

## Report of the General Medical Council Drafting Allegations Working Group

### *Introduction*

1. In July 2008, the GMC established a short-life working group to look at the GMC's case management arrangements. The Working Group was set up against a background of an increase in the length of hearings and an increase in last minute hearing cancellations.
2. The Working Group's report was published on the GMC's website in December 2008. It contained 13 recommendations which were subsequently endorsed by the GMC's Fitness to Practise Committee.
3. One of the Working Group's recommendations was that the GMC should review the current system of drafting charges, with a view to standardising and simplifying practice and to identify mechanisms whereby any potential problems with charges might be identified as soon as possible.
4. The Report also suggested that poorly drafted allegations could have a detrimental effect on the efficiency of panels in determining cases and add to the length of hearings, particularly the time panels spend in camera. Paragraph 17 of Section 4 of the Report commented:

*'The drafting of charges was a major topic of concern, both amongst Panel respondents and also defence organisations and their representatives. There was a significant body of opinion that these were often either too complex, or too difficult to evaluate or assess. For example, charges made use of a number of alternative descriptors, such as inappropriate / irresponsible / dishonest / abuse of professional position. The discussion of these issues, which was a matter of judgment, could take up a great deal of time, or create the need for the Panel to vote "several hundred times" (one panellist cited an example of over 500 decisions to be made as a result of one Notice of Inquiry). There was much discussion of whether or not there was now 'over-prosecution', and whether the GMC might better concentrate on the central and most serious allegations or even introduce a system of 'specimen' charges in some cases'.*

5. As a result, in March 2009 the GMC set up a small internal working group, chaired by Eleanor Grey, a barrister and the former chair of the earlier Case Management Working Group, to look specifically at the GMC's approach to drafting charges.

### *The Drafting Allegations Working Group*

6. In addition to the chair, the Working Group comprised a number of GMC panellists, a number of GMC and external lawyers and GMC staff.

7. The objectives of the Working Group were:
  - a. To review the GMC's current approach to drafting charges and to note any particular concerns; and
  - b. To identify potential improvements to the current arrangements.
8. The Working Group met three times and also communicated electronically.

*The current position*

9. Charges<sup>1</sup> in GMC Fitness to Practise cases are drafted by the GMC's in-house solicitors and counsel, as well as external solicitors and counsel. Whether the charges are drafted in-house or by external advisors may depend on the complexity of the case, amongst other factors.
10. The allegations are initially drafted at the Rule 7 stage of the investigation process. Subsequently, the final particularised allegations (individual heads of charge) are set out in the Hearing Notice in accordance with Rule 15 of the Fitness to Practise Rules.
11. Rule 15(2) of the GMC Fitness to Practise Rules 2004 states that the Notice of Hearing shall 'particularise the allegation against the practitioner *and the facts upon which it is based*' (emphasis added).
12. Once a decision has been taken to refer the doctor to a hearing, the instructed solicitor will engage counsel for the case, who will be responsible for drafting or approving the Notice of Hearing.
13. Draft Notices of Hearing are passed to the Case Presentation Team (CPT) for consideration and approval. The CPT's role in approving the charge is primarily to ensure that the case is presented in a way that reflects the GMC's position on standards and ethics, and its view about issues of patient protection and public interest.
14. The GMC has previously provided guidance to those responsible for drafting charges. It includes guidance on the general principles of drafting, structuring charges, terminology and numbering.
15. The Working Group took the view that, while it would undoubtedly be useful to review the GMC's approach to drafting charges, it did not consider that the general level of drafting was sub-standard. A number of the FTP panel chairs commented that they considered that over recent years there had been an improvement in the

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<sup>1</sup> For the purposes of this report we have used the term 'charges' to refer to the particularised allegations contained in the Notice of Hearing within the meaning of Rule 15 of the Fitness to Practise Rules 2004.

drafting of charges. Nevertheless, there was disquiet about some of the charges seen, and it was felt that there was room for further improvement.

16. The Working Group noted that some positive measures had already been taken to ensure the quality and consistency of drafting, including the introduction of guidance on drafting charges.

17. The Working Group was also mindful that in reviewing the GMC's approach to drafting charges, it had to have regard to the constraints imposed by the current legal framework; a number of potential changes were likely to require an amendment to the GMC's Fitness to Practise Rules.

