

Supplementary guidance on assessing concerns based on police cases resulting in acquittal or a decision not to proceed to trial

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Introduction

1. The Regulator will sometimes receive information about a doctor's behaviour or performance which, in substance, is the same as criminal charges which have resulted in an acquittal at trial, or which could have formed the basis of a criminal charge but have not proceeded to trial for any reason. This could be because of a police decision to take no further action or a decision not to prosecute, to withdraw or discontinue proceedings, or to offer no evidence at trial.
2. There is nothing stopping the Regulator from deciding whether regulatory action is required in respect of the same substantive matter that has resulted in an acquittal at trial because of the 'double jeopardy' rule, by which no one should be put at risk of being convicted twice in a court of competent jurisdiction. This has no application to regulatory proceedings. Although it is not inherently unfair or abusive to consider whether regulatory action is required in respect of the same conduct that has resulted in an acquittal at trial, this does not mean that there will not be circumstances in which it may well be unfair to proceed*.
3. A decision to take regulatory action and criminal proceedings serve different purposes. The purpose of regulatory action, which might result in restrictive action on a doctor's registration, is not to punish a doctor for wrongdoing, but to protect the public.
4. References made to 'public protection' throughout this document refer to the Regulator's legal duty to protect the public which is split into three distinct parts[†]. It means that the Regulator must act in a way that:
 - protects, promotes and maintains the health, safety and wellbeing of the public
 - promotes and maintains public confidence in the profession
 - promotes and maintains proper professional standards and conduct for members of the professions.

Protecting the public		
protect, promote and maintain health, safety and wellbeing	promote and maintain public confidence	promote and maintain professional standards and conduct

* R (Redgrave) v Commissioner of the Metropolis [2003] 1 WLR 1136; R (Phillips) v General Medical Council [2004] EWHC 1858; Sacha –v- General Medical Council [2009] EWHC 302; R (Sinha) v General Medical Council [2009] EWHC Civ 80; Bhatt v General Medical Council [2011] EWHC 783; Ashraf v General Dental Council [2014] EWHC 2618.

[†] Section 1(1A) Medical Act 1983.

The publication [Decision making principles in fitness to practise \(Doctors\)](#) explains this legal duty in more detail.

5. Just because the police (or another prosecuting authority) have decided not to proceed with a criminal matter against a doctor does not mean that the Regulator is prohibited from considering information received that might suggest that the doctor's fitness to practise is impaired.
6. Where the information received is serious enough to give rise to a question of impaired fitness to practise that can, and should, be considered by the Regulator, an investigation will be opened to fully assess the concern. At the end of the investigation, the case examiners will apply the realistic prospect test to decide the outcome*. To do this they will refer to the guidance [Deciding the outcome of an investigation \(Doctors\)](#).
7. The purpose of this *Supplementary guidance on assessing concerns based on police cases resulting in acquittal or a decision not to proceed to trial* is to support the case examiners reach fair and consistent decisions when deciding whether the realistic prospect test is met where the concern is based on the same information from a police case that resulted in acquittal or a decision not to proceed to trial.

* Where the case examiners do not agree, the matter is decided by the Investigation Committee. References to the case examiners in this guidance should be read as also applying to the Investigation Committee.

The realistic prospect test

8. The test that is applied at the end of an investigation is the realistic prospect test. Further information about the test and how it should be applied is in the guidance [Deciding the outcome of an investigation \(Doctors\)](#).
9. The case examiners may have information before them which is different to that presented in a criminal court, because different rules of evidence apply, and different approaches may be taken to the question of admissibility, which is likely to be applied more strictly in a criminal context given that the defendant's liberty is at stake. In addition, the standards of proof are different. In the criminal courts a jury has to be satisfied "beyond reasonable doubt". A decision to take regulatory action is decided on the "balance of probabilities." As different standards of proof apply, there is no incompatibility in the Regulator seeking to prove a disciplinary matter to the civil standard where there has been an acquittal on the criminal standard of proof.
10. In addition, a criminal offence, for example sexual assault, may be linked to wider professional concerns in respect of a failure to obtain consent, offer a chaperone or privacy, or to record an examination in the patient's medical records. An acquittal or decision not to proceed in relation to the criminal offence is likely to have little or no bearing in assessing whether the doctor poses any current and ongoing risk to public protection when considering wider concerns relating to their professional practice.
11. The same principles apply to matters which could have formed the basis of a criminal charge, but which have not proceeded to trial.

