Consultation Response

GMC: reforming fitness to practise investigation and adjudication process

May 2015

MPS's response to the GMC consultation on reforming fitness to practise investigation and adjudication process

General Comments

MPS welcomes this opportunity to respond to the GMC's consultation on the proposed reforms to its fitness to practice investigation and adjudication process.

We are concerned that some of the suggestions and assertions of intent within the consultation paper are not reflected within the proposed new Rules themselves. On the specific question of proposals for awarding and assessing costs, we strongly feel that the number of potential practical implications is such that a separate consultation is needed. MPS urges the GMC to initiate such a consultation within the next few months, so details of these proposals can be properly considered. Separately, we recognise that when considering changes to the fitness to practice investigation and adjudication process, much will depend on practice directions and accompanying guidance. MPS is eager to work with the GMC, as part of the case management group, to ensure both are suitably robust.

Our responses to the consultation questions are listed below. However, changes have been proposed to Rules without comments being sought in the consultation. We first outline our views on these proposed changes.

Changes to Rule 4(5)

We believe that the proposal to remove the requirement of 'exceptional circumstances' in stale cases older than five years is unjustified.

Removing this requirement would prejudice the registrant, who would face having to defend themselves many years after the event that is brought into question, without the expectation of being

able to cite cogent evidence in the registrants defence. No fair trial could be contemplated as a result, and consequently this would breach their Article Six right to fair determination.

There remains a need for the Registrar to consider the criteria set out in the GMC's previous guidance, as to 'exceptional circumstances.' Otherwise, delay by the complainant, the reasons for such delay, the gravity or otherwise of the allegations, and other investigations leading to a conclusion of a lack of evidence, would have no bearing on the decision to proceed.

The balance of a registrant's right to fairness would be lost if only the public interest were to be relevant to stale complaints.

Changes to Rule 16

Little information has been given as to how the changes in respect of 'adverse inferences' and 'refusal to admit evidence' will be implemented.

It is highly likely that in all cases there will be a dispute as to the nature of alleged 'failure to comply' and the circumstances surrounding such 'failure.' Submissions from all parties would be required to enable the Tribunal to reach an informed view. No information has been given as to what may justify the drawing of such an inference, and how the Panel should treat the available evidence. Achieving consistency here is important.

Some, and perhaps all of the parties, may be culpable, and the apportionment of 'blame' may become part of the hearing in the form of representations by all involved. Disclosure between the parties may then be necessary to address respective blame and establish the facts. No indication has been provided as to how and when the Tribunal would indicate a provisional view of 'non-compliance' and whether representations would then be made. All of this would detract from the key issues in the case, delay the conclusion, and fail to meet the public interest.

Questions

1. **We have drafted new Rules for the MPTS Committee. Do you agree with the arrangements for the MPTS Committee as set out in these Rules?**

We have some concerns about the draft new Rules. There is a lack of clarity at Rule 8(1)(c) as to what constitutes 'any investigation.' An MPTS member should only be able to face suspension under Rule 8(1)(c) if they become the subject of a Rule 7(2) investigation, after the 'relevant date' which is to

be amended by proposed fitness to practise Rule 13(a). The member in question should not be susceptible to Rule 8(1)(c) before that date, when the Registrar may be conducting the preliminary inquiries.

The provisions of Rule 8(4)(b) could give rise to a suspended MPTS member making repeated requests for a review of their suspension, and as currently drafted this Rule would mean that every request would have to be met. It would therefore seem appropriate to place some limit on this within the Rules, to mitigate the potential for repeated requests for review and increasing costs.

2. **We propose making provision in the rules for the MPTS to be responsible for setting and publishing the criteria for appointing panellists and panel chairs. Do you agree?**

It is suggested in the consultation paper that legally qualified chairs would be appropriate to hear 'certain categories of cases' whether with or without a legal assessor. However, the proposed Rules are silent as to when and in what circumstances a legally qualified chair can replace a legal assessor in a hearing. For consistency and fairness there should be legally qualified chairs at all hearings, especially as legal arguments and issues often arise unexpectedly. The criteria for having a legally qualified chair, as opposed to a legal assessor, for any hearing should be specified in the Rules. We believe that in the interests of impartiality and consistency, hearings should ideally include both an independent legal assessor as well as a legally qualified chair.

3. **We propose that where legally qualified chairs advise the panel on a question of law they will do so either in the presence of the parties or, where the parties are not present, they will include their advice in their decision. Do you agree?**

Greater clarity is needed here. It would be preferable for there to be an appointed legal assessor in every case. Rule 6 of the Legal Assessor Rules, covering advice by a legally qualified chair, may not cover the situation where the registrant is not present at the time the advice is given, where the advice precedes the Tribunal beginning to deliberate, but arrives after deliberation begins. Such advice should also be included in the written Tribunal decision.

