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## 5a: Fitness to Practise: Hearings Management: Outcome of Consultation Annex A

### General Medical Council Consultation – Management of Fitness to Practise Panel Hearings

#### Introduction

We are consulting on the recommendations of a Case Management Working Group, set up to review our case management procedures and make proposals for how they might be improved.

#### The General Medical Council

The General Medical Council is the independent regulator for doctors in the UK. Our statutory purpose is to protect, promote and maintain the health and safety of the public by ensuring proper standards in the practice of medicine. We do that by controlling entry to the medical register and setting the educational standards for medical schools.

We also determine the principles and values that underpin good medical practice and we take firm but fair action where those standards have not been met.

#### Review of our Case Management Procedures in Fitness to Practise Cases

Our fitness to practise procedures have two stages; the Investigation Stage and the Adjudication Stage. Within the Adjudication Stage, Fitness to Practise panels consider cases that have been referred from the Investigation Stage. Fitness to Practise hearings are held in public except for when panels consider information that relates directly to a doctor's health.

We aim to conclude cases within 15 months of receipt of the relevant allegation or complaint; and within nine months of referral from the Investigation Stage.

We have consistently faced challenges in ensuring that we can meet our Adjudication service targets. One of the key factors has been an increase in the average length of hearings which has risen from 4.7 days in 2006, to 6.4 days in 2007, to 6.7 days in 2008. A combination of increased numbers of referrals and this increase in the length of hearings has resulted in an increase in the number of annual sitting days. The total number of sitting days was 2100 in 2008, 2200 in 2007 and 1750 in 2006.

We have actively tackled this issue by improving support to, and guidance for, staff involved in pre-hearing case management; revising our methods for estimating the length of hearings; developing systems for monitoring and providing feedback on every 'wasted day' of hearing capacity; introducing an over-listing system and developing a flexible approach that seeks to make maximum use of capacity in both our London and Manchester hearing centres.

Despite these measures there are still aspects of our hearing process which we believe could be improved. We have experienced particular difficulties in ensuring the effective case management of more complex cases where the keys to success are: to engage the defence early in the process to identify and narrow the issues in dispute; to ensure that evidence is presented in a manner which is fair to both parties, but avoids duplication and repetition; and to ensure the setting of realistic time estimates.

In July 2008, we established the Case Management Working Group chaired by Eleanor Grey, a barrister. Eleanor Grey is also a member of the Department of Health (England)'s Tackling Concerns Nationally Working Group which was established following the publication of the Government White Paper, *Trust Assurance and Safety*. The White Paper proposed that adjudication of fitness to practise matters about doctors should be transferred to an independent body called the Office of the Health Professions Adjudicator (OHPA). The establishment of OHPA is contained in the Health and Social Care Act 2008. The Tackling Concerns Nationally Working Group has been tasked with overseeing the establishment of OHPA.

Details of the membership of the Case Management Working Group are at Annex A. The Working Group's report was published on our website in December 2008. The Working Group developed 13 recommendations which are attached at Annex B. We have already taken forward two of these recommendations (recommendation 4 and 5 at Annex A).

We are consulting on the remaining 11 Working Group's recommendations and on the difficulties we experience with the management of complex cases which the Case Management Working Group recognised but to which no clear solution has emerged.

The Working Group split their recommendations into short term issues to be addressed by the GMC and longer term issues to be considered by OHPA following the transfer of adjudication. However, OHPA will not be in place until 2011 at the earliest, and the exact timetable remains uncertain. The GMC are keen to address these problems in the short-term.

Details of the GMC's current case management procedures are attached at Annex C.

### **The Case Management Working Group Report**

The Case Management Working Group was set up against a backdrop that hearings were getting longer and a perception that the time spent hearing legal or procedural arguments was increasing.

Average case length has increased, however, the group found no evidence that significant amounts of time are spent in preliminary arguments. The GMC's hearing utilisation rate was 78% between July and December 2007 compared with 70% between January and June 2007. In 2008 it was 75%. The primary causes of the wastage rate are cases being postponed or administratively rescheduled before a hearing starts, or adjourned at the hearing, or because hearings run short. A survey conducted by Panel secretaries of GMC hearings over a three month period in 2008 found that on average 45% of time in a Fitness to Practise hearing is spent dealing with preliminary matters and determining the facts. The remainder is occupied by determinations on impairment and sanctions. 52% of total hearing time, on average, is spent '*in camera*'.

It was apparent to the Group that the skill of estimating the time needed for a hearing, and managing the hearing which follows, is an art rather than a science, and that these tasks are inherently difficult. Cases which adhere precisely 'to plan' are rare. Nevertheless, the Group found that communication and dialogue between all the parties needed to improve if there were to be a reduction in the numbers of hearings which were postponed at short notice, which over-ran, or which went significantly short.

