

Response to GMC consultation on hearings management

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1) Do you have any views on the reasons for the difference in case hearing length between the UK and these other jurisdictions?

Clearly there are significant variations in the procedures for the investigation and the adjudication of fitness to practise matters across various regulators and across different legal jurisdictions, some of which will impact on the length of hearings.

2) Do you have any other comments to make on this issue?

The paper highlights the use of independent tribunals chaired by judges or lawyers. It is worth noting that the RPSGB's Fitness to Practise panels are chaired by legally qualified Chairs, including judges and senior lawyers, so that might prove a useful comparator, given that the RPSGB is one of the healthcare regulators operating within the same jurisdiction as the GMC.

3) Do you think that the introduction of more active case management will improve current problems with lack of engagement and assist with the setting of realistic time estimates? If so, in what way and do you have any comment in this regard?

The principal difficulty in relation to pre-hearing case management is that there are effectively no sanctions for failure to comply with any case management directions. Those who fail to comply with such directions are no doubt aware that it is highly unlikely that any Fitness to Practise panel would exclude evidence simply because it was adduced at a late stage, for reasons of fairness. As the GMC has no ability to make awards of costs either against registrants or against their legal representatives (ie wasted costs) in relation to late or non-compliance with case management directions, there is little incentive for compliance, other than to avoid criticism from the panel at the hearing. We consider that while more active case management may improve the situation to some extent, it is unlikely to completely resolve the problems that the GMC currently faces with regard to parties' lack of engagement with the process.

4) How do you think the GMC might address the issue of enforcing directions in order to support such a system of active case management?

See the response to question 3 the only effective method of enforcement would be to exclude evidence submitted late (which is a difficult path for panels to take, in terms of

fairness as explained above) or to have a costs jurisdiction and therefore to financially penalise a party (or their representative, should it be the representative that is at fault) that does not comply with directions. We note that the RPSGB has operated a costs jurisdiction since its legislation was overhauled in 2007, and it might be useful for the GMC to make inquiries as to the RPSGB's experience of operating that costs jurisdiction and any benefits in terms of improved compliance with case management directions that may have been achieved as a result.

5) Do you agree there may be benefits to be gained from a more flexible approach to timing? If so, do you have any suggestions?

The GMC might wish to consider adopting the approach in the RPSGB's 2007 legislation, whereby automatic standard case management directions are made following a referral to a fitness to practise Committee, without any need for the equivalent of a Stage 1 teleconference. Matters such as anticipated length of the hearing, witnesses to be called etc are also dealt with in the standard directions' requirement for exchange of completed hearing questionnaires. A teleconference/case management meeting is only held if one or other party seeks to depart from those standard directions.

This means that the teleconference/meeting only takes place at a point at which both parties should have a better understanding of what evidence they intend to present/any difficulties with regard to timing etc. Some flexibility in terms of timing would appear to be useful - there is clearly a balance to be struck between ensuring that the teleconference does not take place too early " as it needs to take place at a point in time when it is reasonable to expect both parties to have a good grasp of the issues that are likely to arise during the substantive hearing " and ensuring that the teleconference takes places sufficiently far in advance of the substantive hearing to allow any directions made to be complied with.

6) Do you agree with the list of issues to be discussed at a pre-hearing review shortly before the hearing? Are there any other issues that could be usefully discussed at such a teleconference?

The only other matters that might potentially be dealt with, in order to shorten the length of the substantive hearing, would be any preliminary legal issues. As the paper notes, this is not currently possible within the terms of the GMC's Rules.

Similarly, although not currently permissible under the GMC's Rules, it would undoubtedly be of benefit to the substantive hearing if disputes as to the admissibility of witness and/or expert evidence had to be dealt with at a pre-review hearing to be held shortly before the substantive hearing, and the decision-maker's decisions at that pre-review hearing were binding " as in effect the bundles for the hearing would then be finalised, and could be served on the Committee in advance, rather than on the day, thus saving considerable time that would otherwise have to be spent by the case

presenters in explaining the evidence to the Committee, and by the Committee members in reading the evidence.

7) Do you think that the introduction of a pre-hearing review will affect any specific groups? If so, which ones and in what way?

