Current issues in Fitness to Practise

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What is the purpose of fitness to practise proceedings?

- Instrumentalist v expressionist approach?
- A de facto two tier system
- The role of remediation-effective and meaningful remediation
- Should clinical cases go to a hearing?
- Mason v Grant
- Deference/Diffidence
- Who is the arbiter of public confidence?
- The need for research
- Clear standards, thresholds and criteria

Determinations scrutinised by the Authority

2016/17		2017/18 (as at 3/3/18)	
Determinations	**4,285**	Determinations	**3,784**
Detailed Case Reviews	**200**	Detailed Case Reviews	**230**
Appeals	**13**	Appeals	**7 (one withdrawn)**

By way of comparison:GMC issued 25 appeals since power in force in December 2015

Cases coming through the system (Top five categories by number of cases)

2016/17 Financial Year		2017/18 Financial Year (as at 3/3/18)	
(1) "Clinical Failings":		**(1) "Clinical Failings":**	
• Record keeping/history taking errors	1562	• Record keeping/history taking errors	1482
• Substandard care/treatment	1204	• Substandard care/treatment	1027
• Poor performance/lack of competence	1146	• Poor performance/lack of competence	825
• Failures to examine/diagnose/follow up	1071	• Failures to examine/diagnose/follow up	1049
• Prescription/medicine administration errors	777	• Prescription/medicine administration errors	672
(2) Dishonesty/Fraud/Theft	**1246**	**(2) Dishonesty/Fraud/Theft**	**1127**
(3) Poor Communication	**1099**	**(3) Poor Communication**	**906**
(4) Adverse Health	**546**	**(4) Adverse Health**	**442**
(5) Conviction	**467**	**(5) Conviction**	**433**

Cases coming through the system ("safeguarding/patient safety & dignity" issues)

2016/17 Financial Year		2017/18 Financial Year (as at 3/3/18)	
Failure to maintain professional boundaries	387	Failure to maintain professional boundaries	294
Sexual misconduct	**174**	**Sexual misconduct**	**195**
Rough handling of patients	150	Rough handling of patients	128
Verbal abuse	149	Verbal abuse	132
Violent/aggressive behaviour	205	Violent/aggressive behaviour	201
Child pornography	**21**	**Child pornography**	**38**
Treating without consent	159	Treating without consent	143
Insufficient knowledge of English	**34**	**Insufficient knowledge of English**	**78**

Issue one: *Thresholds and seriousness*

- What is the threshold for regulatory action?
- Acceptance/referral criteria and “provisional inquiries”
- How to build consensus about which matters should be referred to the regulator and which matters should be referred to a hearing?
- Key decision making moved to front line case workers/case examiner/ Registrar-outside the ambit of the Authority’s section 29 jurisdiction
- How to ensure consistency?

Issue two: *Evidence and the Charge*

- "Proportionality" as a reason not to investigate fully
- Discontinuance/offering no evidence
- Interface between professional regulators and system regulators
- Use and instruction of experts
- **"Record keeping" rather than failure to provide care**
- Consensual Panel Disposal

Health Cases

- failure to investigate potential health issues or to allege impairment by reason of ill-health
- continuing and episodic conditions
- not imposing conditions requiring abstinence
- continuity of testing

Fairness to registrant

- **Amending the allegations on first day of the hearing**
- Disclosure of unused material
- Endless review hearings (Clarke v GOC)

Issue three: *The Tribunal*

- The inquisitorial approach

“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.“

RUSCILLO v CHRP [2004] EWCA Civ 1356 (at paragraph 80)

Where there is evidence of undercharging, the Committee itself should intervene and a failure to do so may amount to a serous procedural irregularity

PSA v NMC and Jozi [2015] EWHC 764 (Admin) (at paragraph 33)

- No case to answer

The absence of an opening of the case deprived the Committee of important information about the case, and ‘prevented the Committee from supervising the decision to offer no evidence’.

