Guidance for decision makers on assessing the impact of health in misconduct, conviction, caution and performance cases

Introduction

1 This guidance aims to help decision makers make fair and consistent decisions in misconduct, conviction or caution, and performance cases that would otherwise meet the realistic prospect test (RPT), where a health condition is a contributory factor.

2 A health condition may explain, or provide a reason for, poor performance, misconduct or behaviour leading to a conviction or caution. In some cases it may be possible to address the allegation of misconduct or poor performance that would otherwise meet the RPT by dealing solely with the health condition and without taking specific action in relation to the misconduct or performance issue.

3 To do so, three factors must be present.

a Cogent evidence that a doctor’s health condition is linked to the allegation of misconduct or poor performance and;

b Where the doctor has a pre-existing health condition that puts patients or public confidence in the profession at risk, there must be evidence that a doctor has taken steps to minimise reoccurrence of any risks posed by their health condition, eg seeking and following treatment. Where the events giving rise to the conduct or performance concern happened at the onset of a health condition or despite the doctor seeking and following treatment, this will be regarded as a mitigating factor, and;

c Evidence that the allegations of misconduct or poor performance are at the lower end of the spectrum of matters that would otherwise meet the RPT and would usually require action to protect patients or public confidence in the profession.
4 As a result of the above there may be no realistic prospect of establishing that a doctor’s fitness to practise is impaired by reason of the alleged misconduct* and/or poor performance. Where there is no realistic prospect of finding impairment by reason of misconduct and/or poor performance, this may mean that a case can be treated as a pure health case, rather than as a multifactorial case involving health and misconduct and/or poor performance.

5 In most cases where the alleged misconduct meets the RPT and carries a presumption of impairment, the alleged misconduct will normally need to be addressed, even if it is linked to a doctor’s health condition. This is because of the public confidence issues these allegations raise. However, given the broad range of misconduct that carries a presumption of impairment, there are some circumstances (and these are discussed later in this guidance) in which an allegation of misconduct or performance carrying a presumption of impairment is linked to a health condition and it may be possible to address it by dealing solely with the health allegation and without taking specific action in relation to the misconduct or performance issue.

6 A criminal conviction that would otherwise meet the realistic prospect test would usually require action specifically to address the conviction even where the misconduct is closely linked to a doctor’s health condition. In these cases, action that solely addresses the allegation about the doctor’s health condition is unlikely to be sufficient to address the risk to public confidence raised by the conviction.

7 Where there is evidence to support a serious allegation of misconduct or a serious conviction/caution, a serious performance allegation or there is no cogent evidence of a link between a health condition and a misconduct/performance allegation, then the allegations should be treated separately.

8 If a doctor has received a conviction resulting in a custodial sentence,† these cases must be referred directly to a medical practitioners tribunal (MPT).

9 This document should be read in conjunction with the following pieces of guidance:

a Guidance for the Investigation Committee and Case Examiners on making decisions at the end of the investigation stage

b Guidance for decision makers on assessing risk in health cases

c Sanctions guidance.

* In this overview, we are also using the term “misconduct” to refer to cautions/convictions and determinations.

† Including suspended sentences.
Factors to consider

10 The seriousness of the alleged misconduct/performance issue, and the potential risk to patient safety, are the primary factors that should be taken into account when considering whether an allegation of misconduct or poor performance can be managed solely by addressing the health allegation.

11 Decision makers should also take into account other factors relating to a case, such as:
   a a doctor’s insight into the alleged misconduct and/or alleged poor performance
   b a doctor’s insight into their health condition and its impact on their practice
   c whether the doctor is seeking and following treatment
   d whether the doctor is engaging with local support and steps put in place to manage risk
   e the likelihood that the alleged misconduct/alleged poor performance might be repeated.

12 Further details of factors to be considered are set out in the Sanctions guidance and Guidance for the Investigation Committee and Case Examiners on making decisions at the end of the investigations stage.

Misconduct

Lower-level misconduct

13 There will be allegations of misconduct that are at the lower end of the spectrum of misconduct issues that would otherwise meet our threshold, for example, a doctor with an opiate dependence who steals drugs from work (but is not convicted of theft) or who fraudulently self prescribes. Where there is no patient safety risk and there is cogent evidence that the doctor’s health condition is linked to the alleged misconduct, case examiners may address the allegations solely by taking action to address the health allegations. This will only be appropriate where there is cogent evidence that the doctor’s health condition explains the doctor’s conduct, meaning that the allegation of misconduct will not meet the realistic prospect test. Case examiners should however balance any aggravating or mitigating factors in deciding if the RPT is met in relation to the alleged misconduct.

