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Guidance for assistant registrars on making decisions in relation to a doctor subject to restricted registration

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Introduction

- 1 This guidance is for Assistant Registrars exercising powers to direct a review of a sanction under:
 - a Section 35D (4B) or (11B) of the Medical Act; or
 - b Rule 21 of the GMC (Fitness to Practise) Rules 2004
- 2 This document also includes guidance for Assistant Registrars considering exercising powers under Rule 10 (8) and 37A (3) to refer a doctor with undertakings to a hearing.
- 3 This guidance is a living document which will be revised periodically.

Circumstances when an Assistant Registrar is likely to direct a review under S35D of the Medical Act

- 4 The Assistant Registrar (AR) is likely to apply the power to direct a review under S35D of the Medical Act^{*} where no review has been directed (including where a Legally Qualified Chair (LQC) has no power to direct a review on making an order at a review on the papers and where a Non-Compliance Tribunal has not directed a review):
 - a In cases where a sanction has been imposed for 6 months or more
 - b In cases (including cases where a sanction has been imposed for less than 6 months) where a change of circumstances indicates that a review is needed.

Cases where a sanction has been imposed for 6 months or more

- 5 This supports our policy of ensuring doctors are fit to return to unrestricted practice before restrictions are removed. Therefore, a review is likely to be necessary where there is either an expectation that remediation will have taken place or it is desirable to check that the doctor's practice has remained up to date.
- 6 In order to assess insight and remediation, tribunals will need to be presented with objective evidence. This can include evidence that the doctor's knowledge and skills

^{*} Section 35D (5 (7)) of the Medical Act 1983

have been kept up to date, and that a return to unrestricted practice will not put patient safety at risk.

- 7 Where a doctor has provided positive evidence of remediation, and the evidence has been received in sufficient time before the review hearing, the AR may decide to direct an assurance assessment under Rule 19B to give assurance that any previously identified failing has been addressed.

Cases (including where a sanction has been imposed by a Medical Practitioner Tribunal for less than 6 months) involving a change of circumstances

- 8 In general tribunals will direct a review. On occasion, no review may be directed because at the time the tribunal made the order a review was not considered necessary. This might be the case where a sanction has been imposed for less than six months, for example, because a doctor has almost completed remediation, or because the purpose of the sanction is not to support remediation but to send a message about appropriate conduct.
- 9 Where this is the case, the AR may need to consider directing a review under S35D of the Medical Act where there has been a change of circumstances. This is likely to be necessary where:
 - a The doctor has failed to remediate or the concerns have deteriorated or;
 - b We have received an allegation of impaired fitness to practise since the tribunal's decision.
- 10 The power to direct a review under Section 35D only applies where the doctor has received a sanction of either conditions or a suspension at a tribunal (see paragraphs 25 – 27 for guidance on referring to a tribunal in undertakings cases).
- 11 The AR may need to consider whether the change of circumstances should be considered as a new matter and referred to triage. Factors the AR should consider are:
 - Whether the new information is unrelated to the matter that initially gave rise to concerns on the index case;
 - The amount of time left on the current sanction and;
 - Whether this impacts on our ability to have the matter heard by the tribunal before the current sanction runs out.

Cases where an early review under Rule 21 of the GMC (Fitness to Practise) Rules 2004 is indicated following a change of circumstances

- 12** If there has been a change of circumstances which indicates a sanction needs to be reviewed urgently to protect the public in line with our statutory overarching objective^{*}, then the AR should exercise powers under Rule 21 of the GMC Fitness to Practise Rules to direct an early review. The statutory over-arching objective includes:
- a** protecting the health, safety and wellbeing of the public
 - b** maintaining public confidence in the profession
 - c** promoting and maintaining proper professional standards and conduct for the members of the profession
- 13** There may be cases where a review order is not in place and a change in circumstances indicates that it would be desirable to refer the doctor to the tribunal before the sanction expires. In this instance, the AR should direct a review under S35D and before referring the case for an early review hearing under Rule 21 of the GMC Fitness to Practise Rules.
- 14** The circumstances where the Assistant Registrar will need to consider referring a case for an early review under Rule 21 (for Tribunal conditions), or for a hearing under Rule 10 (8) (for CE undertakings) and Rule 37A (3) (for tribunal undertakings) are outlined in the sections below.

