

Guidance for regulators on fitness to practise hearings during the Covid-19 pandemic

The Professional Standards Authority for Health and Social Care oversees the work of the 10 health and social care regulators. As part of our work we review the performance of the regulators in meeting their duties to protect the public and examine decisions of their fitness to practise panels to ensure that they are sufficient to protect the public. We also run a scheme that accredits voluntary registers of health care practitioners where those registers meet our Standards.

This guidance from the Authority on virtual hearings is aimed primarily at regulators who are holding hearings, whether for Fitness to Practise or other matters, such as registration or restoration. It will also be relevant to Accredited Registers.

Introduction

Following the lockdown measures announced by the UK Governments in March 2020 in response to the coronavirus pandemic, most regulators of health and care professionals and accredited registers paused their substantive Fitness to Practise hearings.

During this period regulators have continued to hold some hearings by video link, allowing participants to attend from various remote locations by way of platforms such as Zoom, Teams or others. These tended to be hearings where there was an urgent public interest in their taking place and included review hearings and interim order hearings, though some also held a small number of substantive hearings in that time.

While this was a necessary response at the time, it is not sustainable in the longer term. Pausing hearings leads to backlogs of cases and may delay necessary action to protect the public or, indeed, restore registrants to practice and will increase the stress felt by those taking part. We therefore welcome the 10 health and social care regulators' intention to re-commence substantive fitness to practise hearings in the next few weeks and note that some have already done so.

The pandemic is not over, and social distancing and other restrictions are likely to continue for some time, so it will be difficult for regulators to hold the same number of physical hearings (with all parties attending in the same place). This means that regulators need to look at other options, such as greater use of wholly online hearings and 'hybrid' hearings where part of the hearing takes place in one location and the remainder virtually.

Within this document when we refer to

- 'virtual hearings' that is one where all of the hearing takes place by video/audio link;
- 'hybrid hearings' that is one where the hearing is part virtual and part at a physical location; and

- ‘physical hearings’ that is one where all of the hearing takes place at a physical location.

Concerns have been raised by registrants’ representative bodies about the implications of more widespread use of virtual hearings. These concerns are about:

- The lack of consultation about the widespread use of such hearings, and the impact on the right to a fair trial under the Human Rights Act (Article 6)
- Privacy of registrants and witnesses and the danger that those observing virtual hearings may record extracts from those hearings and release them via social media
- Difficulties around the identification of witnesses and how far the panel can assess that their evidence is genuine when witnesses are not before them in person, or ensure that they are not being coached
- Some parties, many of whom are vulnerable or have protected characteristics, may find it difficult to engage with the technology and this may affect the quality of their evidence
- The technical stability of the platforms
- Whether the hearings will be recorded and, if so, the arrangements for ownership, retention and storage of the recording
- Lack of guidance about the processes for deciding whether cases should be heard virtually.

This guidance sets out the Professional Standards Authority’s expectations in relation to virtual hearings and aims to encourage a consistent approach between regulators. It does not override the legal rights of registrants or the rules governing the conduct of fitness to practise hearings. We are aware that the courts may adjudicate on some of the matters we discuss.

We drew on HM Courts and Tribunals Service guidance setting out its response to the current pandemic. We consider that the issues faced by the courts and regulators panels are not dissimilar, although we acknowledge that regulators have fewer enforcement powers in respect of abuse of social media by those observing the hearings. We also noted that some regulators have issued guidance on how they will hold virtual hearings.

We also held discussions with the health and social care regulators and with bodies representing registrants; and took account of the findings from consumer research we commissioned recently from Community Research,¹ which examined the public’s views on alternatives to traditional panel hearings. We prepared draft guidance which was published on our website. We received comments on this from the majority of

¹ *The patient and public perspective on future fitness to practise processes* (May 2020). This research sought the views of the public on fitness to practise cases being resolved without the use of hearings. Whilst this did not explicitly consider virtual hearings, the views expressed are relevant.

regulators, from representative bodies for registrants, from some Accredited Registers and from Health Education England. We were grateful for these, which were given at short notice.

