To consider

Separation of Registration Functions and Registration Appeals

Issue

1. The future delivery of the GMC’s registration and registration appeals functions.

Recommendations

2. a. That Council approve the structure for the future delivery of the GMC’s registration and registration appeals functions (paragraphs 13-20).

b. That there should be no requirement for registration cases to be determined at hearings (paragraphs 22-23).

c. That the registration decision making process should be determined by the expertise needed to make particular decisions and provide, wherever possible, for decisions to be made by the Office or the Registrar (paragraphs 24-28).

d. That registration policy and casework decisions will require the involvement of GMC and non-GMC members who specialise in registration work (paragraphs 29-30).

e. That Council approve the principles underpinning the operation of the Registration Appeals Panels (paragraphs 33-43).

Further information

3. Richard Marchant 020 7915 3584 rmarchant@gmc-uk.org
   Paul Buckley 020 7915 3654 pbuckley@gmc-uk.org
   Isabel Nisbet 020 7915 3575 inisbet@gmc-uk.org
Background

4. During 2000-1 the Council carried out a fundamental review of the GMC's structure and of the way in which it conducts its business. It was agreed – in the context of the fitness to practise procedures, but with wider application to our other functions – that there should be a clear separation between the people involved in the GMC's core work, including policy formulation and investigation, and those involved in adjudication. At the Council meeting in November 2001, members agreed that these principles should also apply to the GMC's registration functions. The Registration Committee was invited to consider what arrangements to recommend to Council for the delivery of its functions, and who should be involved in carrying them out.

5. This paper describes our current registration responsibilities and puts forward proposals for how they should be delivered in the re-modelled Council of 35. Because the Committee structure of the smaller GMC has yet to be decided, the paper does not assume the continuation of the present Registration Committee, but nor would it be incompatible with there continuing to be a Registration Committee. Instead, it simply divides responsibilities into core GMC functions and a separate registration appeals function. Core functions would be the responsibility of the GMC. The appeals functions would be carried out by separate adjudicators who are not GMC members.

6. The Committee has recognised that its proposals cannot be considered in isolation. Rather, they must developed as part of the broader policy design for the Council as a whole and taken forward in the context of the other reforms which are currently taking place.

Discussion

7. Our current registration responsibilities can be divided into three main areas: development of registration policy, registration casework and registration appeals.

Overview of registration casework functions

8. Our registration casework functions are summarised in Annexes A, B and C. These include routine administrative functions connected with the maintenance of the registers, decisions about granting registration and restoring doctors to the register, and, in some cases, erasing doctors from the register. The introduction of revalidation will add new registration casework functions which are also described in the annexes.

Overview of registration appeals functions

9. The GMC also has responsibility for determining appeals against certain registration decisions. A summary of the registration decisions which are currently susceptible to appeal is provided at Annex D. For a number of reasons these arrangements are unsatisfactory.
10. Under the Human Rights Act 1998 (HRA),\(^1\) which became law in England in October 2000, anyone who is having their civil rights determined (this includes a decision to refuse registration) is entitled to: the right of access to a court or tribunal, the right to a fair hearing, the right to a public hearing, the right to a hearing within a reasonable time, and the right to an independent and impartial tribunal. Our current appeal arrangements need adjustment in the light of these requirements.

11. The need for change is illustrated by the Review Board for Overseas Qualified Practitioners which has statutory responsibility for reviewing certain decisions affecting the registration of overseas qualified doctors. The Board comprises GMC members, plus a Chairman and Deputy Chairman who are not GMC members but are appointed by the President. The Board therefore lacks the degree of independence now necessary under HRA. It is significant too, that although the Board makes a recommendation on whether the GMC’s decision to refuse registration should be upheld or overturned, the final decision rests with the President.\(^2\)

12. There is also a lack of consistency in our current registration appeal arrangements. In some cases the appeal is to the Review Board, while in others it is to the Registration Committee or to the Privy Council, and in others there is no right of appeal at all. In considering how we should provide for registration appeals in the future one of our aims should be to achieve a common approach, regardless of the type of registration decision. The model described in the following paragraphs proposes how this might be done through a separation of the registration decision making and the registration appeals functions.

Proposed model for the future delivery of registration functions: an overview

13. The Registration Committee has concluded that the key to the separation of registration functions lies in the difference between the processes for admitting doctors to the register and the processes for removing them from it. Controlling entry to and maintaining the registers are core functions of the GMC. As such, they should be the direct responsibility of the Council of 35, although Council members themselves need not carry out all of those functions (see paragraphs 29-30 below). By contrast, decisions about erasing doctors from the register would normally involve the separate adjudication process of the fitness to practise procedures.

14. Under this model, the development of registration policy and all decisions relating to the determination of a doctor’s registration status would initially fall within the core functions of the GMC. They would include all those decisions referred to in Annexes A-C. However, any adverse registration decision would be susceptible to appeal at a hearing. The appeal would be heard before a Registration Appeals Panel.

