

# **Modern and efficient fitness to practise adjudication**

## Appendices

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# 1. Appendix 1: Breakdown of responses received to OHPA policy ambitions

- 1.1 We undertook two different exercises to gauge views on OHPA's policy ambitions:
  - A call for information, aimed at all interested parties
  - Letters to the regulators
- 1.2 Our call for information prompted responses from a range of health professionals, members of the public and those with experience of being a panellist or with similar adjudication experience. This included the following individuals and organisations:
  - Action against Medical Accidents
  - Andrew Lockley, Partner, Irwin Mitchell
  - Association for Improvements in the Maternity Services
  - Association of Optometrists
  - Association of UK University Hospitals
  - Baker & Mackenzie
  - Dr Jean Monro and Dr Christabelle Yeoh, Breakspear Medical Group
  - British Association for Counselling and Psychotherapy
  - British False Memory Society
  - British Medical Association
  - College of Optometrists
  - Complementary and Natural Healthcare Council
  - Federation of Ophthalmic and Dispensing Opticians
  - First Law Limited
  - General Teaching Council for Scotland
  - Independent Midwives UK
  - Medical Defence Union
  - Medical Protection Society
  - NHS Employers
  - NHS National Services Scotland
  - Parliamentary & Health Service Ombudsman
  - Patient Concern
  - Paul Stockton
  - Peter Gribble, GMC Legal Assessors Forum
  - POhWER

- Royal College of Anaesthetists
- Royal College of Midwives
- Royal College of Nursing
- Royal College of Physicians and Surgeons of Glasgow
- Royal College of Radiologists
- St George's, University of London
- Society of Chiropodists and Podiatrists
- Unison.

Ambition	Regulatory bodies	Other stakeholders via the Call for information
<b>Tribunal President</b>	The majority support both the need for independence and the proposed benefits this role affords. It reflects the current or emerging practice of some of the regulatory body's inasmuch as their procedural rules require an independent chair to sit on the adjudicating panel or committee. However, OHPA envisaged the president role as more analogous to the Tribunals Service in that the individual held responsibility for the panellists, overseeing performance and mentoring, as well as discharging a role as a panel chair.	Views were not forthcoming from many patient or health professional respondents. However, this proposal was supported by the majority of those who did respond. The role was described as 'essential' and providing a degree of external validation and oversight of what was otherwise an internal process (i.e. internal to the regulator).
<b>Training and appraisal of panellists</b>	Almost all regulators supported an agreed framework of competencies for panellists, the use of an annual appraisal of performance, and joint training undertaken with panellists of other regulatory bodies and tribunals including those outside of health profession regulation. Some regulatory bodies also expressed positive views of the benefit of support through training and mentoring, effectively making the link between the role of the president and the performance and effectiveness of the panellists	This is the only ambition to gain whole scale support amongst every groups of respondents. It was seen as having the potential to significantly improve the overall adjudicatory process. The current appraisal systems were described by a minority of the respondents as 'not fit for purpose' with poor performance of panellists not appropriately addressed by the regulators

Ambition	Regulatory bodies	Other stakeholders via the Call for information
<b>Legally qualified chairs</b>	Views on the necessity for a legally qualified chair (LQC) of the adjudicatory panel or committee were equally divided in to those who already have LQC or are seeking to move to more independent chairs via Fitness to Practise rules changes, and those who do not have the provision. Of those supporting the proposal, it was in the context that not every hearing necessitated a LQC, so a mixture of LQC and non-LQC was perhaps optimal. A few substantiated this view further by suggesting that LQC may be better equipped to deal with cases with legal complexity or significant size. Conversely, others commented that the LQC should concern him or herself with effective chairing, without distraction of legal process and case law. The Health & Social Care Act 2008 required OHPA to pilot any introduction of LQC, and this need remains if the options, and benefits and risks, are to be fully understood.	A range of views were received. Perceived benefits included an ability to actively manage hearings consistently, and minimise for example, under prosecution or 'inequality of arms'. However, in recognising benefits, some thought that it may be difficult to recruit a sufficient number of LQC. Other respondents did not agree with the need for legal qualification, rather that money should be invested in high quality training of professional and lay chairs.
<b>Pre-hearing case management</b>	All agreed this would be a useful matter to pursue, for dealing with preliminary matters. A suggestion was made that there was a related need for enforcement powers, should directions set at the pre-hearing case management not be complied with. However, no suggestion was made as to what the powers might be	All who responded agreed with this ambition. The tenor of the responses is summarised by one response: ' <i>.....this has the potential to make the system work more efficiently and at a lower cost whilst still providing protection for patients and fair treatments for registrants.</i> ' OHPA included this development in its day one rules (the adaptation to GMC rules). Given the majority of regulators already operate case management provision within their existing rules, there is no legal impediment to a more urgent and immediate introduction of pre-hearing case management procedures.

