Consultation Response

GMC/PSA S60 order 2014

September 2014

MPS's response to: 'The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014 – a paper for consultation'

Overview

MPS welcomes the opportunity to comment on these proposed changes to the GMC's powers and procedures.

We agree with the objective of clarifying the powers and responsibilities of the GMC and MPTS and we have made some detailed comments on the specific proposals below.

We disagree that the GMC should be given the right to appeal decisions of the MPTS. This right should remain solely with the PSA in order to ensure fairness and consistency of the oversight of health professional regulation. As noted below, the MPST is not, and will not be, truly independent of the GMC and, therefore, a separate body should continue to exercise appeal rights in order to protect the public. The PSA is best placed to perform this role and there is no evidence that the PSA is not discharging its function properly.

The MPTS should not be able to appoint 'legally qualified' chairs to also perform the role of case manager as this would undermine the credibility and impartiality of the tribunal chair.

Finally, we welcome the over-riding objective for the GMC that in making rules relating to fitness to practise procedures it should secure that cases are dealt with fairly and justly. We think that this objective should also apply to the MPTS in the way it interprets and applies those rules.

Questions

Q 1: Do you agree with the proposal that the MPTS should be set up as a statutory committee of the GMC to govern the adjudication of fitness to practise processes for doctors?

Yes. We welcome all moves to provide clearer separation between the MPTS and the GMC.

Q 2: Do you agree that the GMC should not have the power to intervene in the areas falling within MPTS responsibility?

Yes. As noted in Q1 we think there should be a clear separation between the MPTS and the GMC.

Q 3: Do you agree that the MPTS should keep a record of its members' private interests, and publish this record in the public domain?

Yes. We note there is already a similar provision for members of FTP Panels.

Q 4: Do you agree that the MPTS should be required to publish an annual report and accounts, to provide a public record and demonstrate accountability?

Yes. The MPTS should be required to publish an annual report and accounts which have been independently audited. The MPTS should also have an accountability hearing with the Commons Heath Select Committee separate from that of the GMC.

Q 5: Do you agree with the proposal that the over-riding objective of rules relating to fitness to practise procedures should be to secure that cases are dealt with fairly and justly?

Yes. The objective of securing that cases are dealt with fairly and justly, and the priority of this objective over the over-arching objective of the GMC, should also apply to the MPTS directly.

The Order would mean that in making rules the GMC will have the objective of securing that cases are dealt with fairly and justly and that this objective takes priority over the over-arching objective of the GMC contained in section 1(1A) of the Act (as it will be amended by this order).

However, the proposed Article 8 of the Order applies only to the making of rules by the GMC and not to how those rules should be applied or interpreted in practice by the MPTS. The application and interpretation of rules is just as important in securing just and fair outcomes as is the making of those rules. Given that the Order will mean that the MPTS 'must have regard to the over-arching objective of the General Council under section 1(1A),' we think that the Order should also state that in applying or interpreting the rules of the GMC the MPTS should be required to give priority to the objective that cases are dealt with fairly and justly.

Q 6: Do you agree that to enhance the pre-hearing case management arrangements, we should enable the MPTS to appoint case managers, including using the chair of a medical practitioner tribunal (where legally qualified) as case manager?

No. The MPTS should not be able to appoint 'legally qualified' chairs to also perform the role of case manager as this would undermine the credibility and impartiality of the tribunal chair.

Case managers are privy to material which does not form part of the final charges or evidence that the parties intend to rely on at a hearing (tribunal). To allow the chair of the tribunal considering the case to also act as the case manager means they would see such material and this could unduly influence their decision in making a determination on the case. Even if it could be argued that a legally qualified chair would be appropriately experienced in disregarding information that does not form part of the case presented to the tribunal, it would still be important for the chair to be seen to be impartial. Anything other than a clear separation of these functions would create doubt as to the impartiality of the chair of the tribunal and undermine the credibly of the chair and the tribunal's decision.

The potential for prejudice in the tribunal viewing material that does not form part of either party's case is clearly recognised under the existing arrangement. Currently, material is only placed before the FTP panel in cases where it is agreed by the parties or following the successful application for such material to be adduced in evidence. This arrangement should be maintained and alternative ways to strengthen pre-hearing case management should be pursued that do not undermine the impartiality or credibility of the tribunals.

A possible alternative could be to have the Legal Assessor perform the role of case manager. As they would not be involved in the decision making process they would be independent and can advise the tribunal on any procedural points related to the management of that case.

In addition, the consultation document does not define what is meant by 'legally qualified' in this context. The fact that an individual possesses a legal qualification does not, of itself, provide the reassurance that they would be appropriate to perform the role. Greater clarity is needed on what constitutes 'legally qualified.'

Q 7: Do you agree that the MPTS should have power to appoint legal assessors where it considers it appropriate to do so?

No. Legal assessors should be present at *all* Medical Practitioner Tribunals and Interim Order Tribunals unless both parties have expressly agreed that a Legal Assessor should not be present. The role of the Legal Assessor will to be provide further confidence in the adjudication of a Tribunal because they are truly independent of both parties and are accountable to their own regulatory body should they fall below the standard expected of them.

