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## Guidance for decision makers on Rule 4(5)

### Introduction

1. Under s.35CC(5) of the Medical Act, an allegation which is more than five years old will only be investigated by the GMC where it is in the public interest to do so. Rule 4(5) of the General Medical Council (Fitness to Practise) Rules 2004 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.'*

2. The function of the Registrar at the Rule 4 stage is to act as a preliminary filter, ensuring that cases are referred appropriately. The Registrar has no power to refer a case to the Case Examiners, if more than five years have elapsed between the most recent events giving rise to the allegation and the time the allegations is first made or comes to the GMC's attention, unless he considers that it is in the public interest for it to proceed.
3. This rule therefore provides an important safeguard which sets a general prohibition against the pursuit of long-delayed complaints, subject to the public interest exception.
4. This document is intended to assist decision makers in applying rule 4(5) by setting out the principles relevant in determining:
  - a. Whether more than five years had 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.
5. Only allegations as defined by s. 35C(2) and rule 2 will fall to be considered under this guidance. Rule 2 defines an allegation as:

*'an allegation that the fitness to practise of a practitioner is impaired and includes an allegation treated as arising by virtue of section 35CC(3) of the Act and an allegation relating to a person whose registration is suspended'*

Other complaints will be closed under rule 4(3). It may be necessary to conduct rule 4(4) enquiries to establish whether there is such an allegation.

6. Determining whether rule 4(5) applies is a question of applying the legal framework to the facts. Deciding whether to waive the rule is a matter of judgment for the Registrar (or those to whom he delegates his powers under this rule).
7. The guidance in this document will apply to the application of Rule 4(5) in cases where the allegation is received or otherwise comes to the attention of the GMC on or after **31 December 2015**.
8. Where an allegation has been received prior to **31 December 2015**, but the decision under rule 4(5) is made after that date, the old test will apply and decision makers should refer to the old [\*Five Year Rule Guidance: Aide Memoire\*](#) (dated May 2010). If an allegation was received before 31 December 2015, but the decision as to whether rule 4(5) is engaged falls to be reviewed after this date (see paragraphs 31-32 below), then again the old test will apply.
9. This is a living document which will be revised periodically.

## Calculating the time which has elapsed

### The date the allegation was made or came to the attention of the GMC

10. The first task for the Registrar under rule 4(5) is to establish with precision the date when the allegation was made to the GMC or otherwise came to the attention of the GMC. In most cases, this will be straightforward. The key points are:
- a. The allegation can only come to the GMC's attention once the Registrar has sufficient information to decide that there is an allegation under rule 4(2). Notice of an unspecified complaint against a doctor (for example in an employer response or a complaint from a member of the public) would not be sufficient to decide whether there is an allegation.
  - b. If the allegation is made by a patient, a patient's representative or some public organisation then the date the allegation was received will be usually be clear. Provided it is clear from the original complaint that there is an allegation (which can be triaged under rule 4(2)) then the relevant date will be when that complaint was received. If further information needs to be requested from a complainant or referrer in order to establish whether there is an allegation which can be triaged, then the relevant date will be when we receive the information which allows us to make a decision under rule 4(2).
  - c. If an allegation comes to the GMC's attention indirectly: for example, through media coverage, then the date of publication will usually be the date it comes to the GMC's attention, provided the publication contains enough detail for us to make a decision under rule 4(2).
  - d. If a potential allegation is referred to the Rule 4(4) Provisional Enquiries ('PE') team, then this must come to the GMC's attention once we have enough information to know that there is an issue we wish to investigate in the PE team.

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

11. The Registrar must then go on to identify the 'most recent events giving rise to the allegation' and the date when those events occurred. This involves analysing the nature of the particular allegation in question.
12. Where the allegation arises from a single incident, identifying the 'most recent events' will be straightforward – there is only one incident.

