

25 September 2014

Council

**General
Medical
Council**

9

To note

Department of Health Section 60 Order consultation – GMC response

Issue

- 1** The Department of Health has issued its eight week consultation on the Adjudication Section 60 Order, to establish the Medical Practitioners Tribunal Service (MPTS) in statute, with a deadline for response of 25 September 2014.

Recommendation

- 2** Council is asked to note the consultation response at Annex A.

Department of Health Section 60 Order consultation – GMC response

Issue

Adjudication Section 60 Order

- 3 The Department of Health published the consultation on the Adjudication Section 60 Order on 31 July 2014. The principal features of the Order are to place the Medical Practitioners Tribunal Service (MPTS) on a statutory footing and give the GMC a right of appeal against the decisions of fitness to practise panels.
- 4 A team consisting of both MPTS and Fitness to Practise staff have negotiated closely with the Department of Health in preparing the draft Section 60 Order for consultation.

Timetable

- 5 The timetable for bringing the Section 60 into force is extremely tight as the parliamentary procedure must be completed before Parliament dissolves for the general election. As a result, the Department of Health shortened the usual consultation period of 12 weeks to only eight weeks. The deadline for responses is 25 September 2014.
- 6 In order to meet this deadline, the Strategy and Policy Board and the MPTS Advisory Committee considered the draft response on circulation.

GMC response

- 7 The draft response to the consultation was approved by Council on circulation. The response is at Annex A.
- 8 We have welcomed the Section 60 Order as addressing some long-standing deficiencies in our legislation and support the majority of proposals. We have provided specific comments in relation to the following:
 - a Proposals to extend the revised statutory objectives to Registration Appeals Panels (question 12).
 - b Proposals to change the 5 year rule to remove the requirement for exceptional circumstances to be present in order for the 5 year rule to be waived (question 18).

- c Overall proposals for change, represented by this Section 60 Order, should in no way substitute for the more fundamental reforms promised by the Law Commission Bill.

Next steps

- 9 We will submit the final consultation response to the Department of Health by the deadline of 25 September 2014.

Supporting information

How this issue relates to the corporate strategy and business plan

- 10 The Section 60 Order is key to implementing reforms to support a more efficient and modern adjudication service and to streamline some of our investigations procedures so that the needs of doctors, patients and the public are met. This relates to our strategic aim 3 to 'Improve the level of engagement and efficiency in the handling of complaints and concerns about patient safety'.

How the issues support the principles of better regulation

- 11 These reforms will promote accountability in the way we work and help ensure our action is targeted and proportionate.

What equality and diversity considerations relate to this issue

- 12 Measures to be introduced in the Section 60 Order include robust and fair recruitment procedures in relation to the MPTS Chair, panellists, case managers and legal assessors.
- 13 Streamlining our procedures will make them easier to understand and navigate and will benefit those involved in our procedures including groups sharing relevant protected characteristics.

If you have any questions about this paper please contact: Anna Rowland, Assistant Director for Policy and Planning, arowland@gmc-uk.org, 020 7189 5077.

**The General Medical Council and the Professional
Standards Authority for Health and Social Care Order 2014
– Consultation**



Department
of Health

The General Medical Council and the Professional Standards Authority for Health and Social Care Order 2014 – Consultation

This consultation document seeks comments and views on the draft Order “The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014”.

Please provide your details and contact information: (required)

Name of respondent, business or organisation (required)

General Medical Council

Address of respondent, business or organisation (required)

350 Euston Road, London, NW1 3JN

Contact email address (required)

sdunn@gmc-uk.org

Consultation Questions

Question 1: Do you agree with the proposal that the MPTS should be set up as a statutory committee of the GMC to govern the adjudication of fitness to practise processes for doctors?

We agree with the proposal to establish the MPTS as a statutory committee of the GMC. This is a key part of the reforms that the GMC consulted on in 2011, which received wide-spread support. This change places the operational separation of the GMC's adjudication and investigation functions, involving establishing the MPTS in shadow form in 2012, on a statutory footing.

We welcome the proposals, integral to this reform, for the GMC Council to arrange for delegation of the committee's powers to the MPTS Chair in relation to the day to day management of hearings.

Question 2: Do you agree that the GMC should not have the power to intervene in the areas falling within MPTS responsibility?

We welcome these proposals designed to ensure the operational separation of the GMC's adjudication and investigation functions.

Question 3: Do you agree that the MPTS should keep a record of its members' private interests, and publish this record in the public domain?

We agree that the MPTS should maintain a register of members' interests as this will ensure transparency.

Question 4: Do you agree that the MPTS should be required to publish an annual report and accounts, to provide a public record and demonstrate accountability?

We welcome this requirement for the MPTS to publish an annual report as it will further ensure transparency. We note that Article 21 does not refer specifically to the MPTS publishing separate accounts and we would not support a proposal to do so. The General Council prepares Annual Accounts in accordance with the requirements of the Charities Act and these changes to the MPTS do not impact those arrangements. We would expect the MPTS accounts to be included in the General Council's annual report to Parliament as is currently the case.