Breach of restrictions

- 15** If a doctor has breached their restrictions before a review hearing, the AR may refer the case for an early review hearing under Rule 21 of the GMC's Fitness to Practise Rules. If this is not necessary because the breach is minor and doesn't raise further concerns about the doctor's fitness to practise, the AR may deal with the breach by issuing either of the following:

^{*} Paragraph 13 of Sanctions Guidance (2015) http://www.gmc-uk.org/DC4198_Sanctions_Guidance_23008260.pdf accessed on 22/10/2015

- a An 'AR letter – Rule 10(8) or 37A(3) Breach' letter for undertakings, or an 'AR letter – Rule 21 Breach' for conditions, which highlights to the doctor the importance of compliance with their restrictions.
- b A 'notification of no compliance concerns' letter which notes that the doctor has breached their restrictions, but that the breach was not the fault of the doctor and therefore we have no compliance concerns regarding their fitness to practise.

Deterioration

- 16 A doctor's performance, health or knowledge of English may deteriorate whilst they have conditions or undertakings. If the deterioration renders their current restrictions inadequate to protect the public, the AR may refer the doctor for a hearing. Alternatively if this is not necessary, the AR may correspond with the doctor about the deterioration by sending a 'notification of no compliance concerns' letter. This letter notes the doctor's deterioration, but explains that no further action will be taken as the existing restrictions are sufficient to protect the public and uphold confidence in doctors.
- 17 An 'AR letter – Rule 10(8) or 37A(3) breach' letter would not be appropriate in these circumstances unless the deterioration amounted to a breach of restrictions.

Refer to a hearing

- 18 If we receive evidence that a doctor has breached a **condition**, or that their performance health or knowledge of English has deteriorated, referral to a tribunal for an early review under Rule 21 of the GMC (Fitness to Practise) Rules 2004 may be appropriate. Other circumstances that may lead to the doctor being referred to an early review hearing will be dealt with by the AR on a case by case basis.
- 19 If we receive evidence that a doctor has breached a Case Examiner or tribunal **undertaking**, or that their performance, health or knowledge of English has deteriorated, referral to a tribunal for a fitness to practise hearing (in a Case Examiner undertakings case) or a review hearing (in a tribunal undertakings case) may be appropriate. The rules that apply are as follows:
 - a Rule 10(8) of the GMC (Fitness to Practise) Rules 2004, for undertakings that have been agreed under Rule 10(4), i.e. following a case examiner decision to invite the doctor to agree undertakings

Or

- b** Rule 37A(3) of the GMC (Fitness to Practise) Rules 2004, for undertakings taken into account by a tribunal under Rule 17(4) or 22(3), i.e. undertakings agreed by the GMC and taken into account by the Medical Practitioners Tribunal.
- 20** There is a key difference in the operation of these two sets of rules. Rules 10 (8) and 37A (3) allow for referral to a tribunal in respect of specific issues arising in relation to doctors subject to undertakings, for example a breach of a doctors undertakings, whereas Rule 21 provides a far broader power that allows for a referral back to a tribunal for an early review where information is received and makes it desirable for the Registrar to do so. The broader power to refer under Rule 21 is designed to encompass referrals where conditional registration is not working, as well as cases where the doctor is in breach. An example would be failure to remediate despite complying with the letter of conditions.
- 21** The AR needs to consider the purpose of a proposed referral to a Tribunal, and what action we will be asking the Tribunal to take. The purpose of a referral to a Tribunal is not punitive, and would normally be based on a concern about potential risk to patients. However a referral might also sometimes be appropriate where a breach does not pose a risk to patients but it is necessary in order to uphold confidence in the profession in cases where a doctor disregards a restriction on their registration. For this reason it will sometimes be appropriate to refer a doctor for breach of a condition or undertaking even though a Tribunal may not increase the severity of the restrictions.

Referral to a tribunal where a doctor has breached their restrictions

- 22** Any decisions on whether to refer a doctor found to have breached their restrictions needs to take account of the following factors:
- a** whether the breach is isolated, a one off or repeated
 - b** whether patient safety has been compromised as a result of the breach
 - c** whether compliance was within or outside the doctor's control
 - d** whether the breach is indicative of a disregard of the instructions issued by the GMC and/or MPTS
 - e** whether the AR believes that the breach was a mistake on the doctor's part and that reoccurrence is unlikely
 - f** the doctor has breached their undertakings or conditions within one year of them being imposed

- 23** Examples of breaches of undertakings or conditions that are likely to merit referral are:
- a** repeated or persistent failure to engage with the GMC and/or supervision
 - b** evidence of failure to comply with restrictions to abstain from alcohol or drugs
 - c** evidence of deterioration of professional performance following attempts at remediation.
 - d** evidence of deterioration of medical condition, where the doctor demonstrates a lack of insight and fails to engage in treatment or follow the advice of the medical supervisor and/or treating doctors
 - e** evidence of deterioration of English language for example where we are notified of additional concerns about the doctor's knowledge and use of English or if the doctor has not provided evidence of achieving a satisfactory IELTS or OET score.