13. However, the exercise is more complex where the complaint raises a series of separate but linked events which straddle the five year deadline. Depending on the circumstances, rule 4(5) may or may not be engaged. For example, an allegation that a practitioner has regularly failed to complete child abuse forms for the last 12 years does not engage rule 4(5) because the 'most recent events giving rise to the allegation' are well within the five year deadline. There is a single composite allegation made at the same time by the same person/body, of identical and persistent misconduct, although evidenced by many events in relation to different patients. Where, as in this example, a number of allegations are considered to form a composite whole allegation, and the latest event has a relevant period (see paragraph 21) of less than five years, the composite allegation will be considered as 'in time' by reason of the continuing nature of the events. Therefore the matters will not be considered under rule 4(5). In such a case it is important that the GMC has a full and informed view of the whole course of conduct, even though some of it occurred more than five years before the allegation was made.
14. Conversely, distinct allegations may be made in relation to discrete incidents involving the same practitioner. For example, one allegation of failure to provide an acceptable level of treatment/care and another of dishonesty on a different occasion in relation to a different patient. Each such allegation has to be considered separately for the purposes of rule 4(5). It is possible for one allegation to fall inside and another outside the five year deadline, even if made by the same person at the same time, against the same practitioner.
15. A single complaint document could contain more than one distinct allegation. The Registrar needs to be aware of this possibility and to pinpoint the allegation(s) in question before applying rule 4(5). The same applies to different allegations which rely on distinct grounds within section 35C(2) of the Act.
16. It is impossible to give guidance on all the possible scenarios that may arise. Where there are a number of incidents with a relevant period around five years, the Registrar should seek to identify the extent to which the alleged events are linked by common features and ought reasonably to be regarded as a composite whole. The more they are, the more appropriate it will be for them to be considered together under rule 4 (5). The less they are, the more it will be appropriate for them to be considered separately under the Rule 4(5) rule. The key factors to be considered are:
- a. the similarity of, and/or connections between the matters alleged;
  - b. the timing and maker of the allegation;
  - c. 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
  - d. the nature of the alleged events.

17. The greater the similarity, the more likely it is to be regarded as a course of conduct giving rise to one composite allegation. It is more likely to be regarded as a single composite allegation if made in one document by one NHS trust than if made by a number of patients over time.

18. If the allegation relates to multiple clinical failings, then the Registrar 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.

This decision 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 to assist with this and the legal team can be asked for advice on whether rule 4(5) is engaged.

19.

- a. It is not uncommon for more than one allegation of indecency to be raised against a doctor. For example, a further complainant contacts the GMC during the course of an existing investigation because s/he has been prompted or emboldened by media coverage to come forward to complain of indecency occurring more than five years earlier. Although there may be a close factual similarity between the episodes of alleged misconduct eg they may both be about inappropriate breast examinations, the allegations are made at different times by different patients in respect of different incidents. The later allegation should be considered separately to the existing allegation and assessed immediately to consider:
  - i. if it amounts to an allegation under rule 4(2);
  - ii. under Rule 4(5), whether the five year rule is engaged; and if so,
  - iii. whether the five year rule should be waived.

b. This is to avoid unfairness because if the later allegation were the only complaint received, the application of rule 4(5) is likely to result in the matter being closed. Whereas if the more recently received complaint were to be considered as one allegation along with the matters already being investigated, the practitioner would be deprived of the protection of rule 4(5) simply because another similar complaint has been made.

c. 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, either at the rule 7 or rule 15 stages.

20. Alternatively the Registrar may have to consider an allegation where the principal incident occurred more than five years before the allegation was made but some later incident is said to be an aggravating or relevant factor.

- a. For example, where, following 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.
  - 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, then these later events would be the latest events giving rise to the allegation.
- b. Or, suppose 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**

21. The relevant period is the period between the actual date the alleged events took place and the date the allegation was made. The Registrar is therefore required to identify the actual date upon which the events in question occurred or get as close to it as possible, not simply the date upon which the events are alleged to have occurred.
22. In establishing the actual date, the Registrar is entitled to take an allegation at face value. The fact that a given date is named in the allegation is prima facie evidence that that was the actual date. Only where there is reasonable room for doubt is the Registrar obliged to carry out further investigations. The Registrar is not required to double check the details given in every allegation and nor is he obliged to seek the doctor's views.
23. The question for the Registrar is whether there is anything to put him on notice that the date(s) given in the allegation are not correct. The Registrar should not proceed on the basis that the dates are as alleged, if the allegation is plainly flawed or there is some other good reason to take a different approach (if for example

there has already been an investigation into the allegation, which concluded that the allegation was unfounded).

