

Guidance for decision makers on referring a case for a non-compliance hearing

Purpose

- 1 This guidance sets out the factors to be considered when deciding whether to refer a case for a non-compliance hearing at any point in the fitness to practise process. The aim of the guidance is to promote consistency and transparency in our approach and decision making in relation to referring cases to a Medical Practitioners Tribunal ('MPT').

The legislative framework

- 2 We may refer a doctor to a MPT where the Registrar is of the opinion that a doctor has failed to submit to an assessment of their performance, health or language or failed to comply with requirements imposed in respect of such an assessment¹.
- 3 Where the Investigation Committee is of the opinion a doctor has failed to submit to an assessment of their performance, health or language, or failed to comply with requirements imposed in respect of such an assessment, they may direct the Registrar to make a referral for the case to be considered by a MPT and the Registrar must make the referral².
- 4 We have the power³ to refer a doctor to an MPT where the doctor has failed to

¹ Schedule 4, paragraphs 5A(3) and 5C(3) of the Medical Act 1983 (as amended) ('the Act')

² Schedule 4, paragraphs 5A(3A) and 5C(3A) of the Act

³ Under section 35A(6C) of the Act

comply with a request to provide information⁴.

- 5 The non-compliance provisions do not apply to a failure to provide current employment details⁵.
- 6 Rule 17ZA of the Fitness to Practise Rules 2004 (as amended) sets out the procedure to be followed at a non-compliance hearing.

Decision to refer for non-compliance

- 7 When considering whether to refer a doctor's case for a non-compliance hearing, the decision maker should ask the following questions:
 - a At the time it was made, was the direction or request to provide information reasonable given the allegation(s) under investigation?
 - b Is there new evidence that the direction or request to provide information is no longer required?
 - c Is there evidence that the doctor has failed to comply with the direction or request for information?
 - d Does the doctor's failure to comply create a risk to public protection because it means we cannot investigate the concern⁶?
 - e Is there a good reason for the doctor's failure to comply?

⁴ Where this request was made under section 35A(1A)

⁵ Requested under section 35A(2)

⁶ The purpose of the non-compliance power is set out in [The General Medical Council and Professional Standards Authority: Proposed changes to modernise and reform the adjudication of fitness to practise cases](#), Department of Health Consultation Response Report, January 2015, pages 31/32.

Was the direction or request to provide information reasonable?

- 8** A reasonable direction or request to provide information is one that is:
- a** made in accordance with our powers under the Act and Rules, and
 - b** *proportionate* to the allegation(s) under investigation and considered *necessary* to further the investigation in order to achieve our regulatory purpose of protecting the public.
- 9** Any direction to undergo an assessment should have been made in accordance with the relevant guidance on directing health, performance and English language assessments.
- 10** Information we may request that is necessary to progress an investigation⁷ may include, but is not limited to:
- private patient medical records where they are held only by the doctor under investigation
 - details of a specific previous employer or work placement
 - details of specific times or dates relevant to an investigation
 - details of a specific location related to an incident, for example a pharmacy.
- 11** This definition excludes information or documents which a civil court could not compel to be produced in civil proceedings or that would be prohibited by, or under, any enactment.
- 12** Where the decision maker has concerns about whether the original direction or request to provide information was appropriate, legal advice should be sought before the matter is considered for referral for a non-compliance hearing.

⁷ Under section 35A(1A)

Is there new evidence that the direction or request to provide information is no longer required?

- 13** Since the original direction or request to provide information was made, additional information about the underlying concern(s) may have become available.
- 14** Where the evidential basis underlying the original decision has significantly changed, the decision maker should consider whether the original direction or request to provide information is still required.
- 15** For example, where a doctor has provided recent objective evidence relating to how a health condition impacts on their fitness to practise, this may be capable of informing our view on whether or not a health assessment is still required to progress the investigation. It is unlikely to be sufficient for a doctor to provide us with evidence about the impact of their own health condition, without independent information to support or verify it.
- 16** Objective evidence relating to how a health condition impacts on a doctor's fitness to practise could come from a number of sources, including: a letter or report from their treating practitioner or GP, an update from their medical supervisor or a report prepared by a GMC health examiner. As objective evidence is independent and verifiable, the decision maker is usually able to attach greater weight to it.
- 17** If the decision maker considers that, in light of further information received, the direction or request to provide information is no longer necessary, they should not refer the case to a non-compliance hearing.