4. **We propose that the MPTS should send the notice of the hearing and the GMC should send the notice of the allegation. Do you agree?**

We agree with this proposal. However, the proposed Rule as set out in article 2(16)(2) of Annex 2 ought to be amended so that a shorter notice period can only be given where either the practitioner

consents or the Registrar/MPTS considers it is reasonable in the public interest to do so given the exceptional circumstances of the case , i.e. the current wording of Rule 15 of fitness to practise.

5. **Do you agree that we should change our rules to reflect our current practice of giving doctors at least 28 days' notice of all matters relating to the hearing (including the time and venue)?**

While we agree that there should be a minimum notice period of 28 days, such a notice period must not become the norm. This is a particularly acute example of where clear and robust guidance is needed, and MPS is keen to work with the GMC in formulating that guidance.

6. **We propose to remove the rule that provides that the MPTS should tell the GMC when an interim order is due to expire. Do you agree?**

Providing the process still works in a satisfactory manner for involved parties, we agree with the proposal.

7. **We propose clarifying the circumstances in which we can refer a doctor with panel undertakings for a review where the doctor does not agree to changes we want to make to their undertakings. Do you agree?**

Yes, we agree with this proposal.

8. **We propose making clear that a doctor with undertakings whose language skills either deteriorate or otherwise give rise to further concerns can be referred to a panel. Do you agree?**

Yes, we agree with this proposal.

9. **We propose giving our hearings a more logical order, identifying a doctor at a hearing before hearing any legal argument. Do you agree**?

Yes, we agree with this proposal. However, the Rules should acknowledge the instances that exist where pre-hearing publicity does not currently identify the registrant. The new Rules should enable anonymity to be maintained prior to the commencement of a hearing.

10. **We propose allowing both parties to make submissions on the facts before the panel decides with facts are true. Do you agree?**

This is an established practice, and providing the defence is placed last, we support making this the case formally.

11. We propose removing the need to refer to transcripts of previous hearings in review and restoration hearings unless this is necessary. Do you agree?

Were this proposal to be adopted, we would be concerned as to who would be determining whether making previous transcripts available to a hearing was 'necessary.'

While there should not be an absolute requirement for the GMC's presenting officer to refer to a transcript, a transcript should be made available (unless it is agreed by the parties that it is not required) in all cases, for the following reasons;

- Matters that may be relevant at a subsequent hearing may not be specifically referred to in a previous Panel's determination in any sufficient detail.

- Any subsequent Panel would not have had the benefit of hearing the evidence given at the previous hearing first-hand. The transcript is the next best thing in those circumstances.

- A review hearing is concerned with the question of whether or not the practitioner's fitness to practise remains impaired at that time. This is a question for the Panel's judgement. Evidence given at the previous hearing, particularly where the practitioner has given oral evidence, would provide a useful mechanism for the Panel to measure the extent to which the practitioner has genuine insight at the date of any review hearing. This may only be properly assessed with the benefit of the totality of the evidence given and not just the previous Panel's determination.

- If it transpired that the transcript was required by the parties and/or the Panel at the review hearing, then time would be wasted to allow the transcript to be made available and also to be read by the Panel. Had the transcript been provided as a matter of course, then the Panel could have read this before the hearing.

- An unrepresented doctor is less likely to appreciate the potential importance that the transcript of their earlier hearing may have to their review hearing. Consequently, it would be unfair to expect he or she to request a transcript prior to the hearing.

Essentially, if a transcript is considered necessary by any interested party, then it should be referred to and made available to the hearing.

12. We propose clarifying that the MPTS arranges recordings of panel hearings and the registrar arranges recordings of Investigation Committee hearings and that, on request, the MPTS or registrar (as the case may be) can provide a written record. Do you agree?

Yes, we agree with this proposal.

13. We propose clarifying the terminology we use, in the particular what we mean by 'witness.' Do you agree?

While clarification of terminology is welcome, we have some concern about the implications of strictly defining a 'witness.'

The registrant cannot be fairly required, by case management, to serve a witness statement; the registrant has the right to make representations under Rule 17(g) and would be prejudiced in exercising this right, if required to have disclosed their own evidence beforehand. Any steps to clarify terminology should reflect this, as the distinct character of the registrant should not be absorbed into the term 'witness.'

14. We propose allowing case managers and Investigation Committee members to adjourn hearings that are part heard when either party requests this. Do you agree?

Case managers and Investigation Committee members should be allowed adjourn hearings on request, but within limits.

Once a hearing has commenced it is in everyone's interests for it to be concluded as soon as possible, whilst doing justice to the parties. Adjournments are stressful, expensive and potentially prejudicial where, for example, witnesses become discouraged from giving evidence due to the delays in the case. Consequently, we propose that unless both parties are agreed that an adjournment is required, the question of a further adjournment needs to be addressed by the Panel at a hearing and not a case manager. This should discourage unmeritorious applications for adjournments being made.

