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

Analysis of Responses

1. This annex analyses responses to the consultation on the recommendations in the report of the Case Management Working Group.

General comments

2. We received 26 responses to the consultation. Parties responding to the consultation included medical defence organisations, Medical Royal Colleges, GMC panellists, other regulators, GMC Legal and one of the barristers' chambers with experience in GMC hearings.

3. In addition, we also held meetings with the Medical Defence Union (MDU) and the Medical Protection Society (MPS).

4. A response was provided on behalf of GMC Legal. It concluded:

> *'In general we felt that the CMWG had given careful and thoughtful consideration to exploring ways in which the current case management system could be improved for the benefit of all parties involved in the adjudication of FTP Panel cases and we welcome the thrust of their findings.'*

5. However, the response questioned whether overarching improvements could be implemented until the Office for the Healthcare Professions Adjudicator (OHPA) has taken over responsibility for the GMC's adjudication functions and can consider implementing more significant measures such as pre-hearing disclosure requirements and costs sanctions.

6. Patient Concern also suggested that some of the issues, such as comparative research might be better left to OHPA.

7. One doctor who responded who had been subject to a GMC FTP hearing, commented that there was no mechanism for feeding back to the GMC. She commented that the case management and subsequent hearing did not appear to her to be competent or fit for purpose.

Comparison with other jurisdictions

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?

8. Questions 1 and 2 considered whether any meaningful lessons could be drawn from looking at the hearing length in other jurisdictions.

9. The MDU indicated that they considered the apparent difference in case hearing length to be '*remarkable and a matter for concern*' and suggested that it raised questions about the management of FTP hearings. They supported the recommendation that a detailed comparative research programme should be undertaken.

10. The MDU also commented on the increase in the length of GMC hearings over the last 10 years, and outlined a number of contributory factors relating to an increase in the number of 'clinical negligence' cases referred to Fitness to Practise panels.

11. The MPS recommended that in addition to comparing against the experience of other jurisdictions, it would also be useful to compare the management of hearings in other regulatory bodies, such as the General Dental Council and the General Optical Council.

12. The Medical and Dental Defence Union of Scotland (MDDUS) questioned whether the length of hearings might result from the generic nature of Fitness to Practise hearings since 2004 and suggested research on that issue:

> *'It seems to us the most telling statistic in the GMC paper in this regard is that 52% of hearing time is spent in camera. This seems to us to confirm our view that it is the range of issues addressed in a single hearing and the highly staged nature of the GMC hearing process which has increased hearing length.'*

13. The Royal College of Psychiatrists (Scottish Division) also agreed that there should be '*more robust analysis and comparisons with other countries*' systems.' Similarly, the Academy of Royal Colleges and Faculties in Scotland agreed that it would be useful to try to establish why UK hearings are significantly longer than those in other jurisdictions.

14. The Pharmaceutical Society of Northern Ireland explained that in many countries, cases are heard at a regional level. They suggested that any research could consider case management in systems operating a federalised system, such as Canada.

15. An individual doctor (who had been subject to a FTP panel hearing) suggested that there might be a range of contributory factors, relating to the nature of the cases prosecuted (inappropriately in her view) by the GMC, for example, on the basis of one bad outcome rather than deficient performance.

16. A GMC panellist who responded suggest that one contributory factor to the length of hearings was the format of the charges:

> '*Complex structure of allegations, often requiring panels to consider a set of allegations such as 'inappropriate', 'misleading' etc, in relation to many sub-paragraphs. The detailed reasoning panels must give when writing determinations, which has gradually increased. For example, determinations on facts are now much longer than they used to be.*'

17. Another GMC panellist made the same point:

> '*However, based on 8 years of being a panel member and chair, it seems that length relates to a number of factors: 1. That in many cases the charge sheet is unnecessarily detailed so that there is often a long forensic enquiry into the precise details of each subhead. For example, in a case involving alleged mismanagement of an operative and postoperative procedure, the heads of charge broke down the events into discrete timeslots, in each of which precise allegations were made. The evidence from experts and the experience of medical panel members was that the process was a continuous one and it was so distant from normal clinical practice to break it down in this way that the charges were unrealistic… In another example, the total number of heads and sub heads were about 60 and the final series.'*

18. One response suggested that any research might also consider the range of sanctions. The response noted that some regulators have a wider range of sanctions available, including fines.