Is there evidence that the doctor has failed to comply?

- 18** There does not need to be culpability on a doctor's part for the decision maker to conclude there is evidence that the doctor has 'failed to comply.' At this stage, the decision maker is simply considering whether there is evidence to show, as a

matter of fact, the doctor has not complied with our direction or request to provide information.

19 A doctor may have failed to comply with an assessment or request to provide information where they have:

- a** explicitly refused to submit to a direction to undergo an assessment or provide the information requested from them
- b** agreed to submit to a direction to undergo an assessment but subsequently failed to comply with some or all of the requirements imposed in respect of that assessment
- c** agreed to provide the information requested but subsequently failed to provide it in part or in full
- d** failed to respond to a direction to undergo an assessment or request to provide information
- e** been prevented from participating in an assessment by reason of their adverse physical or mental health (health-related non-compliance).

20 In scenario (a) the doctor's refusal must be demonstrable and should be unambiguous. Evidence of an explicit refusal will usually be in writing in the form of a letter or email. The doctor may also have spoken to a member of GMC staff in which case a comprehensive telephone note of the conversation should have been made. The doctor's refusal should be acknowledged in writing.

21 In scenarios (b) and (c) it should be made clear to the doctor in writing that unless they comply in full with the requirements of the assessment or request to provide information, they could be referred for non-compliance.

22 In scenario (d) where a doctor does not respond to a direction or request to

provide information, two reminders should be sent to the doctor.

23 In scenario (e) the evidence that a doctor has been prevented from participating in an assessment will usually be in the form of a report from the doctor's treating healthcare practitioner, but may also be an update from their medical supervisor or a report prepared by a GMC health examiner. This scenario normally arises where a doctor is unable to engage with us during a health investigation, due to an existing health condition. These cases should be referred to in our communications with the doctor as health-related non-compliance and managed sensitively.

24 In all scenarios the correspondence sent to the doctor must outline the potential consequences of non-compliance. It will not be appropriate to refer a doctor for non-compliance if they have not been given a reasonable opportunity to respond to a direction or request for information and informed of the possible outcome for failing to comply.

25 After the initial correspondence containing the direction or request to provide information, subsequent letters to the doctors must not be worded or considered as a new direction, but should be sent as reminders for the doctor to submit to the original direction and the consequences of not doing so. The doctor should be asked to provide reasons for any explicit refusal to comply, or failure to comply in part or in full. This will help inform any decision made in respect of non-compliance, including our assessment of whether we have undertaken reasonable steps to engage with the doctor to explain the consequences.

26 At a non-compliance hearing it will be necessary for the GMC to provide proof of service of the direction to undergo an assessment or request to provide information. The decision maker should be satisfied that the GMC can prove service otherwise there will be no prospect of proving non-compliance at a hearing. Where possible, copies of letters should be sent to both the doctor's registered address and email address.

Does the doctor's failure to comply create a risk to public protection because it means we cannot investigate the concern?

- 27** There is a clear risk to public protection⁸ where a concern about a doctor's fitness to practise has been raised but cannot be investigated other than by means of an assessment or by requiring a doctor to provide information and the doctor does not comply. The absence of such evidence may interfere with our ability to take forward a case on the grounds of impairment⁹.
- 28** The outcome of the assessment, or the information requested from the doctor, should be material to the GMC's investigation. If without it we cannot proceed with the investigation in a proportionate way and take action in response to the concerns raised about the doctor's fitness to practise, the failure to comply will create a risk to public protection.
- 29** If there are other proportionate means by which the allegations can otherwise be adequately investigated, or the information requested from the doctor can be acquired, these avenues should be pursued before a referral for a non-compliance hearing is made.

Is there a good reason for the doctor's failure to comply?

- 30** When considering the issue of whether there is a good reason for a doctor's failure to comply, the decision maker will need to make a judgement based on the individual circumstances of the case.
- 31** Examples of good reason could include, but are not limited to, where:

⁸ This is the overarching objective of the GMC and includes: promoting and maintaining patient safety, promoting and maintaining public confidence in the profession and promoting and maintaining professional standards (sections 1(A) and 1(B) of the Act).

⁹ [The General Medical Council and Professional Standards Authority: Proposed changes to modernise and reform the adjudication of fitness to practise cases](#), Department of Health Consultation Response Report, January 2015, pages 31/32.