The Working Group found that while the current case management procedure represented a much needed mechanism for assisting hearing preparation and scheduling it had a number of weaknesses.

In particular, at present the case management procedures do not appear to be successful in ensuring that preliminary discussion between the parties and their lawyers takes place. Such preliminary discussions would support a narrowing of the issues in dispute, or at least early identification of those issues. Such discussion could open the door to a consideration of potential sanctions and would support proper consideration of the appropriateness of consensual disposal.

The Working Group also found that the current system does not always ensure that the case is presented in a way which assists the panel as much as possible. For example, limited material is available to the panel in advance and oral evidence is at times repetitive.

The Working group noted that all the usual problems of lack of engagement; lack of focus on the issues in dispute, difficulty with setting realistic time estimates and presentation of evidence that is fair to both parties and helpful to the panel, are exacerbated when doctors are unrepresented. In some cases, unrepresented doctors will fail to engage with the GMC at all, prior to the hearing.

The single issue most cited as preventing the current case management system from engaging the parties effectively was a lack of enforcement powers. Both Listing Officers and Case Managers lack the means to effectively enforce case management requirements. Even within the more formal constraints of the Rule 16 Case Review procedure there are no costs sanctions and the sanction of adverse comment for failure to comply with directions, for example, by refusing permission to present the relevant information at the hearing, is not often used. When it comes to a hearing, Panels are concerned that exclusion of evidence may lead to injustice and, in some cases, lead to punishing registrants for failures by their legal representatives.

The source of difficulty with enforcement is the fact that Listing Managers and, arguably, Case Managers lack both real and perceived independence from the GMC, a party to the proceedings, making it difficult for them to 'hold the ring' between the GMC in its role in presenting the case and the defence team.

In early 2000, Lord Carlile chaired a Working Group which developed a pre-hearing protocol for GMC cases, aimed at improving engagement between the parties, including the introduction of full disclosure prior to the hearing by both sides and meetings of experts' where appropriate. The protocol fell into abeyance due to lack of effective sanctions for enforcement.

The Working Group suggested that the issue of enforcement should be shelved for OHPA to consider, on the basis that OHPA will have both real and perceived independence, however, we are keen to explore whether changes can be made prior to that transfer that will bring real benefits to the operation of our current adjudication process.

### **Management of Complex Cases**

The problems which arise from difficulty in engaging the parties effectively at the pre-hearing stage have a greater impact in more complex cases. A lack of information about the likely response to the case by the defence and the witness evidence to be presented, in more complex cases, can often lead to considerable under-scheduling for hearings. If the hearing slot is insufficient, cases must be adjourned to a later date and, at times, there have had to be several adjournments. Difficulties with scheduling additional dates which are convenient for the same panel and all the parties' legal counsel, has presented considerable logistical difficulties and can mean that hearings take a long time to complete.

## **The Experience of Other Jurisdictions**

The Case Management Working Group sent a short questionnaire to healthcare regulators in the United States, Australia and New Zealand to ascertain whether they faced similar challenges. In general, responses indicated that it was more common in these jurisdictions to manage cases within an inquisitorial rather than adversarial system and that hearings were shorter.

It is difficult to establish, on the basis of the fairly anecdotal information collected by the Working Group, what factors might underpin this difference in hearing length. There are a number of key differences between those jurisdictions and the UK.

In the US each state has an independent medical board which oversees the regulation of physicians. Some Boards hold their own hearings and others refer cases to the Office of Administrative Hearings. Formal rules of evidence are not applied and the Panel or Administrative Law Judge reign in the advocates, limit oral evidence and enforce deadlines.

The key issue for the GMC in this respect is that, as the body responsible for both case presentation and adjudication, great care has been taken not to appear to be unfair to doctors. Such a perception could in practice lead to an appeal by the doctor. Doctors in the USA also have a right of appeal to the civil courts. It was not apparent from the information collected by the Working Group the extent to which they exercise this right.

In Australia regulation is also organised on a state rather than a national basis. In most states cases are heard either by a professional committee (for less serious cases) or by a medical tribunal chaired by a District Judge. In professional committee hearings doctors can be represented but by non-lawyers only. Most matters are resolved by consent on the basis of a Statement of Agreed Facts.

In New Zealand most cases are heard by a disciplinary tribunal (except health issues which are heard by a health committee and competence issues which are heard by a Medical Council committee). The tribunal is chaired by lawyers appointed by the Department of Health who impose robust pre-hearing procedures and timetabling with extensive use of written arguments to limit the length of hearings.

