

Agenda item:	17
Report title:	Guidance for tribunal members on deciding the facts of a case where the doctor whose fitness to practise is in doubt has raised concerns locally
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Action:	To note

Executive summary

Guidance has been developed for tribunal members on the approach to take when deciding the facts of a case where the doctor involved has raised public interest concerns locally.

In June 2016, the Board approved guidance for Case Examiners on the approach to take in these cases at the end of an investigation. The guidance for tribunal members will also be incorporated into the *Principles for decision makers* to be launched as a supplementary guide to the sanctions guidance later in 2016.

Recommendation

The Strategy and Policy Board is asked to note the *Guidance for tribunal members on deciding the facts of a case where the doctor whose fitness to practise is in doubt has raised concerns locally*, at Annex A.

Background

- 1 At its meeting on 22 March 2016 the Board considered progress in addressing the recommendations made by Sir Anthony Hooper in his independent review of whistleblowing. The Board agreed that a referred doctor having raised concerns may be relevant context to inform case handling, where the only evidence to support referral is of a subjective nature. Guidance for case examiners on the approach to take in these cases was approved by the Board in June 2016. On 11 July 2016 we launched a pilot of safeguards for doctors who have raised public interest concerns to support implementation of the eight recommendations made in Sir Anthony's review. To support a consistent and proportionate approach to decision making, we have developed guidance for tribunal members when considering hearings where the doctor has raised public interest concerns.
- 2 This guidance will be included in training for tribunal members and incorporated into the *Principles for decision makers* to be launched as a supplementary guide to the sanctions guidance later in 2016.

Guidance for Tribunal members

- 3 The guidance provides advice on the relevance of a doctor's previous history of raising concerns at each stage of the hearing process.

The Facts Stage

- 4 Tribunal members are advised that the fact a doctor has raised concerns locally would not usually, in itself, be a relevant consideration where evidence exists that is objective and independent of the views of those involved in the doctor's whistleblowing history. In these circumstances, the objective evidence is likely to form the basis of the tribunal's decision.
- 5 A doctor's whistleblowing history will, however, be a relevant consideration to inform the tribunal's approach where the key evidence to support the allegations is based on witness testimony disputed by the doctor and, in particular, witness statements provided by those who have a connection to the doctor's previous history of raising concerns (for example the doctor's colleagues or employer, where the doctor remains in the same employment as when they raised public interest concerns). Tribunal members are also alerted to the possibility of collusion where several witnesses are giving evidence and they have concerns about witness credibility.
- 6 The key message is that tribunals must consider all the relevant factors in these cases including the context in which the concerns have arisen and, where evidence is disputed, it will need to be carefully assessed together with the credibility of individual witnesses.

The Impairment Stage

- 7** A doctor's history of raising concerns locally may also be relevant at the impairment stage where a tribunal has found allegations proved. Factors such as the difficult environment in which the doctor was working (for example, due to the employer responding inappropriately to their raising patient safety concerns) when considering the gravity of the doctor's misconduct and whether it is likely to be repeated are likely to be considered by a tribunal at this stage.

The Sanction Stage

- 8** A doctor's history of raising concerns locally is unlikely to be relevant at this stage as this will already have been taken into account at the facts and impairment stages. If having considered the full context in which the conduct arose, the tribunal finds that a doctor's fitness to practise is impaired i.e. that they pose a risk to patients or confidence in the medical profession, regardless of their history of raising concerns, action will be needed to address those risks and the guidance provided in the Sanctions Guidance will apply in the usual way.

Other considerations

- 9** The guidance also highlights that it will be relevant to consider the stage at which the doctor indicated that they raised concerns locally. If this is only raised at the hearing stage, the tribunal is likely to request objective evidence to verify the doctor's past history of raising concerns.

Equality and Fairness

- 10** We have developed an equality analysis. We don't hold data about whether certain groups of doctors are more at risk of a GMC referral as a result of having raised a patient safety concern locally. However, the Hooper Report identified generally that some doctors face difficulties locally for having raised public interest concerns that may include referral to fitness to practise. The proposed changes are designed to reduce the risk of our progressing cases where the basis of the referral is linked to the doctor's history of raising concerns in the absence of other concerns about the doctor's fitness to practise. These changes and the new guidance for decision makers will provide greater reassurance for those in the process. We will evaluate them to assess their success at reducing such risks. We are also making changes to Siebel to support the systematic collection of data about whistleblowing.