### **The Power to carry out investigations**

24. Prior to referring a case to the case examiners, the Registrar has a power under Rule 4 (4) to carry out provisional enquiries . A Registrar might require further investigations to be carried out which would help him to determine, for example:
  - a. whether rule 4(5) 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;
  - d. the length of the relevant period .
25. In some cases, the date upon which the alleged incident(s) took place will be clear from the face of the allegation, with no cause for doubt. If so, the Registrar can simply note the date.
26. Alternatively, the allegation may lack clarity or even be silent as to the relevant date(s). There may be some inconsistency within the information available to the Registrar about the date(s). If so, the Registrar should make enquiries with the complainant or an appropriate third party to confirm the relevant date(s). A failure to carry out such investigations would be unreasonable.
27. In some cases, the dates given are close to the five year limitation period. If the Registrar feels satisfied that it is clear the relevant date falls one side or another of the five year period, s/he can exercise his discretion not to carry out any further investigations.
28. If it is not clear from the face of the allegation whether (each or any) of the alleged incident(s) occurred before or after the cut-off, the Registrar should seek to clarify the relevant dates with the complainant or an appropriate third party or obtain evidence which will assist with this eg medical records.

### **The relevant period**

29. Once the Registrar has established both the date of the allegation and the actual date of the most recent events giving rise to the allegation, the period which has elapsed between the two should be calculated. This is the 'relevant period'. If the relevant period is five years or less, no issue arises under rule 4(5) and the remainder of this guidance has no relevance to the case.

30. If the relevant period is more than five years, the Registrar must consider rule 4(5), with reference to the guidance set out below.

### **Revisiting decisions as to whether Rule 4(5) is engaged**

31. Calculating the relevant period and whether rule 4(5) is engaged is a matter of objective fact. Where the Registrar has reached a decision on this which later transpires to have been founded on a mistake as to the underlying facts, he has power to correct the error. This power may arise at any stage of the fitness to practise investigation. For example, a doctor's Rule 7 response or close examination of the evidence by the Case Examiner may reveal a discrepancy as to the dates. In such circumstances, the Registrar must reconsider whether Rule 4(5) is engaged.

32. This power to revisit the decision 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 a decision has been made.

## Applying Rule 4(5): the substance of the decision

### The test

33. Rule 4 (5) sets out that where the relevant period is greater than five years, the allegation shall not proceed further unless the Registrar considers that it is in the public interest for it to proceed. The Registrar 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 stale it may be. The relevant question here is **'does the public interest warrant this allegation being proceeded with, despite the fact it is late?'**

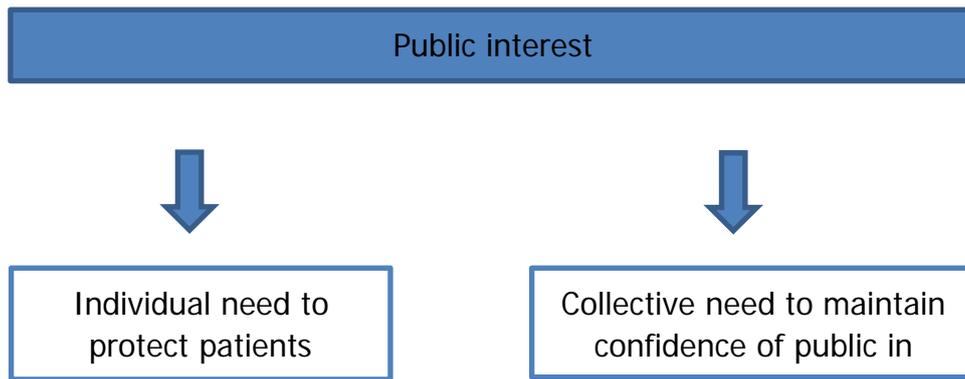
34.

- a. Rule 4(5) requires analysis of competing considerations.
  - i. On the one hand, a reasonable time should be allowed for allegations to emerge (and what is reasonable will vary from case to case).
  - ii. On the other hand, practitioners should not be pursued by moribund allegations.
- b. The decision depends on the Registrar's discretionary judgment, informed by his experience and expertise. Even if some public interest circumstances are present, it is not inevitable that the allegation should proceed. For this reason it is necessary for the Registrar to identify and analyse the particular public interest factors which apply in a given case.