Q 8: Do you agree with the proposal that the MPTS should have power to award costs, draw adverse inferences and refuse to admit evidence following a party's failure to comply with rules or directions or otherwise award costs for unreasonable behaviour?

No. We agree that the MPTS should have the power to award costs, where a party does not comply with any rule(s) or direction(s) and has behaved unreasonably in not doing so. The MPTS should not, however, be able to draw adverse inferences because of non-compliance nor be able to refuse to admit evidence which it may otherwise have permitted.

Tribunals will have direct implications on the safety of patients, public confidence in the profession, as well as the reputation and ability of the registrant to practice their profession. It is not appropriate to prevent evidence being considered by the tribunal that could assist them in their decision making. To do so would be contrary to the purposes of tribunals in protecting the public and would be unjust to registrants considering the effect on their livelihood a decision can have. Where a party's (unreasonable) failure to comply with a rule or direction requires an adjournment or postponement of the hearing a costs award can be made to meet any additional costs that flow from this. This is a proportionate way to support effective case management.

Q 9: Do you agree with the proposal to enable reviews to be held by the tribunal chair without the need for a panel hearing when the GMC and doctor are in agreement, subject to the ability of the chair to nevertheless convene a full hearing?

Yes.

Q 10: In order to improve efficiency do you agree that the GMC should be able to provide notification of decisions by email rather than letter, when an email address has been provided for this reason?

Yes. There would need to be appropriate safeguards put in place to ensure that such communication is both secure and being received by the recipient. For example, if a 'read receipt' is not obtained, then the notice/decision should be posted in the usual way.

Q 11: Do you agree that the over-arching objective of the protection of the public, which involves the objectives of protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the profession and promoting and maintaining proper standards and conduct for members of that profession,

should be the over-arching objective of the GMC and that medical practitioner tribunals and interim orders tribunals should have regard to it when making their decisions?

Yes. However, we think that both the GMC in making rules relating to fitness to practise and the MPTS in interpreting and applying those rules should be required to give priority to the over-riding objective of ensuring that cases are dealt with fairly and justly (as noted above in our response to question 5 above).

Q 12: Do you agree that we should require registration appeals panels to have a duty to have regard to the over-arching objective in the same way that a medical practitioners tribunal should have to?

Yes

Q 13: Do you agree with the proposal that the GMC should have a right of appeal, corresponding to the PSA's power to refer cases, to the higher courts in order to challenge MPTS decisions?

No. The GMC should not be able to appeal decisions and this right should remain solely with the PSA.

The MPTS is not truly independent from the GMC, nor will it be even if the proposed Order is made and comes into force. It is unfair to give regulators the right to appeal their own decisions.
It is reasonable that the decisions of fitness to practise hearings (medical practitioners tribunals) can be reviewed to ensure confidence in regulation and that the public is protected. But this role should be performed by an independent body which is not a party to the proceedings. The Professional Standards Authority (PSA), which already oversees decision making of all healthcare regulators, is not funded by registrants or by any of the regulators and is responsible to Parliament. It is truly independent and is best placed to perform this role and should have the right to appeal decisions rather than a regulator. There is no evidence that the PSA is not discharging its function properly on behalf of the public and this proposal is unjustified.

In addition, it would be unreasonable to give both the PSA and the GMC the right to appeal decisions. It would be both unjust and costly for healthcare professionals if each panel decision could be reviewed via two different routes. The proposal would also dilute the role of the PSA and could undermine public confidence in the PSA where, for example, appeals are initiated by the GMC but not by the PSA. A more proportionate approach would be to give the GMC a formal right to request the PSA review a case.

This proposal would set a precedent for other regulators and start a process of introducing appeal rights for regulators on an ad hoc basis. This would complicate the healthcare regulatory framework by giving different regulators different appeal rights. A single right of appeal by the PSA on behalf of all regulators is a clear and consistent approach to oversight of professional healthcare regulation and provides for proper accountability across all professions. This arrangement should be maintained.

The proposal would entail a complicated system of communication between the PSA and the GMC in terms of who is to take the lead on appeals which would cause confusion and duplication in cost. Also, the cost of appeals brought by the GMC whether successful or unsuccessful would be borne by the registrants. All of this would be avoided if the simple and clear existing appeals and oversight process is maintained.

Q14: Do you agree that we should amend the grounds of the PSA's power to refer fitness to practise cases for consideration by the relevant court for all regulated healthcare professions and social workers in England in the manner described and also reflect those grounds in the GMC's new right of appeal?

No. We agree that it is reasonable to amend the grounds of the PSA's powers to refer cases but we do not agree that the GMC should have a right to appeal cases of the MPTS (as noted above in our response to question 13).

Q 15: Do you agree that the GMC should be able to request, in writing, information or documents to assist with the investigation of allegations, and where such a request has been made the registrant fails to comply, the GMC should be able to refer the case to a medical practitioner tribunal?

We think that the type of information and/or documentation that can be requested from a registrant should be specified in legislation in the interests of fairness.