Question 5: Do you agree with the proposal that the over-riding objective of rules relating to fitness to practise procedures should be to secure that cases are dealt with fairly and justly?

We believe that an overriding objective to deal with all cases justly and fairly will clarify for all parties the approach to be taken by MPTS in dealing with cases.

Question 6: Do you agree that to enhance the pre-hearing case management arrangements, we should enable the MPTS to appoint case managers, including using the chair of a medical practitioner tribunal (where legally qualified) as case manager?

We welcome the proposals regarding case management, including case manager decisions being legally binding, as these will improve our procedures and support the smooth running of hearings.

Question 7: Do you agree that the MPTS should have power to appoint legal assessors where it considers it appropriate to do so?

We welcome the changes to the Medical Act in relation to the appointment of legal assessors. Currently, their appointment is mandatory in all cases. Appointing legal assessors on a discretionary basis will enable the MPTS to select the cases or category of cases where legal assessors are to be appointed and enable resources to be concentrated in a more efficient manner. One example of this is uncontested reviews where, we believe, legal input is not required.

Question 8: Do you agree with the proposal that the MPTS should have power to award costs, draw adverse inferences and refuse to admit evidence following a party's failure to comply with rules or directions or otherwise award

costs for unreasonable behaviour?

We welcome these proposals. They are necessary to allow the MPTS to deal more effectively with non-compliance with directions and reduce the length of hearings.

Question 9: Do you agree with the proposal to enable reviews to be held by the tribunal chair without the need for a panel hearing when the GMC and doctor are in agreement, subject to the ability of the chair to nevertheless convene a full hearing?

We agree with these proposals. They will allow the MPTS to deal with cases proportionately.

Question 10: In order to improve efficiency do you agree that the GMC should be able to provide notification of decisions by email rather than letter, when an email address has been provided for this reason?

We support this proposal to increase efficiency across our investigation and adjudication functions.

Question 11: Do you agree that the over-arching objective of the protection of the public, which involves the objectives of protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the profession and promoting and maintaining proper standards and conduct for members of that profession, should be the over-arching objective of the GMC and that medical practitioner tribunals and interim orders tribunals should have regard to it when making their decisions?

We welcome the proposals to revise the GMC's statutory objectives. The newly worded statutory objectives address our key aim of protecting the public and set out clearly the importance of public confidence issues when deciding on appropriate action in the public interest.

Question 12: Do you agree that we should require registration appeals panels to have a duty to have regard to the over-arching objective in the same way that a medical practitioners tribunal should have to?

We note the proposals to extend the explicit duty to consider the revised objectives to Registration Appeal Panels (RAP). This would reflect the proposed requirements for medical practitioner tribunals and interim order tribunals. However, we do not consider that there is sufficient evidence of a need to do so.

The role of RAPs differs from these tribunals. RAPs consider appeals brought by doctors against registration and licensing decisions, with a further right of appeal to the County or Sheriff Court. The additional obligation to consider the revised statutory objectives including maintaining public confidence in the profession helps to address the issues relating to the case law regarding the way fitness to practise panels approach the determination of impairment. The RAP procedures do not approach fitness to practise issues in the same way; indeed fitness to practise issues are rarely aired before the RAP. We therefore think that more consideration should be given to whether it is necessary to impose the same duty on these panels as is proposed for medical practitioner and interim order tribunals.

Question 13: Do you agree with the proposal that the GMC should have a right of appeal, corresponding to the PSA's power to refer cases, to the higher courts in order to challenge MPTS decisions?

We welcome the introduction of an appeal right for the GMC. The right reinforces the separation of investigation and adjudication, giving us a transparent mechanism for decisions to be challenged where the GMC, as a party to the proceedings, considers that a decision made by a Medical Practitioners Tribunal is not sufficient to protect the public. We also welcome the application of the revised statutory objectives as the grounds for appeal which will involve consideration of protecting the health, safety and wellbeing of the public, maintaining confidence in doctors and upholding professional standards and conduct in the practice of medicine.

Question 14: Do you agree that we should amend the grounds of the PSA's power to refer fitness to practise cases for consideration by the relevant court for all regulated healthcare professions and social workers in England in the manner described and also reflect those grounds in the GMC's new right of appeal?

We are content with the proposals to amend the PSA grounds for referral to bring consistency of approach between our own right of appeal and PSA referral.

Question 15: Do you agree that the GMC should be able to request, in writing, information or documents to assist with the investigation of allegations, and where such a request has been made the registrant fails to comply, the GMC should be able to refer the case to a medical practitioner tribunal?

We support these proposals to introduce sanctions for non-compliance with requests for information as they will assist us in meeting our statutory objectives. The proposed changes will not affect a doctor's right to withhold information about his or her defence or to avoid self-incrimination. However, where a doctor fails to engage with enquiries (as required by paragraph 73 of Good Medical Practice) to such a degree as to impede an investigation, for example by refusing to disclose details of his employer, this significantly increases the length of an investigation and, depending on the nature of the concerns raised, can increase the risk posed to the public. The changes proposed will allow the MPTS a range of sanctions to address non-compliance where necessary in the public interest.