### The Public Interest

35. The public interest has two elements: the particular need to protect individuals and a collective need to maintain the confidence of the public in their doctors<sup>1</sup>. It is well established that there is an important distinction between what is in the public interest, and what is interesting to the public or subject to public clamour especially in the media.

<sup>1</sup> Merrison report



36. The principles of the over-arching objective are closely related to the term “public interest”: striving to achieve the objectives set out within the over-arching objective is in “the public interest”. A helpful first step in assessing whether the rule 4(5) test is met is to measure whether investigating the allegation would assist in achieving the over-arching objective.

37. The general rule is that where the relevant period is more than five years, an allegation will not be investigated. However, the primary focus of the GMC will always be the protection of the public, in keeping with the over-arching objective. 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.

38. The decision under rule 4(5) requires a balancing exercise to be carried out between:

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

A person facing a stale allegation may be significantly disadvantaged in defending himself: the extent of that disadvantage *may* mean that it is not in the public interest for the five year rule to be waived.

39. The Registrar will need to determine whether it will be possible to have a fair and just inquiry in which it will be possible to fairly resolve the issues raised by the allegations. An inquiry into the facts of an allegation dating back more than five years will be one which is disadvantaged by the passage of time. The Registrar must weigh up whether the nature of the late allegation is such that it justifies a decision to proceed, notwithstanding the fact that it will almost always be harder for the Case Examiner to assess the case and for the MPT to determine accurately whether the allegation is proved on the balance of probabilities.
40. The best way to protect public confidence in the system as a whole is for matters to be investigated as quickly as possible. In an ideal situation, an allegation would be investigated and resolved as close in time to the facts as alleged as possible. This maximises the chances of the Case Examiners or the MPT finding the truth. Public confidence in the process must inevitably be challenged where matters are dealt with a long time after the alleged matters. The Registrar must ask whether the nature or seriousness of the allegation justifies waiving the five year rule. Applying this test will allow the Registrar to act in accordance with the true public interest in a given case.
41. In exercising their discretion the Registrar should take into account a range of considerations such as those listed at paragraph 42 below. The weight to be attributed to each of these is to be assessed by the Registrar on a case by case basis. It may be that one or more of the considerations below is not a material factor in a given case. Furthermore this is not an exhaustive list and the Registrar should ensure that he has taken into consideration all the relevant factors in the particular case. However, they will usually be the most significant factors and so the Registrar should check their decision to make sure they have considered each of them carefully.
42. As a starting point, the Registrar should take into account the following matters:
- 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
  - 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

## The reasons for the lapse of time

43. The Registrar should take into account the extent to which the maker of the allegation can be criticised for not making it sooner. Does any explanation for delay explain why no complaint was made over the whole period of delay?
44. Consider all of 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 complainant does not need to collect together all the necessary evidence prior to making a complaint, but this may not be known to them.
  - e. Waiting for the conclusion of a civil claim arising out of the same facts is not a good reason for failing to make a complaint in a timely manner.
45. The Registrar should consider whether the maker of the allegation has protected characteristics which have contributed to the delay. 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. This will sometimes require the Registrar to think about the nature of the allegation itself. It would be wrong for the Registrar to decide that a case should not proceed, solely on the basis of delay caused by a factor of this type.
46. Having made enquiries as to why the complaint was not made sooner, the Registrar must not simply recite the explanation given to him in his decision, but analyse it fully to establish what it means in the context of rule 4 (5) 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**

Often, at the rule 4(5) stage, the Registrar will not know all the details of what evidence will be available and he should not make assumptions about what may not be available. However, in some cases the Registrar will be made aware of obvious evidential problems. In all cases the Registrar should ensure that he identifies anything already known to be absent before considering whether this might result in real prejudice to the doctor. Plainly the Registrar is not required to carry out a full evidence-gathering process as this will come at a later stage. If the Registrar knows that significant evidence needed to prove the allegation is absent, then it will rarely be in the public interest for the allegation to proceed.

47. Relevant considerations might be:

- a. whether medical records or other documents will still exist – though the Registrar is entitled to take a common sense approach to NHS records retention, in line with the policy;
- b. whether the allegation will turn solely or largely on oral evidence (because no contemporaneous records were made);
- c. whether witnesses will be available to give oral evidence.