We do not consider that the introduction of a pre-hearing review will affect any particular group more than another. We consider that a pre-hearing review may assist unrepresented registrants to understand what they are required to do prior to the substantive hearing. If that is the case, there will also be a corresponding benefit to both the GMC and the fitness to practise Committee, as the substantive hearing should run more smoothly as a result.

8) Do you have any other proposals for improvements to the GMC case management procedure?

We have no other comments

9) Do you agree that full disclosure of evidence at the pre-hearing stage would assist with case preparation?

Yes

10) Given that a Defence Statement is considered to be compatible with the rights of Defendants in the criminal sphere, do you think that it would compromise fairness in the context of the GMC procedures? If so, why?

No

11) Do you think that the introduction of pre-hearing disclosure and/or a Defence Statement will affect any specific groups? If so, which ones and in what way?

We do not see why the introduction of pre-hearing disclosure and a Defence Statement would affect any particular minority group rather than another.

12) Do you have any other comments to make on this issue?

Pre-hearing disclosure and the requirement for a Defence Statement would mean that the registrant/their representative will need to prepare their defence in advance of the substantive case opening, and hearing the evidence to be adduced by the GMC. For some registrants, this would represent a considerable change in their approach but it is

difficult to identify any specific groups (other than potentially unrepresented registrants) that would be adversely affected.

Pre-hearing disclosure and the service of a Defence Statement should not result in any unfairness, as the registrant will in any event already have sight of the written witness statements and other evidence upon which the GMC intends to rely and should therefore be in a position to identify the issues that are relevant to their defence. Our view is that the introduction of these measures would serve to level the playing field between the regulator and the registrant.

These measures would mean that the substantive hearing can be conducted more efficiently, as it should ensure that both parties can be fully-prepared prior to the hearing, and also that the Committee can be provided with both parties' evidence in advance of the hearing, thus potentially saving a significant amount of hearing time.

13) Do you support this recommendation? If not, why?

Yes

14) Do you have any other comments to make on this issue?

No, other than to note that with the transfer of the GMC's adjudication functions to the OHPA in due course, any reference to overriding objective(s) will need to be a reference to OHPA's overriding objective rather than to the GMC's.

15) Do you support this recommendation? If not, why?

Yes

16) What more, if anything, could be done to support unrepresented doctors who appear before Fitness to Practise panels at the GMC?

It might assist both the unrepresented doctors, and the conduct of hearings generally, if they were able to have access prior to the hearing to advice concerning the structure of the hearing and the various stages involved. Ideally it would assist unrepresented registrants also to have access to some form of legal advice in relation to the defence of their case, even if they wish to present their case themselves.

While it may not be within the GMC's remit to provide such independent legal advice, the GMC might wish to explore with other bodies the prospects for some form of legal advice (possibly pro bono ?) being offered to unrepresented registrants. While Legal Assessors undoubtedly will attempt to assist the unrepresented registrant where necessary during the hearing itself, they are primarily there to advise the Committee and that places limits upon what assistance they can provide to unrepresented registrants

(any assistance offered at the hearing may also be less useful than assistance provided beforehand to assist the registrant in preparing their defence).

17) Do you have any other comments to make on this issue?

No

18) Do you support the recommendation to evaluate costs sanctions as a means of attempting to deliver compliance with directions and enhancing the smooth and expeditious running of Fitness to Practise hearings?

We support the recommendation see our comments above suggesting that the GMC liaise with the RPSGB to understand the practical implications of operating a costs jurisdiction, as experienced by the RPSGB since its 2007 legislation came into force.

19) Do you think that the introduction of costs sanctions will affect any specific groups? If so, in which ones and in what way?

We do not see that the introduction of such sanctions should affect any group more than another. The effect will vary to some extent depending on the nature of the jurisdiction “there is a significant difference between a jurisdiction where costs follow the event and one where costs are only awarded either in the event of a culpable default by one party in complying with directions, or a culpable default by their representative (wasted costs). The GMC should note that the High Court’s wasted costs jurisdiction against legal representatives is rarely used, as it requires the party to demonstrate very serious failings by the legal representative concerned.