Ambition	Regulatory bodies	Other stakeholders via the Call for information
<b>Oral hearings only when necessary</b>	While all agreed with this ambition, a concern was expressed that consistency and transparency must be assured to prevent undermining public confidence. A move to remove the need for review hearings, when all parties agreed there had been no change since the previous hearing or conditions were defined, was supported.	A significant majority of respondents endorsed this ambition. Some suggested that it must be undertaken with the agreement of both parties (this is as OHPA intended), but a small number were concerned that this could be seen as 'reverting to pre-Shipman, deals behind closed doors'. They urged a need for the decision, and facts on which the decision had been made, to be made public to retain public assurance.
<b>A two-stage process</b>	A range of views was offered; from a two-stage process already in operation, to a three-stage process to prevent impairment and sanction decisions being conflated, to a four-stage process believed to be implied by case law. There was greater consensus on reducing the number of times a panel deliberated in private, and of other time-efficient methods such as providing oral deliberations. Given the range of views expressed this perhaps suggests a need for further detailed consideration and legal opinion.	Many were supportive of the idea of reducing the time spent in private deliberations, but weren't sure whether this was the way to resolve the matter. More than one respondent equated the number of stages with the complexity of the case, and is perhaps illustrative of a lack of common understanding of the decision-making processes in FtP cases.
<b>Limiting the number of allegations charged</b>	Only one regulator disagreed with this ambition stating that a regulator could not be sure which of a number of allegations might be accepted by a panel. However, others agreed in principle or are already working towards a form of specimen charging procedures. Caution was urged in communicating this move to the public, to ensure public confidence was maintained and no perception was left that practitioners were escaping justice.	Those respondents most directly involved with regulation similarly agreed. However, professional bodies were concerned that this effectively required a case to be pre-judged before all of the evidence had been presented.

Ambition	Regulatory bodies	Other stakeholders via the Call for information
<b>Witness impact statements</b>	This ambition attracted little appetite, some respondents commenting that it added little relevance and confusion to the hearings. However, some did offer positive suggestions of how and when such statements may prove useful. Specifically, in conduct cases where it might assure public confidence, and if specimen charging were to be introduced to assist the establishment of the overall effect of misconduct in the absence of facts. The latter suggestion would of course fall if the key facts were not proven.	Whilst a warmer response was received from some, many did not see impact statements playing a useful role in public protection. It was suggested however that the statements might be usefully deployed in earlier complaint and mediation stages, so that a practitioner became aware of how their behaviour or conduct had affected patients
<b>Costs awards</b>	Again, opinion was divided based on experience. Those currently enjoying such provision do utilise it, and awards can be made for or against the regulator. Others do not have provision for costs awards and view the idea with some scepticism. Worries were expressed that unrepresented registrants might not defend a case in fear of a costs award against them. The majority of regulators suggested that the proposal be researched further to find a way which would not unfairly penalise.	Some described this as a sensible development, to focus the commitment of the parties in efficient case preparation and delivery. It was also suggested to be akin to a fine on a professional who showed no insight during a hearing. However, many raised questions on how costs would be awarded and afforded, and that more work is needed to provide a cohesive argument for this development.
<b>Cost capping</b>	Only three regulators responded with any comments; one that already has the provision, one that will be consulting on it soon, and one that recorded a concern for the additional cost in training panellists to make costs judgements. Whilst not a priority, this ambition may still be worthy of further investigation and testing with those already exercising the power, to identify any benefits and risks.	No clear view was forthcoming, although one respondent perhaps offers an option for the future – ‘OHPA makes a compelling case, but costs are an exceptionally difficult area. It would be prudent to consider responses to a consultation on cost-shifting in tribunals before deciding a way forward.’