14 This will also apply (in limited circumstances) to cases that fall within one of the categories of presumed impairment, where the alleged misconduct lies at the lower end of the spectrum of allegations which carry a presumption of impairment, as follows.
a In violence and dishonesty allegations, where exceptional circumstances are not required to rebut the presumption of impairment, as the nature of the conduct does not indicate that the doctor poses a risk to patients or to public confidence in the profession. Where there is evidence that the allegations are linked to the doctor’s health condition, the RPT is unlikely to be met and undertakings can be agreed to address the health allegations.

b In other presumption of impairment cases, a doctor’s health condition may in some circumstances (but not always) constitute an exceptional circumstance that could justify solely addressing the allegations about the doctor’s health. Given the seriousness of these cases, this approach can only be taken where there is cogent evidence of a link to a doctor’s health condition i.e. there are specific circumstances relating to the doctor’s health condition such as the sudden onset of a condition or where the doctor has sought and is following treatment that has been ineffective, and the alleged misconduct is at the lower end of the spectrum.

15 Where a doctor’s health condition has some connection to the misconduct allegations, but it does not explain the doctor’s behaviour, if the alleged misconduct (even where less serious) would still meet the realistic prospect test, the case should be treated as a health and misconduct case.

Deciding whether undertakings are appropriate in health and misconduct cases

16 Health related undertakings are unlikely to be appropriate where the case examiners have determined there is a realistic prospect of a MPT finding a doctor’s fitness to practise to be impaired and where undertakings will not be sufficient to protect patients and maintain public confidence in the profession.

17 Some cases will not be appropriate for undertakings, e.g. where evidence is disputed or a doctor does not agree to undertakings.

18 When deciding to resolve cases involving concerns about a doctor’s health condition through undertakings, case examiners should take into account any mitigating or aggravating factors as specified in the Sanctions guidance and refer to the Guidance for decision makers on agreeing, varying and revoking undertakings.

19 Examples of the types of cases which might be suitable for undertakings can be found in Annex A.

* Please refer to the sections on violence and dishonesty in Making decisions at the end of the investigation stage.
Serious misconduct and convictions/cautions

20 Some health and misconduct or conviction/caution allegations will still need to be referred to a MPT. This may be the case even where health provides an explanation for the misconduct.

21 These types of cases fall into three categories.

a Allegations of serious misconduct that raise public confidence issues.

b Where a doctor has a conviction that results in a custodial sentence* (where the Registrar is required to refer directly to a MPT).

c Where a doctor has a non-custodial conviction and the conviction would, in itself, meet the RPT. A response specifically to address the conviction is usually required because of the public confidence issues raised by this type of case.

22 Allegations of serious misconduct that pose a risk to the public’s confidence in the medical profession may relate to a doctor’s actions during their professional practice or an incident which has taken place in their personal life.

23 Where the alleged misconduct is so serious that public confidence would only be maintained by referring the case to a MPT, the case should not be resolved through undertakings, even where a doctor’s health may explain or provide a motive for the alleged misconduct.

24 The more serious the allegations of misconduct, the more likely there will be a public interest in the matter being referred to a hearing. The types of allegation that are likely to result in a referral, if they do not fall within the exceptions identified at paragraph 14, include (but are not limited to):

a sexual assault or indecency

b sexual or improper emotional relationships with a patient or someone close to them

c violence

d dishonesty

e unlawfully discriminating in relation to characteristics protected by law

f knowingly practising without a licence

* Including suspended sentences.
g gross negligence or recklessness about a risk of serious harm to patients.

25 Criminal convictions also raise specific public confidence issues. Where a doctor has a conviction for misconduct that results in a custodial sentence,* the case must be referred to a MPT. A criminal conviction that would otherwise meet the realistic prospect test would usually require action specifically to address the conviction even where the misconduct is closely linked to a doctor’s health condition. In these cases, action that solely addresses the allegation about the doctor’s health condition is unlikely to be sufficient to address the public confidence issues raised by the conviction.

26 The Guidance on convictions, cautions, determinations and other methods of disposal has further information on the types of cases that should be directly referred to a MPT.

27 See Annex B for a list of example cases.

Performance

28 An allegation of poor performance may be the result of, or may be amplified by, a health condition, or a doctor may have unrelated health and performance allegations. Because of the risks to patients raised by poor performance, it will usually be necessary to respond to the performance allegations as well as the health allegations where both are present. There may be limited circumstances in which the performance allegations are at the lower end of the spectrum and the link with the doctor’s health condition is so clear that it may be appropriate to address the performance allegations solely by addressing the health allegations. However, any risk to patients will need to be carefully assessed and addressed.

