

*To consider*

**Fitness to Practise Rules: Outcome of Consultation and Approval of Draft Amendment Order and Rules**

**Issue**

1. Responses to the consultation on proposed changes to the Fitness to Practise Rules and whether Council approves the draft Amendment Order.

**Recommendations**

2.
  - a. To consider the responses to the consultation on proposed changes to the Fitness to Practise Rules (paragraphs 13-35 and Annex A and Annex B).
  - b. To approve the Amendment Order required to bring the rule changes into force (paragraph 36 and Annex C).
  - c. To authorise the Chair to agree any necessary changes to the Amendment Order and to make the Order on the Council's behalf (paragraph 37).

**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 statutory framework for our fitness to practise procedures is provided by the Medical Act 1983 and the Fitness to Practise Rules 2004.
5. The proposed enhancements of the 2004 Rules support Key Aim Seven of the Business Plan 2009: *To enhance patient safety by dealing fairly and effectively with doctors whose fitness to practise may be impaired.* The Business Plan emphasises the importance of the continuous improvement of our fitness to practise procedures.
6. The 2004 Rules came into effect in November 2004. We have identified a number of areas where improvements can be made. They arise from legal advice in relation to individual cases and from operational experience and evaluation.
7. In 2008, Council agreed a number of changes to the statutory framework, on the recommendation of the then Fitness to Practise Committee.
8. Our aims are:
  - a. To continue to ensure that our fitness to practise procedures are fair, objective, transparent and free from unlawful discrimination.
  - b. To ensure that our procedures continue to be effective and efficient.
9. In February 2009, Council noted proposals to consult on the package of proposed amendments. The consultation was approved by the Fitness to Practise Reference Group in April 2009. The details of the proposed changes are in the consultation paper at Annex A.
10. We consulted for a period of two months from 19 March to 22 May 2009. We circulated details of the consultation to around 150 key interest groups. Details of the consultation were also published on our website. In addition, during the consultation we also held meetings with the Medical Defence Union and the Medical Protection Society.
11. An analysis of responses to the consultation is at Annex B. Two members of the Fitness to Practise Reference Group, Dr Joan Martin and Professor Iqbal Singh reviewed all responses to the consultation and have confirmed that the summary reflects the full range of responses.
12. On 19 June 2009, the Fitness to Practise Reference Group considered the responses to the consultation and agreed that we should seek Council's approval of a revised draft Amendment Order.

## Discussion

13. We received 43 responses of which 28 were from organisations which included medical defence organisations, patient organisations, the medical Royal Colleges and other healthcare bodies; and 15 were from individual doctors, lawyers, GMC panellists and members of the public.

14. The majority of responses were generally supportive of the package of proposed amendments. Many of the proposed amendments are of a technical nature and attracted relatively little comment. However, a number of organisations, particularly the medical defence organisations, expressed concerns about particular proposals.

### *Rule 3(5)(a): Appointment of Specialist Performance Advisers*

15. We consulted on a proposal to remove the requirement under Rule 3(5)(a), when appointing a performance adviser, to have regard to the specialty to which the allegations relate. A number of respondents expressed concerns and it was argued that the current wording of Rule 3(5)(a) provides sufficient flexibility in that it requires the Registrar to have regard to the specialty to which the allegation relates, but does not require the Registrar to appoint a performance adviser in the same specialty.

16. On reflection, in the light of the concerns expressed, we are satisfied that the rules provide sufficient flexibility and we are not, therefore, inviting Council to effect the proposed amendment.

### *Rule 4: Vexatious complaints*

17. We consulted on a proposal to amend Rule 4 to provide a power to filter out vexatious complaints at the point of initial consideration.

18. We received a number of comments on the proposal. Most responses, including those from medical organisations, expressed their support. Many of the responses commented on the importance of developing clear criteria. The medical defence organisations want such complaints to be disclosed to the doctor.

19. Action against Medical Accidents and POhWER (one of the organisations providing the Independent Complaints Advisory Service in England), both of whom provide advocacy services, expressed concerns.

20. We remain of the view that the proposed amendment would provide a useful and appropriate tool for dealing with a small but onerous category of complaints. This view was echoed in the majority of responses. We recognise the importance of developing clear criteria and of involving key interest groups in the development of such criteria. We intend to disclose such complaints to the doctor but will implement this through operational guidance rather than rules.

