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To consider

Fitness to Practise: Hearings Management: Outcome of Consultation

Issue

1. Analysis of responses to our consultation on hearings management.

Recommendations

2.
 - a. To note the responses to the consultation (paragraphs 15-46 and Annexes A and B).
 - b. To agree that we should take forward the development of the proposed programme of work outlined in paragraph 46.

Further information

3. If you require further information about this paper, please contact us by email: gmc@gmc-uk.org or tel. 0161 923 6602

Background

4. The review of our hearings management arrangements outlined in this paper and the resulting work programme support Key Aim Seven of the 2009 Business Plan: *To enhance patient safety by dealing fairly and effectively with doctors whose fitness to practise may be impaired*. The 2009 Business Plan emphasises the importance of the continuous improvement of our fitness to practise procedures.

5. The effective management of hearings at the adjudication stage of our fitness to practise procedures is crucial to the delivery of Key Aim Seven in our Business Plan. We are committed to continuing to enhance the management of hearings, pending the transfer of our adjudication functions to the Office of the Health Professions Adjudicator which is due to take place in 2011.

6. We have already implemented a number of measures aimed at improving our adjudication processes. We have enhanced the support and guidance we provide for staff involved in pre-hearing case management; we have revised our methods for estimating the length of hearings; we introduced an over-listing system that enables gaps to be utilised when cases are postponed or cancelled; and we have a flexible approach that seeks to make maximum use of capacity in our London and Manchester offices.

7. In July 2008 we established the Case Management Working Group, chaired by Eleanor Grey, a barrister and former member of the Department of Health (England)'s Tackling Concerns Nationally Working Group.

8. The Working Group was established in response to a marked increase in the number of panel sitting days and an increase in the average length of hearings. The Working Group focused on the case management procedures that take place prior to the hearing, including the pre-hearing teleconferences which allow for dialogue between the GMC and the doctor's defence. It also considered the management of complex cases at hearings.

9. The Working Group made 13 recommendations covering the following issues:

- a. The introduction of more active case management procedures.
- b. The timing of various stages within our current case management procedures.
- c. Disclosure.
- d. The inclusion of an overriding objective for our case management procedures.
- e. Unrepresented doctors.
- f. Costs sanctions.
- g. Case management at the hearing.

h. The management of complex cases.

10. On 10 February 2009, Council reviewed the report of the Working Group and agreed that we should consult on the recommendations in the report. Council invited the Fitness to Practise Reference Group to oversee the consultation and to report back. In April 2009 the FtP Reference Group agreed detailed proposals for consulting.

11. We hoped, through the consultation, to seek views on the recommendations contained in the report. In particular, we were keen to obtain suggestions and ideas for how to tackle the difficult issues of increasing hearing length and difficulties in engaging the parties effectively at the pre-hearing stage, in advance of the transfer of our adjudication function to OHPA.

12. It was agreed that, although it may not be possible to progress some of the matters in the short term, it would nonetheless be useful to consult on the recommendations in order to gauge views and better inform that which the GMC should address and those issues which should be flagged to OHPA.

13. The consultation paper is at Annex A.

14. In tandem with the consultation, a second short-life working group, also chaired by Eleanor Grey, has been looking specifically at our approach to drafting charges in Fitness to Practise cases. A number of responses to the consultation suggested that the format and content of charges could have a significant impact on the time needed by panels to make their determination. The outcome of this further work will be reported to the FtP Reference Group on 15 December 2009.

Discussion

15. We consulted between May and August 2009. In addition to notifying a wide range of our key interest groups, we also contacted organisations with a particular interest in the issues, such as barristers' chambers.

16. We also held very useful meetings with the Medical Defence Union and the Medical Protection Society.

17. Many of the issues considered in the consultation are of a very technical nature and are likely to be of interest to a relatively narrow range of key interest groups; which may explain why we received a relatively low number of responses to the consultation.

18. We received 26 responses. A summary of responses is at Annex B. Two members of the Reference Group, Dr Joan Martin (Convenor) and Professor Rajan Madhok, reviewed the responses to the consultation before the matter was considered by the FtP Reference Group and verified that the summary of responses reflected the range of responses received.