18. The Working Group also acknowledged that the planned transfer of the GMC's adjudication functions to the Office of the Healthcare Professions Adjudicator and the increasing emphasis on a more consistent approach by the various healthcare regulators might, in the longer term, require some changes to the GMC's approach to drafting charges.

#### *Areas of concern*

19. As part of its preliminary work, the Working Group reviewed a number of examples of charges that had been highlighted as problematic in feedback provided by GMC Fitness to Practise Panel chairs. The problems identified largely fell within the following categories:

#### Complexity

20. In some cases there had been a tendency to make the charges overly complex, in particular, to break the charges down into numerous sub-clauses.

#### 'Kitchen sink'

21. The 'kitchen sink' approach involves including every potential failing in the charges, rather than limiting the charges to the most serious allegations. This could result in relatively minor issues sitting alongside much more serious charges.

#### Summary clauses

22. Summary clauses are often used in charges to explain why the particular conduct or behaviour alleged is problematic. Charges may include a list of terms which purport to describe the doctor's actions, such as "inappropriate", "irresponsible" and "not clinically indicated".

23. The particular concern was that, with limited central guidance and a number of different individuals involved in the drafting process, each of whom might have different experience of 'custom and practice', there was scope for these descriptive summary clauses to be used inconsistently.

24. Among Panel chairs on the Working Group, there were a range of different views about the benefits of summary clauses; some of the Panel members suggested that it was useful to have a series of “judgements” offered to them rather than deciding themselves how best to describe the doctor’s behaviour, while others felt that they were cumbersome and tended to add to the time it took Panels to complete their determinations.

25. There was a general agreement that there was scope for addressing the over-use of such summary clauses. The Working Group considered that there was a need for a better balance to be struck, between the wish to preserve the Panel’s freedom to decide, and avoiding over-burdening it.

#### Inclusion of arbitrary detail

26. On occasions, the inclusion of arbitrary detail that cannot readily be proved (for example, the time of a particular incident), risked undermining the allegations as a whole, if not crucial to the events on which the charge rested. However, the Working Group noted that any party and Panels of their own motion may consider amendments to charges; and Panels can (and do) decide charges in such a way as to dispense with minor details that do not affect the overall seriousness of the charge.

#### Adoption of a narrative style

27. This referred to the adoption of an detailed narrative style which tends to result in excessive background information that is not necessarily pertinent to the charges. As with the ‘kitchen sink’ approach, the effect of this is that it tends to lead to a mix of uncontroversial factual statements alongside the specific criticisms of the doctor. Again, the Group noted that some narrative ‘grounding’ of the charges was always necessary, and the uncontroversial would frequently be admitted or would not cause delay to the proceedings.

#### Key facts omitted

28. Panel chairs have raised concerns that, in some cases, key facts are not being included in the charges. Again, the Working Group noted that there is a power to amend if this causes no injustice to the doctor; but plainly it was undesirable to be forced to rely on this power at the hearing.

#### *The Working Group’s review*

29. The Working Group reviewed the approach to drafting allegations adopted by other health regulators both within the UK and overseas. It also compared the GMC’s approach with that of the Crown Prosecution Service in respect of criminal indictments. During this exercise the Working Group looked at examples both of charges and guidance used by a range of organisations.

30. While this exercise was useful, the group did not identify any specific models which it considered would be both more effective than the current approach or more appropriate to the GMC's cases. In particular, it was difficult to draw on the approach of many overseas regulators as in many cases their legal framework and procedures are very different from those of the GMC. Many overseas regulators do not appear to share the GMC's experience of very complex cases relating to the standard of a doctor's clinical practice. The approach to drafting charges adopted by other UK based regulators was found to be similar to the approach taken by the GMC.

31. The Working Group also reviewed relevant case law. Some of the relevant case law is reflected in the guidance on drafting charges.

32. In addition to looking at examples of drafting that had caused Panels some difficulty, the Working Group reviewed allegations that had been redrafted in different formats, in order to examine the likely impact of different drafting styles.

#### *Format of charges*

33. The group considered the format of GMC charges and questioned whether the GMC could make a fundamental change by adopting much shorter allegations, similar to indictments in criminal cases, but supported by a more detailed statement of case.

