ proceed to the next section.

### **Excluding factors which do not apply to all types of enquiry**

- 17** The last three factors which will exclude some concerns from being suitable for a provisional enquiry are seriousness, a doctor's fitness to practise history and whether the complaint or referral is multi-factorial and one of the elements meets the investigation threshold. These factors do not however need to be considered if:

- a we are aware the doctor has raised public interest concerns and independent corroboration of the allegations about their fitness to practise is needed
- b the information we hold suggests that aspects of the complaint may be confused or based on a misperception or there may not be reliable evidence to support it. Further information is needed to clarify whether a question is raised about the doctor's fitness to practise.

These enquiries may still be suitable for a PE even where there is a presumption of impairment or the doctor has a previous history of similar concerns.

### *Possible outcomes*

- If the doctor has raised public interest concerns or the information we hold suggests that aspects of the complaint may be confused, based on a misperception or there may not be reliable evidence to support it → proceed to [part C](#) to consider the criteria for the different streams and to allocate the enquiry to the appropriate one.
- Where the above does not apply → proceed to next section.

**Seriousness – is the allegation of such a serious nature that regulatory action is likely to be required even if the risk of repetition is low?**

- 18** The decision maker should consider whether the concern is so serious that, should it be proved, regulatory action is likely to be required even if there is a low risk of repetition. This is because failure to take action may impact on public confidence in the medical profession. This would apply to new concerns that carry a presumption of impairment eg there is an allegation the doctor has been violent towards a patient or behaved in a dishonest manner\*. New enquiries involving probity or criminal behaviour will usually be promoted straight to an investigation.
- 19** Although most concerns about clinical care will be suitable for a PE, there will be some that are so serious that it will be clear a full investigation is required, even though they may relate to a single incident.
- 20** In determining whether clinical concerns are so serious as to require an investigation, the decision maker should consider whether, even if satisfactory evidence of steps taken to attempt to remediate were to be provided by the doctor, the matters are not easily remediable and a finding of impairment may still be required. This would be consistent with our overarching objective to protect the public which includes

\* The full list of types of allegation with a presumption of impairment is sexual assault or indecency, violence, improper sexual/emotional relationships, knowingly practising without a licence, unlawfully discriminating in relation to characteristics protected by law, dishonesty and gross negligence or recklessness about a risk of serious harm to patients.

maintaining public confidence in the medical profession and proper professional standards and conduct for doctors. This principle is established in case law\* although it is likely to be engaged in only a small number of cases where the seriousness of the error, or disregard for patient safety, appears to be "truly, exceptionally bad." This should be judged by whether a matter would be likely to be viewed as such by a reasonable, fair-minded and informed member of the public.

- 21** Where decision makers consider that there is a likelihood that an error or disregard for patient safety could be considered "truly, exceptionally bad", a PE will not be suitable, and a full investigation should be opened. This may arise where the error was of an extremely serious nature or a doctor's actions were deliberately reckless.

#### *Possible outcomes*

- If the concern carries a presumption of impairment ➡ promote to an investigation
- If the concern involves alleged clinical failings which are of such a serious nature to be considered "truly, exceptionally bad" ➡ promote to an investigation.
- If the concern does not raise issues of such seriousness they require immediate investigation ➡ proceed to the next section below.

**Doctor's fitness to practise history - does this suggest a pattern of similar and persistent concerns about their fitness to practise indicating the new concerns are not suitable for a PE?**

- 22** A doctor's previous history should be taken into account when determining whether a current allegation is likely to meet the threshold for an investigation. The decision maker needs to establish if the new enquiry suggests a pattern of similar and persistent concerns about the doctor's fitness to practise. This would indicate that the new concerns are not suitable for a PE.
- 23** When considering a doctor's fitness practise history, decision makers should consult and follow the principles in our *Guidance for decision makers on when to take a doctor's fitness to practise history into account*.

#### *Clinical concerns*

- 24** Where a doctor has a history of fitness to practise (FTP) allegations relating to clinical failings, it is unlikely that new concerns of a similar nature will be suitable for consideration under the SCI PE or SCC provisional enquiry streams. For example, if action has previously been taken on a doctor's registration as the result of allegations

\* CHRE v NMC and Grant [2011] EWHC 927 (Admin)

which are similar in nature to those currently under assessment, then it is unlikely that the new enquiry can be viewed as a single clinical incident or a single clinical concern. A previous similar allegation, resulting in FTP action, may also mean that the current enquiry should be viewed in a more serious light as the repetition of concerns may indicate a lack of insight/remediation, and/or a pattern of failings. However, an exception to this may be where the new concerns arose during the Covid-19 pandemic. Decision makers should assess whether the circumstances of the pandemic may be a key factor in explaining the doctor's actions, for example if the doctor was working outside of their speciality. Where this is the case, a provisional enquiry will be suitable. If the decision maker determines, once further information about the circumstances has been received, that they do not explain the doctor's actions, then the usual considerations set out above should be applied.

### *Possible outcomes*

Having reviewed the doctor's fitness to practise history, is there a pattern of similar and persistent concerns about their fitness to practise indicating the new concerns are not suitable for a PE?

- Yes ➡ promote the enquiry to an investigation.
- No ➡ proceed to the next section below.

**Multi-factorial cases - Is it a multi-factorial case and one of the allegations meets the threshold for an investigation eg a health, performance or language assessment is needed?**

- 25** Finally, decision makers should consider whether the concern raised is multi-factorial. A PE will not be suitable in clinical cases where the non-clinical concerns, for example about the doctor's health or knowledge of English, meet the threshold for a full investigation without the need for provisional enquiries. This will usually be where a health or language assessment is needed.
- 26** Where a new concern includes both clinical practice and conduct allegations, the enquiry will not be suitable for a PE where the conduct concerns meet the threshold for a full investigation without the need for provisional enquiries. This includes where the conduct concerns are closely linked to clinical practice. For example:
- a** removal of life supporting treatment despite knowledge of a family seeking a court order
  - b** refusal to provide treatment due to a disagreement about lifestyle choices
  - c** subsequently amending a consent form after a procedure has taken place.

### *Possible outcomes*

- 27** If any aspect of a multifactorial complaint meets the investigation threshold without the need for provisional enquiries ➡ promote the enquiry to an investigation. If any of the allegations relate to the doctor's health, the investigation should be allocated to the Communications Investigation Team (CIT.)
- If the answer is no ➡ the enquiry is suitable for a PE.

### **Next steps for enquiries with no excluding factors**

- 28** If none of the above exclusions apply, then the enquiry is likely to be suitable for a PE if it also satisfies the criteria for one of the streams and (with the exception of PIC PE) it is feasible to obtain the evidence needed through targeted and limited enquiries.
- 29** Decision makers should now proceed to [part C](#) to consider the criteria for the different streams and to allocate the enquiry to the appropriate one.