In considering the points raised, we took into account that:

- In a pandemic, it may be appropriate to take action swiftly without the level of consultation that would normally be held
- There have been no serious concerns about hearings that have so far been held virtually, albeit most of these hearings have been relatively simple, usually involving only the panel and lawyers
- Some regulators' panels have heard evidence from witnesses by video link for many years and we have not heard concerns that such evidence has been tainted
- It is open to individuals attending physical hearings to record them and post them on the internet, though such behaviour is more easily observed and prevented and the risk of such conduct occurring is higher in the virtual environment
- Virtual hearings may be more convenient for some registrants and vulnerable people (particularly those who are shielding and have caring responsibilities) and save costs, but may also cause difficulties for people who are unfamiliar with or do not have access to technology.

Using this guidance

We will take this guidance into account when assessing the regulators' performance through our performance reviews. It is relevant in particular to our assessments of performance in respect of the Standards of Good Regulation applying to Fitness to Practise, notably Standards 15 (ensuring that investigations are fair and timely), 16 (ensuring that decision-making is fair and prioritises public safety) and 18 (ensuring that all parties are supported to participate in the process).

The Authority's approach

There is a strong public interest in fitness to practise cases being heard expeditiously and that it should be possible for members of the public to observe such hearings, whether by attending a physical hearing in person or by observing virtual hearings online.

We have seen no evidence to suggest that regulators should not use online hearings as a major part of their approach to address the challenges posed by the pandemic.

However, the concerns will carry greater weight in some cases than in others and in some cases may suggest that an online hearing is inappropriate for all or part of the proceedings. The regulators should assess the concerns in each case and should do so with reference to defined criteria and guidance.

We expect the regulators to work in collaboration with each other, registrants and registrant and patient bodies as well as the Authority, to develop a fair, robust and, subject to their different powers and resources, consistent system for listing and holding hearings. They should also pay careful regard to the findings of the research by Community Research, and that of recent public inquiries and investigations in considering how patients and the public will be informed, involved and supported as appropriate.

It is important that concerns raised by registrants and others are addressed with flexibility, sensitivity and cooperation.

Over-arching considerations for regulators

The regulators should take into account the following when considering their policies for hearings:

- the overarching objective set out in the Health and Social Care (Safety and Quality) Act 2015 and its three limbs
 - a) to protect the health, safety and well-being of the public;
 - b) to maintain public confidence in the profession concerned; and
 - c) to maintain proper professional standards and conduct for members of that profession
- the fair administration of justice
- safeguards to ensure the integrity of the process and that inappropriate breaches of privacy are avoided
- the importance of ensuring that physical hearings take place safely for the regulator's staff, the panel and the parties involved in the hearing and comply with Government guidance, including social distancing and other Covid-19 safety measures
- The impact on vulnerable individuals and those with protected characteristics under the Equality Act 2010.

Public access to hearings

As in the civil and criminal justice system, open public hearings are crucial to maintaining confidence in the regulatory system. The public should be able to observe hearings whether they are held physically, virtually or as a hybrid, though it may be that, as a result of restrictions, numbers of people who do so may be limited.

There are risks from broadcasting hearings over the internet in that it is easier for proceedings to be recorded and placed on social media. However, we have no evidence that this is actually happening in regulatory proceedings and we consider that it is possible to provide safeguards that will address the risks in the overwhelming majority of cases. We do not consider that the fact that individuals or journalists may be more likely to observe the hearings is relevant.

We note the following extract from the Family Court Guide. Whilst the Court has powers open to it to act in such circumstances, we are of the view that the final sentences identify the key issue here.

Section 53 of the Act provides for temporary modifications of the Courts Act 2003 which make it an offence (a) to record a broadcast from the court that has been directed for the purpose of enabling members of the public to see and hear the proceedings and (b) in any event to record or transmit material gained through participation through a live link. Whilst security vulnerabilities remain, it is clear beyond peradventure that the need to keep the family justice system operational in some form outweighs, in in the current unprecedented circumstances, the security issues of doing so with 'off the shelf' remote methodologies. The perfect cannot be permitted to be the enemy of the good.