Missed appointments

- 24** We accept that medical supervision appointments may be missed for very good reasons, and would not normally refer a doctor to a Tribunal in respect of a single missed appointment where they have provided adequate reasons and rescheduled the appointment. If multiple appointments have been missed the reasons will need to be significantly more compelling in order to avoid referral to a Tribunal.

Failure to abstain from alcohol and drugs

- 25** We accept that relapse is a feature of addiction and dependency, and that therefore from time to time doctors required to abstain from alcohol will fail to do so. It will not be appropriate to refer every such failure to a Tribunal. However, in order for us to require a doctor to be abstinent, we will have previously developed significant patient safety and/or public confidence concerns in respect of their alcohol use, so we must take every failure to comply very seriously.
- 26** Where a doctor required to abstain has relapsed, but subsequently re-commences abstinence and treatment, has an appropriate support network in place and is complying with supervision and all other requirements, we will not usually refer them to a Tribunal. If relapse occurs again the AR has discretion to refer the doctor to a Tribunal.

Referral to tribunal where the doctor's health, performance or English language has deteriorated

- 27** Decision makers should consider the significance of any deterioration in the doctor's performance, health or English language and the evidence that supports that assessment when deciding whether to refer a doctor to a tribunal. However, if deterioration occurs in conjunction with a breach of restrictions, the breach should be dealt with as a priority.

Health

- 28** Information may be received that suggests a doctor's health has deteriorated where for example, a doctor with bipolar affective disorder has had a serious relapse and has been admitted to hospital. Usually such deterioration is well managed by the doctor and there is no patient safety or confidence issue. However, in instances where the deterioration is not managed or where the doctor has failed to engage with the GMC, it may be appropriate to refer the doctor to a tribunal for it to consider what sanction may be required to ensure patient safety and maintain confidence in the profession.

Performance

- 29** Information may be received that suggests a doctor's performance has deteriorated where for example, a doctor has not maintained their knowledge of medicine in a particular area and over time their ability to perform in this area diminishes. If we receive information that suggests a significant deterioration it may be appropriate to obtain Case Examiner advice on whether a performance assessment is required and, depending on the outcome of any performance assessment, refer the matter to a tribunal.

English language

- 30** Information may be received that suggests that a doctor's knowledge of English language
- a** has deteriorated (i.e. we have existing fitness to practise concerns and we have information to suggest that these skills have decreased)
 - b** otherwise gives rise to further fitness to practise concerns (i.e. where we receive information relating to new concerns about the doctors language skills or a doctor fails to improve over time)

- 31** In these circumstances, it may be appropriate to refer the doctor to a tribunal for it to consider what sanction may be required to ensure patient safety and maintain confidence in the profession.

Refer to a hearing

- 32** A doctor can be said to have agreed undertakings, having either:
- a** been invited to do so by the Case Examiners under Rule 10, or
 - b** had undertakings agreed with the GMC and approved by a Medical Practitioners Tribunal under Rule 37A.
- 33** In either scenario, as a result of information received by the GMC, the Case Examiners may wish to vary the undertakings and the Registrar will invite the doctor to comply with the varied undertakings.
- 34** If the doctor has not, within 28 days of the invitation, agreed to comply with the varied undertakings, it may be appropriate for the AR to refer the doctor to a tribunal under Rule 10 or 37A.
- 35** If the doctor has failed to observe undertakings, the breach may be serious enough to require referral to a Medical Practitioners Tribunal. 'In the event of a referral, the AR should consider whether to also make a referral to the Case Examiner to consider a referral to an Interim Order Tribunal. (See 'Imposing interim orders: Guidance for the interim orders tribunal and the medical practitioners tribunal'*)'.

Not to refer to a hearing

- 36** If based on the guidance above, the AR determines that the doctor should not be referred to a tribunal, the AR may notify the doctor that no referral has been made under:
- a** Rule 10(8) for CE undertakings
 - b** Rule 37A(3) for tribunal undertakings
 - c** Rule 21 for tribunal conditions.

