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## 6b

*To consider*

### **Fitness to Practise: Consensual Disposal**

#### **Issue**

1. Expanding the category of cases which can be concluded at the Investigation Stage.

#### **Recommendation**

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  - a. To agree in principle that the use of consensual disposal and of undertakings should be extended in appropriate circumstances. (paragraphs 16-19).
  - b. To invite the Fitness to Practise Reference Group to oversee further work on consensual disposal, including appropriate engagement and consultation, and to report the results, with recommendations (paragraphs 20-21).

#### **Further information**

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

## **Background**

4. The Fitness to Practise procedures focus on allegations or complaints that may require removal or restriction of a doctor's right to practise.
5. The purpose of the Fitness to Practise procedures is to protect the public interest, which includes, but is not confined to, patient safety, and embraces public confidence in the profession and in the regulatory system.
6. The fitness to practise procedures are not designed to provide redress; and the courts have repeatedly said that their purpose is not to punish, although that may be an incidental effect.
7. The Fitness to Practise procedures have two stages - the Investigation Stage; and the Adjudication Stage.
8. Within the Investigation Stage, two case examiners (one medical and one lay) decide, on the available information, whether there is a realistic prospect of establishing that the doctor's fitness to practise is impaired. If there is a realistic prospect, the doctor is normally referred to a Fitness to Practise panel for a hearing.
9. However, case examiners may, in appropriate cases, accept undertakings from the doctor if they are satisfied that those undertakings will protect the public interest. This is known as consensual disposal. We consulted on the guidelines that govern consensual disposal; and the guidelines are published on our website. The Rules preclude consensual disposal when there is a realistic prospect that the doctor would be erased from the register if referred to a Fitness to Practise hearing.
10. 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.
11. If a Fitness to Practise panel finds, on the facts proved, that the doctor's fitness to practise is impaired, the panel may impose conditions on registration, suspend registration, or erase the doctor from the register. A panel may accept undertakings from the doctor, as an alternative to conditions.

### *Undertakings*

12. Undertakings may involve restrictions on scope of practice or require the doctor to undergo remediation or training. Undertakings are included in the List or Registered Medical Practitioners, as are conditions, except when they would disclose details of a doctor's health. Undertakings are monitored by our Case Review Section. We act when there is a failure to comply; and we may, if necessary, refer the doctor to a Fitness to Practise hearing.

13. Compared with conditions, the significant distinction is that undertakings are agreed with the doctor rather than imposed. For all practical purposes, undertakings secured by case examiners are indistinguishable from conditions imposed by a Fitness to Practise panel or undertakings accepted by a panel.

14. The opportunities to accept undertakings within the Investigation Stage were extended in 2007, following consultation. The aim was to increase the use of consensual disposal in cases involving, for example, clinical incidents which signalled a need for further training or remediation. The impact of the 2007 change has been limited; and only seven cases have been concluded under the amended provisions. The guidance embodies a conservative approach to consensual disposal.

15. The 2007 changes were made following extensive consultation, including market research carried out by GfK NOP. The market research was aimed, in particular, at gauging public opinion about extending the availability of undertakings and the kinds of safeguards that they would expect to be incorporated.

## **Discussion**

16. 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. The visibility of our Fitness to Practise procedures, including hearings held in public, makes an important contribution to securing the confidence and support of key interests.

17. However, the February 2007 White Paper acknowledged that regulatory processes should not only protect patients but also have built-in mechanisms to help health professionals retain or regain their fitness to practise when that is an appropriate and proportionate course of action. The White Paper recognised the value of consensual disposal and of undertakings in such cases.

18. Thus, the principle of consensual disposal leading to undertakings, without a hearing, is recognised and embedded. The questions are practical – is it possible to extend the use of consensual disposal without risk to patient safety; and, if it is possible, how far can consensual disposal be developed without risking damage to public confidence and support and to the deterrent effect of a public hearing?

19. We are confident that we can extend consensual disposal without risk to patient safety. Informal discussions with the medical defence organisations suggest that they would welcome an opportunity to engage with us in helping to deliver the White Paper's aims on support and rehabilitation. An important achievement would be creating an environment within which doctors were encouraged to recognise, accept and address deficiencies.

**Recommendation:** To agree in principle that the use of consensual disposal and of undertakings should be extended in appropriate circumstances.

20. We would need to guard against the risk that extending consensual disposal would be seen as doing deals behind closed doors. During the consultation conducted by GfK NOP, some concerns were expressed about the implications of determining outcomes without an airing of the facts at a public hearing. Those concerns are valid and need to be addressed. This is not an argument against change: it is an argument for ensuring that we engage effectively with key interests and for demonstrating that we are responsive to valid concerns.

21. It will require further detailed work to develop the basis for engagement and consultation with key interests. This will include the identification of appropriate categories of case, the drafting of revised guidance for case examiners, and proposals for evaluation. The aim would be to bring formal proposals to Council for approval, together with the results of engagement and consultation.

**Recommendation:** To invite the Fitness to Practise Reference Group to oversee further work on consensual disposal, including appropriate engagement and consultation, and to report the results, with recommendations.

### **Resource implications**

22. The costs of the further work, including engagement and consultation, are likely to be in the range £5,000 to £10,000; and can be met within the 2009 Budget.

### **Equality**

23. An Equality Impact Assessment will be developed as part of the further work.