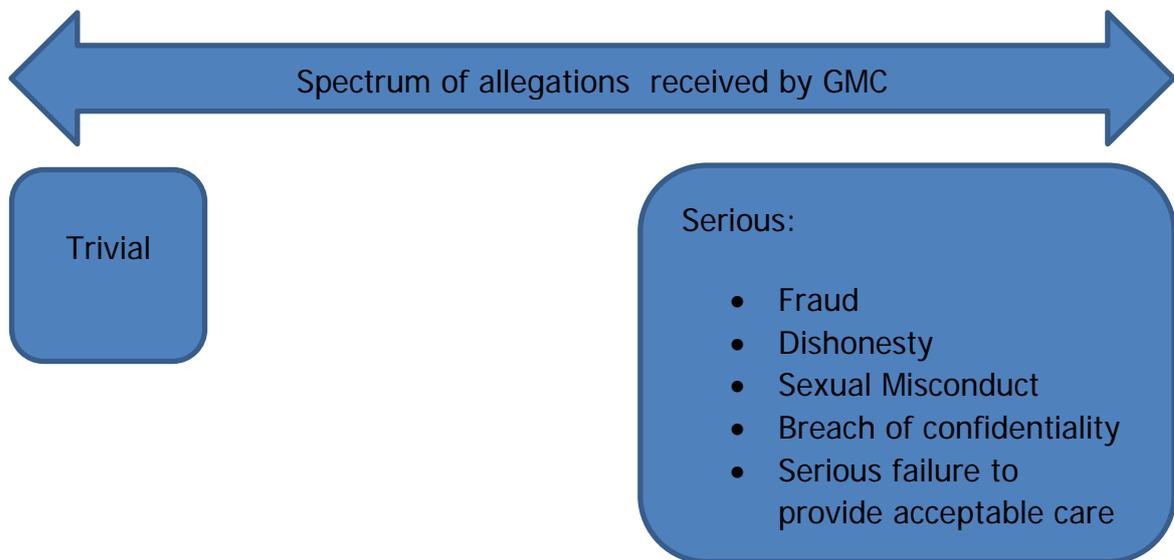
## **The gravity of the allegation**

48. Not all allegations received by the GMC are necessarily grave. Before considering rule 4(5), the Registrar is entitled to dismiss an allegation: (under rule 4(3))

- a. on the ground that it is not an allegation within the meaning of rule 4
- b. which he considers to be vexatious.

49. The GMC receives a **wide spectrum of** allegations, **from the less serious to the very grave**<sup>[1]</sup>. The Registrar is entitled to have regard not only to the nature of the allegation/s but also to the particular facts and circumstances which underlie them. In the context of the rule 4(5) test, **it is likely to be the more serious allegations that proceed in the public interest and in particular cases involving allegations relating to risks to patients**

<sup>[1]</sup> For guidelines on gravity, in the context of sanctions, see the GMC's Sanctions Guidance. See also *P* [15 onwards].



50. It is important to consider seriousness in context- not the context of the expected standards, but the context of the types of complaints received and investigated by the GMC. 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. but bearing in mind that the particular impact on a given individual may increase the public interest in a case being fully investigated.

51. The gravity of the allegation (and consequences) might mean that it is in the public interest for the case to be investigated, but the Registrar 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.**

52. Sometimes, it will also be relevant to consider other allegations made by different people at different times against the same practitioner; but not always. In the case of *Gwynn* Mr Justice Sullivan 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 he also noted that this is not the rule 4(5) test and that it is the task of the Case Examiners (not the Registrar) to decide which allegations should reach a medical practitioners tribunal. So a similarity between two or more allegations does not in itself justify allowing a late allegation to proceed.

53. For example, the late allegation may be linked to existing allegations, all of which are already under investigation by the GMC. Investigating the late allegation may be the only way to give a full picture. However, this will depend upon the circumstances of the particular investigation. Not every allegation forming part of a series of linked allegations must, necessarily and regardless of other factors, be allowed to proceed further.

54. If the practitioner is already about to face serious allegations before a Medical Practitioners Tribunal, or has already been found to be impaired, there may be little public interest in pursuing a very minor (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 in order to incorporate the new matter. The key is therefore balancing whether the public 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 and the extent of any delay caused by considering the late allegation recently received
- c. 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.

55. It may assist the Registrar 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. The Registrar 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**

56. A key consideration here will be whether the practitioner is still practising within the relevant specialty or at all.