Ambition	Regulatory bodies	Other stakeholders via the Call for information
<b>Better use of hearing rooms</b>	Whilst the proposal to hold hearings at weekends was not persuasive, on the grounds of increased cost, the better use of modern technologies was supported. This was seen as an improvement for participants, especially vulnerable witnesses, providing greater accessibility to all.	Similar support was forthcoming from many respondents, with the proviso that any arrangements did not adversely impact upon equality and diversity. The continuance of hearings in to the evenings and at weekends was opposed on the basis of late running and tiredness being grounds for appeal. Such unintended consequences therefore need solution before this development might be progressed further.
<b>Local focus on panel recruitment</b>	Three responded. A perceived benefit for the diverging health systems across the home countries was described. This ambition was proposed by OHPA for cost reduction purposes; current costs for panellist travel, accommodation and subsistence are significant, and a means to reduce this was sought. It would be interesting to compare costs between a regulator that holds hearings in a single centre against one that uses multiple centres across the home countries to identify any cost differential and opportunity for savings. The same study might also usefully elicit commentary from witnesses and registrants of their views on more local hearings. This might be taken further, in order to consider the previous ambition, specifically whether the use of modern technology might provide a solution to deliver local convenience.	A cautious welcome was given by some, with the caveat that the overriding selection criteria are right skills, competencies and diversity, rather than geographic location. Conversely, some offered geographic location as a positive as there might be opportunity to draw from a group reflective of the diversity of the registrant in question, as long as the respective individuals were not known to one another.

## 2. Appendix 2: CHRE learning points

- 2.1 This appendix provides greater detail around some of the issues that often result in CHRE sending learning points to the regulators following review of decisions made by fitness to practise panels.

### Decision-making and giving reasons for decisions

- 2.2 The health professional regulators' fitness to practise panels are 'tribunals' and therefore act as 'public authorities' for the purposes of the Human Rights Act 1998. Under that Act it is unlawful for a 'public authority' to act in a way that is incompatible with a European Convention right (include the guarantees about 'fairness' under Article 6(1) of the European Convention on Human Rights).<sup>1</sup> Under English law, the principles established in the case of *English v Emery Reimbold & Strick Ltd*<sup>2</sup> that 'justice will not be done if it is not apparent to the parties why one has won and the other has lost' apply to any tribunal charged with the duty to reach a judicial or quasi-judicial conclusion.
- 2.3 This means that fitness to practise panel hearings are legally required to be 'fair'. Giving adequately reasoned decisions is an essential part of a 'fair' hearing process. Providing a reasoned decision means that the registrant will be able to assess whether or not to appeal that decision, and it will also mean that any appeal court will be able to understand the original panel's decision. Providing reasons is also important to help any future panel to understand the basis for the current panel's conclusions. This is particularly important if the case is to be reviewed at the end of a period of suspension or conditions. The courts have said that panels should formulate their reasons by 'reference to the degree of illumination which a subsequent Committee might require...'.<sup>3</sup>
- 2.4 It is important for fitness to practise panels to explain the reasons for the decisions that they reach in individual cases, not only so that both the regulator and the registrant concerned understand the outcome of the case, but also so that the decision itself serves to declare and uphold professional standards, and to maintain public confidence in the profession and its regulation. We regard it as good practice for fitness to practise panel decisions to set out the panel's reasons for each element of their decision in full. In our *Learning Points Bulletin* we recommended that panels should provide the reasons behind their findings. For example if a panel were to be satisfied that a registrant had not been misusing controlled drugs, it should refer to the reasons for believing this to be true e.g. the fact the panel had seen medical reports, including drug test results.<sup>4</sup>
- 2.5 However panels are not legally required to set out the reasons for all of their decisions in every case. There have been several appeals of fitness to practise panel decisions that have led to the courts examining the legal duty on fitness to

<sup>1</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell

<sup>2</sup> English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605

<sup>3</sup> Needham v NMC [2003] EWHC 1141 (Admin)

<sup>4</sup> CHRE. 2009. *Protecting the public: learning from fitness to practise*. Available at: [https://www.chre.org.uk/\\_img/pics/library/Protecting\\_the\\_Public\\_-\\_Learning\\_from\\_Fitness\\_to\\_Practise.pdf](https://www.chre.org.uk/_img/pics/library/Protecting_the_Public_-_Learning_from_Fitness_to_Practise.pdf) [accessed July 2011]

practise panels to give reasons at various stages of their decision-making process, which we refer to below.

#### *Giving reasons for decisions about the alleged facts*

- 2.6 In 2005, the Shipman Inquiry Report recommended that fitness to practise panels should be required to give brief reasons for their main findings of fact.<sup>5</sup> In 2006 in the Phipps case<sup>6</sup> the High Court suggested that in some instances it may be necessary to give reasons for findings of fact. In 2010 in the Southall case<sup>7</sup>, Leveson J reviewed the previous case-law concerning giving reasons for factual findings and said:

*...I have no difficulty in concluding that, in straightforward cases, setting out the facts to be proved and finding them proved or not proved will generally be sufficient both to demonstrate to the parties why they won or lost, and to explain to any appellate tribunal the facts found*

- 2.7 However Dr Southall's case was not straightforward, and was described by the Court as 'exceptional'. The Court found that the reasons set out in the panel's determination were inadequate, and in particular highlighted that the reasons should have explained why the panel apparently disbelieved Dr Southall's evidence on one particular issue saying:

*If, as must have been the case, they disbelieved him, in the context of this case and his defence, he was entitled to know why even if only by reference to his demeanour, his attitude or his approach to specific questions.*

- 2.8 According to the leading textbook in the area of health professional regulation, while panels may not be legally required to provide reasons for their findings of fact in every case, they should explain which facts and which matters were taken into account at each stage of the decision-making process.<sup>8</sup> It is important that a panel's determination identifies any issues that are vital to its conclusions, and that it explains the manner in which the panel resolved those issues, so that an appeal court will be able to understand the decisions reached.<sup>9</sup>

#### *Giving reasons for other decisions*

- 2.9 The obligation on panels to set out the reasons for their conclusions about misconduct/impairment and sanction is less controversial than the issue about giving reasons for factual findings. In *Selvanathan v GMC* (2001) Lord Hope stated that 'in practice reasons should now always be given' both in relation to the finding of misconduct (or impairment) and as to sanction. In 2006 in the Marshall case,<sup>10</sup> the High Court said that panels are required to give reasons for imposing particular sanctions, including explaining why the sanction selected protects the

<sup>5</sup> The Shipman Inquiry. 2004. *Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future*. Available at: <http://www.shipman-inquiry.org.uk/fifthreport.asp> [accessed July 2011] Paragraph 27.258

<sup>6</sup> *Phipps v the General Medical Council* [2006] EWCA Civ 397

<sup>7</sup> *Southall v the General Medical Council* [2010] EWCA Civ 484

<sup>8</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 19-001

<sup>9</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 19-017

<sup>10</sup> *The Council for the Regulation of Healthcare Professionals v the General Dental Council and Marshall* [2006] EWHC 1870 (Admin)

public. Failure to give adequate reasons would be a serious procedural failing. In *Threlfall*<sup>11</sup> the court stated that panels are obliged, both by common law and pursuant to Article 6 of the European Convention on Human Rights, to give adequate reasons in good time. Furthermore, there is a practical reason why they should give adequate reasons for their decisions and that is to enable CHRE to consider whether we should exercise our section 29 powers.

- 2.10 The Shipman Inquiry Report highlighted the value of tools such as indicative sanctions guidance in ensuring transparency and consistency of decision-making. It is important that fitness to practise panels take due account of the regulator's indicative sanctions guidance, because whether they have done so or not will be taken into account at any appeal.<sup>12</sup> On a practical note, well-drafted and detailed indicative sanctions guidance can prove extremely helpful to panels in ensuring that they have taken all the relevant factors into account and followed the correct process in reaching their decision about sanction (thereby reducing the possibility that they will have reached the wrong conclusion). According to the leading textbook, it would be a mistake for a fitness to practise panel to regard reference to indicative sanctions guidance as optional.<sup>13</sup> The value of indicative sanctions guidance has recently been commented on by the High Court, which described it as assisting the transparency of the proceedings and providing a useful reference point both for the tribunal and those appearing before it.<sup>14</sup>
- 2.11 We have noted that the health professional regulators' indicative sanctions guidance varies considerably in length and level of detail, and that this variation does not appear to be the result simply of the variation in the professions they regulate or in their legislative frameworks. We have recently fed back concerns to some regulators about the lack of detail in their indicative sanctions guidance where we consider that this may have contributed to poor-quality outcomes from the fitness to practise process.

### *Assessing insight*

- 2.12 One essential element of the fitness to practise panel's task, once it has established that all or some of the factual allegations have been proved, and has moved on to assessing whether or not the registrant's fitness to practise is currently impaired, is to examine the extent of any insight that the registrant may have. According to the High Court in *Grant*: 'When considering whether fitness to practise is currently impaired, the level of insight shown by the practitioner is central to a proper determination....'<sup>15</sup>
- 2.13 Establishing the level of the registrant's insight is important, because it is relevant to the panel's assessment of the risk of any future repetition. The panel may wish to see evidence that the registrant has shown remorse and/or apologised, but also that they have, if appropriate, taken remedial steps to prevent a similar event from occurring again. Depending on the circumstances of the case, the registrant might also be expected to demonstrate an understanding of the impact of their actions

<sup>11</sup> *Threlfall v the General Optical Council* [2004] EWHC 2683 (Admin)

<sup>12</sup> *Salha & Another v the General Medical Council* [2003] UKPC 80

<sup>13</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 20-007

<sup>14</sup> *Hazelhurst and Others v Solicitors Regulation Authority* [2011] EWHC 462

<sup>15</sup> *Council for Healthcare Regulatory Excellence v the Nursing and Midwifery Council and Paula Grant* [2011] EWHC 927 (Admin)

on others, on professional standards, and on public confidence in the profession. The GMC's Indicative Sanctions Guidance specifically advises its panels to take into account whether or not the registrant has demonstrated insight consistently throughout the hearing, for example, that the registrant has not given untruthful evidence or falsified documents.