Is the realistic prospect test met?

12. To reach a decision on whether the realistic prospect test is met, case examiners will consider:
 - Has the concern been sufficiently evidenced?
 - Does the doctor pose any current and ongoing risk to one or more of the three parts of public protection?
13. An acquittal or decision not to proceed to trial does not necessarily indicate that a doctor does not pose any current and ongoing risk to public protection requiring restrictive action in response.
14. However, the fact that the doctor has been acquitted at trial in respect of the same behaviour, or that the matter has not proceeded to trial, is a relevant factor to which the case examiners must have regard when considering whether concerns against a doctor have been sufficiently evidenced, and therefore satisfy the evidential limb of the realistic prospect test.
15. When considering whether a concern has been sufficiently evidenced, the case examiners should consider the quality of the evidence relied upon to inform criminal proceedings and whether the Regulator is proposing to rely on the same evidence.
16. Where the Regulator is proposing to rely on the same evidence, the case examiners will need to carefully consider the basis and reasons for the acquittal or the decision not to

proceed to trial. This will require careful analysis of the police file or, where a matter has proceeded to trial, the prosecution file and any transcripts and the trial judge's summing up and directions to the jury.

- 17.** When considering the impact of an acquittal, or the decision not to proceed to trial, case examiners should note that:
- there is only one civil standard of proof and that is proof on the balance of probabilities which is the relevant standard in regulatory proceedings
 - the inherent improbability of an event having occurred will be a relevant factor when deciding whether it did in fact occur. As a result, proof of an improbable event may require more cogent evidence than might otherwise be required
 - the seriousness of the concern, or the consequences to the doctor of finding it proved to the civil standard, does not necessarily affect the likelihood of it being true and does not therefore justify a requirement of more cogent evidence.*
- 18.** Where the transcripts and the judge's summing up indicate that the credibility of one or more key witnesses has been significantly undermined then that is likely to affect whether the realistic prospect test is satisfied. However, where the evidential basis to support the concern remains relatively intact, the case examiners may be satisfied that there is a realistic prospect of the concern being proved at a medical practitioners tribunal (MPT) hearing, even if it was not proved to the criminal standard.
- 19.** Where the acquittal or decision not to proceed is reached on technical or procedural grounds, it may have little bearing on the prospect of impairment being found by an MPT. Where, however, the police decide not to prosecute because they consider the concerns lack substance, or the prosecution evidence discloses no case to answer, or the doctor is acquitted after full consideration of the evidence at trial, such an outcome may well affect the prospect of impairment being found by an MPT.
- 20.** If the Regulator is relying on additional evidence that was not previously available to police or prosecutors that may also impact on case examiners' consideration of the realistic prospect test and whether it is met. The realistic prospect test may be met where:
- a key witness was unwilling or unable to give evidence in the criminal proceedings but are willing or able to attend a hearing before an MPT, and / or
 - the Regulator has obtained new expert evidence that indicates the doctor's behaviour was not clinically indicated and may have been sexually motivated.
- 21.** The case examiners should only assess whether a doctor poses any current and ongoing risk in relation to concerns where they are satisfied that the concern(s) has been sufficiently evidenced i.e. that there is a realistic prospect of the concern(s) being proved.

* These principles derive from [Jones v Birmingham City Council \[2023\] UKSC 27](#)

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- 22.** When assessing risk, the case examiners' assessment of the quality and reliability of the evidence will inform their assessment of the seriousness of the concern(s) about the doctor's behaviour, performance and / or the impact of a health condition on their ability to practise safely and effectively.
- 23.** Where a concern is serious enough to give rise to a question of impaired fitness to practise and falls at the higher end of the spectrum of such matters, there is likely to be a greater public interest in proceeding with regulatory action, notwithstanding the failure of any underlying criminal prosecution.