57. In some cases the doctor will have previous disciplinary history with the GMC, either in the form of proven or unproven allegations. Not all will be relevant. The Registrar must guard against relying on unfounded allegations when seeking to quantify any continuing risk. However, in some cases the Registrar may consider previous allegations when determining the question of whether it would be in the public interest to proceed with the allegation. Relevant considerations here will include:

- a. the nature of any such allegations,
- b. any similarities or common features,
- c. whether they appear to create a pattern of behaviour,
- d. whether they were proven or unproven.
- e. what steps were taken in respect of unproven allegations and why. It may be necessary for a closed allegation to be revisited under rule 12 which is a separate decision for the Registrar.

58. When assessing continuing risk, the Registrar 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

**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.**

59. 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 the GMC to consider the allegation. Of course this will not be the case where:

- another body has made findings critical of the practitioner and/or
- another body has recommended that the GMC should become involved and/or
- there is a perceived need to protect the public from a practitioner who continues to practise.

Like other regulators, the GMC should take into account 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 the objectives and aims of the GMC are different to those of other bodies. For example it may be the case that a police investigation into a doctor's behaviour results in the CPS giving advice that no further action should be taken. But this does not and should not preclude the GMC from carrying out its own investigation. The Registrar must establish the outcome of any alternative investigation/ventilation and also the substantive reasons for that outcome eg 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 GMC proceedings.

## **Key factors**

60. The following are likely to be very important considerations:

- a. the gravity of the allegation; and
- 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.

61. Overall though, the considerations above are likely to have a cumulative impact, with no single one being decisive. The Registrar's reasons should refer to the wording of rule 4(5) (without paraphrase) and identify the public interest factors which lead to the conclusion that the five year rule should or should not be waived.

## Seeking the views of the doctor

62.

- a. The Registrar is not under a duty to seek the doctor's comments before making a decision as to whether or not Rule 4 (5) 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:
  - i. the dates of the relevant events
  - ii. whether the complainant was in a position to raise the allegation in a more timely way.
- b. This is within the discretion of the Registrar, and the fact that the doctor may have been able to provide further information does not mean that the Registrar has acted unreasonably in failing to obtain his comments before making a decision.

## Duty to notify/give reasons

63. Where the Registrar makes a decision under Rule 4(5) that an allegation should proceed, s/he is required to notify both the doctor and the complainant (if any) (rule 4(3)(b)).

64. Where the Registrar decides that rule 4(5) is engaged (that is, decides that the relevant period is more than five years) s/he is required to give reasons for that decision and for the subsequent decision as to whether or not it is in the public interest for the allegation to proceed.

65. As a matter of good practice, where the Registrar determines that Rule 4(5) is not engaged (that is, decides that the relevant period is not more than five years), he should make a note of the 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 Rule 4(5) is not engaged and the GMC should be able to supply them. Clearly, the Registrar only needs to record these reasons where an allegation might be said to potentially raise an issue under rule 4(5), for example if the Registrar needs to decide whether there are a number of separate allegations which straddle the five year period or whether there is one composite allegation.

## Legal Advice

66. The in-house legal team are available to advise on any decision:
- a. as to whether rule 4(5) applies
  - b. or where there is a preliminary view that the 5 year rule should be waived.

## Checklist

67. A checklist for decisions under rule 4(5) is available [here](#).

## Rule 4(4) Provisional Enquiries team

68. The Rule 4(4) Provisional Enquiries ('PE') team carry out preliminary investigations to confirm the nature of an unclear allegation or to establish whether a complaint is likely to amount to an allegation as defined by rule 2. The Registrar should still make decisions in the order described at paragraph 5 above. Only if the Registrar decides to promote an Enquiry from the PE team to a full investigation is there an allegation. If so, then the Registrar will then need to decide whether rule 4(5) is engaged and if so, whether the five year rule should be waived.
69. However, the Registrar should consider whether an Enquiry in the PE team may, if it amounts to an allegation, engage rule 4(5). If it might, then whilst carrying out investigations under rule 4 into the nature of the allegation, the Registrar should at the same time consider carrying out investigations into factors relevant to rule 4(5). This will avoid the time wasted in having to make two sets of enquiries with a party. For example, if a complainant raises a complaint which is unclear and which also seems to be older than five years, then the Registrar 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 PE team.