Question 16: Do you agree that where a doctor fails to engage or comply with a direction to undergo a performance, health or language assessment, the GMC should be able to refer the case to a medical practitioner tribunal to consider a suspension order or conditional registration?

Likewise, we welcome proposals to introduce sanctions for non-compliance with performance, health or language assessments. This will enable us to meet our statutory objective of protecting the public.

Question 17: Do you agree with the proposal to enable medical practitioners tribunals to require review of their directions before expiry?

We welcome this proposal. We agree it will ensure active management of doctors returning to practice on expiry of a sanction in order to enhance public protection.

Question 18: Do you agree that we should confirm expressly on the face of

the Medical Act the powers to close cases at the initial consideration stage, the power to review investigation stage decisions and the public interest test which applies where the matters giving rise to the allegation are more than five years old, but that we should remove the 'exceptional circumstances' element from that test?

We welcome the proposals to clarify our powers on the face of the Medical Act.

It is important to note that the proposed changes to the '5 year rule' test (under rule 4(5) of the Fitness to Practise Rules), to remove the requirement for exceptional circumstances to be present in order for the 5 year rule to be waived, will increase the number of old cases that we are required to investigate. Gathering evidence in cases older than 5 years old is very challenging and as a result such cases do not have a high success rate. The exceptional circumstances provision was introduced in order to help us to balance the public interest in pursuing lengthy investigations where the prospects of success are low against the importance of addressing the risks posed by the doctor concerned. Being able to consider the exceptional circumstances in each case has allowed us to bring an appropriately nuanced approach to these considerations.

For the reasons outlined above, we are content with the current drafting of the 5 year rule. However, we recognise that others consider the current threshold too high and await with interest the outcome of the consultation on this point.

Question 19: Do you agree that we should specifically reflect the new arrangements of the GMC referring a case to the MPTS (rather than directly to a medical practitioner tribunal) by making express provision for their powers to continue investigating and the procedure for cancelling a referral?

We agree that this express provision is necessary to reflect the new arrangements.

Question 20: Do you agree that we should clarify that undertakings can be agreed between the doctor and the GMC at any point following a referral for a public hearing until a determination on impairment has been made and subsequently undertakings should only be agreed by the medical practitioner tribunal itself and subject to appeal/referral to the higher courts?

We note the provision of this power in the section 60 Order and await with interest the outcome of the consultation on this point.

Question 21: Do you agree that we should close the regulatory gap where, in certain circumstances, an order might lapse during an appeal against a subsequent review order?

We welcome the proposal to close this regulatory gap as it ensures that the public remain protected whilst an appeal against a subsequent review order is progressing.

Question 22: Do you agree that the Registrar should be able to direct the form and content of professional performance assessments and whether it should be carried out by an individual assessor or an assessment team?

We welcome the introduction of flexibility around how we conduct performance

assessments. In particular, this will enable us to increase our use of assessments prior to returning doctors to unrestricted practice which will enhance public protection.

Question 23: Do you agree that the GMC should have the described power in order to investigate the fitness to practise of a doctor who has been erased from the medical register but subsequently makes an application for restoration?

We welcome this proposal as it will allow us to ensure all registered doctors are fit to practise in order to maintain public protection.

Question 24: Do you have any other comments on the proposals contained in the draft Order?

We are grateful to the Department of Health for bringing this consultation forward and are committed to working with the Department in continuing to progress the proposals.

We wish to stress, however, that although we very much welcome the fact that these proposals will enable us to address a limited number of current issues, they are not in any way a substitute for the much more fundamental and wide ranging legislative reforms that are needed to ensure that our fitness to practise arrangements, and medical regulation as a whole, remain fit for purpose in years to come. The vehicle for achieving this is the Regulation of Health and Social Care Professions Etc Bill published by the Law Commission in April 2014. We urge that parliamentary time is found at the earliest opportunity to take this Bill forward.

Question 25: Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:

- An increase;
- A decrease; or
- Stay the same

- Please explain your answer

We expect these proposals to support more streamlined and efficient investigation and adjudication procedures. It is difficult to estimate the exact impact on our costs and administrative burden. However, we would expect both to decrease.

Question 26: Do you think that any of the proposals would help achieve any of

the following aims:

- eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010?
- advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?
- fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?

If yes, could the proposals be changed so that they are more effective in doing so?

If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

We believe these proposals will support our aims of dealing with concerns about a doctor's fitness to practise in a fair, robust and efficient manner.

Thank you for participating in this consultation.

The Department of Health will only contact you should we seek further information about your response.

Responding to this consultation

Filing in the response form by downloading it at:
www.gov.uk/government/consultations

Emailing your response to:

HRDListening@dh.gsi.gov.uk

Posting your response to:

Adjudication Consultation
Professional Standards
Room 517
Department of Health
Richmond House
79 Whitehall
London
SW1A 2NS