- a** there is objective evidence that demonstrates a doctor's adverse physical or mental health prevented them from complying with a direction or request to provide information, and there is a realistic prospect of the doctor being able to comply in a reasonable timeframe in the future (see below)
- b** a doctor can demonstrate they have not received a direction to undergo an assessment or request to provide information
- c** a doctor can demonstrate they are not, or could not reasonably be expected to be, in possession of the information requested by the GMC
- d** a doctor can demonstrate they had taken steps to remove themselves from the medical register (see below)
- e** a doctor can demonstrate that, in all the circumstances, it was not reasonable to expect them to comply with the GMC's direction or request to provide information (see below).

32 Not having legal representation will not amount to a good reason for a doctor failing to comply with a direction or request for information. However, where it is known a doctor has not obtained legal advice, the decision maker should be satisfied that we have undertaken reasonable steps to engage with the doctor to explain the consequences of non-compliance. Reasonable steps are likely to include making attempts to communicate with the doctor through more than one method; such as by letter, email and / or telephone.

33 The decision maker should carefully consider the appropriate weight to attach to any evidence available to inform their judgement of whether there is a good reason for the doctor's failure to comply.

Adverse physical or mental health

34 To consider whether there is a good reason, the decision maker will need to be presented with objective medical evidence that:

- a** sets out how the doctor's adverse physical or mental health prevented them from participating in the assessment or providing the information we requested, and
- b** provides an opinion on when it is anticipated the doctor will no longer be prevented from participating in the assessment or providing the information requested.

35 It is unlikely to be sufficient for a doctor to provide us with evidence about the impact of their own health condition, without independent information to support or verify it.

36 Objective medical evidence about a doctor's adverse physical or mental health could come from a number of sources, such as: a letter or report from the doctor's treating practitioner or GP, an update from their medical supervisor or a report prepared by a GMC health examiner. As objective medical evidence is independent and verifiable, the decision maker is usually able to attach greater weight to it.

37 If further clarification is needed about a doctor's health condition, it should be requested from medical professionals already familiar with the doctor's health. However, rarely, it may be necessary to request an opinion from a GMC health examiner regarding the doctor's ability to take part in the fitness to practise process.

38 In some cases, it may be appropriate for us to obtain specialist health advice to help inform the decision whether the doctor's adverse physical or mental health is a good reason for their failure to comply. This is likely to be where the objective medical evidence that is available is unclear and / or the doctor's health condition is particularly complex.

39 In the absence of objective medical evidence, or where the objective medical evidence does not indicate there is a realistic prospect that the doctor will be able to comply in a reasonable timeframe, referral to a non-compliance hearing is likely to be appropriate.

- 40** What amounts to a reasonable time frame will depend on the individual circumstances of the case, including, but not limited to: the content of any available objective medical evidence, whether the case is multifactorial and there are other allegations we are still investigating, the history of the case, and / or the impact of delay on the complainant and / or witnesses.
- 41** In cases where there is no realistic prospect that a doctor will be able to comply in a reasonable timeframe, and there is no other proportionate way of progressing or concluding the investigation, a health-related non-compliance order¹⁰ may be appropriate. An interim order is unlikely to be sufficient in the long term to address the ongoing issues raised by the doctor being unable to comply, whereas a health-related non-compliance order will achieve public protection and limit the impact of an active investigation on an unwell doctor.
- 42** At a non-compliance hearing, no finding will be made in respect of whether the doctor's fitness to practise is impaired. Where a doctor has not complied because they are unable to do so due to their adverse physical or mental health, a health-related non-compliance order can be made to restrict the doctor's practice until such time as they are able to comply.
- 43** In cases where a doctor states they are unable to comply with an assessment or provide the information requested for reasons related to their health, the decision maker should consider whether reasonable adjustments to the assessment process have been requested by, or explored with, the doctor.
- 44** Where we have offered to make adjustments which would have enabled the doctor to participate in an assessment or provide the information requested and the doctor has not complied, it is unlikely the doctor's adverse physical or mental health will amount to a good reason.

¹⁰ As for all types of non-compliance, in a health-related non-compliance case, a direction of conditions or suspension may be made.

45 Where available, the decision maker should consider any advice obtained from a medical case examiner about the likely impact of a doctor's health condition, or possible health condition, on their ability to engage in the fitness to practise process. Where relied upon, the case examiner's advice will need to be clearly referenced in the decision document.