34. The Working Group concluded that there were a number of obstacles to adopting such a change. The Group considered that there was a significant distinction between charges in a GMC Fitness to Practise case and an indictment in a criminal case. The GMC cannot rely on statute to provide the wording of any charge, and is also required by the Rules to include 'the facts on which it [the allegation] is based'. Both of these factors lead to a more descriptive and narrative approach. The Rules would also imply that if such a model were to be adopted, the detailed Statement of Case would have to be considered a part of the Notice of Hearing; in which case it was not apparent how any material change, let alone advantage, would result.

35. The Working Group also discussed the risks that a change to the drafting style could have unintended consequences or impact on other aspects of the procedures. For example, less detailed charges could result in a requirement for the Panel to give more detailed reasons at the findings of fact stage in hearings.

36. The Working Group considered that it would be difficult to implement a fundamental change to its style of drafting allegations without a change to the procedural Rules. Although the Working Group tried to look at different approaches to drafting, there was a scarcity of obvious alternatives, and the Group was unable to agree that any particular approach would be a preferable option or minimise any of the difficulties currently experienced.

37. In relation to concerns of 'over prosecution' or the kitchen sink approach, the Group noted that deciding which charges to include is inevitably a matter of judgement. The GMC will be guided by the Case Examiners' decision, especially given that these decisions introduce a measure of independent scrutiny into the question of whether or not to initiate proceedings. If lesser or 'secondary' charges would not, on their own, justify a finding of impaired fitness to practise, then very careful consideration must be given as to whether or not they should be included in the Notice of Hearing, or whether they represent an unnecessary or oppressive distraction of effort.

38. On the other hand, secondary aspects of a case may properly amount to 'aggravating' circumstances; and matters that would normally of themselves justify fitness to practise proceedings cannot be ignored because of the presence of more serious allegations (which might not be proved). Further, although it was acknowledged that the Case Management Working Group had heard complaints about the 'kitchen sink' approach to charges, still the evidence concerning 'over-prosecution' was anecdotal and there was an absence of agreement that it was a genuine area of concern.

39. The Working Group considered that, given the apparent difficulties in implementing a fundamentally new approach to drafting in the short-term at least, the GMC should instead focus on improving the consistency and quality of its allegations. This might be achieved in a number of ways which are considered below.

#### *Revised guidance on drafting charges*

40. The Working Group suggested a number of changes to the guidance currently used. It acknowledged that it would be a matter for the GMC to agree the final format of the guidance, but considered that revised guidance would be a useful tool. The Working Group also recognised that the guidance would inevitably be a living document that would need further amendments to reflect relevant case law and other factors.

41. So as to ensure greater consistency of practice, the Working Group also considered that it was essential that the GMC take steps to ensure that the revised guidance is known to and used by all those responsible for drafting charges.

42. The Working Group also recommended the development of a number of templates for different types of charges to help ensure greater consistency.

#### *Operational issues and quality assurance*

43. The Working Group reviewed the process for drafting charges. One suggestion made during the work of the Case Management review was that experienced GMC Panel members could be asked to review draft charges. It was suggested that they would be able to spot issues that would cause a Panel

difficulties in decision-making. This suggestion was discussed by the Working Group. However, despite the advantages of the idea, it did not find favour. First, it would increase the numbers of people involved in the drafting process, adding complexity and possible delay. More fundamentally, there was a concern to maintain the independence of the Panel members from the GMC. It was felt this crucial independence would be compromised by increased involvement in the GMC's pre-hearing preparations even if the Panel members involved were not, of course, eligible to sit on any cases they had scrutinised. Finally, any such changes would not survive the introduction of OHPA, which would be responsible for the recruitment and activities of Panellists.

44. The Group therefore discussed whether the GMC (primarily through the CPT) could be more robust in its quality assurance of charges drafted by external solicitors or counsel. It recognised that this could be a difficult task, but felt that such measures were essential to ensure consistency.

45. There was a general view that there needed to be 'joined up thinking' about what should be included and excluded in the final charges. There was a degree of concern that the quality of charges might sometimes be affected by the number of parties involved in the process. The Working Group noted that it was important that this process of reviewing and refining charges should include maintaining a record of any allegations that had not been taken forward.

