

Guidance for regulators on fitness to practise hearings during the Covid19 pandemic

The Professional Standards Authority oversees the work of the ten 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.

Introduction

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

During the 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. These tended to be relatively simple hearings where there was an urgent public interest in their taking place and included review hearings and interim order hearings. However, we are aware that some regulators held relatively simple substantive hearings in that time.

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

We also recognise that the pandemic is not over and that, as a result, it may 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 online (by video link using platforms such as Zoom) and 'hybrid' hearings where part of the hearing takes place in one location and the remainder virtually. We have heard of no serious concerns about the operation of the virtual hearings that have taken place since lockdown. Concerns, however, have been raised by registrants' representative bodies about the implications of more widespread use of such 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 extracts from hearings held by video link may be recorded and released on the internet if there is public access to the hearings

- 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 above.

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 remote hearings.

We also held discussions with the ten health and social care regulators and with bodies representing registrants; and took account of the findings from consumer research we commissioned recently from Community Research¹, which examined the public's views on alternatives to traditional panel hearings.

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

- There have been no serious concerns about hearings that have so far been held remotely, while noting that these hearings have generally 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
- 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

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.

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 and public safety) and 18 (ensuring that all parties are supported to participate in the process).

The Authority's approach

The Authority considers that 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 remote hearings online.

We recognise that the present pandemic has provided significant challenges. We have seen no evidence to suggest that online hearings should not be part of the approach taken by regulators to address them solution and we do not consider that the concerns that have been raised suggest that there are insurmountable problems.

However, the concerns will carry greater weight in some cases than in others and, in some cases, there may be reasons why an online hearing is inappropriate. The regulators should assess whether a physical or remote hearing can be held on a case by case basis, but 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 robust system for listing and holding hearings.

We expect regulators to 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. In this period, we believe that it is important that concerns raised by registrants and others are addressed with flexibility, sensitivity and co-operation.

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 infection control measures
- The impact on vulnerable individuals and those with protected characteristics under the Equality Act 2010.

Public access to hearings

We consider that, generally, it should not be more difficult for the public to observe hearings than it was before the pandemic. We consider that, as in the civil and criminal justice system, open public hearings are crucial to maintaining confidence in the system.

We note the following extract from the Family Court Guide. Whilst we note that 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 attend hearings include:

- allowing members of the public to observe the process over the internet, possibly with requirements for them to register and provide any social media identities and, in all cases, a requirement to accept that proceedings should not be recorded or published other than would be permissible at a physical hearing. In all cases, the public must not be not able to see confidential documents, should be prevented from observing parts of the hearing held in private, have access in a manner that does not allow them 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, arrangements should still be made for remote attendance.

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 online and physical hearings involve different risks. We have referred to the concerns in respect of online 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.

The appropriate approach will need to be determined on a case by case basis. However, 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.

We consider that regulators should consider the following matters in determining what type of hearing is appropriate for each case:

- Whether the registrant and other participants have sufficient access to and understanding of technology to enable them to take part effectively in a virtual hearing, including having access to advice
- 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 or vulnerable people, the case has attracted media attention or there are particular features of the case or those involved that point to a heightened risk
- Any features of the case which make it particularly difficult for it to be held remotely – 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
- The ability to ensure that the hearing complies with Government guidance on the safety of all involved
- Other matters that would be likely to affect the integrity or smooth running of the hearing.

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, regulators should have provisions that enable final decisions to be taken. This could be by panels or by Chairs through case management hearings.

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

We consider that it would be appropriate for regulators to build on their experience with virtual hearings to provide some good practice guidance for the conduct of such hearings and make this available to all parties – particularly to registrants and witnesses. 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
- 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
- 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
- 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 may want to 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
- 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 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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