19. The General Optical Council commented that they have legally qualified chairs and suggested that they might prove a useful comparator.

The introduction of more active case management procedures.

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?

20. Questions 3 to 6 considered whether the GMC's procedures could be improved by the introduction of more active case management procedures.

21. The MDU criticised the apparent failure by the GMC itself to comply with the case management process and timetable in many cases. They also suggested that it was difficult for the GMC to play an effective role in enforcing compliance while there is not proper separation of adjudication from investigation. The MDDUS also suggested that there can be delays in the GMC instructing Counsel, especially in less complex cases, precluding early discussion with their Counsel. They indicated their support for further evaluation of the current arrangements which they said they found to be helpful.

22. Deans Court Chambers agreed that active case management could address some of the current problems. They suggested that on-line case management be piloted. They also emphasised that it was essential that Case Managers '*are able to exercise independent judgement and be perceived as independent.'*

23. The MPS suggested that we consider introducing the General Dental Council's FTP Rule 51 meetings:

> '*an optional preliminary meeting between the chair, legal assessor and both parties – to assist more active case management. We have found these meetings to be helpful as the same legal assessor is involved all stages, bringing an independent aspect to proceedings, although a different chair can be involved at the final hearing.'*

24. A GMC panellist who responded suggested that there were three particular factors that contributed to the length of hearings:

a. The scheduling of witnesses often results in shorter days and longer hearings.

b. The length of in-camera discussions is often unpredictable and might be improved through firm but fair chairmanship.

c. The drafting of determinations can take a long time; he suggested that the answer is good and expeditious drafting skills as well as adoption of reserved determinations.

25. The Academy of Royal Colleges and Faculties in Scotland suggested that the GMC should explore making more use of independent case managers.

26. GMC Legal suggested that active case management could be particularly beneficial to:

a. Focussing the parties' minds on their respective case preparation.

b. Narrowing the issues in dispute.

c. Allowing for more accurate hearing time estimates to be made.

27. The Locum Doctors Change suggested that it would be particularly helpful to enforce active case management in cases where the doctor is representing himself.

28. A doctor who responded commented that it would be useful for the GMC to get early expert advice. She stressed that it was also essential that any advice was appropriate and from a doctor with an up to date knowledge of the particular issues.

29. A GMC panellist suggested that more could be done during the case management process to review the merits of the case prior to the hearing:

> '*I have been involved in many cases where it is implicit (though not explicit) that the case as originally pleaded may have been very different and we are left with a 'rump' which often means that the heads of charge seem puny or illogical. In some cases uncontested defence evidence is given which, if known to the GMC in advance would surely have led to charges being dropped or amended. In such cases one has the impression that GMC Counsel has nevertheless been instructed to fight tooth and nail to retain the allegation, thereby adding to the time and expense involved.*

30. The GOC questioned how effective case management would be if it is not supported by the power to award costs:

> *'As the GMC has no ability to make awards of costs either against registrants or against their legal representatives (i.e. wasted costs) in relation to late or non-compliance with case management directions, there is little incentive for compliance, other than to avoid criticism from the panel at the hearing. We consider that while more active case management may improve the situation to some extent, it is unlikely to completely resolve the problems that the GMC currently faces with regard to parties' lack of engagement with the process.'*

31. They also suggested:

> 'th*e only effective method of enforcement would be to exclude evidence submitted late (which is a difficult path for panels to take, in terms of fairness as explained above) or to have a costs jurisdiction and therefore to financially penalise a party (or their representative, should it be the representative that is at fault) that does not comply with directions.*
>
> *The only other matters that might potentially be dealt with, in order to shorten the length of the substantive hearing, would be any preliminary legal issues. As the paper notes, this is not currently possible within the terms of the GMC's Rules. Similarly, although not currently permissible under the GMC's Rules, it would undoubtedly be of benefit to the substantive hearing if disputes as to the admissibility of witness and/or expert evidence had to be dealt with at a pre-review hearing to be held shortly before the substantive hearing.'*

32. A GMC Panellist suggested:

'Prehearing experts' meetings, as used in clinical negligence cases, might well make this type of case much shorter.'