#### *Rule 4(4) and 4(5): Five year Rule*

21. Rule 4 provides for the initial consideration of allegations and for the referral of allegations to case examiners. The rule stipulates that we will not investigate allegations about events that took place more than five years earlier, unless it is in the public interest to do so. We consulted on a proposal to amend Rule 4(4) to include a new sub-clause (c) to provide an express power to investigate in order to establish whether or not to proceed under the five year rule. Most respondents who commented expressed support for the proposed change. However, AvMA stated that they felt that a more fundamental review of the five year rule was required. They expressed concern that: *'The introduction of a time limit skews the primary focus of the GMC away from protecting the public and the public interest.'*

22. We remain of the view that we should proceed with the proposed change.

#### *Rule 12: Review of decisions*

23. We consulted on a proposal to amend Rule 12, to extend the circumstances in which a case may be reviewed and to provide that the Registrar may exercise the power to review investigation stage decisions.

24. A number of respondents expressed their support for the proposed amendment. However, the medical defence organisations and some others expressed concern both about the proposed wording of the draft rule and about the two year time limit during which cases could be reviewed. They suggested that the proposed wording did not place any limits on the scope for reviewing decisions. They also argued that two years was too long. Currently, Rule 12 has no time limit.

25. There were also concerns about the Registrar reviewing his own decision and concern that the rule should not be used as a vehicle for reviewing cases simply because one party or another was unhappy about the outcome of the Investigation Stage.

26. The Registrar does not make decisions within the Investigation Stage. Decisions are made by case examiners and investigation managers. In practice, therefore, the Registrar would not review his own decisions but the decisions of other GMC staff.

27. We believe that a two year time limit is appropriate. Based on practical experience, it strikes an appropriate balance between the need for flexibility and the need for finality.

28. We remain of the view that we should proceed with the thrust of the proposed change. However, in the light of the responses, we have amended the proposed rule change to provide greater clarity in relation to the two stage review process and to the criteria to be applied at each stage.

### *Rule 17: Procedure before a Fitness to Practise Panel*

29. We consulted on a proposal to amend Rule 17(2)(m) to clarify that undertakings may only be agreed following a finding of impairment. A number of the defence organisations questioned this approach and suggested that, following a recent High Court decision, undertakings may also be relevant within the second stage of a fitness to practise hearing, when the panel is considering whether the doctor's fitness to practise is impaired.

30. We have changed the draft amendment to clarify that undertakings can only follow a finding of impairment, as an alternative to the imposition of a sanction. That said, the willingness of a doctor voluntarily to restrict his or her practice or behaviour is likely to be relevant to the question of insight and/or risk of repetition of the conduct or behaviour, at the impairment stage.

### *Rule 28: Cancellation of a hearing*

31. We consulted on a proposal to amend Rule 28 to include an express power to cancel an Investigation Committee hearing when, for example, a doctor who initially declined to accept a warning, subsequently confirms that he or she is willing to accept one. This appears to be uncontroversial.

32. We also consulted on a proposal to amend Rule 28 so that, on the cancellation of a referral to a Fitness to Practise panel or to the Investigation Committee, the case may be remitted to the case examiners who, in addition to the power to conclude the case, may invite the doctor to accept a warning, invite the doctor to agree undertakings or reconsider the allegations about the doctor's fitness to practise.

33. There was general support for the proposal to introduce more flexibility into the process following referral to a panel by allowing a hearing to be cancelled and cases to be referred back to the case examiners to consider whether a warning or undertakings might be appropriate, and we propose to proceed with this change. However, some responses expressed concern about the proposal that a case, once cancelled, could be referred for the allegations to be reconsidered. In view of this we have not included in the draft Amendment Order the power for the decision-maker, on cancellation, to refer the matter back for a further investigation and decision under Rule 8.

### *Rule 40: Service of documents*

34. We consulted on a proposal to amend the provisions on the service of documents, to allow service on the doctor's solicitors and service by email. There was broad support, subject to some suggestions, particularly highlighting that service to solicitors or defence organisations must be by prior agreement case by case.

35. We have changed the draft amendment and propose to introduce a procedure to ensure that representatives serve a formal Notice of Acting and that any address for service is notified by them in advance.

**Recommendation:** To consider the responses to the consultation on proposed changes to the Fitness to Practise Rules.

*Next steps*

36. The revised draft Amendment Order is at Annex C. If approved by Council, the aim would be to invite the Privy Council to make the Amendment Order later in July 2009 and to bring the amended rules into effect from 1 August 2009.

**Recommendation:** To approve the Amendment Order required to bring the rule changes into force.

37. We will finalise the draft Amendment Order taking into account members' comments at the meeting.

**Recommendation:** To authorise the Chair to agree any necessary changes to the Amendment Order and to make the Order on the Council's behalf.

38. We will reply on an individual basis to some of those who provided responses to the consultation.

39. In implementing the changes, we will engage key interest groups including the medical defence organisations and patient organisations.

**Resource implications**

40. There are no significant resource implications.

**Equality**

41. We have completed an Equality Impact Assessment and a copy is available on request.