- 2.14 The level of a registrant's insight may be critical in the panel's decision about current impairment, and it is therefore essential that the panel's conclusions about this are clearly set out, so that people reading the determination can understand the reasons for the panel's finding about whether or not the registrant's fitness to practise is currently impaired. We frequently feed back concerns to regulators whose fitness to practise panels have not, in our view, adequately explained their conclusions as to the level of the registrant's insight.

### 'Under-prosecution' by the regulator

- 2.15 'Under-prosecution' refers to failures in the work that the regulator undertakes before the hearing to investigate the case and/or to draft appropriate allegations to be considered at the hearing and/or to present the relevant evidence to the panel at the hearing. The courts have established that where a regulator fails to include appropriate allegations, that can itself amount to a serious procedural irregularity which means that an appeal court will not be in a position to judge whether or not the sanction imposed was unduly lenient. In such circumstances, if CHRE appeals the case, the court will send the case back to the regulator with directions about how to proceed. This is what occurred in the case of the GMC's fitness to practise panel determination in the case of Dr Mahesh Rajeshwar.<sup>16</sup> On appeal by CHRE, the High Court decided that the GMC's failure to include allegations relating to the sexual motivation behind Dr Rajeshwar's actions amounted to 'under-prosecution' of the case, and was a serious procedural irregularity which meant that the appeal court was 'unable to decide whether the decision as to penalty was appropriate or not'.<sup>17</sup> The court therefore remitted the case back to the GMC.
- 2.16 We regularly feed back learning points to some regulators concerning the 'under-prosecution' of cases. This can be where we consider either that appropriate allegations have not been included where there was evidence to support them, including where the regulator has not specifically included a particularly serious allegation e.g. of dishonesty or of sexually motivated misconduct, or on some occasions, where it appears that the regulator has not take sufficient steps to investigate the case, or has not presented all the relevant evidence to the panel at the hearing. This latter issue is explored in more detail below.
- 2.17 We note that there is no consistency across the regulators in terms of whether or not they make submissions to the fitness to practise panels about the sanction that the regulator considers appropriate. According to the case-law,<sup>18</sup> it is acceptable for a regulator to make a submission to the panel about what sanction is appropriate. However it is for the panel to exercise its own independent judgment about which sanction to impose (and the panel should be advised about that by its Legal Assessor). We have on a small number of occasions fed back

<sup>16</sup> *The Council for the Regulation of Healthcare Professionals v the General Medical Council and Dr Mahesh Rajeshwar*: [2005] EWHC 2973 (Admin)

<sup>17</sup> *Council for the Regulation of Health Care Professionals v General Medical Council and Ruscello and Another* [2005] 1 WLR 717 [2004] EWCA Civ 1356, paragraph 72

<sup>18</sup> *Bevan v General Medical Council* [2005] All ER (D) 74 (Feb)

concerns to the regulators about their failure to ‘bid’ for a more severe sanction, given the influence that a regulator’s submission may have on the fitness to practise panel and also on public confidence in the regulator’s commitment to declaring and upholding professional standards. It might assist in achieving greater consistency across the sector if a framework was agreed between the regulators as to whether or not case presenters should, at least in some cases, set out for the fitness to practise panels which sanction the regulator considers is appropriate, and as to how staff and panellists should be trained to make/respond to those submissions. Developing such a framework could form part of a larger piece of work aimed at achieving greater consistency in the use and content of the indicative sanctions guidance which each of the regulators provide for their fitness to practise panels.

#### *Inadequate investigation and preparation for the hearing*

- 2.18 In 2005 the Shipman Inquiry Report highlighted the dangers of a regulator behaving as a secondary referral body and failing to carry out investigations properly itself.<sup>19</sup> The report suggested that relying upon another body’s investigation could only be appropriate where:
- The allegation arose not from a private individual, and
  - Where the other body is content, and
  - Where the other body has the expertise and resources to carry out the investigation, and
  - Provided that the regulator did not ‘lose sight’ of the case.
- 2.19 We have commented in our audits of the initial stages of the regulators’ fitness to practise process that some of them have relied inappropriately on investigations carried out by third parties, and have as a result failed to obtain sufficient evidence before reaching decisions not to refer cases to fitness to practise panel hearings.<sup>20</sup> Similarly, in our work reviewing the decisions made by fitness to practise panels we have identified cases in which some regulators do not appear to have made due inquiry during the investigation stage of the process, with the consequence that some allegations and/or relevant evidence are not put before the fitness to practise panel at the hearing. For example, this could include cases where the regulator investigates and presents to the fitness to practise panel allegations concerning a number of criminal convictions for offences associated with alcohol or illicit drug use, but does not also consider any potential associated impairment arising from ill-health as a result of alcohol or drug dependency. Inadequate investigation is clearly one factor that can contribute to ‘under prosecution’.