33. The GOC suggested that the development of more active case management would benefit unrepresented doctors.

The timing for the current stages within our current case management procedures.

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?

34. Questions 7 to 10 considered whether the current timings within our case management procedures should be reviewed.

35. The MDU suggested that it may be beneficial to adopt a more flexible approach to the timing of stages in case management procedures and proposed that the timing of the Stage 1 telephone conference be delayed:

'We therefore propose that Stage 1 telephone conferences be put back to, say, two months after the case examiners' decision, but it should be clearly understood that this is to enable the prosecution to make progress in their investigation and evaluation of the case before a Stage 1 telephone conference takes place.'

36. Similarly, they suggested that there should be greater flexibility of the timing of Stage 2 telephone conferences *'to allow review following disclosure of GMC evidence and the notice of inquiry'.*

37. The MPS echoed the benefits of a more flexible approach and also suggested that teleconferences are often scheduled too early in the process.

38. Deans Court Chambers also agreed that there could be benefits from a more flexible approach to timings. They suggested that the current arrangements do not propose preliminary discussions.

39. The MPS suggested that it would be helpful to get information about witnesses, including details of who are attending and the order, as early as possible.

40. The Royal College of Psychiatrists (Scottish Division) commented:

> '*All possible attempts to arrive at positions of agreed facts would be beneficial. If this were able to be achieved then the hearing could concentrate on areas of dispute.'*

41. A GMC panellist suggested that: '*serious consideration be given to specific days being allocated for such a process. Several cases could be dealt with on one day and could be presided over by an experienced FTP panel chairman without the necessity of a full panel*.'

42. GMC Legal agreed with a review of both the timing of Stage 1 and other telecons. They referred to the list of issues (on page 7 of the consultation paper) which could usefully be discussed at what would effectively be a Stage 3 telecon. They argued that this would add to the efficiency of the process and suggested that it should take place immediately after the Notice of Inquiry has been sent to the doctor.

43. The MDDUS suggested that it would be sensible to pilot the concept of a pre-hearing review shortly before the hearing. They suggested that, in order to be useful, it would have to be attended by counsel or by solicitors who are in a position to take decisions on points of discussion.

44. The Locum Doctors Association again questioned how the arrangements would affect cases involving unrepresented doctors.

Disclosure.

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?

45. Questions 11 to 14 explored whether any changes should be made regarding the disclosure of evidence at the pre-hearing stage.

46. The MDU strongly opposed any change that would require defence disclosure in the form of a defence statement:

> *'There is good reason to retain an FTP panel procedure whereby factual and expert evidence is given orally and may be tested under cross-examination. We consider that it is appropriate to retain the safeguards inherent in the current procedure and that there should not be a specific requirement for disclosure of defence statements.'*

47. The MDDUS did not support any change prior to the OHPA becoming operational:

> *'We would point out that full disclosure is not the norm in the Scottish civil courts and so is not the procedure prevailing throughout the UK. Nor are the criminal procedures entirely common to all UK jurisdictions as we understand it.'*

48. *They set out two particular reasons for their objection; firstly that the onus is the GMC to prove its case, rather than for the doctor to prove his innocence; secondly that very often the GMC's case is not clear until the 28 day notice of the hearing, giving the defence very little time to finalise its response.*

49. In contrast Deans Court Chambers suggested that the disclosure of defence evidence before the hearing could improve the efficiency of hearings and would not compromise the fairness of hearings.

50. The MPS suggested that the introduction of pre-hearing disclosure would be of primary benefit to unrepresented doctors, allowing them more time to prepare a robust defence.