We are concerned that the power to request the disclosure of information (and sanction for non-compliance) will tip the balance from the GMC having to prove that a registrant's fitness to practise is impaired towards the registrant having to prove that their fitness to practise is not impaired. From our experience we think there is a significant risk that these provisions will be overused particularly as requests for disclosure are usually made at an early stage of an investigation and by non-legally qualified staff at the GMC. This increases the chances that a registrant will respond to these requests without the benefit of legal advice and we think that this would be unfair. Safeguards to protect the fairness of investigations are needed and the types of information and/or documentation that can be requested should be clearly set out in either the primary or secondary legislation.

Q 16: Do you agree that where a doctor fails to engage or comply with a direction to undergo a performance, health or language assessment, the GMC should be able to refer the case to a medical practitioner tribunal to consider a suspension order or conditional registration?

No. It is important that the GMC is always required to prove that the registrant's fitness to practise is impaired and the simple act of refusing to undergo an assessment of performance, health or knowledge is not in itself sufficient to demonstrate impaired fitness to practise. Greater safeguards are needed in this proposal to ensure fairness to the registrant.

We agree that the GMC should have the power to sanction non-compliance with assessments but only where the case warrants it. The onus should be on the GMC to prove that the request for the registrant to undergo an assessment was reasonable in the circumstances of that case.

Q 17: Do you agree with the proposal to enable medical practitioners tribunals to require review of their directions before expiry?

Yes.

Q 18: Do you agree that we should confirm expressly on the face of the Medical Act the powers to close cases at the initial consideration stage, the power to review investigation stage decisions and the public interest test which applies where the matters giving rise to the allegation are more than five years old, but that we should remove the 'exceptional circumstances' element from that test?

No. We agree with the proposal in as far as it makes clearer the existing procedure. However, we disagree with the removal of the 'exceptional circumstances' test.

Removing the 'exceptional circumstances' test would, in effect, remove the entire five year rule as there would likely always be a public interest in investigating concerns against a practitioner.

After five years evidence becomes stale and it is an appropriate safeguard to protect the registrant that allegations older than this are considered too old in investigate. We think the 'exceptional circumstances' test provides the proportionate counter-balance to protect the public for those cases where an investigation might be appropriate. This change is ill-considered and disproportionate and should not be implemented.

Q 19: Do you agree that we should specifically reflect the new arrangements of the GMC referring a case to the MPTS (rather than directly to a medical practitioner tribunal) by making

express provision for their powers to continue investigating and the procedure for cancelling a referral?

No. Due process should mean that the GMC should complete its investigation fully before referring the case to the MPTS to arrange a hearing. This proposal would allow the GMC to continue all cases after they had been referred and contains no safeguards to protect the registrants. Safeguards would be needed to make this proposal proportionate.

Q 20: Do you agree that we should clarify that undertakings can be agreed between the doctor and the GMC at any point following a referral for a public hearing until a determination on impairment has been made and subsequently undertakings should only be agreed by the medical practitioner tribunal itself and subject to appeal/referral to the higher courts?

Yes. The current system of undertakings is a useful means of consensual disposal of a case without a referral being made to a FTP Panel. However, as the consequences of breaching undertakings will be the same as breaching conditions imposed by a tribunal, this proposal may make undertakings seem a less attractive proposition for a registrant. A possible consequence would be that more cases proceed to, or at least get very close to, a hearing before undertakings are agreed resulting in more hearings and increased costs.

Q 21: Do you agree that we should close the regulatory gap where, in certain circumstances, an order might lapse during an appeal against a subsequent review order?

Yes.

Q 22: Do you agree that the Registrar should be able to direct the form and content of professional performance assessments and whether it should be carried out by an individual assessor or an assessment team?

No. We agree that there should be flexibility in how performance assessments are conducted but the registrar does not have the expertise to determine the form and content of assessments. Furthermore, assessments should always be carried out by team to reduce bias and ensure fairness.

Q 23: Do you agree that the GMC should have the described power in order to investigate the fitness to practise of a doctor who has been erased from the medical register but subsequently makes an application for restoration?

No. The consultation paper refers only to applications from those who have been erased from the register for fitness to practise reasons but the proposed changes also include those applying for restoration following voluntary and administrative erasure. We consider requiring applicants routinely to undergo health, performance or language assessments in these circumstances to be disproportionate. Furthermore, as the onus is already on the registrant to satisfy the Panel that they are fit to practise any further restrictions could infringe the practitioner's rights to pursue their profession.

Q 24: Do you have any other comments on the proposals contained in the draft Order?

No

Q25: Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:

- **An increase;**
- **A decrease; or**
- **Stay the same**

The proposals will increase the costs and administrative burden for MPS. This will principally be because of potential cost awards against MPS and costs in relation to disputes over the discourse of documents.

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 290,000 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

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact me.

Oliver Rawlings
Policy and Public Affairs Officer

Email: oliver.rawlings@mps.org.uk

The Medical Protection Society Limited
33 Cavendish Square
London W1G 0PS
United Kingdom

Tel: +44 (0)20 7399 1300
Fax: +44 (0)20 7399 1301

info@mps.org.uk

www.mps.org.uk
www.medicalprotection.org