It is notable that in all these cases, the most contentious issues are not dealt with by in house regulatory panels and that independent tribunals chaired by judges or lawyers seem able to enforce directions more successfully than GMC panels.

## **Consultation Questions**

### *Experience of other jurisdictions*

When compared with tribunals in the USA, Australia and New Zealand, GMC hearings appear to be significantly longer.

The reasons for such differences are complex and cannot be summarised as relating to case management procedures alone.

The Case Management Working Group recommended that the GMC should consider commissioning, as part of its comparative research programme, research into disciplinary processes in other jurisdictions. Such research, if commissioned, should seek to describe the nature of the adjudication process in each region studied (including 'case mix') and to ascertain the reasons for the apparent ability to manage disciplinary processes in respect of medical practitioners in comparatively expeditious fashion.

***Do you have any views on the reasons for the difference in case hearing length between the UK and these other jurisdictions?***

***Do you have any other comments to make on this issue?***

#### *Active Case Management*

It was apparent to the Working Group that the structures in place to manage the GMC pre-hearing stage and hearings were less powerful than those in place in the civil and criminal courts. The Working Group acknowledged that the effectiveness of the current process was severely limited by the inability to enforce directions. That said, there may still be gains to be achieved from the introduction of some aspects of those systems, for example, preliminary hearings and an increased use of Independent Case Managers. The Working Group acknowledged the danger of increasing costs and were unable to produce any realistic costing modelling for likely changes.

The Working Group recommended that the GMC should conduct an evaluation of its use of the Case Review system, with a view to (a) identifying which cases might benefit from active case management: and (b) documenting experience gained from such an approach and the costs and benefits resulting from any increased use of Independent Case Managers.

***Do you think that the introduction of more active case management will improve current problems with lack of engagement and assist with the setting of realistic time estimates? If so, in what way and do you have any comment in this regard?***

***How do you think the GMC might address the issue of enforcing directions in order to support such a system of active case management?***

***Do you think that the introduction of more active case management will affect any specific groups? If so, which ones and in what way?***

***Do you have any other comments to make on this issue?***

## *Timing of Case Management Procedures*

The Stage 1 teleconference takes place about a month after the case is referred for a hearing.

Although the importance of a hearing at an early stage in order to focus the process was considered important, a teleconference much later in the process than the Stage 2 teleconference might be helpful with a view to discussing:

- the extent of GMC disclosure
- any issues arising from the Notice of Inquiry
- the likelihood of Defence admissions and whether a Statement of Agreed Facts would assist the Panel
- the anticipated timetable for trial
- the hearing bundles and advance circulation of experts reports and statements
- the merits of a meeting of experts
- whether any legal arguments were to be raised and directions for written skeletons to be exchanged
- consideration of the use of written Opening Statements or Skeletons.

The Working Group recommended that the timing and frequency of Stage 1 and other teleconferences should be considered as part of any review of the operation of Case Management procedures.

The Working Group further recommended that any such evaluation should assess the merits of holding pre-hearing reviews timed to take place shortly before the hearing, with a view to considering the conduct of any hearing.

***Do you agree there may be benefits to be gained from a more flexible approach to timing? If so, do you have any suggestions?***

***Do you agree with the list of issues to be discussed at a pre-hearing review shortly before the hearing? Are there any other issues that could be usefully discussed at such a teleconference?***

***Do you think that the introduction of a pre-hearing review will affect any specific groups? If so, which ones and in what way?***

***Do you have any other comments to make on this issue?***

## *Disclosure*

At present there is no obligation under the Rules for the defence to make advance disclosure of its case. Further, there is little scope for discussion of admissions by the registrant before the hearing itself.

This stands in contrast not only with civil proceedings (where full disclosure of evidence is the norm) but also with criminal proceedings, where the Defence is required to submit a Defence Statement, and where mutual disclosure of experts' reports, coupled where appropriate with meetings between experts, is now the norm.

There is a perception that such changes would not command consensus amongst registrants, or potential defendants in particular, on the basis that it is for the GMC to prove its case. However, it is difficult to maintain that procedures accepted in a criminal context could compromise the fairness of the GMC procedures.

The Working Group recommended that the evidence concerning the limitations of the current procedural Rules, and the existence of the case management procedures operative in, for example, the criminal courts should be brought to the attention of OHPA as soon as it is operational, so as to enable OHPA to consider changes to the current practice as part of its work in developing procedural Rules for its Panel hearings.

The GMC has taken a general view that any difficulties with the adjudication process should be addressed and tackled in advance of the transfer of the adjudication function to OHPA.