15. We propose that, to protect the public, when the panel has adjourned a review hearing before it has made a finding of impairment, a panel should be allowed to extend a sanction until the panel can reconvene to consider impairment. Do you agree?

We disagree with this proposal. An adjournment can be needed for a number of reasons which are unconnected with the registrant. What is being proposed could give rise to the unfair situation of a sanction being extended for a registrant whose fitness to practise may not be impaired. Such instances should not then give rise to open-ended, continuing sanctions. These sanctions can have employment, contractual, financial consequences for the registrant and in many cases adversely affect the patient and the public interest.

Review hearings should be listed in good time with sufficient flexibility to allow the case to be concluded without the order lapsing. Where this is not possible, then an interim order of conditions or suspension could be made by the Panel if necessary to protect the public. While there may have to be a re-hearing of the original allegation, this would be in the best interests of fairness rather than simply extending the sanction for the reasons stated above.

16. Do you agree with the circumstances we have set out in the draft rules for when case management decisions will not be treated as binding?

We agree with circumstances set out in the draft Rules, but we do not feel sufficient rationale has been given for the decision to remove Rule 16(5) – requiring case managers to act independently of the parties. This is an important requirement to avoid both bias and the perception of bias, and we believe Rule 16(5) should remain.

It is an important feature of case management, and in the absence of a rationale being provided for its removal in place of potential alternative wording elsewhere, Rule 16(5) should remain. Essentially, the situation where the content of the Rule is repeated, rather than not said at all, is the preferable scenario.

17. Do you agree with our proposals for awarding and assessing costs, as outlined in the draft rules?

We have wide ranging concerns about these proposals. While we understand that the associated powers may be appropriate, in some circumstances, we have a number of concerns about the practical implications. Some of these concerns are outlined below, however we strongly believe that

there is a case for a separate consultation on the proposals for awarding and assessing costs, as these clearly require detailed consideration.

Arguments on costs award would inevitably add more time to a hearing, for the parties to make their respective cases, and the Panel to then decide whether or not one or both parties has behaved unreasonably. There is likely to be considerably more time spent on such arguments where the registrant is unrepresented. This could also give rise to the satellite litigation through appeals being made in the civil courts to challenge an order of costs.

Although it is stated in the consultation paper that costs will be calculated based on the amount of the receiving party's time that was wasted, the proposed Rules do not specify this.

There is also an issue where the 'unreasonableness' may become apparent before the hearing, and where disclosure would be necessary on that issue to enable the Tribunal to determine the facts and circumstances. This again would most likely lead to delay and divert the Tribunal's attention from the real purpose of the hearing.

The proposed 28 day period for disclosure of a schedule of costs, and a written response to it with evidence as to means, is a critical one after a hearing. It is the period in which a registrant considers appeal and, if so advised, has to prepare all necessary documents to issue such an appeal. The registrant who has been suspended must also make arrangements, in the interests of their patients, to ensure continuity of care and facilitate the transfer of responsibilities. The registrant who has been made the subject of conditions will be required to take steps to comply with those in the stated timescale.

For the registrant who must face suspension and/or meet their private solicitors' costs, the prospect of also having to meet an award of costs may prove an insurmountable obstacle.

Given the number of foreseeable practical implications of these proposals, we would strongly urge the GMC to launch a separate consultation on the matter, so the proposals can be considered in greater detail.

18. When we make provisional enquiries to decide if we need to carry out an investigation, we propose removing the need to tell a doctor's employer. Do you agree?

We agree with this proposal, however there is uncertainty as to whether the absence of notice will also apply to the Secretary of State and offices associated thereof, as set out within the Medical Act 1983

s.35B(1). This requires clarification, because if this is not the case, and the Council intends for discretion is to be exercised in this respect, a risk arises that the registrant and/or their employer would learn of the Council's considerations of a matter indirectly.

This is an undesirable scenario, which could lead to confusion and distress on the part of the registrant, so clarification is needed as to whether removing the need to tell a doctor's employer extends to the reach of s.35B(1) of the Medical Act 1983.

19. We propose introducing a process for a new type of non-compliance hearing to deal with substantive non-compliance with assessments or requests for information required in order to enable us to investigate concerns. Do you agree with that process?

We disagree with this proposed process. In such cases the burden of proof would be reversed onto the practitioner. The current system of the GMC having to prove the allegation of impairment is both fair and consistent with Article 6 of the ECHR.

In appropriate cases, the fact that a registrant does not comply with a request to undergo an assessment may amount to a separate allegation of misconduct, which could then be referred to an MPTS Panel either with or without the original allegation of impairment. An interim order of conditions or suspension could still be made if appropriate. We disagree with the new type of process outlined in the consultation.

20. Do you think any of our proposals will adversely affect people from groups with protected characteristics? This could include doctors, patients, and members of the public.

We have no comment to make on this question.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. Highly qualified advisers are on hand to talk through a question or concern at any time.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

CONTACT

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