19. We received responses from a range of organisations, including medical defence organisations, medical royal colleges and other regulators and from individuals such as GMC panellists and doctors with a particular interest in our fitness to practise procedures.

20. All the responses commented positively on the aims of the review and the consultation. A number of responses suggested that it would be difficult for the GMC to take forward some of the potential changes prior to the transfer of the GMC's adjudication function to OHPA; this was either because a change to the GMC's statutory framework would be required or because it would be difficult to implement the change while the GMC carries out both the prosecution and adjudication functions.

21. Nonetheless, responses to the consultation suggested that the GMC could consider implementing certain changes in advance of OHPA taking on its adjudication role. These are considered in more detail in the paragraphs below.

Recommendation: To note the responses to the consultation.

Comparison with other jurisdictions

22. The consultation asked whether any meaningful lessons could be drawn from looking in more detail at the procedures of other jurisdictions to try to establish whether there are any particular factors that contribute to the apparent disproportionate length of GMC hearings compared with those of other regulators

23. Many of the respondents agreed that it would be useful to carry out such research. 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 with other regulatory bodies, such as the General Dental Council and the General Optical Council. We are conscious that such research is likely to be costly and take some significant time to complete. In view of this we propose to consider further the likely benefit of such research given the planned transfer of our adjudication function to OHPA and we will report back to the FtP Reference Group early in 2010.

Active case management

24. The consultation considered whether the GMC could implement more active pre-hearing case management. A number of responses suggested it would be difficult to implement major changes while the GMC performs both the prosecution and adjudication functions, although in general introducing some independence into the case management process was supported.

25. A number of specific suggestions were made such as the development of on-line case management arrangements and the introduction of a preliminary meeting between the chair, legal assessor and both parties (as takes place under the General Dental Council's procedures). We consider that a number of these suggestions merit further consideration.

Timing of case management

26. There was general support for a more flexible approach to the timing of the pre-hearing teleconferences, suggesting that, in particular, the Stage 1 teleconference often took place at too early a point in the process. Our own legal team also suggested the introduction of a teleconference immediately after the Notice of Hearing is issued.

27. We will review in more detail the timing of teleconferences within our case management arrangements and will involve all relevant parties, including the medical defence organisations, in this process.

Pre-hearing disclosure

28. Many responses supported the introduction of greater pre-hearing disclosure. However, the MDU argued strongly against it and supported the current approach '*whereby factual and expert evidence is given orally and may be tested under cross-examination*'.

29. Realistically, it would be very difficult to implement any changes regarding pre-hearing disclosure within the current framework and in advance of the transfer of our adjudication function to OHPA. However, we consider that it would be useful to revisit the issue at a later date, once OHPA has assumed its responsibilities.

Overriding objective

30. The report of the Case Management Working Group questioned whether our rules should include an overriding objective, similar to that contained in the civil and criminal procedure rules. In the criminal procedure rules the overriding objective requires cases to be dealt with justly which includes ensuring all parties are dealt with equally, respecting the interests of the parties including their human rights, ensuring the establishment of guilt or innocence and having regard to the complexity of the issues. In the civil procedure rules it includes saving expense and allocating the courts resources appropriately to each case bearing in mind the needs of other cases.

31. While some parties supported the proposal, the majority of responses did not appear to consider that it would have a significant impact; the MPS was of the view that doctors were already under a duty to co-operate under *Good Medical Practice*. We agree that the inclusion of an overriding objective in the rules is unlikely to have a significant impact and in view of the fact that this was not supported by the majority of respondents we do not propose to pursue this further.

Unrepresented doctors

32. The Case Management Working Group questioned whether more could be done to support unrepresented doctors. A number of responses commented on the difficulties that unrepresented doctors face because of unfamiliarity with our procedures.

33. There was agreement that it was important that we provide such doctors with clear information. However, a number of responses made the point that the GMC had to perform a difficult balancing act in such cases and that there was a limit on the kind of support we could provide.

34. We have recently reviewed our guidance for doctors facing FtP hearings. We involved a number of key interest groups in the review process. The revised guidance aims to provide a comprehensive explanation of the hearing process.