#### *Drafting of allegations*

- 2.20 Charges/allegations must be sufficiently detailed (‘particularised’) in order to comply with Article 6(3)(a) of the European Convention on Human Rights, which states that a defendant has a right to be informed promptly and in detail of the

<sup>19</sup> The Shipman Inquiry. 2004. *Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future*. Available at: <http://www.shipman-inquiry.org.uk/fifthreport.asp> [accessed July 2011]

Paragraph 27.201

<sup>20</sup> CHRE. 2011. *Fitness to practise audit report: audit of health professional regulatory bodies' initial decisions*. Available at: <https://www.chre.org.uk/satellite/387/> [accessed 6 June 2011]

nature and cause of the accusation against him. The leading textbook in the field advises that any matter that has a significant bearing on penalty should be explicitly pleaded, for example if it is alleged that the practitioner acted dishonestly as opposed to merely unprofessionally.<sup>21</sup>

- 2.21 There is case-law<sup>22</sup> establishing that it is a requirement of fairness that any allegation of dishonesty must be explicit and unambiguous. Allegations of dishonesty should identify the particular conduct in question, and explain precisely why it is said to be dishonest. In order for a dishonesty allegation to be found proved, it will have to be established that what the individual did would be regarded as dishonest by the ordinary standards of behaviour and that the individual must have realised that.<sup>23</sup> Panels should ensure before imposing a sanction on the basis of dishonesty that the dishonesty was specifically alleged and found as a fact.<sup>24</sup>
- 2.22 Most regulators' rules allow for the allegations to be amended at any stage of the proceedings so long as the practitioner will not be 'prejudiced' as a result. Even where there is no express power in the regulator's rules to amend the allegations, the panel has an implied power to allow such amendments.<sup>25</sup> It is clearly essential in terms of fairness for the practitioner to have a proper opportunity to defend themselves on all the alleged facts. This means that in some circumstances, if the allegations are amended at the hearing, it may then be necessary to adjourn the hearing for a short period. In the Kingdom case<sup>26</sup>, the court criticised the NMC's panel for failing to amend the allegation in order to include dishonesty.
- 2.23 It is important that fitness to practise panels take a pro-active role in considering whether or not the allegations fairly reflect the evidence before them and the evidence addresses the real issues in the case. In the Ruscillo<sup>27</sup> case the Court of Appeal stated: 'The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.' This means that the fitness to practise panel may need to be proactive if the regulator has failed to include appropriate allegations and/or has failed to adduce relevant evidence. The Shipman Inquiry Report referred to the inquisitorial function of fitness to practise panels, and recommended that, as part of their training, panellists should be advised that it is entirely appropriate for them to intervene and ask questions if they feel that any issue is not being adequately explored.<sup>28</sup>
- 2.24 We have fed back a number of concerns to regulators about cases which we consider have been 'under-prosecuted' and in which the panels concerned have,

<sup>21</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell; chapter 20

<sup>22</sup> Salha & Another v the General Medical Council [2003] UKPC 80

<sup>23</sup> R v Ghosh [1982] EWCA and Constantinides v The Law Society [2006] EWHC 725 (Admin)

<sup>24</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 20-017

<sup>25</sup> Gangar v the General Medical Council [2003] UKPC 28

<sup>26</sup> Council for the Regulation of Healthcare Professionals v the Nursing and Midwifery Council & Michelle Kingdom [2007] EWHC 1806

<sup>27</sup> Council for the Regulation of Health Care Professionals v General Medical Council and Ruscillo and Another [2005] 1 WLR 717 [2004] EWCA Civ 1356

<sup>28</sup> The Shipman Inquiry. 2004. *Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future*. Available at: <http://www.shipman-inquiry.org.uk/fifthreport.asp> [accessed July 2011] paragraph 27.255

in our view, not taken appropriate action to ensure that outstanding issues were fully investigated and/or made the subject of allegations.

