RESPONSE TO

GMC CONSULTATION: REFORM OF FITNESS TO PRACTISE PROCEDURES

APRIL 2011

Executive Summary

Action against Medical Accidents (AvMA) is the charity which specialises in issues of patient safety and justice. Established for almost 30 years, AvMA has extensive experience of giving advice on GMC fitness to practise procedures to patients or their families, and of engaging with the GMC on matters of policy.

Whilst AvMA is not opposed in principle to the idea of dealing with cases without holding a panel hearing in some circumstances, we have serious concerns about some of the proposals being considered. Without the introduction of the safeguards we set out in this response, we believe the changes envisaged could put patient safety at risk by not dealing appropriately with dangerous doctors, and would be very damaging to public confidence in the GMC and the profession.

In particular, we believe there must be the following safeguards in order to make the process fit for purpose:

- There should be no place for 'mediation' in the process.

- There should not be "without prejudice" meetings – there must be maximum transparency.

- The issues of establishing facts and applying sanctions should be kept entirely separate.

- Doctors under investigation should not be allowed to avoid investigation or negative findings by opting for 'voluntary erasure' (even if it is re-named "by mutual consent").

- There should be involvement of lay panellists in the process even if not conducting a panel hearing, so as to ensure a lay perspective and more transparency.

- The decision on what sanction to apply where it has been agreed fitness to practise is impaired, should be made by a panel including lay members.

- The CHRE should be given the power to review cases dealt with under the proposed process, equal to the power they have with regard to fitness to practise panel decisions.

We would also like to take this opportunity to express our frustration at yet another initiative to reform fitness to practise procedures without looking at the need for overall reform. It remains the case that the GMC's rules do not always put patient safety above other considerations and there is no access to independent review where the GMC has made unreasonable decisions not to investigate a doctor. Members of the public still have no access to a funded advice service to help them raise concerns to the GMC or other regulators.

Below we set out our answers to the specific Consultation questions.

ANSWERS TO CONSULTATION QUESTIONS

Question 1
Do you agree that, where there is no significant dispute about the facts, we should explore alternative means to deliver patient protection other than sending cases to a public hearing? If you disagree, please give reasons for your answer.

We agree in principle that patient protection could be maintained by alternative means than a fitness to practice panel, BUT ONLY IF THE SAFEGUARDS SET OUT BELOW ARE IMPLEMENTED. To make the proposed changes without the safeguards we are proposing would, in our opinion, put patient safety and public confidence in the GMC and the profession at risk.

A key overarching safeguard would be the introduction of the right for the Council for Healthcare Regulatory Excellence (CHRE) to review cases where it deems the GMC sanction to be too lenient or the process followed to be flawed. This is a key element of the existing arrangements pertaining to fitness to practice panels which would otherwise be missing where a panel is not convened.

Question 2
Do you agree that it would be appropriate for the GMC to have discussions with doctors in order to foster cooperation? If you disagree, please give reasons for your answer.

No, we do not believe that discussions should be held with doctors under investigation "in order to foster co-operation". It is the professional duty of any doctor to co-operate with an investigation. Any communication between the GMC and doctors under investigation should be objective, respectful and professional. It would be inappropriate to foster a relationship that went further than this.

Question 3
Do you think that doctors:
a Should be able to share information on a 'without prejudice' basis?
b Should not be able to share information on a 'without prejudice' basis?
c Should be able to share information on a 'without prejudice' basis where the GMC cannot directly use that information in a later hearing but can conduct further investigation and use any information uncovered by such investigation?

We do not agree that a doctor under investigation should be able to share information on a 'without prejudice' basis. We can see no justification at all in such an arrangement if the object of the exercise is to establish the facts and to protect the public. The adoption of such a practice would be totally lacking in openness and transparency and would be very damaging to public confidence in the process. The notes of all meetings in connection with the investigation should be kept and made available on request to the complainant/referrer. It is vital that information provided by doctors who are involved in this process is made available to other interested parties who may be in a position to refute the information or put it in context.

Question 4
Do you agree that we should consider ways to access practical facilitation skills to support constructive discussions with doctors?

No, we do not think the GMC should use facilitators to support constructive discussions with doctors. The GMC should recruit and train staff with the necessary skills to be able to conduct investigative meetings in an objective, respectful and professional way. The introduction of third party facilitators would create the perception that the object of the meeting was other than to establish the facts/determine whether the doctor accepts the facts and sanction.