35. More generally, many respondents commented on the likely effect of a number of the Case Management Working Group's recommendations on unrepresented doctors. In some cases, they considered that the recommendations would be to the advantage of this group. We are conscious that in considering any changes we will need to take account of possible implications for unrepresented doctors.

Costs sanctions

36. There were mixed views about the possible use of costs sanctions. A number of parties suggested that OHPA should consider their use once it assumes responsibility for our adjudication function, although many respondents were strongly opposed to them in principle. An alternative option proposed was the possible power to restrict a party's right to adduce evidence if they fail to comply with directions.

Case management at the hearing

37. A number of parties expressed concern about the amount of time that panels spend '*in camera*'. A number of respondents argued for more robust chairing of panels or for the introduction or piloting of legal chairs. The MDU questioned whether there was sufficient incentive for panels to conclude cases promptly.

38. There were mixed views about the possible introduction of reserved judgements which would allow panels to release parties and deliver their determination at a later date.

39. The MPS considered that it could be a useful device in appropriate cases. The MDU expressed some concern and preferred the option of releasing the parties during deliberations.

Management of complex cases

40. The comments made in response to the questions about the management of complex cases tended to echo comments made to some of the early questions.

41. The MDU suggested that a more flexible approach to the pre-hearing conference might be adopted. They also suggested that it was particularly important in these cases for the GMC to carry out appropriate investigations and provide disclosure to the defence as soon as possible.

42. The MPS suggested that increasing the use of information technology including the provision of electronic transcripts of evidence would assist all parties.

43. Several respondents commented that the difficulties experienced by the GMC in managing hearings are due largely to the adversarial nature of the proceedings and urged a greater use of consensual disposal (item 5b on the agenda).

Next steps

44. We will need to establish projects to explore, in more detail, the potential for taking forward some of the initiatives suggested by those who responded to the consultation.

45. When the FtP Reference Group considered the responses to the consultation, it agreed that we should develop a programme of work and aim to identify work that could be taken forward immediately; work that we should aim to take forward in the medium term prior to the transfer of our adjudication functions to OHPA; and those issues that we should discuss with OHPA with a view to OHPA taking forward the proposals once established.

46. We are proposing therefore to develop a work programme based on the three categories of priority identified by the FtP Reference Group:

Work to commence immediately (within three months)

- a. To undertake a review of the current case review process with a view to considering greater use of independent case managers.
- b. To consider more flexible use of case management telephone conferences, particularly a telephone conference shortly before the hearing.
- c. To consider greater use of video conferencing for witnesses.
- d. To consider how to make better use of experts' meetings.
- e. To consider greater use of the release of parties during panel deliberations.

Work to undertake in the medium term prior to the introduction of OHPA (within six to twelve months)

- a. To monitor the impact of the above changes on unrepresented doctors and to modify the process as necessary.

Issues to discuss with OHPA

- a. The benefit of undertaking comparative research in order to identify whether there are any particular factors that contribute to the length of GMC hearings, including the cost and timing of such research.
- b. The use of reserved determinations.
- c. The merits of introducing cost provisions.

Recommendation: To agree that we should take forward the development of the proposed programme of work.

47. We will need to develop detailed proposals for each work stream. We will work closely with the medical defence organisations, the Shadow Board of OHPA (once established) and with other key interest groups in planning how we progress the work.

Resource implications

48. Developing a series of projects to take forward the reviews above will have resource implications and will need to be planned accordingly. In addition, the outcome of these reviews may have specific resource implications, for example, any proposal to increase the use of independent case managers, introduce more telephone conferences and increase the use of video conferencing facilities and experts' meetings. However if these measures improve efficiency, which they are designed to do, this should reduce hearing length which will achieve savings. As part of each review, a cost/benefit analysis will need to be undertaken in developing a recommendation.

Equality

49. In taking forward the different work streams we will need to be mindful of the potential implications on particular groups of doctors. It is important that we monitor the impact of any changes to our procedures on unrepresented doctors.

50. We will carry out equality impact assessments for the projects that we intend to take forward.