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\(^1\) The HRA incorporates into UK law the provisions of the European Convention on Human Rights (ECHR)

\(^2\) It is important to recognise that these are the arrangements which we are currently required to operate under the provisions of the Medical Act 1983. The fact that the Review Board is not HRA compliant does not mean that we are acting ultra vires. This is because we are not obliged to act in a way which is compatible with the ECHR where this would conflict with existing domestic legislation. Nevertheless, as a responsible public body it is appropriate that we take steps to bring our arrangements into line with the ECHR.
(RAP) drawn from adjudicators who are not GMC members. The characteristics of the RAPs are discussed further in paragraphs 32-43 below.

15. This model has a number of attractions. First, it would achieve the aim of separating registration decision making and registration appeal functions. Second, it would provide a single registration appeals process which applies equally to all registration cases. Third, although RAP members would not be GMC members, the appeal process would come within the broad ambit of the GMC. This would help to ensure consistency of standards and the coherence of the decision making process. Fourth, the RAPs would give continued ownership by the professional regulator of decisions about entry to the register.

16. Despite the separation of functions the RAPs would not provide complete independence and would, therefore, be unlikely to comply fully with the requirements of the HRA. In addition, since the HRA gives individuals the right of access to a court or tribunal, it is sensible to provide for this by creating a right of appeal to the courts.

17. The Department of Health has separately signalled its intention that all registration decisions should be susceptible to appeal to the courts. This has been prompted in part by recent EC legislation. The SLIM Directive (Simpler Legislation in the Internal Market) will introduce a right of appeal to ‘the courts under national law’ against a refusal to grant registration to European nationals. The NHS Reform and Health Care Professions Bill also introduces a right of appeal to the court in cases where individuals have been erased from the register because their registration has been obtained fraudulently or made incorrectly.

18. Given the government’s intention to allow an appeal to the courts in all cases, it can be argued that having the initial appeal mechanism of the RAPs would add little value and merely build an unnecessary tier and additional delay into the decision making process. The Registration Committee has concluded, however, that as well as ensuring consistency and coherence, the RAPs would provide a filter mechanism which may help to reduce the number of appeals which need to be referred to the courts. It is difficult accurately to predict the proportion of cases which would be filtered out by the RAPs. This is partly because the future impact of revalidation is unknown. However, the majority of all registration appeals currently come before the Review Board. Of the 26 cases considered by the Board during 2000-1, it recommended that the GMC’s decision should not stand in 10 cases.

19. The Committee has also taken the view that, in common with the appeal arrangements proposed in future for fitness to practise cases, the avenue of appeal in registration cases should be to the High Court. In reaching this conclusion the Committee noted that the consequences of affecting a doctor’s registration are equally serious whether the decision is made in the context of the fitness to practise procedures or as part of the registration process. It was therefore appropriate to provide for an equivalent level of appeal to the courts. The Committee was also mindful that, at present, the majority of registration appeals involve overseas qualified doctors applying to the Review Board. Providing a lower level of appeal in

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3 Directive 2001/19/EC
4 NHS Reform Bill, Clause 28
5 NHS Reform Bill, Clause 28.
registration cases would therefore impact disproportionately upon overseas qualified doctors. Thirdly, the Committee took account of the fact that the High Court would be in a position to build up a body of expertise in the determination of registration cases which would be difficult to achieve if appeals were heard at lower level courts around the country.

20. It is important to note, however, that whether we are able to secure a right of appeal to the High Court will depend upon the outcome of discussions with the Department of Health. Until now the Department has taken the view that registration appeals should fall to the county court\(^6\) and this is reflected in the drafting of both the NHS Reform Bill and the initial drafts of the Section 60 Order which will introduce the smaller GMC.

**Recommendation:** That Council approve the structure for the future delivery of the GMC’s registration and registration appeals functions.

*Operating the registration model*

21. Although much of the detail of the new model remains to be worked out, the Committee has identified key features of the decision making process. These are summarised in the following paragraphs.

**Decisions on the basis of paper evidence**

22. The vast majority of all registration decisions are made by assessing an application form or other paper evidence. However, a small number of cases are determined at hearings before the Registration Committee. These include applications for registration from overseas qualified doctors where there is a question about the applicant’s good character or professional knowledge, skill and experience, certain questionable applications for restoration to the register following non-disciplinary erasure, and cases where registration may have been fraudulently obtained or incorrectly made (see Annex C).

23. The Committee has concluded that because the introduction of the RAPs will give an automatic right to an appeal hearing in all cases, there will be no need for hearings at the registration decision making stage. Hearings at this stage would simply build delay into the process without adding value.