29 Health and performance allegations may be addressed by health and performance undertakings to manage any risks and can be varied as appropriate as a doctor’s health and/or performance improves.

30 In cases where there are misconduct allegations in addition to those about health and performance, these should also be addressed. In line with the guidance above, these may be addressed by taking action solely in relation to health in some circumstances.

31 Undertakings may be appropriate to address both health and performance allegations where case examiners have determined that there is a realistic prospect of a MPT finding the doctor’s fitness to practise to be impaired, and where undertakings will be sufficient to protect patients and maintain public confidence.

* Including suspended sentences
Some health and/or performance cases will not be appropriate for undertakings. This will be where evidence is disputed, a doctor does not agree to undertakings, undertakings would be insufficient to protect the public or there are additional allegations of misconduct which must be ventilated before a MPT.
Annex A – Examples of health and misconduct/performance cases where undertakings may be suitable

This annex outlines a number of case studies where both health and misconduct/performance allegations are present and there is no patient harm. While these case studies can be used to give an indication of the types of cases where undertakings might be considered, each case will be different and there may be other mitigating or aggravating factors present which affect the outcome.

Example 1

*Substance use disorder and criminal caution*

A doctor was arrested and given a caution for possession of a Class C drug. A health assessment finds that the doctor has self-prescribed the drug (a sedative) which they take on a regular basis to control an anxiety disorder. The health assessor recommends supervision. There is clear evidence of a cogent link between the misconduct and the doctor’s health condition and the doctor has insight into their health condition and is in appropriate treatment. A caution was given but there were no concerns about the doctor’s clinical performance or risk to patients.

**Suitable for undertakings** - In this case the misconduct is closely linked to the doctor’s health condition and, while serious, it is not so serious as to require us to refer it to a hearing. Undertakings would be suitable in this case if the doctor has insight and is engaged in treatment.

Example 2

*Alcohol use disorder*

A doctor is suspended from work after drinking excessively the night before a shift and not turning up for work on two occasions. When the doctor’s employer contacted them to follow up, it became clear that the doctor was not able to work due to excessive alcohol intake. The doctor’s employer suspended the doctor and referred the doctor to the GMC. A health assessment diagnosed harmful use of alcohol and an alcohol dependency disorder.

**Suitable for undertakings** – While missing a shift is a serious matter, this case is likely to be suitable for undertakings because there is cogent evidence of a link between the alcohol consumption and the doctor’s health condition, and because the doctor did not exacerbate the situation by attending work while under the influence of alcohol.
Example 3

Performance

A doctor is referred for concerns that have arisen recently, including being late for clinic and arriving in a dishevelled state, and for making a series of mistakes involving correspondence and record keeping. The doctor has also shouted at a colleague on two occasions. A health assessment diagnoses a mental health condition and the health examiner’s opinion is that concerns at work relate to the health condition. The doctor accepts the GMC’s findings and acknowledges the impact that their health has had on their work.

Suitable for undertakings – Likely to be suitable for health undertakings as the performance allegations are clearly linked to the doctor’s health, there is no patient harm, and the doctor has insight into their health condition. If there is likely to be an ongoing risk to patients that is not addressed by health supervision, performance undertakings are likely to be necessary.

Example 4

Presumption of impairment - violence

A doctor was refused access to a nightclub. As the security guard tried to remove the doctor from the area, the doctor became verbally abusive and in resisting attempts to move him from the area pushed the security guard away. The push was not forceful but nevertheless results in a caution for common assault. A health assessment diagnoses alcohol dependency, and the health examiner’s viewpoint is that the misconduct is linked to the doctor’s health condition.

Suitable for undertakings – Likely to be suitable for undertakings as there is cogent evidence that the incident is linked to the doctor’s health, it is the doctor’s first offence, the doctor has insight, and is engaged in treatment. While violence has a presumption of impairment, this can be rebutted in some circumstances including where the incident is at the lower end of the scale and did not involve a patient. As there is also cogent evidence that the police caution is linked to the doctor’s health condition, the case can be concluded with undertakings.

Example 5

Presumption of impairment - dishonesty

A doctor receives a conviction for stealing a laptop charger. This is the doctor’s first offence. A health assessment diagnoses a mental health condition and discussion with the doctor reveals that they were away from home during a training placement and were isolated when they became unwell. The assessment found a clear link between the
doctor’s health and the theft. The doctor has insight into their condition and is receiving treatment for it, and it is judged that the risk to patients is low.