Steps towards removal from the medical register

46 A doctor may have a good reason for failing to comply where they can demonstrate they had taken steps to be removed from the medical register during the investigation, and as a result it would not be proportionate for them to complete the assessment or respond to the request to provide information at that point in time.

47 To demonstrate they had taken steps to be removed from the medical register a doctor would have to show they had submitted a completed application for voluntary erasure to us.

48 In these circumstances, it may not be proportionate for the doctor to complete the assessment or respond to the request to provide information until:

- a** the application for voluntary erasure has been determined by us, and
- b** the doctor receives notification that voluntary erasure was not granted.

49 A doctor relinquishing their licence to practise is distinct from applying to be removed from the medical register and would not be sufficient to amount to a good reason. Stated intentions by a doctor to no longer practise in the UK, relinquish their licence to practise, or submit an application to have their name removed from the register, are also not sufficient.

In all the circumstances, it was not reasonable for the doctor to comply with the GMC's direction or request to provide information

50 A doctor may say that, given the circumstances at the time the direction or

request to provide information was made, it was not reasonable for them to comply.

51 Where a doctor raises their personal circumstances as a reason for not being able to comply, the following situations will not usually amount to a good reason, unless there is objective evidence the doctor will be able to comply in a reasonable timeframe:

- a** a doctor says they are unable to travel or obtain a visa to travel
- b** a doctor cites financial difficulties
- c** ill-health of a family member - unless they are a dependent of the doctor and there is objective medical evidence to show the doctor is *prevented* from complying as a result, and there is a realistic prospect of the doctor being able to comply in a reasonable timeframe in the future.

52 The content of any objective evidence submitted by the doctor should help the decision maker evaluate:

- a** why the doctor is unable to comply, and
- b** when the doctor will be in a position to comply.

53 As objective evidence is independent and verifiable, the decision maker is usually able to attach greater weight to it.

54 For example, objective evidence relating to a doctor being unable to travel could include the submission of documents demonstrating a visa had been applied for in a timely manner, but consideration of the application has been delayed for reasons beyond the doctor's control and will be complete within a specified time. In this scenario, it is unlikely to be sufficient for a doctor to simply inform us that they have been unable to obtain a visa.

- 55** What amounts to a reasonable time frame will depend on the individual circumstances of the case, including, but not limited to: the content of any available objective evidence, whether the case is multifactorial and there are other allegations we are still investigating, the history of the case, and / or the impact of delay on the complainant and / or any witnesses.
- 56** GMC registration requires doctors to cooperate and take part in our regulatory processes. In the absence of objective evidence that the doctor will be able to comply in a reasonable timeframe, the above scenarios could lead to the fitness to practise process being delayed for an indefinite period of time. This could have the effect of preventing us from fulfilling our regulatory purpose to protect the public in a proportionate way.
- 57** In these cases, a proportionate response will be to seek a non-compliance order to restrict the doctor's practise until such time as they are able to comply with the direction or request for information. Any non-compliance order can then be reviewed when the doctor is able to take the assessment, for example, because they can now return to the UK or raise funds.

Multi-factorial cases

- 58** Where an investigation is concerned with more than one head of impairment and a doctor fails to comply with one aspect of the investigation, the case should still be considered for referral for a non-compliance hearing where the failure is considered to be material to the investigation of whether the doctor's fitness to practise is impaired.
- 59** For example, where a doctor is under investigation for health and misconduct concerns and does not comply with a health assessment, provided the decision maker is satisfied that the outcome of the health assessment is material to the investigation of whether the doctor's fitness to practise is impaired, the doctor's non-compliance with the health assessment should be considered for referral.

60 Where a doctor is referred to a non-compliance hearing because of a failure to comply with one aspect of an investigation, ongoing investigations into other heads of impairment may be able to continue.

Referrals for early review

61 Where a doctor complies with a direction or request to provide information before a non-compliance order is due to expire, the case should be referred for an early review hearing¹¹.

62 Before making a referral, the decision maker must be satisfied that the doctor has complied with the direction or request to provide information to the extent needed for us to be able to progress the investigation. In assessment cases, a doctor must not only have submitted to undergo the assessment, but must also have complied with all requirements of the assessment.

63 Where it is anticipated that a non-compliance order will be revoked at a review hearing, we will need to consider whether the MPT should be asked to impose an interim order while the fitness to practise process continues.

¹¹ Under rule 21.