**Recommendation:** That there should be no requirement for registration cases to be determined at hearings.

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\(^6\) The county court is the lowest level court in the judicial system and cases are heard by a judge sitting in isolation.
The attributes necessary to make registration decisions

24. Registration decisions fall naturally into three groups:

   a. Administrative decisions involving routine maintenance of the registers (see Annex A).

   b. Casework decisions which do not raise fitness to practise issues (see Annex B).

   c. Casework decisions raising questions about doctors’ fitness to practise (see Annex C).

How these decisions are made should be determined by the expertise needed to make them. Thus the largely administrative decisions described in Annex A would be made, as at present, by the Registrar or the Office.

25. The cases described in Annex B are those which may require some form of medical or non-medical input for them to be determined. They are mainly cases requiring judgements about doctors’ capability for practice and include applications for limited and full registration from overseas qualified doctors. In most cases the medical and non-medical input which brings expertise and legitimacy to the decision making process would be provided at the level of GMC policy making. As at present, this would include such matters as deciding what knowledge, skill and experience are necessary for practice under limited registration. Also as at present, policy makers would be able to draw up explicit criteria enabling most decisions on individual cases to be delegated to the Office without direct medical or non-medical input.

26. In exceptional cases falling outside the explicit criteria there would be a need for direct medical or non-medical input in decision making. In relation to applications for limited and full registration, the cases requiring such input might be similar to those which are currently referred to the Registration Committee. In relation to revalidation decisions, they would be cases where the Registrar cannot determine whether a doctor has provided sufficient information for revalidation because of the way in which the information is presented.

27. The third group of cases (Annex C) includes, for example, those applications for limited and full registration which are currently referred to hearings before the Registration Committee and in which questions have arisen about a doctor’s character, or knowledge, skill and experience. Decisions in cases of this nature may require both direct medical input (including specialist medical knowledge where there are questions about a doctor’s competence) and non-medical input to provide the patients’ perspective and ensure public confidence in the process.

28. The Committee considered, however, that some decisions are so clear cut that, not only is a hearing unnecessary, but expert medical and lay input would add no value to the decision making process. This might occur, for example, if an applicant for registration had been convicted of a serious criminal offence. It would
be possible to develop explicit criteria against which the Registrar could refuse registration in certain cases without recourse to expert advice.\textsuperscript{7} This would enable us to achieve greater efficiency and flexibility in the decision making process where particular expertise is not required.

**Recommendation**: That the registration decision making process should be determined by the expertise needed to make particular decisions and provide, wherever possible, for decisions to be made by the Office or the Registrar.

Who makes the decisions?

29. The greatly reduced size of the new Council will mean that the current level of member involvement in day to day decision making on registration issues will simply not be practical. This applies both to the development of registration policy and the determination of individual pieces of casework. In relation to casework, this involves a significant number of cases being referred to members for determination each week. Where specific medical and lay input is required, therefore, this must come, to a large extent, from suitably selected and trained non-GMC members. Our use of non-GMC personnel is already well established, both in the context of the development of the PLAB test and in the operation of the fitness to practise procedures, notably the performance procedures. The arrangements for selecting individuals to carry out these functions would mirror those used for identifying individuals to contribute to our other core functions.

30. The involvement of non-GMC personnel in registration casework would not, of course, preclude GMC member participation. As the GMC will remain the setter of standards and guardian of the registers it would be important for some members of the Council to have hands-on experience of casework. This would facilitate the co-ordination of casework decision making and the development of policy, and help provide accountability. The need for continuity and consistency, together with the technical aspects of registration work, also persuaded the Committee that individuals (whether GMC members or non-GMC members) should specialise in this area.

**Recommendation**: That registration policy and casework decisions will require the involvement of GMC and non-GMC members who specialise in registration work.

31. Given that we do not know whether the new Council will wish to establish an equivalent to the current Registration Committee, it is not yet possible to specify how it will carry out its work. However, the need for specific medical and lay input in certain casework functions means that one or more Registration Decisions Panels will need to be established.\textsuperscript{8} The composition and operation of these panels will be the subject of further work in the months ahead.

\textsuperscript{7}In fact, the law already empowers the Registrar to make independent decisions of this kind in relation to applications for limited and full registration from overseas qualified doctors since it is the Registrar, not the Council, who must be satisfied about an applicant’s good character. At present, it is only the Council’s own Standing Orders which require the Registrar to refer such cases to the Registration Committee for advice on the appropriate course of action.

\textsuperscript{8}We expect that the draft Section 60 Order covering the constitution and governance of the GMC will provide for the establishment these panels.
Operating the registration appeals model

32. Like the registration decisions process, much of the operational detail of the RAPs remains to be developed. The Registration Committee has, however, agreed the key features which will underpin the appeals process.

What decisions will be susceptible to appeal?

