

To consider

Disclosure of Warnings after Five Years and Interim Orders where there is no Substantive Fitness to Practise Finding

Issue

1. Development of our publication and disclosure policy in relation to warnings after five years have elapsed and interim orders where the case is closed with no subsequent finding of impairment against the doctor.

Recommendations

2.

- a. To agree that warnings should only be published for five years (paragraphs 18-26).
- b. To consider whether warnings should continue to be disclosed to any enquirer on request after five years have elapsed (paragraphs 18-26).
- c. To agree that interim orders should no longer be published when the case is closed with no subsequent finding of impairment against the doctor; but that they should continue to be disclosed to any enquirer on request (paragraphs 27-31).

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. Strategic Aim Two of the Business Plan 2010, states that we will provide patients and the public with greater access to information about their doctor through the List of Registered Medical Practitioners (the LRMP).
5. Fitness to practise information is published on the GMC's 'Recent Decisions' page on the website, the LRMP and through circulation of a monthly decisions circular to employers, other regulators and international regulators.
6. All current sanctions in relation to a doctor are displayed on their individual record on the LRMP, together with relevant hearing minutes. The LRMP also contains a fitness to practise history section where all restrictions previously imposed on a doctor's registration and which are no longer current (including interim orders) are published indefinitely.
7. The only exception to this is matters relating solely to a doctor's health which are treated as confidential.
8. Minutes of all Fitness to Practise Panel hearings where there is a finding of impairment or where a warning is issued are published on the LRMP. Interim Orders Panels are heard in private; therefore, the minutes are not published.
9. The decisions circular is issued monthly to employers, other UK regulators and international regulators, and contains details of sanctions on a doctor's registration including interim orders, warnings issued and fitness to practise cases where voluntary erasure is agreed or the doctor is administratively erased.
10. Our current publication and disclosure policy stems from 2004, when we implemented the present fitness to practise procedures following a formal consultation which ran from March to May 2004.
11. The following principles emerged from the consultation which was, in part, a response to criticisms during the Shipman Inquiry that considered aspects of our disclosure policy to lack transparency and consistency:
 - a. Transparency in general is in the public interest and disclosure should be made unless there is a good reason not to.
 - b. Information about sanctions on a doctor's registration is of general importance to the public.
 - c. Once something is in the public domain it is neither desirable nor practical to later treat it as confidential.
 - d. There is a distinction between what should be actively published and what should be disclosed on request.

12. Following the consultation, in July 2004 Council agreed that minutes of all Fitness to Practise hearings, where there is a finding of impairment or sanction imposed, would be published indefinitely and all sanctions on registration (including interim orders) would be published on the LRMP and disclosed indefinitely. This included interim orders when the case was closed without a subsequent finding of impairment being made against the doctor.

13. During the consultation, opinion about what approach should be taken to warnings, which are not an action on registration, was divided. Some respondents felt that warnings should only be disclosed for five years and that disclosure for longer would be disproportionate. Other respondents were uncomfortable with the notion that warnings would only be disclosed for five years. They felt that five years was an arbitrary cut off point and that, in reality, the relevance of a warning after five years would differ in different circumstances.

14. The then Council agreed that it was proportionate to publish and disclose warnings for five years but deferred a decision about what should happen after five years until we had greater operational experience of warnings.

15. At its meeting on 15 December 2009, the Fitness to Practise Reference Group was asked to consider our policy on the publication and disclosure of warnings after five years have elapsed. The first warnings imposed after the reformed fitness to practise procedures were introduced in 2004 reach their five year anniversary in April 2010.

Discussion

16. We have a responsibility to be transparent and accountable in our decision making processes. Since 2004 we have established a reputation for openness and transparency that has enhanced our reputation as a fair and accountable regulator, both domestically, in particular with the Council for Healthcare Regulatory Excellence, but also internationally.

17. The Fitness to Practise Reference Group expressed strong support for the principle that transparency in general is in the public interest and that findings should be disclosed unless there is a good reason not to.

Warnings

18. In relation to warnings, the Reference Group was concerned that this principle needed to be balanced with the principle of proportionality. The Reference Group concluded that it would disproportionate to publish warnings after five years, as they were intended to be a response to matters that fall below the threshold for impairment and could impact on the doctor's future prospects.

19. However, the Reference Group felt that warnings should continue to be disclosed to enquirers on request, as long as the information was placed in context for the enquirer, with an explanation that the warning had expired.

20. In particular, the Reference Group had concerns about not disclosing factual information about a doctor's fitness to practise history in response to a specific request, for example, from an employer. There was general agreement that such information was relevant information for employers and should not be withheld.