51. The Academy of Medical Royal Colleges and Faculties in Scotland supported greater pre-hearing disclosure:

> *'In a civil case e.g. personal injury compensation, full exchange of views takes place between the opposing parties which focuses the issues in contention more effectively with the benefit that only the relevant issues are debated and that is how out of court settlements are reached.'*

52. Similarly a GMC panellist suggested that 'Full *disclosure is essential to good management and expeditious running of cases. This should include all documents and also the filing of a Defence Statement and the disclosure of defence witnesses. This would seem to be fair to both sides and also fair to all participants in a hearing.'*

53. The GOC supported the introduction of pre-hearing disclosure:

> *'We support the full disclosure of evidence at the pre-hearing stage and believe that doctors would better understand and accept a regulatory system which had within its powers a process which, for example paralleled civil proceedings.'*

54. They did not consider that it would result in any unfairness:

> *'Pre-hearing disclosure and the service of a Defence Statement should not result in any unfairness, as the registrant will in any event already have sight of the written witness statements and other evidence upon which the GMC intends to rely and should therefore be in a position to identify the issues that are relevant to their defence. Our view is that the introduction of these measures would serve to level the playing field between the regulator and the registrant.'*

The inclusion of an overriding objective for our case management procedures.

Do you support this recommendation? If not, why

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

55. Questions 12 and 13 considered whether it would be helpful to include an overriding objective for our case management procedures.

56. Deans Court Chambers suggested that the inclusion of an overriding objective could be useful in '*guiding the parties and in assisting their understanding of case management decisions.'*

57. The MPS did not consider that an overriding objective would add any benefit and suggested that the requirements in Good Medical Practice already set out the doctor's responsibilities to co-operate.

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?

58. Questions 14 to 16 considered whether more could be done to assist unrepresented doctors within our procedures.

59. The MDU agreed that it was important to pay attention to the particular demands and needs of unrepresented practitioners. Deans Court Chambers agreed and suggested that a scheme of volunteers similar to the Personal Support Unit Manchester Civil Justice Centre could be considered.

60. The Royal College of Psychiatrists (Scottish Division) suggested that the GMC should carry out research into why some practitioners appear unrepresented at hearings.

61. The General Teaching Council recognised that the GMC needs to be mindful of its independence and that providing too much support for unrepresented doctors could be seen to undermine its role in protecting the public interest.

62. A GMC panellist suggested:

> *'Better, more helpful information, given long enough in advance, about how to obtain pro bono legal representation.'*

63. The GOC made a similar point:

> *'It might assist both the unrepresented doctors, and the conduct of hearings generally, if they were able to have access prior to the hearing to advice concerning the structure of the hearing and the various stages involved. Ideally it would assist unrepresented registrants also to have access to some form of legal advice in relation to the defence of their case, even if they wish to present their case themselves.'*

Costs sanctions.

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?

64. Questions 17 to 21 looked at the possibility of the introduction of costs sanctions.

65. The MDU indicated that they did not support the introduction of costs sanctions and thought that this would be difficult while there is not proper separation of investigation and adjudication functions. Their preferred option was *'sanctions that may if appropriate restrict a party's right to adduce evidence if they default in complying with directions.'*

66. The MPS also opposed the introduction of costs sanctions and mentioned that although both the GOC and GDC have the power to enforce costs, they very rarely use them.

67. The MDDUS agreed that cost sanctions could not be introduced while the GMC is still managing and presenting cases.

68. The MPS suggested that *'introducing procedural hearings to get an adjudicated rule of disputes before the main hearing would be helpful.'*

69. Deans Court Chambers agreed that consideration of costs sanctions should be left for consideration by OHPA. They also commented:

> *'The professional duty and responsibility (as stated in GMP) to co-operate and comply with the procedures should be highlighted and emphasised by a high profile campaign*.'

70. The Locum Doctors Association argued against the introduction of costs. They suggested, however, that the GMC should reimburse doctors when their fitness to practise is found not to be impaired at hearings.

71. The majority of individuals and GMC panellists supported assessing the use of costs sanctions.

Case management at the hearing.