### **Procedural issues**

2.25 As explained above, the fitness to practise hearings of the health professional regulators must operate in a way that is legally ‘fair’. We have recently fed back concerns to regulators about the following procedural issues:

- Failing to admit hearsay evidence
- Dealing with allegations involving criminal convictions only after the panel have made determinations about the other allegations (in order to avoid prejudice)
- Failing to serve documents on the registrant promptly.

2.26 Some of the other procedural issues that have led to us sending ‘learning points’ to the regulators are set out below.

#### *Proceeding in absence and other failures to follow rules*

2.27 The most frequent examples of procedural failings include failing to serve notice of a hearing on a registrant in accordance with the rules (and proceeding with the hearing in their absence, having done so) or failing to follow the procedural rules that apply during the hearing itself. A procedural failing could itself be a ground for an appeal by the practitioner concerned. Most regulators ensure that their fitness to practise panel determinations contain detailed explanations of the panel’s reasons for proceeding with a hearing in the practitioner’s absence (not least in order to minimise the risk of a successful appeal of that decision at a later stage, based simply on an inappropriate decision to proceed with the hearing). It would assist in improving decision-making generally if all panels approached the task of setting out their reasons for all their decisions in a similarly rigorous way.

#### *The role of the Legal Assessor/Adviser/Legal Chair*

2.28 The Legal Assessor/Legal Adviser/Legal Chair has the role of advising the fitness to practise panel about questions of law, as well as of informing the panel about any irregularity in the conduct of the hearing, and advising the panel to prevent a mistake of law being made. In order to ensure the fairness of the proceedings, any advice that the Legal Assessor gives to the panel in private should be repeated in the hearing, so that the parties have an opportunity to comment upon it.<sup>29</sup> We have recently fed back concerns to one regulator about the inadequate explanation of a Legal Assessor’s advice, which was provided in a summary form that meant that neither of the parties to the case could have understood it or challenged it if appropriate.

2.29 It is important that the Legal Assessor does not create any perception about the decision he/she would reach if they were part of the decision-making body.<sup>30</sup> Their role is to advise the panel only, although they do often also try to assist unrepresented registrants in understanding the process, in order to ensure that

<sup>29</sup> Nwabueze v the General Medical Council [2000] UKPC 16

<sup>30</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 15-037

the fairness of the proceedings is not compromised by their lack of professional representation.

- 2.30 We have recently raised concerns with one regulator about its panel and the Legal Assessor permitting what we considered to be the overly-aggressive cross-examination of a vulnerable witness. Similarly panel members themselves must be careful not to overstep what is acceptable in terms of the questions they ask of witnesses, or they may give the appearance of bias or unfairness.<sup>31</sup> In one case the court stated:

*...it has to be recognised that the form or indeed the substance of questions asked by anyone sitting on an inquiry carrying out a judicial function of ascertaining the details of past events and forming an opinion as to the propriety or otherwise of what has been done or omitted to be done is entitled to a degree of latitude in the form and style of the questions which may be asked...<sup>32</sup>*

But a sustained and persistent attack upon a witness could indicate that the decision-maker had 'shed his robe as judge and taken on the mantle of an advocate.' It is for the Legal Assessor to intervene in the proceedings if an irregularity could lead to unfairness.

#### *Adjournments on the grounds of ill-health*

- 2.31 We have recently criticised regulators who have permitted adjournments based on claims that the registrant is too ill to attend the hearing without requiring appropriate medical evidence to support those claims. While such adjournments should be granted where there is unchallenged medical evidence that the registrant is not fit to participate,<sup>33</sup> where the medical evidence is inadequate it may be appropriate to refuse an adjournment. Our concern in relation to inappropriate adjournments relates not only to the postponement of the outcome (and the effect this could have upon public confidence in the regulatory process) but the consequent potential impact on the quality and reliability of the evidence that may be available at the reconvened hearing, as well as the potential impact on the costs and efficiency of the regulatory process.

#### *Ill-health allegations*

- 2.32 We have fed back comments to some regulators about their handling of cases in which there are (or it appears to us that there should be) allegations of impairment based on both misconduct/convictions and ill-health. This area is complicated by the fact that not all the health professional regulators have the same legislative framework governing their fitness to practise processes. Some regulators (including the GMC) have a single fitness to practise panel that can deal with all allegations of impairment, whereas other regulators (including the NMC and HPC) have separate committees to deal with allegations concerning impairment arising as a result of ill-health rather than impairment arising on other grounds.
- 2.33 Where there is an allegation of misconduct (or a conviction) as well as ill-health, and the facts are such that, if the allegations are found proved by the panel a

<sup>31</sup> Al-Fallouji v the General Medical Council [2003] UKPC 30

<sup>32</sup> Roylance v the General Medical Council No 2 (2000)

