

Realistic Prospect Test Guidance for Investigating Panels

Version:	5.0
Date:	October 2023
Doc Ref:	#071
Review date:	October 2026

Version number	Purpose/Change	Author	Date
5.0	Final Document for publication	Jude Savage	October 2023

Introduction

1. The purpose of registration with the Academy of Healthcare Science ('Academy') is to protect the public. Protecting the public requires that the Academy publishes the standards required of its registrants and takes appropriate action when registrants fail to meet those standards. The Academy also needs to ensure public confidence in its regulatory work; it works in the public interest, and not in the interests of professionals or others involved in the delivery of healthcare.
2. Determining a registrant's fitness to practise is central to the Academy's work. When we say that a registrant is 'fit to practise' we mean that they have the skills, knowledge and character to practise their profession safely and effectively.
3. Fitness to practise is not just about professional performance. It also includes acts by a registrant which may affect public protection or confidence in the profession and may also include matters not directly related to professional competence. The Academy's procedures are designed to protect the public from those who are not fit to practise.
4. If a registrant's fitness to practise is 'impaired', it means that there are concerns about their current ability to practise safely and effectively. This may mean they should not practise at all, or that they should be limited in what they can do. Of course, registrants may make mistakes that are unlikely to be repeated. They may also recognise that they lack the skills or knowledge to perform certain tasks and take action to develop these skills. In such cases, while the individual may have done something wrong, their fitness to practise may not be impaired, and it may not be in the public interest to pursue such a case. Nor is it in the public interest to act where there is no or little chance of success.
5. The Academy's Fitness to Practise Procedure includes a Realistic Prospect Test. This test is commonly used in healthcare regulation and is intended to ensure that regulators focus on protecting the public and patients and act when appropriate and in the public interest.
6. In accordance with the Academy's Fitness to Practise Procedure, the Realistic Prospect Test is applied by an Investigating Panel once it has considered the evidence about a registrant.
7. The Investigating Panel consists of at least three people who are not involved in the management or decision making of the Academy.

The Realistic Prospect Test

8. Having considered the evidence before it, an Investigating Panel is able to make one of the following decisions:
 - a request that further investigation be carried out in relation to specific matter(s);
 - b close the case with no further action;
 - c close the case and issue a Letter of Advice to the Registrant;
 - d close the case and issue a Warning to the Registrant; or
 - e refer the case to the Fitness to Practise Panel for a hearing.
9. In making this decision, the panel needs to determine whether there is a realistic prospect of a finding of impairment; that is, that at a hearing in front of the Fitness to Practise Panel, the Academy would be able to establish that the registrant's fitness to practise is impaired.
10. The Investigating Panel needs to be satisfied that there is a real or genuine possibility (as opposed to a remote or fanciful one) that the Academy will be able to establish its case.
11. The test does not require the panel to be satisfied on the balance of probabilities or call for substantial inquiry, but the panel still needs to consider the case carefully. The panel should bear in mind that it is for the Academy to prove the alleged facts and that the registrant's fitness to practise is currently impaired, and not for the registrant to disprove the facts or to demonstrate their fitness to practise.
12. The panel should apply the Realistic Prospect Test to the whole of the allegation. This includes assessing whether it is likely that the Academy will be able to:
 - a Establish the facts;
 - b Establish whether those facts amount to the grounds of the allegation (e.g. misconduct, lack of competence); and
 - c In consequence, establish that the registrant's fitness to practise is likely to be currently impaired.

Each of these elements should be considered carefully and in the order set out above.

Facts

13. In most cases, the evidence will relate solely to the facts (that is, evidence that certain events involving the registrant occurred on the dates, and at the places and times alleged). It will be rare for separate evidence to be provided that those facts amount to grounds or the issue of impairment, as these are matters of judgement for the panel (although in some cases, such as criminal convictions, evidence of fact may also be evidence of grounds).