Options for enabling the public to observe hearings include:

- Allowing members of the public to observe the process over the internet, with arrangements that are likely to prevent witnesses observing hearings before they give evidence or to mitigate risks of inappropriate sharing. These might include requirements for observers to accept that proceedings should not be recorded or published other than would be permissible at a physical hearing and provide all contact details and any social media identities. Regulators should have the ability to exclude individuals for breach of those conditions and should ensure that members of the public cannot see confidential documents, are prevented from observing parts of the hearing held in private, are not able to disrupt or attempt to participate in proceedings and can be ejected for inappropriate behaviour.
- Streaming the hearing within the hearings building or other controlled environment(s) so that the proceedings can only be viewed in situ, with similar safeguards.
- Socially distanced attendance in the hearing room itself, when Government guidance permits. Where however this has a material impact on capacity, consideration should be given to supplementary arrangements to enable remote attendance, should there be a demand.
- Where there are serious risks associated with allowing visual access to a virtual hearing, providing access to the hearing by audio only.

We recognise that regulators may choose different options according to their individual circumstances and resources.

Regulators may wish to consider the value in finding and sharing alternative venues where they can hold hearings, given the impact social distancing will have on the current office space they have.

Consensual Disposal

Some regulators have powers to dispose of a matter referred for a final hearing by way of consensual disposal or meetings. This may be appropriate and pragmatic in some circumstances. However, we urge caution in using this route where a hearing is required in the public interest, the matter does not meet the regulator's standard criteria for the use of such an approach and/or the case is not suitable for consensual disposal. We do not consider that it is appropriate for regulators to develop a different approach simply to accommodate cases because of the pandemic.

Matters to consider in determining the type of hearing

Both virtual and physical hearings involve different risks. We have referred to the concerns in respect of virtual hearings, but physical hearings also present challenges at this time, particularly to individuals who face greater risks in travelling to a hearing or have caring responsibilities, particularly if they are high risk of adverse consequences if they contract Covid-19.

In each case, the regulator should consider whether a case is most suitable to be heard physically, virtually or as a hybrid.

The appropriate approach will need to be determined on a case by case basis weighing the advantages and risks in each case. Suggestions were made to us that the registrant's consent should be required before a hearing is heard virtually. This does not seem appropriate. We are unaware of similar proceedings where one party has a veto over the type of hearing and, unless the courts determine otherwise, we do not consider that this would be right in these hearings. However, it is essential that the registrant should be consulted about the mode of hearing and their reasoned views be given careful consideration and appropriate weight. However, we are aware that there may well be a substantial number of competing matters for regulators to consider and these may carry greater weight than the registrant's preferences. Similarly, the regulator's preferences as the prosecutor should not be determinative either and, ultimately, a panel will need to rule on the question. It is crucial that regulators provide clear guidance to listing officers and panels about the factors that need to be weighed so that an appropriate decision is taken.

Access to and the ability to use technology is not universal and inadequate equipment or uncertainty about how to use it effectively could be a barrier to a fair hearing. The same applies where the registrant or witness does not have access to appropriate accommodation to enable them to participate effectively. It is entirely inappropriate for registrants or witnesses to be required to participate from public places or where their domestic circumstances militate against participating without distractions. We urge the regulators to give consideration to this issue and how they can assist registrants to overcome any barriers.

