

To note

Guidance for decision makers when assessing the impact of a doctor's health in misconduct cases

Issue

- 1 Guidance to assist decision makers in dealing with cases where there are findings of misconduct, where the misconduct may be partly or wholly a result of a doctor's health problems.

Recommendation

- 2 The Strategy and Policy Board is asked to note the *Guidance for decision makers when assessing the impact of a doctor's health in conduct cases*.

Guidance for decision makers when assessing the impact of a doctor's health in conduct cases

Issues

- 3 The impact that a doctor's health has on their conduct has been the subject of discussion in recent years and we are keen to ensure that decision makers have clear guidance to ensure an appropriate and consistent approach.
- 4 There may be cases where misconduct is less serious and it is clear that there is a strong link between the misconduct and the doctor's health problems, where it may be appropriate to deal with the case by action to tackle the doctor's health problems alone without specifically addressing the misconduct.
- 5 However, where misconduct is more serious, even if there is a strong link between the misconduct and the doctor's health problems, action specifically to address the misconduct will be necessary to ensure that public confidence is maintained.

Guidance

- 6 Guidance for our decision makers on how to ensure a robust and consistent approach to dealing with misconduct linked to a doctor's health problems is at Annex A.
- 7 Case law has clarified that even where linked to health problems, serious misconduct should be addressed. The guidance provides criteria that should be applied when considering how to respond including on how to weigh up aggravating and mitigating factors.
- 8 Doctors with mental health problems may be disproportionately affected by this guidance compared with registered doctors generally however, case law has clarified that maintaining confidence in the profession requires a response to serious misconduct even where it is linked to health problems. We will be reviewing the way we deal with doctors with health problems in our fitness to practise procedures in 2015 and will consider whether there is more we might do in the way we handle these cases to minimise difficulties for doctors with health problems.

Training

- 9 We propose to ensure that all staff receive training on the guidance to ensure a robust and consistent approach to these cases.

Supporting information

How this issue relates to the corporate strategy and business plan

10 Strategic Aim 2: To give all our key interest groups confidence that doctors are fit to practise.

If you have any questions about this paper please contact: Anna Rowland, Assistant Director of Policy, Business Transformation and Safeguarding, ARowland@gmc-uk.org, 020 7189 5077.

Guidance for decision makers when assessing the impact of a doctor's health in misconduct cases

Guidance for decision makers when assessing cases where a doctor's health impacts on his/her conduct.

Guidance for decision makers when assessing the impact of a doctor's health in conduct cases

Introduction

- 1 The purpose of this guidance is to assist decision makers when assessing the impact of a doctor's health in conduct cases.
- 2 This guidance should be considered together with other GMC guidance for decision makers, in particular *Guidance for the Investigation Committee and cases examiners on making decisions at the end of the investigation stage* and *Guidance for decision makers on assessing risk in health cases*.^{*}
- 3 To practise safely, doctors must be competent in what they do. They must establish and maintain effective relationships with patients, respect patients' autonomy and act responsibly and appropriately if they or a colleague fall ill and their performance suffers.
- 4 A doctor whose conduct has shown that he cannot justify the trust placed in him should not continue in unrestricted practice while that remains the case. Case law has clarified the public interest includes, amongst other things:
 - a protection of patients
 - b maintenance of public confidence in the profession
 - c declaring and upholding proper standards of conduct and behaviour.
- 5 The purpose of any action taken by the GMC is not to be punitive but to protect patients and the wider public interest, although it may have a punitive effect. This was confirmed in the judgment of Newman J in the case of *The Council for the Regulation of Health Care Professionals v General Dental Council (Fleischmann)*[2005] EWHC 87 (Admin), endorsing the view of the court in *Bolton v Law Society* (1994) 1 WLR 512, which stated:

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http://s1prdl04/edrms/livelink.exe/fetch/2000/3797757/3799142/6590642/3799345/50484776/DC4315_Guidance_for_decision_makers_on_assessing_risk_in_health_cases.pdf?nodeid=48690383&vernum=-2

'The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.'

- 6 This approach was confirmed in the judgment of Laws LJ in the case of *Raschid and Fatnani v The General Medical Council* [2007] 1 WLR 1460 in which he stated:

'The panel then is centrally concerned with the reputation or standing of the profession rather than the punishment of the doctor.'

Proportionality

- 7 Any action and the period for which it is imposed must be necessary to protect the public interest. Decision makers should weigh the interests of the public with those of the practitioner when considering the doctor's conduct.
- 8 Whilst there may be a public interest in allowing a doctor to continue to practise where appropriate, decision makers should bear in mind that the protection of patients and the wider public interest (i.e. maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour) are our primary concerns.