17 – Guidance for tribunal members on deciding the facts of a case where the doctor whose fitness to practise is in doubt has raised concerns locally

17 – Annex A

Guidance for Tribunal Members on deciding the facts of a case where the doctor whose fitness to practise is in doubt has raised concerns locally



To: Tribunal Members
Legal Assessors

Copy: Tribunal Clerks

Date: XX September 2016

Guidance for Tribunal Members on deciding the facts of a case where the doctor whose fitness to practise is in doubt has raised concerns locally

Background

On 11 July 2016 the GMC launched a pilot of 'safeguards for doctors who have raised public interest concerns' to support implementation of the eight recommendations of Sir Anthony Hooper's independent [review](#) into whistleblowing.

The GMC is carrying out a number of steps to ensure that the recommendations are taken forward and further information can be found in this [document](#). Where a doctor that is the subject of a fitness to practise investigation indicates that they have raised concerns locally, the investigation team will seek to obtain any further objective evidence (independent of the views of those involved in the doctor's whistleblowing history) which may be available before case examiners decide how to conclude the case. Once such information has been obtained, if key evidence continues to relate to disputed witness evidence despite efforts to obtain objective evidence to clarify the disputed matters, a referral to a hearing may be necessary to resolve them.

The attached document aims to provide guidance to Tribunal Members when considering hearings where the doctor has (or indicates they have) raised public interest concerns.

We intend to publish a range of guidance for decision makers later this year which will include the guidance covered in this document.

What do we mean by raised concerns locally?

This is where the doctor has raised concerns locally about patient safety. This may include concerns that patient safety or care is being compromised by the practice of colleagues or the systems, policies and procedures in the organisation in which they work. The concerns may relate to danger, illegality or anything else that poses a risk to patients, that is in the

public interest and has been raised with an appropriate body (for example, the doctor's employer). This type of concern is distinct from a grievance or private complaint, which may be a dispute about the employee's own employment position and has no public interest element.

Hearing a case where the doctor whose fitness to practise is in doubt has raised concerns locally

When the tribunal have information that the doctor has raised concerns locally, either through information contained in the hearing bundle and/or identified by a doctor to the tribunal, the tribunal will need to consider the relevance of this to the matters under consideration at the appropriate stage in proceedings.

The Facts Stage

At the facts stage, where evidence exists that is objective and independent of the views of those involved in the doctor's whistleblowing history, this is the basis on which the tribunal will usually determine whether the facts are found proved. In those circumstances, whether the doctor has raised concerns locally should not in itself be a relevant consideration. The tribunal should consider the allegations and make findings against these.

However, when deciding the facts of a case where key evidence is based on witness testimony disputed by the doctor and provided by those who may have a connection to the doctor's previous history of raising concerns (for example the doctor's colleagues or employer where the doctor remains in the same employment as when they raised patient safety concerns), the doctor's whistleblowing history will be a relevant consideration.

Tribunal Members should consider the possibility that the perception of a doctor's attitude or actions may be influenced by difficulties locally relating to the doctor's previous history of raising concerns. Where several witnesses are providing evidence, and tribunal members have concerns about witness credibility, the possibility of collusion should also be borne in mind. As in all other cases, the tribunal will need to consider all the relevant factors, including the context in which the concerns have arisen and, where evidence is disputed, hear evidence and assess the credibility of individual witnesses.

The Impairment Stage

A doctor's history of raising concerns locally may also be relevant at the impairment stage. Where a tribunal has found allegations proved at the fact finding stage, the fact that the doctor's history of raising concerns has led to difficulties locally (for example the employer responding inappropriately to the doctor raising concerns), the difficult environment in which the doctor was working and in which the alleged misconduct or other concerns arose may be a relevant factor. For example, a tribunal may consider in a particular set of circumstances that a doctor's conduct arose in response to the particular situation that they found themselves in and is unlikely to be repeated.

The Sanction Stage

A doctor's history of raising concerns locally is unlikely to be relevant at the sanction stage. Under this guidance, that history will be taken into account where appropriate at the facts stage in deciding whether the allegations against the doctor are proved and at the impairment stage to decide whether in the context of the difficulties locally the conduct amounts to impairment. If having considered the full context in which the conduct arose, the tribunal finds that a doctor's fitness to practise is impaired ie that they pose a risk to patients or confidence in the medical profession, regardless of their history of raising concerns, action will be needed to address those risks and the guidance provided in the Sanctions Guidance will apply in the usual way. The raising of patient safety concerns locally does not mitigate conduct that has been found, after full consideration of the context in which it arose, to pose a risk to patients and public confidence in the profession.

At what stage did the doctor indicate they raised concerns locally?

The tribunal may need to consider the stage that the doctor indicated that they raised concerns locally. If the issue is only raised at the hearing stage for the first time, the tribunal may wish to consider why this has not been brought to the attention of the GMC previously. Where this is new information, the tribunal should consider what objective evidence is available to verify the doctor's past history of raising concerns locally.

If you have any queries please contact us.

Kind regards

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