46. The Working Group recognised the importance of consistency and quality and suggested that the GMC may need to look at its quality assurance measures in respect of drafting charges. The Working Group considered that there was scope for strengthening quality control mechanisms. It recognised that lawyers bring a legally qualified eye to drafting and that in each case they will have assessed the strength of the evidence on which allegations are based. The Working Group recognised that it might be difficult for members of the CPT to challenge lawyers about the charges they have drafted, but felt that it was still an important function if the GMC is to achieve a greater level of consistency. The Working Group concluded that the CPT could have an important function in acting as a quality control mechanism for reviewing the way in which charges are presented, ensuring, for example, that they comply with the approach set out in the guidance.

#### *Use of summary clauses*

47. The Working Group discussed the use of summary clauses. There were a range of views on this issue within the Working Group. There was a common view that they were often over-used and that there was a lack of consistency in their use.

48. The Working Group considered whether summary clauses should be used at all. The balance of views was to the effect that summary clauses could be a useful tool if used appropriately. However, there was a need for more discipline in their use. The Group considered draft guidance on the meaning of terms commonly used that

was developed to by GMC Legal during the course of the Group's meetings to try to ensure greater consistency in the use of the various commonly used terms.

49. The group recognised that it is possible to distinguish between clauses which refer to matters such as dishonesty or sexual motivation, which require a Panel to make findings upon the nature of, or motivation for, behaviour; and those which represent a judgement by the Panel on the extent of any shortcomings (e.g. 'not of a standard to be expected of a registered medical practitioner' or 'inappropriate').

50. The first type clearly needed to be included in order to set out the nature of the GMC's case; for example, it would be a serious procedural error not to plead dishonesty if it were to be alleged that conduct was dishonest. The second should flow from the facts set out in the remainder of the Notice. There was a suggestion that the second type of summary clause represented an exercise of judgement which related more to Stage 2 (finding of impairment) rather than Stage 1 (findings of facts).

51. However, the current practice is to make all such judgements in the course of Stage 1. More fundamentally, regardless of the stage at which the Panel has to make a judgement on the seriousness of any errors, the defence will wish to know how the GMC intended to characterise them, and this is not a matter which may – at least in all cases – appropriately be left until Stage 2. This is supported by the fact that, under the Rules, a 'half-time' submission by the defence that the GMC's case has not been made out can include submissions that there is insufficient evidence to support a finding of impairment (Rule 17(2)(g)). As a result and following debate, it was felt that the 'radical' approach, of abolishing the second type of summary clause altogether, and leaving it to a Panel (following submissions) to decide how to describe the nature of any errors, should be rejected.

52. In addition, although there were a range of views within the Working Group about the use of summary clauses, the Group considered that it was preferable to be more specific in the charges themselves about the alleged failings. It was important to use summary clauses only when they added some real value to the charges.

53. The Working Group welcomed the draft guidance on the meaning and use of commonly used summary clauses that was developed by GMC Legal in the course of the Group's work. It considered that the definitions would encourage consideration of whether the use of a proposed summary clause was necessary or appropriate, as well as greater consistency of meaning. The draft guidance on summary clauses is attached as an annex to the draft revised drafting guidance (see paragraph 40).

54. The Working Group also considered whether summary clauses should be used at the end of individual heads of charge or at the end of the charge. The Working Group considered that the first option was more effective; the latter option tended to mean that Panels were faced with the lengthy task of 'referring back' and applying the general summary clause to each of the individual heads of charge that had been found proved.

55. In parallel with the Working Group review, GMC Legal also considered the use of summary clauses in charges, in particular, in the light of case law.

56. GMC Legal too drew a distinction between two types of summary clause. The first category includes some matters in respect of which specific factual findings need to be made, as they may be aggravating features of the alleged misconduct. These include references to the conduct being dishonest, misleading, reckless or sexually motivated. These could be described as 'specific aggravating factors'.

57. The second category of summary clauses include terms such as 'inappropriate', 'inadequate' and 'not of the standard expected of a registered medical practitioner'. Clauses of this nature are not in themselves factual matters which require specific findings of fact; rather they apply to the exercise of judgement at the impairment stage, and are matters of judgement rather than matters of fact for proof. These are referred to as 'generic wrap up clauses'.

58. GMC Legal agreed with the Working Group that specific aggravating factors, such as dishonesty and sexual motivation, are factual matters which in themselves require proof to the requisite standard. These therefore need to be expressly charged as the Panel must make a factual finding.

