

8th October 2010

Response to the Government's consultation *Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery*

Background

1. In February 2007, the previous Government published its White Paper, *Trust, Assurance and Safety*. This set out a programme of reform to health regulation in the UK. This included proposals for the establishment of an independent body to adjudicate on fitness to practise cases relating to doctors following criticisms of the General Medical Council's (GMC) ability to adjudicate independently in the Shipman Inquiry. It was envisaged that other health regulators as well as the GMC could also refer their cases to this new independent body if they so wished.
2. Following the publication of the White Paper, the General Optical Council (GOC) considered whether it should volunteer to refer its fitness to practise cases to the new independent adjudication body.
3. The GOC's ability to adjudicate independently had not been called into question, as had been the case with the GMC, and the GOC had already taken considerable steps to introduce a high degree of independence to its adjudication function. These included:
 - New legislation being introduced in 2005 forbidding Council members from being members of the Hearings Panel;
 - An independent consultancy overseeing the appointment of Hearings Panel members;
 - No staff involved in the investigation or prosecution of fitness to practise cases being involved in the administration of hearings;
 - The appraisal of Hearings Panel members being conducted by the chairs of hearings; and the appraisal of chairs being conducted by staff who are not involved in the investigation or prosecution of cases;
 - Legal advice on hearings matters being sought from different legal firms from those involved in the investigation and prosecution of cases, with instructions coming from staff who are not involved in the investigation or prosecution of cases.

4. Notwithstanding the above steps to ensure the independence of the adjudication process, the GOC could see that there would be benefit in referring its cases to the new independent adjudication body. Firstly, there would be benefits in terms of the perception of there being clear independence between the investigation and prosecution of cases and their adjudication under such an arrangement. Secondly, the GOC felt that, given the great strides it had taken in introducing 'internal' independence to its adjudication function, it was in a good position to influence the new body at an early stage, to prevent the new body from being too medically focused, and to lead on behalf of the non-medical regulators in this regard.

5. As such, the GOC approached the Government and asked for legislation to be introduced to enable it to refer its fitness to practise cases to the new independent body. Such legislation was introduced in the Health and Social Care Act 2008 which established the Office of the Health Professions Adjudicator (OHPA). The provisions relating to the GOC have not been commenced.

6. The GOC's responses to the consultation questions below need to be viewed in the light of the above. The GOC has been an enthusiastic participant in the OHPA project, and we have been pro-active in shaping the legislation and policy regarding OHPA. The GOC has been represented on the Tackling Concerns Nationally Working Group, the OHPA Programme Board, and in June 2010 the OHPA Chair, Walter Merricks, outlined to the Council OHPA's policy ambitions which were warmly received.

Consultation Question: Should the Government proceed with its preferred option – Option 2?

7. We believe the Government should proceed with Option 2 in the consultation paper.

8. As outlined above, the GOC has been an enthusiastic participant in the OHPA project, and has broad support for the policy ambitions which OHPA has developed in discussion with us. However, there are a number of considerations which have led us to believe that the Government's decision to take stock is timely, and that the position outlined in Option 2 represents the most proportionate way forward.

9. Firstly, we note the transitional costs were originally estimated at £3-4m but have increased to £10-16m.

10. Secondly, the GOC has been the only regulator to volunteer to refer its cases to OHPA. The Government has not compelled regulators other than the GMC to refer cases to OHPA even where evidence has existed that their adjudication functions were in trouble. This has been disappointing, as it means that certain economies of scale (most notably the sharing of OHPA's fixed costs across a number of regulators) will not be realised, at least in the short term.

11. Thirdly, we have considered the nature of the problem which the OHPA project was intended to address. The provenance of OHPA was the criticism levelled at the GMC's ability to adjudicate independently. This was why it was only the GMC who were to be compelled to refer cases to OHPA. However, we note the great strides made by the GMC in improving its adjudication processes and its ambitions to create further independence with the establishment of Doctors' Disciplinary Tribunal. We understand that the GMC intends to allow other regulators to use its tribunal service once this has bedded in with doctors. We would urge that the Government ensures that any legislation allows for other regulators to refer cases to the new service, and that the GMC in devising its processes does so in full consultation with the other regulators so they are fit for purpose for other regulators to use. This way cost savings can be realised through economies of scale, which will not be realised if each and every regulator continues to have its own adjudication service for perpetuity. We would urge the Government to take a strong stand in setting out clearly its expectations with regard to the regulators working together to achieve such economies.

12. With respect to the GOC, the benefits of referring cases to OHPA were more to do with increased perceived independence, rather than any substantive problem around the GOC's ability to adjudicate independently. However, accusations of perceived unfairness or bias are very rare, and hence we do not believe this is an issue requiring a costly solution.

13. Finally, a number of the OHPA's policy ambitions could be realised within the framework of adjudication being administered within the GOC. Should the Government decide to pursue option 2, we will undertake a review of our adjudication processes and look to embed a number of the OHPA's policy ambitions into our own processes. We would strongly urge that the learning from the OHPA project is not lost, and that the Government commits to enhancing and modernising the adjudication processes of all the healthcare regulators, and not just the GMC, should option 2 be pursued.

14. On the basis of the considerations, the GOC believes that option 2 is the most proportionate and cost effective way forward.

Consultation Question: Do you have any comments on the identified benefits, costs and risks of the Options that are detailed in this document and its accompanying impact assessments and are there any other considerations that the Government should consider?

15. If, following the consultation, the Government was minded to pursue Option 1, and not Option 2, we believe the Government should consider compelling all the healthcare regulators to refer their cases to OHPA for adjudication.
16. Given the increased set up costs for OHPA, it makes sense that such investment should be made for the benefit of all healthcare regulators. Furthermore, economies of scale could then be properly realised, with all the regulators sharing OHPA's fixed costs on a proportionate basis. We believe this option should be further explored and costed on this basis, should Option 2 be rejected.
17. We are aware that the OHPA in its response to this consultation is suggesting it could have a role in the appointment, training and appraisal of panel members to the GMC's proposed Doctors' Disciplinary Tribunal. This would help ensure the independence of adjudication tribunals from the GMC. We believe this idea is worth further exploration.

Yours sincerely,

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