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?

72. Questions 22 to 25 considered the issues of case management arrangements at the hearing itself.

73. The MDU expressed concern at the amount of time that panels spend in camera. They suggest that this might raise questions about the competence of panels and chairmen to conduct proceedings and reiterated their support for the introduction of legal chairmen.

74. The MDU supported a proposal to release parties pending the outcome of panel deliberations, but did not support the recommendation that FTP panels should reserve their determinations to a later date. They suggested that this approach would be unfair to registrants as it would delay the outcome and extend the hearing still further.

75. The MDDUS did not support the introduction of reserved determinations. They considered that it would lead to further delay before respondents know the outcome of their case. They supported the release of parties when the Panel is aware that they will be in camera for a lengthy period.

76. Deans Court Chambers also questioned the benefit of reserved determinations:

> *'We consider that reserved determinations would impose heavy burdens on Panel members and would be stressful for doctors due to the additional delays. The advantage of the present system is that Panel members remain together and deliver relatively expeditious decisions. The need for a quick decision should be paramount.'*

77. In contrast, the MPS commented:

> 'W*e consider that although uncertainty can be overcome by certainty of the date of determination, in contrast it will mean not waiting for an unknown and what can be a considerable length of time.'*

78. They suggested, however, that the option should only be used where it is likely to take the panel a considerable amount of time to complete its determination.

79. The General Teaching Council suggested that reserving determinations was an interesting proposal.

80. GMC Legal suggested that the GMC should assess the feasibility of enabling FTP panels to reserve their judgements; they acknowledged that Panels already release parties and their representatives when they are likely to be in camera for some time. They suggested however that the rules might need amending in respect of submissions on immediate sanctions. They also suggested that the panel chair could be empowered to hand down the determination on behalf of the panel at a later date.

81. The MDU questioned whether there is sufficient incentive for panels to conclude cases promptly and suggested that they GMC should analyse the reasons why so many cases are not concluded as promptly as possible. They also suggested that it would be useful to review the arrangements for paying panellists.

82. An individual doctor who commented questioned the competency of GMC panellists and suggested it would be preferable to have legal chairs. She also commented that there is no incentive for panels to conclude cases promptly.

The management of complex cases.

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?

83. The final two questions looked at the management of complex cases.

84. The MDU suggested that a more flexible approach to pre-hearing conference might be adopted. They also suggested that it was particular important in these cases for the GMC to carry out appropriate investigations at an early stage and to comply with its disclosure requirements.

85. Deans Court Chambers suggested that a more robust enforcement process might also be beneficial:

> *'We agree that the enforcement of directions is a difficult issue. In furtherance of an appropriate Overriding Objective and effectively using resources it is sometimes appropriate to take a robust approach by striking out allegations or refusing permission to call evidence. Panels and Case Managers should be trained in the use of such powers and should use them when necessary to achieve the OO.'*

86. The MPS suggested that increasing the use of information technology in terms of the submission of transcripts of evidence would assist all parties.

Additional points

87. The MDU suggested that further consideration should be given to the possibility of concluding cases consensually before the hearing:

> *'The Case Management Working Group recommended that a form of consensual disposal should be available to be considered following referral to an FTP panel. We support that recommendation. There are many cases that proceed to a hearing before an FTP panel that could sensibly be resolved by consensual disposal by the use of undertakings, and could thereby achieve much the same outcome as a lengthy and costly FTP hearing.'*

88. The British Association for Counselling and Psychotherapy supported the recommendations in the report: '*We particularly applaud the approach that 'most matters are resolved by consent on the basis of a Statement of Agreed Facts.'*

89. The Royal College of Psychiatrists (Scottish Division) suggested that the difficulties experienced by the GMC are due largely to the adversarial nature of its proceedings:

> *'The adversarial nature of the legal system leads to delays and adjournments. The reality of the court system is that a lot of time is wasted and we don't believe the GMC is immune from this… the real issue is that there must be a shift from an adversarial court based system to more of a Tribunal system; otherwise the cases will grow ever more complex and take even longer!'*