If the GMC is to avoid the perception (and possibly the reality) or some kind of negotiation over the sanction similar to 'plea bargaining', it must keep the investigation of facts separate from the sanction. A doctor should have the opportunity to agree to findings of fact, but on the understanding it is left to the GMC to determine the sanction.

Question 5
Do you agree with the approach outlined for communicating with complainants about our discussions with doctors? Please give reasons for your answer.

No, we do not believe your proposed approach to communicating with complainants goes far enough. Our main concern is that there would be an opportunity for a doctor to seek to influence the GMC investigation by challenging evidence or presenting new evidence, without a complainant/referrer being able to provide an alternative view. To safeguard against this, the GMC should

- undertake to share any new evidence or challenges to existing evidence with the complainant/referrer with an opportunity for them to comment/reply.
- Consider holding a meeting with both sides (doctor and complainant/referrer) present.

Question 6
Do you think the term 'by mutual agreement' correctly reflects the outcome of discussions with doctors? If not, what term would you prefer and why?

We do not agree that the phrase 'by mutual agreement' on its own accurately and appropriately expresses the true situation where a doctor has been investigated and found in breach of their professional code. A more appropriate phrase would be

"by mutual consent following a breach of professional conduct" (or something similar).

There should be no room for a doctor to avoid a negative finding by simply agreeing to removal from the register 'by mutual consent'. There should not be a perverse incentive for the GMC to accept such arrangements for an easier life.

It is also imperative that a public record is kept of the issues about which the doctor has been found wanting. The doctor might attempt to re-register in the UK or to register in another country in which case this information needs to be available.

Question 7
Do you think that publication of the sanction accepted by the doctor will maintain public confidence in the profession? If not, are there other steps we should take?

We strongly disagree that the doctor should be given the opportunity to accept or not accept a sanction. The issue of establishing facts should be separated from the consideration and application of sanctions. Not to do so would inevitably lead to some form of 'plea bargaining' which the GMC says it wishes to avoid. In other words, doctors should be given the opportunity to accept the findings of an investigation on the understanding that the GMC will apply a sanction based on those findings. If the doctor accepts the findings, then the GMC decides, ideally through a panel involving lay members, on the sanction. If the doctor does not agree with the investigation findings, then the case goes to a full panel hearing.

We agree that the sanction applied and the reasons for it should be published. This would help avoid a loss of public confidence in the process and the profession. The safeguards we propose in our other answers are also essential for public confidence.

Question 8
Do you believe we should publish a description of the issues put to the doctor? What other information (mitigation taken into account, etc) should we publish?

Yes, the findings of the investigation and any consideration of mitigation in arriving at a sanction should be published.

Question 9
Do you think our proposals above are a reasonable way to deal with any risk of deterioration of evidence? Do you have any other suggestions?

We agree that doctors should be asked to sign a statement of agreed facts.

Question 10
How do you think we might ensure that unrepresented doctors fully understand the implications of signing a statement of agreed facts?

The GMC could offer to arrange representation for an unrepresented doctor through one of the defence organisations.

Question 11
Are there cases which should be referred for a public hearing even where the doctor is willing to agree the sanction proposed by the GMC? If yes, what types of cases and what criteria should the GMC apply to identify such cases?

We believe that there should be an option for a public hearing to be held where the Chief Executive of the GMC accepts an appeal from a complainant or person acting in a public capacity that the sanction is too lenient or due process has not been followed.

Question 12
Do you agree that there are some convictions that are so serious that the behaviour is incompatible with continued registration as a doctor and that there should be a presumption that the doctor be erased?

We agree with the list of offences where it should be presumed that the doctor be erased.

We would add to that list as follows:

"i Deliberate dishonesty with a patient/their next of kin over errors or omissions in their treatment which has led to harm".

Question 13
Do you agree that the convictions we have identified are convictions which fall into this category?

See above.

Question 14
Are there any other convictions you think should fall into this category?

See above.

Question 15
Do you agree that doctors within our fitness to practise procedures who refuse to engage with our investigation, where we have made every attempt to seek their engagement, should be automatically suspended from the register?

Yes, we fully agree that a doctor refusing to co-operate with an investigation be immediately suspended, and then after a set timeframe to be removed from the register if they are still not co-operating.

Question 16
Do you think that these proposals will benefit or disadvantage any groups of people who are involved in our fitness to practise procedures?

If the proposals are modified to incorporate our proposed safeguards, they will benefit both doctors and complainants.

Question 17
Do you think these proposals will impact on the confidence in our procedures of any particular groups of people? If so, which groups and why?

Unless the proposals are altered to incorporate the safeguards we suggest, we think that confidence in the GMC and the profession on the part of the public will be damaged.