Guidance for decision makers on assessing insight when considering whether undertakings are appropriate

Introduction

1. The purpose of this guidance is to assist decision makers when considering in appropriate cases whether a doctor has demonstrated the insight necessary for the case to be disposed of by means of consensual undertakings.

2. In particular, this guidance is intended to consider the cultural factors which may influence how a doctor demonstrates insight. To ensure a fair and consistent approach, decision makers should take a broad view of evidence of insight and consider whether the doctor has an understanding of their failings and is likely to agree and comply with undertakings. This guidance should be considered together with other guidance for decision makers and, in particular, the guidance on undertakings.

Application of undertakings

3. Undertakings are likely to be appropriate where a doctor understands their failings and the need to limit their practice or undertake retraining or other remedial measures, increasing the likelihood of a return to safe unrestricted practice in the future.

Expressions of regret and apology

4. It is important to recognise that there can be different cultural factors which influence somebody’s willingness to apologise. Cross-cultural communication studies* into the different ways people from different cultures acknowledge fault show that there are great variations in the way that individuals from different cultures and language

* Influential thinkers and academics in this field include S. M Gass, Marc L. Bergman and Keiko Okumura. The supplementary paper ‘Academic research into the different ways people from different cultures acknowledge fault’ provides a list of further reading.
groups use language to code and de-code messages. This is particularly the case when using a second language, where speakers may use the conventions of their first language to frame and structure sentences, often translating as they speak and may also be reflected in the intonation adopted. As a result, the language convention, subtleties or nuances of the second language may not be reflected. In addition, there may be differences in the way that individuals use non-verbal cues to convey a message, including eye contact, gestures, facial expressions and touch.

5 Awareness of, and sensitivity to, these issues are important in determining the following:

a How a doctor frames his/her ‘insight’.

b The doctor’s demeanour and attitude.

6 Decision makers should be aware that there may be cultural differences in the way that insight is expressed and the process of communication, and that this may be affected by the doctor’s circumstances, for example, their ill-health.

7 In relation to considering whether a doctor has offered an apology, decision makers will need to be alive to the cultural factors at play but also recognise that our guidance *Good medical practice* clearly explains that a doctor is expected to apologise when things go wrong. This requirement has been further highlighted by the introduction of a mandatory duty of candour. This makes it unlikely that doctors who have trained in other cultures are unaware of the expectations in the UK about apologising when things go wrong.

8 Unless it is otherwise clear to the decision maker that the doctor has insight into their failings and the failure to apologise is not an indication of lack of insight, then a failure to make a timely apology will be an influential factor in deciding that a doctor lacks insight.

9 *Good medical practice* provides the following guidance at paragraph 55 and 61 to doctors when things go wrong:

‘Being open and honest with patients if things go wrong.

55 You must be open and honest with patients if things go wrong. If a patient under your care has suffered harm or distress, you should:

c put matters right (if that is possible)

d offer an apology

e explain fully and promptly what has happened and the likely short-term and long-term effects.
61 You must respond promptly, fully and honestly to complaints and apologise when appropriate. You must not allow a patient’s complaint to adversely affect the care or treatment you provide or arrange.’

10 The guidance we provide for tribunal members on sanctions at tribunal (the Sanctions Guidance) states at paragraph 35 that this reflects a number of expectations on behalf of the profession and the public, including that the doctor should:

a take steps to improve by learning from mistakes and preventing similar events recurring

b be open, honest and apologise.

11 The main consideration for decision makers is to ensure that the agreement of undertakings will provide adequate protection to patients in that the doctor has recognised that steps need to be taken to limit their practice or undertake remediation.

12 Decision makers should consider the following factors, when assessing evidence of insight:

a an indication that the doctor is likely to be agree to and comply with undertakings

b the doctor accepts they should have behaved differently (showing empathy and understanding)

c the doctor has taken timely steps to remediate and apologise at an early stage of the investigation

d the doctor has demonstrated the timely development of insight during the investigation and hearing.