**Suitable for undertakings** – Likely to be suitable for undertakings as there is cogent evidence that the misconduct is linked to the doctor’s health, the incident was at the lower end of the scale of conduct involving theft, there is no patient harm, and the doctor has insight and is engaged in treatment.

**Example 6**

*Substance use disorder, presumption of impairment – dishonesty*

A doctor steals drugs and syringes for their personal use from work and is referred to us by their employer. A health assessment diagnoses opiate dependence syndrome. The doctor has insight into their condition and is currently complying with treatment.

**Suitable for undertakings** – The allegation of theft has a presumption of impairment (dishonesty), although this can be rebutted if the doctor’s dishonest behaviour does not pose a risk to patients or to public confidence. This case is suitable for undertakings as there is a clear link with the doctor’s health, the misconduct is not at the most serious end of the scale, and no harm was caused to patients.

**Example 7**

*Substance use disorder, presumption of impairment – dishonesty*

A GP is referred to the GMC for fraudulently issuing prescriptions for their own personal use in the names of fictional patients. The prescriptions were for anti-depressants and benzodiazepines (sleeping tablets.) The doctor has undergone a health assessment which diagnosed them with a severe depressive disorder. They are now seeking treatment under their own name, have engaged with their Occupational Health department and expressed remorse for their actions.

**Suitable for undertakings** – Although the doctor’s actions were dishonest, and therefore carry a presumption of impairment, this presumption can be rebutted where the doctor’s dishonest behaviour does not pose a risk to patients or to public confidence in the profession. This case is suitable for undertakings as there is a clear link between the misconduct and the doctor’s health, the misconduct is not at the most serious end of the spectrum, and no direct harm was caused to patients.
Annex B – Examples of health and misconduct or conviction/caution cases where undertakings are not appropriate

Example 1

Substance use disorder, presumption of impairment – dishonesty, criminal conviction

A doctor is convicted of theft after stealing controlled drugs for their own use from hospital stock over a three month period. A health assessment diagnoses opiate dependence syndrome.

Referral to a hearing – Given the criminal conviction meets the realistic prospect test in its own right, undertakings would not be suitable. If the matter had not resulted in a criminal conviction, health undertakings may be sufficient if the doctor had not put patients at risk as a result of their misconduct (for example by removing for their own use medication that had been prescribed to a patient to support their care), had insight and was complying with treatment. See example 6 in annex A.

Example 2

Presumption of impairment – violence and dishonesty and criminal conviction

A doctor is convicted of three counts of aggravated burglary and possession of crack cocaine. A health assessment diagnoses opiate dependence syndrome.

Referral to hearing - In this case, the misconduct is very serious, carries a presumption of impairment (which has not been rebutted) and resulted in a criminal conviction so undertakings would not be suitable. If it attracted a custodial sentence the case would have to be referred directly to a hearing under our rules.

Example 3

Presumption of impairment – sexual assault

A doctor is convicted of sexual assault against two junior nurses and a receptionist. The doctor was found to have kissed and touched their breasts without consent. A health assessment diagnoses a depressive disorder and harmful use of alcohol.

Referral to hearing - This misconduct is extremely serious, carries a presumption of impairment and would not be suitable for undertakings given the public confidence issues it raises. This includes cases where the doctor has not been convicted of the alleged actions but findings have been proved in fitness to practise proceedings. If the conviction
attracted a custodial sentence the case would have to be referred directly to a hearing under our rules.

**Example 4**

*Presumption of impairment – images of sexual abuse of children, criminal conviction*

A doctor is convicted of viewing 250 indecent images of children. A health assessment diagnoses a depressive disorder and harmful use of alcohol.

**Referral to hearing** - This misconduct is extremely serious carrying a presumption of impairment and health would not constitute an exceptional circumstance. It raises significant public confidence issues and would not be suitable for undertakings. This type of case is also likely to carry a custodial sentence where we are required to refer direct to a hearing under the rules.

**Example 5**

*Presumption of impairment – dishonesty, criminal conviction*

A doctor receives a conviction for forging and stealing multiple prescriptions which they presented at a number of local pharmacies over a period of 12 months. The doctor had previously received a warning from the GMC for self-prescribing. A health assessment finds that the doctor is suffering from a mental health condition which the doctor attempted to control through self-medication. The case was referred to a hearing as the doctor lacked insight, dismissed their actions as negligible, and the actions were prolonged and serious.

**Referral to a hearing** – The misconduct is serious and protracted. It carries a presumption of impairment (which has not been rebutted), resulted in a criminal conviction and the doctor lacks insight. Health would not therefore constitute an exceptional circumstance not to refer, despite cogent evidence of a link to a doctor’s health condition.