14. The panel's function is not to find fact. It cannot test the veracity of the evidence, definitively resolve significant conflicts of evidence or reach a conclusion as to whether an allegation is true or untrue. It falls solely to the Fitness to Practise Panel to make a final determination and judge whether any facts are proved. The role of the Investigating Panel is to assess whether, on the basis of the evidence before it, there is a real and genuine possibility that the Academy is likely to be able to establish the facts before a Fitness to Practise Panel.
15. In considering whether there is a real prospect of the facts being found to be proved before a Fitness to Practise Panel, the Investigating Panel should bear in mind that the Fitness to Practise Panel will consider whether the facts have been proved on the balance of probabilities, (rather than that they are sure or beyond a reasonable doubt). In other words, a Fitness to Practise Panel must be satisfied that it is more likely than not that an event happened.
16. The Investigating Panel may assess the overall weight of the evidence but should not seek to resolve substantial conflicts in the relevant evidence. Resolving substantial conflicts in the available evidence, such as deciding which of several differing versions of events is correct, is not a task which can be undertaken by an Investigating Panel. Such conflicts do not mean that there is a case to answer and, conversely, do not mean that the Academy would be unable to prove its case.

Grounds

17. Having considered the facts, the panel should turn its attention to whether there is a realistic prospect that the Academy will be able to demonstrate that the facts amount to the grounds of the allegation. These grounds are set out in the Fitness to Practise Procedure.
18. In reaching their decision the panel may have regard to the relevant standards – for example, to 'Good Scientific Practice' and the 'Standards of proficiency'. It may also take account of any standard protocols or procedures commonly used. It should be stressed, however, that failure to follow an established protocol or procedure may not in of itself constitute grounds. The panel must assess whether it is likely that the Academy will be able to demonstrate that the facts amount to one of the grounds of allegation outlined in the Fitness to Practise Rules.
19. The panel should exercise utmost caution when disagreeing with the conclusion of another body with appropriate expertise (such as a statutory regulator), which has reached its decision after a hearing where all the evidence before the panel was considered.

The panel is not entitled to go behind the fact of a conviction. Equally the panel is not entitled to go behind the giving of a police caution which involves an admission of guilt by the registrant. It should not consider submissions by the registrant they were not in fact guilty of the offence of which they were convicted or in respect of which they were cautioned. Evidence of conviction or caution is, in of itself, grounds.

Impairment

20. At this stage, the panel should turn itself to consideration of the possibility of a finding of impairment. The panel must remember that a case to answer decision can only be made on the basis that fitness to practise is currently impaired. Simply establishing that the facts appear to breach the standards required of registrants or that this may amount to grounds of allegation is insufficient.
21. A finding of impairment is a finding that, based on prior events, there are on- going concerns about a registrant's ability to practise their profession. Consequently, panels should recognise that impairment is unlikely to be found in cases relating to:
 - relatively minor issues, where the registrant has acknowledged and has insight into any failings and where local resolution or other remedial action has been taken;
 - employment issues which do not compromise the safety or well-being of, service users, such as lateness or poor time keeping, absence from work or personality conflicts; or
 - consumer complaints where there is no abuse of the registrant-service user relationship, such as complaints about minor differences in the pricing of goods or services.
22. An assessment of current impairment will involve consideration of past events and steps taken to remedy it. However, there may be some instances of past conduct or performance or criminal offences that are so deplorable that a registrant's fitness to practise is likely to be impaired, or where the need to uphold proper professional standards and public confidence would be undermined if a Fitness to Practise Panel did not make a finding of impaired fitness to practise.
23. The panel should take care to distinguish between matters of culpability and mitigation. The panel is entitled to consider whether there is a real prospect of it being proved that the registrant did what they are alleged to have done but should take matters of purely personal mitigation into account with caution. Personal mitigation is more properly considered by a Fitness to Practice Panel at the sanction stage, if necessary.

Public interest

24. In deciding whether there is a case to answer, panels need to take account of the wider public interest, including protection of the public and public confidence in both the regulatory process and the profession. Wrongly concluding that there is a realistic prospect of a finding of impairment is not in the public interest. It is unfair to the registrant concerned and diverts resources from the protection of the public.
25. Panel members must remember that the Investigating Panel only considers documentary evidence at a private meeting, held in the absence of the parties and where the Registrant does not have an opportunity to make oral representations.
26. The investigations process in and of itself does not uphold the public's confidence in the regulatory system for healthcare science; this is upheld through complaints of impairment being thoroughly and openly explored by a Fitness to Practise Panel at a public hearing. It is in this context that the filtering role of the Investigating Panel should be considered. The decisions of the Investigating Panel may be open to challenge if it appears, for example, that a panel has reached a perverse decision (that is, a decision which no reasonable panel could have reached taking into account the evidence), has failed to apply the appropriate test to its decision-making or has provided inadequate reasons to explain its decision.