Regulators should consult the parties, their representatives and witnesses to determine what type of hearing is appropriate for each case. Where the registrant is not represented, care should be taken to ensure that the process and options available

to the registrant have been clearly explained so that an informed decision can be made. Relevant considerations for determining the type of hearing include:

- Whether the registrant and other participants have sufficient access to and understanding of technology, and access to an appropriate environment to enable them to take part effectively in a virtual hearing, including having access to advice. If this cannot be achieved, we suggest that it is unlikely to be possible to hold a fully virtual hearing fairly.
- Whether there is reason to believe that there are risks of a breach of privacy – these might arise where the facts are sensitive, especially if they involve intimate medical or sexual matters; the case has attracted media attention or there are particular features of the case of those involved that point to a heightened risk of breaches (see the discussion of public access above). Serious risks of a breach of privacy online might point to a physical hearing.
- Any features of the case which make it particularly difficult for it to be held virtually – e.g. difficulties in presenting evidence.
- Any evidence which suggests that the integrity or fairness of the hearing may be compromised by a virtual hearing.
- The impact of any disabilities or other vulnerability of any of the participants – it may be relevant to consider Health Education England’s Accessible Information Standard.
- The public interest in the expeditious disposal of cases.
- The health of participants and, in particular, whether they fall within the groups likely to be at high risk of serious adverse effects if they contract Covid-19.
- The ability to ensure that the hearing complies with Government guidance on the safety of all involved.
- Other matters relevant to that case that would be likely to affect the integrity or smooth running of the hearing.

With the exception of the first point, we do not consider that any single factor above has, of itself, any greater weight than the others. Different conditions will apply in individual cases and will need to be weighed accordingly.

Process for determining the type of hearing

It is likely that most decisions about the format of the hearings can be taken by listing officers within the regulators in consultation with the parties. However, where there is disagreement, regulators should have provisions that enable final decisions to be taken. We suggest that final decisions are most suitably taken by panels or by Chairs through case management hearings and should be reviewed if matters change.

The regulators should provide guidance which sets out the decision-making process and ensures that all parties have opportunities to raise concerns and present evidence for consideration.

Conduct of virtual hearings

Regulators should provide good practice guidance for the conduct of such hearings and make this available to all parties – particularly to registrants and witnesses so that they are clear about the process and options. This could cover:

- arrangements for ensuring that the factors which led to the decision to hold the hearing in a particular format are kept under review throughout the process and the arrangements changed or modified if necessary
- a process for testing connectivity etc prior to the hearing to ensure that all parties can engage effectively
- encouragement for parties to engage prior to the hearing to ensure that an agreed bundle is available to the panel
- public access to the hearing
- arrangements for private discussions between registrants and their representatives and for the panel to proceed and deliberate in private
- arrangements for providing advice and support to registrants and witnesses about the process, particularly if they are unrepresented
- the efficient conduct of the hearing, including secure and ready access to documents and unused material, who will be visible on screen during the hearing, raising interjections or concerns (for example about the visual or sound quality) when another party is speaking
- practical issues including how the oath or affirmation is to be taken by witnesses and expectations relating to dress, behaviour and surroundings during the process
- a recognition that technological difficulties may slow proceedings or cause interruptions with a reminder that patience may on occasion be necessary
- guidance on the need for regular breaks during the hearing and on how often those might be
- any arrangements for recording the hearings and for ownership, retention and storage of the recording and, particularly, ensuring that full consideration has been given to the GDPR implications.

Regulators should provide briefings or training for Chairs and other panel members about good practice.

Regulators may also wish to issue statements or guidance about any changes to the arrangements for physical hearings (for example to take account of social distancing) or of hybrid hearings to ensure that the matters set out here are taken into account.

For the future

Hearings have not been conducted by video link to this extent before. There will inevitably be learning to be gleaned from experience. We urge that:

- representative bodies work closely with regulators to ensure that individual hearings are carried out safely, fairly and efficiently
- regulators consult widely on process and guidance and attempt to ensure consistency of practice between them
- there is an opportunity to assess the process and make changes in the light of experience
- the views of all parties to the hearings, patients and the public are actively sought.

The Authority will keep this guidance under review and seek views on how it continues to be appropriate in March 2021, unless there is evidence, for example of new developments or unforeseen problems, to suggest it needs to be done more urgently. We will assess whether regulators have had regard to it as part of our performance review process.

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