* http://www.gmc-uk.org/DC4792_Imposing_Interim_Orders_Guidance_for_the_IOT_and_MPT_28443349.pdf (accessed on 24/03/2015)

Breach in undertakings where the AR decides that the breach is not serious enough to warrant a referral to tribunal

- 37** An 'AR letter – Rule 10(8) or 37A(3) breach' may be sent if the doctor has breached their undertakings, but the breach is not serious enough to require referral to a Tribunal. This notification will:
- a** highlight the undertakings breach
 - b** reaffirm to the doctor the importance of compliance with their restrictions
 - c** remind the doctor they may be referred to Tribunal if any subsequent breaches occur.
- 38** This notification does not act as a sanction and does not appear on the public record.
- 39** The fact we have sent this notification may be disclosed to the doctor's RO (and additional employers where the RO isn't the doctor's employer) who will have previously been notified of the breach and other relevant parties involved in monitoring the doctor's compliance with the restrictions (see the doctor's notes section of the restrictions bank).
- 40** The fact we have sent this letter to the doctor will be considered by the Investigation Officer as part of the periodic review of the doctor's case. If the case is referred to a Tribunal, a copy of the letter will form part of the bundle of papers presented when the doctor's case is considered.
- 41** The letter itself may be disclosed to the doctor's medical supervisor. If further concerns arise, the AR will consider this information and may decide to refer the case to a Tribunal, based on a pattern of behaviour/repeated failures to comply with restrictions.
- 42** If the doctor's revalidation was put on hold while we made a decision, the doctor will be given a new submission date.

Breach in conditions whether the AR decides it is not serious enough to warrant a referral to tribunal

- 43** A 'Notification of the AR's decision under Rule 21' may be sent if the doctor has breached their conditions, but the breach is not serious enough to require referral to an early review hearing. This notification will:
- a** highlight the conditions breach

- b** reaffirm to the doctor the importance of compliance with their restrictions
 - c** remind the doctor they may be referred to tribunal for early review if any subsequent breaches occur.
- 44** This notification does not act as a sanction and does not appear on the public record.
- 45** The fact we have sent this notification may be disclosed to the doctor's RO (and additional employers where the RO isn't the doctor's employer) who will have previously been notified of the breach and other relevant parties involved in monitoring the doctor's compliance with the restrictions (see the doctor's notes section of the restrictions bank).
- 46** A copy of the letter will form part of the bundle of papers presented to the Tribunal when it meets to review the doctor's case to ensure that any wider pattern of behaviour can be taken into account.
- 47** The letter itself may be disclosed to the doctor's medical supervisor if one is in place.
- 48** If further concerns arise, the AR will consider this information and may decide to refer the case to a Tribunal for early review, based on a pattern of behaviour/repeated failures to comply with restrictions. This information will also be considered by the Tribunal at the next scheduled review hearing.
- 49** If the doctor's revalidation was put on hold while we made a decision, the doctor will be given a new submission date.

Breach of restrictions that were beyond the doctor's control or where the deterioration did not raise compliance concerns

- 50** If the doctor was unable to comply with their restrictions due to factors entirely beyond their control or where the doctor's deterioration was managed appropriately, a 'Notification of no compliance concerns' may be issued under Rule 10(8), Rule 37A(3) or Rule 21 to confirm the AR's decision that a referral to Tribunal is not necessary.
- 51** The fact we have sent this notification may be disclosed to the doctor's RO (and additional employers where the RO isn't the doctor's employer) who will have previously been notified of the breach and other relevant parties involved in

monitoring the doctor's compliance with the restrictions (see the doctor's notes section of the restrictions bank).

- 52** In undertakings cases, the fact we have sent this letter to the doctor will be disclosed to the Case Examiners as part of the annual review of the doctor's case. In conditions cases, a copy of the letter will form part of the bundle of papers presented to the Tribunal when it meets to review the doctor's case. This will ensure that any wider pattern of behaviour can be taken into account.
- 53** The letter itself may be disclosed to the doctor's medical supervisor if one is in place. Examples where this form of notification may be appropriate include:
- a** where a doctor may have been required to attend a training course but no such course exists, but not where there is a fee and the doctor has declined to pay it.
 - b** where a doctor may have been required to attend medical supervision according to a specified pattern, but that pattern has been altered by the supervisor and the GMC is of the view that the supervision is sufficient.
 - c** where a doctor has had a deterioration in their mental health, however they have put safeguards in place to ensure that the public are protected.
- 54** If the doctor's revalidation was put on hold while we made a decision, the doctor will be given a new submission date.