In the former case (costs follow the event) the result may be to encourage registrants to make appropriate admissions at an early stage (equally, depending on the approach of the costs decision-maker to making costs awards against the regulator, it may be to discourage the regulator from bringing some allegations where evidence is weak). We suggest that the GMC makes inquiries from other regulators that have such costs jurisdiction as to their experience of it in practice. However in either situation, it appears likely that unrepresented registrants may be more seriously affected than other registrants, unless they are clearly informed of the implications of the costs jurisdiction for them, so that they can make appropriate preparations for and decisions about the defence of their cases.

20) Would you recommend that the GMC explore other means of achieving this end? If so, what?

It is not clear to us what other means there might be of achieving this end, other than excluding evidence that is served late, which is potentially: a) unfair to the party attempting to adduce that evidence; and b) unhelpful to the Committee, whose role it is to inquire into the allegations.

21) Do you have any other suggestions for how to improve enforcement of case management directions in advance of a transfer of the GMC's adjudication function to OHPA?

The only other option appears to be for the Committees to note on the record of the hearing where parties have failed to comply with directions, and for the GMC thereafter to write to complain to any legal representatives/representative bodies who routinely fail to ensure compliance " it is very doubtful that doing so would effect any real improvement in the situation.

22) Do you have any other comments to make on this issue?

We have no other comments.

23) Do you support this recommendation?

We agree that it is wasteful of resources for the parties and their legal representatives to be kept waiting while Committees deliberate in camera, should any such adjournment last a considerable length of time, and that if it is feasible for parties to be released, that would be preferable. However we have some concerns about the suggestion of reserving determinations, particularly in the context of a decision-making process that is split into three stages.

It appears to us to be important that any reserved decision must still be the decision of the entire Committee " and therefore the GMC would need to arrange for the panel to reconvene in order to reach a decision. We would suggest that it would be preferable for the panel to reconvene in person, rather than by virtual methods, in order to ensure that panel members can all contribute effectively. Unless the intention is for the panel to continue its consideration during the allotted hearing time (merely releasing the parties from waiting until the panel is ready to deliver its determination) there may be practical difficulties in scheduling a time when the panel members can reconvene, given their other commitments.

It also appears to us that should any such reconvened meeting be delayed by more than a few days, there is a real possibility that the evidence will no longer be fresh in the minds of one or more panel members, and that they will therefore have increased difficulty in contributing effectively to the decision-making process. It is not clear from the paper whether the GMC anticipates that a panel might wish to reserve its determinations at stages 1 and/or 2 of its decision-making process (ie facts and impairment) or only its decision as at stage 3 (ie sanction), or indeed whether the proposal relates merely to the delivery of a consolidated written determination (the panel's determinations as to the various stages having been delivered orally). We assume that the proposal relates only to the delivery of a consolidated written

determination following the conclusion of the entire hearing, as otherwise it seems to us that the proposal would make the operation of the GMC's three-stage decision-making process more difficult, resulting either in hearings having to be reconvened following delivery of reserved decisions at each of the various stages, or both parties having to present evidence and arguments in relation to facts, impairment and sanction in one go, rather than in the separate stages currently used.

24) Do you perceive any operational problems or any problems for doctors arising from such a change in practice?

If, contrary to our presumption above, it is proposed that the panel might reserve its decisions at stages 1 and/or 2 of the process, without giving an oral indication of its decisions relevant to these stages, we anticipate that operational problems might arise if the hearing of any oral evidence relating to impairment had to be delayed because the panel had reserved its determination as to the facts. We understand that currently such evidence is likely to be adduced by the registrant only.

However, if in future there were pre-hearing disclosure by both sides, it is in theory possible that the GMC might then wish to adduce evidence to rebut evidence called by the registrant in relation to impairment (for example, the GMC might wish to adduce evidence from an expert to address whether or not any remedial action that the registrant states they have taken, rendering them currently fit to practise, appears to conform with good practice). We would also anticipate that doctors might complain if, having cancelled clinical commitments in order to attend the hearing, it is then adjourned, to be reconvened at a future date once the panel has reached its determination as to the facts, before continuing to hear evidence/arguments in relation to impairment and sanction.