59. In contrast, generic summary clauses are intended to contribute to findings of either misconduct or deficient professional performance, in the light of specific facts which have been alleged and found proved in the remainder of the charges.

60. GMC Legal referred, in particular, to the judgments in the cases of Cohen and Cheatle which made it clear that the process of finding of impairment at Stage 2 of the procedure at Fitness to Practise panel hearings is itself a two step process. First there must be a finding of misconduct (or deficient professional performance, etc). Second, the Panel must conclude that, as a result, the doctor's fitness to practise is impaired.

61. GMC Legal were concerned, therefore, that including generic summary clauses risked unnecessarily complicating the exercise by the Panel of its judgement – first, as it confused the Panel's roles at Stage 1 and Stage 2, and second as it implied that such matters required proof (to the civil standard).

62. The Working Group were informed, therefore, that the preference of GMC Legal is to modify the GMC's approach to drafting charges under Rule 15 by focussing on the pleading of specific aggravating factors only, and to restrict the use of generic summary clauses to those cases where there is a specific need dictated by the circumstances of the case. For example, in cases concerning a doctor's performance, the charges should state the degree to which the doctor's performance had fallen short of an accepted standard.

63. The draft guidance on drafting allegations was amended to reflect the approach favoured by GMC Legal, with regard to the use of summary clauses.

64. The Working Group has noted already (see paragraph 40 above) that, ultimately, the formulation of the guidance is a matter for the GMC. The approach to summary clauses now reflected in the draft guidance forms a wider part of the issue of the nature and extent of the 'Stage 2' inquiry, most recently affected by the judgments in Cohen, etc (see paragraph 62 above). Whilst most of the issues raised lay outside of the terms of reference of the Working Group, it recommended that the GMC consider the adequacy of its methods of collecting feedback – e.g. from Panel chairs – upon the conduct of Stage 2 in particular, with a view to ensuring that there was proper scrutiny of the effect of the proposed changes in drafting.

*Relationship between allegations in Rule 7 letter and final heads of charge*

65. The group discussed the format of allegations at the Rule 7 stage. One comment was that they could be too detailed and could look more like final charges. It was important to differentiate between the purpose of the Rule 7 letter and the final charges. The purpose of Rule 7 letters is to set out the case under investigation, not to anticipate what will happen at a later stage.

66. The Working Group recognised that the allegations in the Rule 7 letter served a different purpose to the charges laid in the Notice of Hearing and that there are, of course, different provisions in the Fitness to Practise Rules for the two processes. In particular the allegations in the Rule 7 letter do not necessarily require the same level of particularisation as charges in the Notice of Hearing.

67. There were a number of views about how much information should be included in the Rule 7 letter. One view was that there should be fairly brief allegations, supported by a more detailed statement of the case.

68. Another view was that detailed allegations are useful in a Rule 7 letter as the response to the Rule 7 letter is the closest that the GMC gets (at present) to formal admissions from the doctor, so it can be helpful to set allegations out as fully as possible at that stage.

69. The Working Group noted that when drafting the Notice of Hearing, the drafter is not unduly bound by the allegations in the Rule 7 letter. There was scope for adding additional charges, where to do so would not unfairly prejudice the practitioner. The CPT has produced operational guidance on the scope for adding further charges.

70. In the light of all the above, the Working Group decided not to recommend any change to the manner in which Rule 7 allegations are drafted at present. However, it hoped that the circulation of revised guidance on the drafting of the Notice of Hearing would serve as a reminder that the Rule 7 allegations should not simply be 'adopted' at this later stage, but thoroughly reviewed in the light of all the additional material that would have been gathered since they were sent to the practitioner.

## **Conclusions and Recommendations.**

71. The Working Group recommended that:-

- a. Revised Guidance, including the proposed definitions of summary clauses, be circulated to all those instructed to draft charges on the GMC's behalf;
- b. The Case Presentation Team take steps to review their own processes for the scrutiny of draft Notices of Hearing, to ensure (a) a robust inspection of the work of Counsel responsible and (b) consistency with the amended Guidance.
- c. The GMC consider how it will monitor the effect of any changes in drafting style upon (in particular) the conduct of Stage 2 hearings.

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