Protection of the public

- 9 When assessing how best to protect the public, decision makers should remember that it is not only the patients with whom the doctor may come into contact, but the wider public also.

Aggravating and mitigating factors

- 10 A decision maker can have due regard to any evidence of mitigation, as well as aggravating factors relating to the facts of the individual case.
- 11 In conduct cases, decision makers should look to see if there are any aggravating features that may include (this list is not exhaustive):
- i Repeated behaviour, planning or pre-meditation.
 - ii Previous findings and sanctions imposed on the doctor's registration either by the GMC or any other regulator.
 - iii Evidence that the doctor has abused their position of trust by taking advantage of a vulnerable person (breaching paragraphs 53 and 54 of Good medical practice).
- 12 Mitigation may include (this list is not exhaustive):

- i Evidence of the doctor's understanding of the problem and his/her attempts to address it. This could include admission of the facts relating to the case, any apologies by the doctor to the complainant/person in question, his/her efforts to prevent such behaviour recurring or efforts made to correct any deficiencies in performance or knowledge of English; and
- ii Lapse of time since the incident occurred.
- iii The circumstances leading up to the incidents such as the context in which the doctor was working such as lack of training or supervision.
- iv Personal mitigation such as the character and previous history of the doctor (including testimonials).

Doctor's health put forward as the motive or reason for offending

13 In cases where it is suggested that a doctor's health is the reason for or in part explains the conduct being investigated, save where culpability is reduced in law, motive is likely to have little or no bearing on the gravity of the offence.

14 The criminal offence focuses on the act NOT the motive.

Protection of the public and the maintenance of standards and public confidence in the profession are paramount. Even where the conduct by the doctor occurred outside the clinical setting the conduct could still be regarded as reflecting adversely on the profession. For example, the impact of a doctor who repeatedly accesses child pornography on a home computer to alleviate his/her depression is no different to someone accessing the material for sexual pleasure. The harm caused to the child in the making of such material is the same regardless of the motive for viewing the material.

15 In the example above, although it is not the doctor's conduct in a professional capacity which is seen as reflecting adversely on the profession, the conduct would nevertheless have such an effect. The public's confidence in the profession would be seriously undermined, were they to be made aware of the nature of the conduct. The public expect that doctors will be someone of unquestionable integrity, probity and trustworthiness.

16 Conduct due to the doctor's ill health, which has continued over a period of time may be seen as an aggravating, rather than mitigating, factor. Not all of those faced with professional or personal difficulties resort to criminal behaviour - whether that is drug misuse, alcoholism, fraud or financial impropriety – most work legitimately to

overcome their problems. Failure to seek medical help and continuing to engage in criminal activity may show a lack of insight and understanding of the underlying health issues.*

Assessing the gravity of the conduct

- 17** In cases involving criminal offences, the gravity of the conduct concerned can be assessed by reference to the rationale for the creation of the offences, the penalties available to the courts for the offence, Court of Appeal guidelines and the sentence (if any), imposed by the criminal court.
- 18** The length, duration and purpose of a sentence can also be a useful indicator of the seriousness of the conduct concerned and the steps the criminal courts consider necessary to protect the public.
- 19** Community Orders and ancillary orders, e.g., a requirement to sign the sex offenders register, serve to punish the conduct and to rehabilitate the offender. Such orders also contain an element of protection of the public and management of future risk.
- 20** In the Fleischmann case, Newman J observed that when concerned with criminal convictions, the individual must serve his/her sentence and complete it satisfactorily before being allowed to practise. The only exceptions would be where the circumstances justify a different approach e.g. a period of disqualification from driving or an extended period to pay a financial penalty.
- 21** If a doctor applied for registration while subject to a Community Order for a criminal offence, it is unlikely that he would be admitted to the register until the conclusion and satisfactory completion of the community order. The same principle should apply when considering all cases where conduct is under investigation.
- 22** In other health and conduct cases decision makers should take into account the following factors:
 - a** the seriousness of the conduct
 - b** evidence about the doctor's response to any treatment programme he/she has undertaken
 - c** any insight shown by the doctor
 - d** the likelihood of the doctor repeating the behaviour

* The Council for the Regulation of Health Care Professionals v General Dental Council (Fleischmann)[2005] EWHC 87 (Admin)

- e the possible risk to patients and the wider public if the doctor was allowed to practice unrestricted
- f the possible damage to the public's trust in the profession if the doctor was unrestricted in his/her practice.

23 Each case should be considered on its merits and decisions taken in the light of the particular circumstances relating to the case.