However, we assume that any inconvenience caused will be no greater than that currently experienced when hearings over-run and have to be re-scheduled. If however the only proposal is that the panel would reserve delivery of its final written determination, having already orally indicated the nature of its decisions as to stages 1, 2 and 3, we do not foresee any practical difficulties, provided that the panel is required to deliver the determination within a reasonable timeframe. Both the doctor and any complainant are likely to wish to know the panel's decision as soon as possible, as it may affect the doctor's employment situation " if however the panel have indicated orally the overall case outcome, we do not anticipate that any significant difficulties would arise as a result of the detailed written reasons being delivered at a slightly later date. We assume that the GMC have considered any potential impact of reserving determinations on the application for orders immediately suspending any registrant whose erasure has been ordered .

We also assume that the GMC have already considered what impact reserving determinations might have on the effective end-date in relation to a registrant's appeal rights and the CHRE's consideration of the panel's decision. While the GMC currently have no costs jurisdiction, if there is any intention to introduce such a jurisdiction, then

the impact of determinations being reserved will need to be taken into account - it might make it difficult for the panel to make a summary assessment of costs at the conclusion of a hearing if no finalised determination is available at that point - and it might therefore be necessary to identify a different mechanism for decision-making as to costs applications.

25) Do you think the introduction of more active case management will affect any specific groups? If so, which ones and in what way?

It is not clear why introduction of these measures should affect any minority group more than any others. More active case management may benefit some unrepresented doctors, in that it should ensure that they have focused on the issues and prepared for the hearing, whereas currently there is a risk that unrepresented registrants do not understand what is required and therefore may be relatively ill-prepared for the substantive hearing.

More active case management should in theory benefit the GMC and its case presenters, as it should lead to an improvement in engagement from the defence in some cases, allowing the GMC a better opportunity to prepare for the hearing. However, no real benefit will be achieved if more active case management does not result in improved engagement from all parties and hence better preparation prior to hearings.

26) Do you support this approach?

We agree that there may be gains from implementing case management procedures, provided that adequate enforcement mechanisms can be put in place.

27) Do you think that the proposal to reserve determinations will affect any specific groups? If so, which ones and in what way?

We do not consider that reserving determinations will affect any specific groups more than others.

28) Do you have any other comments to make on this issue?

We have no other comments.

29) Do you have any suggestions for tackling this issue over and above the recommendations made by the Case Management Working Group?

None

30) Do you have any other comments to make on this issue?

We would assume that the difficulties that some unrepresented registrants face in presenting their defence to the Committee and in examining and cross-examining witnesses may in some cases lengthen hearings (and that unrepresented registrants may also face difficulties in accurately estimating hearing length; and the lack of legal representation may also make it difficult for the GMC to reliably estimate hearing length).

We would also assume that the non-disclosure by the defence of their case (including any expert evidence) prior to the hearing, and the failure to resolve any issues relating to the admissibility of evidence may also significantly lengthen hearings (and render hearing estimates unreliable), as it may result in requests for adjournment to allow the parties to consider new material. If prior to hearings parties were required to exchange their evidence, and identify the matters that remain in dispute and the witnesses to be called, it might be possible to produce more accurate time estimates. As per our comments above, we would suggest that, provided adequate enforcement measures are available, the approach taken in the RPSGB's 2007 legislation is helpful, whereby standard case management directions apply (relating to exchange of evidence, hearing estimates etc) unless one or other party applies for the standard directions to be amended.

As per our comments above, we would also suggest that the GMC might wish to explore any opportunities for ensuring that unrepresented registrants receive appropriate advice prior to the hearing of their case. As per our comments above, we would also suggest that the GMC should investigate the possibility of a preliminary hearing/review hearing being held to resolve any pre-hearing issues relating to admissibility of evidence/preliminary legal arguments. This is perhaps particularly important in complex cases where such preliminary issues may be more likely to arise. However we appreciate that that would necessitate a significant change to the GMC's current adjudication processes, and it may be instead that it is a matter that the GMC might wish to consider recommending be considered for inclusion in the procedures to be operated by OHPA in future.

31) Do you have any other comments to make on this issue?

None