***Do you agree that full disclosure of evidence at the pre-hearing stage would assist with case preparation?***

***Given that a Defence Statement is considered to be compatible with the rights of Defendants in the criminal sphere, do you think that it would compromise fairness in the context of the GMC procedures? If so, why?***

***Do you think that the introduction of pre-hearing disclosure and/or a Defence Statement will affect any specific groups? If so, which ones and in what way?***

***Do you have any other comments to make on this issue?***

*Overriding Objective*

The civil and criminal procedure rules contain a statement of their Overriding Objectives, of which the parties must take account.

The Working Group recommended that any consideration of rule changes should consider whether the Rules should contain a statement of the Overriding Objectives, and the parties' obligation to co-operate in furthering those ends.

***Do you support this recommendation? If not, why***

***Do you have any other comments to make on this issue?***

*Unrepresented Defendants*

A significant number of those consulted by the Case Management Working Group drew attention to the particular challenges posed by doctors who represent themselves.

The Working Group recommended that the GMC should consider reviewing its guidance for registrants, with a view to providing simple guidance about the stages of its processes for, in particular, unrepresented doctors and that any evaluation of the Case Review system should pay particular attention to the special demands and needs of unrepresented defendants.

***Do you support this recommendation? If not, why?***

***What more, if anything, could be done to support unrepresented doctors who appear before Fitness to Practise panels at the GMC?***

***Do you have any other comments to make on this issue?***

#### *Costs Sanctions*

There are, at present, no effective sanctions in the event that hearings are adjourned or prolonged as the result of, for example, a failure to comply with disclosure obligations in a timely manner, or late service of evidence for no good reason. The warning, within the current process, that adverse inference can be drawn by the panel for failure to comply with directions, for example, by refusing permission to present the relevant information at the hearing, is largely ineffective.

The Working Group recommended that OHPA should be asked to consider the advantages and disadvantages of introducing a system to enable costs sanctions to be applied if there has been unreasonable conduct, or of similar schemes which enable the appropriate award of costs. The Working Group acknowledged the difficulty for the GMC in 'holding the ring' between its role in presenting the case and the doctor's defence team, given it is a party to the proceedings.

***Do you support the recommendation to evaluate costs sanctions as a means of attempting to deliver compliance with directions and enhancing the smooth and expeditious running of Fitness to Practise hearings?***

***Do you think that the introduction of costs sanctions will affect any specific groups? If so, in which ones and in what way?***

***Would you recommend that the GMC explore other means of achieving this end? If so, what?***

***Do you have any other suggestions for how to improve enforcement of case management directions in advance of a transfer of the GMC's adjudication function to OHPA?***

***Do you have any other comments to make on this issue?***

#### *Case Management at the Hearing*

A survey conducted by Panel Secretaries of GMC hearings over a period of three months in 2008 at the request of the Case Management Working Group showed that time spent 'in camera' takes up, on average, about half of the time of each hearing.

The Working Group recommended that the GMC assess the feasibility of enabling Fitness To Practise Panels to reserve their determinations to a fixed time and place, and/or releasing the parties and their representatives whilst deliberating in camera for any length of time.

***Do you support this recommendation?***

***Do you perceive any operational problems or any problems for doctors arising from such a change in practice?***

***Do you think that the proposal to reserve determinations will affect any specific groups? If so, which ones and in what way?***

***Do you have any other comments to make on this issue?***

The survey conducted by Panel Secretaries mentioned above further showed that length of hearing days differs considerably.

The Working Group recommended that the GMC consider the statistical evidence concerning length of Panel hearings, with a view to ascertaining whether there are any learning points to be reviewed in its training sessions for Panel members and Chairs.

***Do you perceive any other reasons for length of hearings not already mentioned? If so, what?***

***Do you have any other comments to make on this issue?***

#### *Management of Complex Cases*

We described above the particular difficulties with the management of complex cases, where inability to engage the parties in constructive pre-hearing discussion and the lack of enforcement powers, has particularly detrimental results on the effective running of a hearing. In some of our more complex cases this has led to considerable under-estimation of the length of hearings and resulted in several adjournments which can considerably lengthen the hearing.

***Do you have any suggestions for tackling this issue over and above the recommendations made by the Case Management Working Group?***

***Do you have any other comments to make on this issue?***

#### **Why is this consultation process taking place?**

We wish to seek views on the Case Management Working Group's recommendations. We would welcome your comments on any aspect of the proposals.

## **How to comment**

You can take part in an online version of the consultation, or you can download the main consultation document and respond in writing, either by e-mailing or by sending your response to:

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This consultation runs from 19 May 2009 to 19 August 2009.

## **Further information**

If you have any questions about the consultation please contact Michael Cotton on 020 7189 5168 or by e-mail to [ftpconsultation@gmc-uk.org](mailto:ftpconsultation@gmc-uk.org)