33. Under the RAP model, all adverse registration decisions would be susceptible to appeal by the doctor affected. This will greatly extend the list of decisions which can currently be appealed against.

34. There will be a limited number of cases where providing a right of appeal is either unnecessary or undesirable. Individuals erased from the register for failing to maintain an effective address or for failing to pay the annual retention fee should have no right of appeal since the position is easily remediable either by providing an address or paying the fee. Similarly, to avoid frivolous or vexatious actions, there should be no right of appeal against a refusal to grant registration where the reason for refusal is that the individual does not hold a relevant primary qualification or because he or she has refused to pay the registration fee. These limited exceptions would not, however, detract from the principle that any registration decision affecting a doctor’s status should be susceptible to appeal.

The role and powers of the RAPs

35. When reviewing a decision by the GMC to refuse to grant registration, the Review Board has just two options: it may recommend that the GMC’s decision should stand or that it should be overturned. The Board may not modify the GMC’s decision in any way or impose a separate decision.

36. If the RAPs are to provide a genuine appeal mechanism, rather than simply a process of review, they must not be confined simply to making recommendations which the GMC may or may not accept. Instead, they must be able to dismiss an appeal or allow the appeal and quash the decision appealed against. They must also be able to substitute for the decision appealed against any other decision that the GMC decision maker in the case could have made.

37. RAPs should have a power to award and enforce costs, either for or against the doctor. This would be a reserve power to be used in exceptional cases only, for example, where the actions of the GMC or the appellant were deemed to have been unreasonable.

The nature of the RAPs

38. RAPs would be generic and capable of considering all types of registration appeals. Unlike the Review Board, they would not be confined to considering particular categories of case.

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9 Section 30(5) of the Medical Act 1983 provides for erasure in these circumstances.
RAP membership

39. RAP members would not be members of the GMC. They would be drawn from those appointed as adjudicators, and selected through the same mechanisms as all other individuals performing GMC adjudication functions. They would be selected according to competency criteria and would be required to complete appropriate training before being eligible to sit on a panel. RAP members would not be eligible to participate in any core GMC functions whilst serving as adjudicators.

40. Although adjudicators, RAP members would form a discrete sub-set, specialising in registration issues. This would give continuity of membership and enable members to develop and retain appropriate expertise. This would not, however, preclude other adjudicators from being empanelled on RAPs, provided that they had completed appropriate training.

Composition of panels

41. Unlike the current Review Board, which is comprised of medical members only, RAPs would include both medical and lay members.

42. The Registration Committee recognised that it might in some cases be desirable for the composition of a RAP to take account of the circumstances of the appellant. Thus, where the appellant is from overseas or from an ethnic minority the panel might include an overseas qualified doctor or someone from an ethnic minority group. The Committee concluded, however, that imposing specific requirements for RAPs to reflect appellants’ circumstances in this way would be operationally impractical and might serve to disadvantage appellants if it led to hearings being delayed until a suitable panel could be convened.

Accountability of the RAPs to the GMC

43. Since RAPs will not include GMC members, a question arises about their accountability to the GMC. The report of the Fitness to Practise Policy Committee on the review of fitness to practise (item 13e) includes proposals for ensuring the accountability of fitness to practise adjudication panels. The proposed model will apply to all GMC adjudication functions, including RAPs.

Recommendation: That Council approve the principles underpinning the operation of the RAPs.

Discussions with the Department of Health

44. In developing this model for the future delivery of our registration functions, we have shared our thinking with the Department of Health. This has been done partly in order to inform the design of the Section 60 Order which will describe the arrangements for the future constitution and governance of the GMC. There is provision for an agenda item if the Order is published before Council meets.

45. We are confident that the Order as drafted will enable us to carry out the
registration decision processes which are set out in this paper. We do not yet know, however, whether it will also incorporate the full range of appeals functions proposed. It will make some provision for registration appeals, at least to the extent that is necessary to maintain our existing appeals functions and provide for the introduction of revalidation, but it is possible that the Government may wish to retain a modified version of the current arrangements, at least for the moment.

**Resource implications**

46. The separation of functions discussed in this paper relate to activities which are already carried out by the GMC. To that extent, the arrangements proposed are largely cost-neutral, although it is likely that the appeals caseload would be greater than that of the current Review Board, particularly bearing in mind appeals generated by the revalidation process.

47. The selection, training and remuneration of non-GMC members to carry out registration decision making and adjudication functions would entail additional costs, but these individuals would need to be recruited anyway as part of the separation of functions exercise being undertaken by the GMC as a whole.

48. The government’s intention to create a right of appeal to the courts would have significant, but as yet unquantified, cost implications. These will depend in part on whether appeals are to be heard in the High Court or the county court. In any event, the effect might be mitigated to some extent by using RAPs as a filter to the court system.

**Charitable status**

49. This paper’s recommendations are compatible with charitable status and with charity law.