21. A further issue has arisen in relation to the disclosure of warnings after five years since this was discussed at the Reference Group meeting in December 2009. In July 2004, Council agreed that warnings should be published and disclosed for five years but did not make a decision at that time about what should happen after five years. The guidance on our website reflects this position and states that warnings are published and disclosed for five years.

22. Defence lawyers have recently raised arguments on behalf of doctors that a general understanding has developed that warnings will only be published and disclosed for five years and that to disclose them indefinitely is both disproportionate and contrary to general expectation.

23. There appears to be general agreement that warnings should only be published for five years, but in relation to disclosure after five years the arguments either way are finely balanced.

24. In relation to enquiries by employers, which are the bulk of enquiries we receive about doctors, the notion that we would not disclose information about a doctor's fitness to practise history in response to a direct question would appear to be inappropriate.

25. On the other hand, warnings are a response to matters that fall beneath the threshold for impaired fitness to practise even though they involve a significant departure from *Good Medical Practice* and are not a sanction on registration. They are not, in fact, a sanction at all but a warning to the doctor to ensure that they do not repeat the behaviour in question which could, if it persists, lead to impairment. There is an argument, in view of this, that to disclose warnings indefinitely may be disproportionate, particularly if, as defence lawyers have argued recently, a general understanding has developed that warnings will only be disclosed for five years.

26. The options are:

a. To continue to disclose warnings after five years, taking care to provide an explanation to the enquirer that the warning was only published for five years and no longer appears on the doctor's record.

b. To limit disclosure of warnings to five years, although we would need to explain to enquirers that we can only confirm that a doctor has not received a warning in the last five years and are unable to confirm whether the doctor had received a warning prior to that time. In this instance, we would also need to undertake a communications exercise with employers to ensure they understand the impact of a policy of non-disclosure of warnings after five years in relation to the information they can expect to receive from the GMC in response to a direct request.

Recommendation: To agree that warnings should only be published for five years.

Recommendation: To consider whether warnings should continue to be disclosed to any enquirer on request after five years have elapsed.

Interim orders where there the case is closed with no subsequent finding of impairment

27. During the discussion at the Reference Group meeting in December 2009 about warnings, members also considered our publication and disclosure policy in relation to interim orders where the case is closed with no subsequent finding of impairment against a doctor.

28. When an interim order is removed, details of the interim order no longer appear on the face of the doctor's individual record but remain in a doctor's fitness to practise history in the LRMP indefinitely. Traditionally, this has included interim orders where the case is closed with no subsequent finding of impairment against the doctor as well as cases which result in substantive fitness to practise action. The principles which underpin this policy are:

- a. An interim order is a sanction on registration and, since 2004, our policy has been that transparency about sanctions on a doctor's registration is of benefit to all parties and that all sanctions on registration should remain a matter of public record indefinitely.
- b. It would be inappropriate that such sanctions were not displayed on our website but could still be discovered by a search on the internet.
- c. As a matter of fact and historical record, the doctor was suspended or had conditions during the relevant period.

29. The Reference Group considered that, in this instance, the principle that transparency is in the public interest needed to be balanced against fairness to the doctor. The Reference Group was concerned that there was a risk of unfairness to doctors whose prospects may be affected by the presence of an interim sanction in their fitness to practise history in the LRMP in cases where an investigation had failed to establish substantive evidence of impairment.

30. Clearly such information has been placed in the public domain and, regardless of whether it appears on our website, will continue to be accessible by a search on the internet. The Reference Group acknowledged the general principle that once something is in the public domain it is neither desirable nor practical to later treat it as confidential. However, in this instance it distinguished between the impact such information may have on a doctor's reputation if it appears on the GMC website as opposed to from other sources on the internet.

31. There was agreement that it would be appropriate to disclose details of such an order to enquirers on request, given that it had resulted in substantive action on the doctor's registration, but that the information should be placed in context for the enquirer with an explanation that the order was made on an interim basis pending further investigation and no finding of impairment was subsequently made.

Recommendation: To agree that interim orders should no longer be published when the case is closed with no subsequent finding of impairment against the doctor; but that they should continue to be disclosed to any enquirer on request.

32. Any amendments to our publication and disclosure policy will be communicated to all interested parties via the GMC website and discussed directly with key interest groups such as employers and defence organisations. The effect of any changes to our policy will be evaluated by monitoring enquiries.

Resource implications

33. These matters can be dealt with within existing budgets and resources. The Strategic Applications Project has the capacity and capability to implement the recommendations contained within this paper within appropriate timescales.

Equality

34. There are no obvious equality implications arising from these proposals. The changes proposed will apply equally to all doctors in our fitness to practise processes.