<sup>33</sup> Brabazon-Drenning v UK Central Council for Nursing and Midwifery and Health Visiting [2000] CO/490/2000

sanction of striking off would be ‘a serious possibility’, the case should not be heard by a health committee.<sup>34</sup> This is because the sanctions available to a health committee do not include ordering striking-off.<sup>35</sup> Where the allegations concern both ill-health and other grounds of impairment one of the first questions to be addressed by regulators who do not have a unitary fitness to practise panel is to decide which committee should consider the case. It can be difficult at the outset of a case to identify whether or not striking off may be the appropriate sanction – according to the court even where striking off is not a possible sanction, it may still be inappropriate to refer the case to a health committee, because of the public interest in complaints being determined in public, and the need to uphold and declare professional standards. In those circumstances it will be for the panel consider the potential transfer of the case to weigh up the considerations for and against a transfer.<sup>36</sup>

#### *Immediate orders following sanctions of striking off or suspension*

- 2.34 The legislation of most of the regulators provides that where an order for suspension or striking off is made, that order does not take effect if an appeal is brought, until such time as the appeal is dismissed. This can greatly delay the implementation of the sanction, potentially exposing the public to risk in the meantime. The panel making the order has the power to impose an order for immediate suspension if it determines that it is necessary to do so. We have fed back concerns about failure to consider making such an order on a number of recent occasions.<sup>37</sup>

#### *Public hearings*

- 2.35 Holding hearings in public is a general requirement of the English system of the administration of justice<sup>38</sup> and, since 2000, public authorities have also been required by Article 6(1) of the Human Rights Act 1998 to hold hearings in public. It is considered important that justice is not only done, but that it is seen to be done. Holding hearings in public is thought to deter inappropriate behaviour, to maintain public confidence in the administration of justice, and to enable the public to know that justice is being administered impartially. It is said to have the benefit of meaning that evidence may become available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties’ or witnesses’ identity concealed, and of making uninformed and inaccurate comment about the proceedings less likely.<sup>39</sup>
- 2.36 The courts have explained the reasons why it is important that fitness to practise proceedings concerning healthcare professionals are held in public:

<sup>34</sup> Crabbie v the General Medical Council [2002] UKPC 45

<sup>35</sup> The exception here is the NMC who can do so after a period of suspension/conditional registration

<sup>36</sup> R v the General Medical Council ex parte Toth [2003] EWHC 1675 Admin

<sup>37</sup> Regulators that refer some cases to ‘case meetings’ rather than to ‘hearings’ may face particular difficulties if there is an order to strike off or suspend the registrant, because their procedural rules may not allow for the imposition of an immediate order at a ‘case meeting’, which means that the registrant may be able to continue practising during the appeal period. We have fed back concerns to the NMC about routing potentially serious cases to ‘case meetings’ for this reason.

<sup>38</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 15-026

<sup>39</sup> Glynn J, Gomez D. 2005. *Fitness to practise: health care regulatory law, principle and process*. London: Sweet & Maxwell, paragraph 15-026

*the public have an interest in the maintenance of standards and the investigation of complaints of serious professional misconduct against practitioners; public confidence in the [regulator] and the ... profession requires, and complainants have a legitimate expectation, that such complaints (in the absence of some special and sufficient reason) will be publicly investigated by the [panel]; and (c) justice should in such cases be seen to be done. This must be most particularly the case where the practitioner continues to be registered and to practise<sup>40</sup>*

- 2.37 Hearings of the health professions regulators are only held in private (or partly held in private) where required to protect the private lives of individuals concerned (often in relation to evidence of the registrant's ill health). The names of patients and other individuals who may attend to give witness evidence (e.g. professional colleagues) are anonymised by some regulators during public fitness to practise panel hearings, in order to protect their privacy. However this is another area where practice across the various regulators is not wholly consistent.
- 2.38 Recently we have raised issues with some regulators where their panels have taken irrelevant matters into consideration when deciding whether or not it is appropriate to hold hearings (or parts of hearings) in private rather than in public.

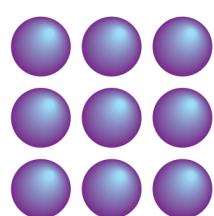
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<sup>40</sup> R v General Medical Council ex parte Toth [2000] 1 WLR 1290, paragraph 14

Council for Healthcare Regulatory Excellence  
157-197 Buckingham Palace Road  
London SW1W 9SP

Telephone: 020 7389 8030  
Fax: 020 7389 8040  
Email: [info@chre.org.uk](mailto:info@chre.org.uk)  
Web: [www.chre.org.uk](http://www.chre.org.uk)

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