PSA v NMC and X [2017] EWHC 70 (Admin)],

- Being arbitrary/acting outside powers (use of slip rule)

- Determinations

ARIYANAYGAM v GMC [2015] EWHC 3848

A “model determination”:

- sets out the Panel’s conclusions on each of the paragraphs of the charge sheet
- provides an adequate summary of the background to the allegation
- summarises its view of the witnesses evidence
- comments on the quality of the evidence provided by the Registrant
- explains “in some detail” why some allegations were found not proved and others were found proven.
- provides detailed explanations of why the Panel reached the conclusion it did.

Approach of Panel towards aggravating and mitigating factors (Harm)
Approach of Panel in relation to “insight” at impairment and sanction stages

What we don’t see:

- Duty of candour
- Importance of whistleblowing
- distinguishing Fleishmann in conviction cases

Dishonesty and lack of integrity

‘when dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts . . . . When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.’

IVEY v GENTING CASINOS (UK)
t/a Crockfords [2017] UKSC67 (at paragraph 74)

Alternative explanations
Application form cases

“very commonly the case that a finding of dishonesty is a matter of inference from proven facts rather than the subject of direct evidence”
Irvine v GMC

- Dishonesty not related to practise

Professional boundaries

- Approach of panels and the Court to boundary violations between colleagues
- Approach of panels towards “sexual motivation”

The Authority's Fitness to Practise Seminar November 2017

- "Threshold and Seriousness"- the approaches of different regulators

6 Big Questions:

a) *How can regulators retain public confidence and credibility in their fitness to practise processes, in the light of increasing complaints and limited resources?*

b) *What is "serious?" How can consensus be achieved on those matters that should be referred to the regulator for investigation; and those matters that should be referred to a hearing?*

c) *Does the fitness to practise process currently strike the right balance between remediation and public confidence?*

d) *What does a "good" fitness to practise process look like and how can regulators work closer together to share ideas and disseminate good practice?*

e) *What quality indicators should regulators be monitoring in their Fitness to Practise processes?*

f) *What do you consider to be the main fitness to practise challenges facing regulators, over the next three years?*

What the regulators told us

- regulators need to be aware of the dangers of operating within a “bubble”, encased by rigid legislative requirements and impenetrable terminology
- clear signposting about how to make a complaint; simplification of language and terminology; and better communication by regulators were considered key to maintaining the confidence of the public and stakeholders
- harness new developments in technology to keep participants regularly updated
- “managing expectations”: acknowledge the different perspectives of all participants in the fitness to practise process; identify desired outcomes at the outset
- consensus that regulators needed to “de-mystify” the fitness to practise process: improve public and registrant understanding and set out clearly the legal tests and criteria to be applied at each stage
- consistency of regulatory approach, and consistency in decision making: the need to establish a clear understanding amongst the regulators about when regulatory intervention is required
- **a need for detailed research into public attitudes about: particular types of conduct; the appropriate sanction for categories of case; and the effectiveness of remediation**

Nine central elements of a “good” fitness to practise process were identified:

- simplicity and clarity
- fairness and transparency
- communication
- timeliness
- quality
- consistency
- efficiency
- cost
- impact

What the regulators told us (continued)

- Quality to be assessed across all stages of the fitness to practise process
- The potential for a “cultural shift” away from fitness to practise: “upstreaming” and preventative work
- Opportunities to share learning and good practice: development of common skill sets and training arrangements; inter-regulatory secondment opportunities for fitness to practise staff

The Defence perspective:

- costly legal representation and travel/accommodation costs
- the intimidatory nature of the proceedings: formal and technical language
- the stress and strain of the proceedings on the practitioners (including those who might already be ill or vulnerable
- the impact of delays in case progression
- the effect of interim orders on the practitioner (even where the practitioner is ultimately absolved)
- lack of consistency on issues such as sanction, assessment of “the public interest” and “public confidence”

Indicative Sanctions:Judicial Endorsement

- Abraehaem
- Solanke
- Bevan
- Giele
- Khan (Scotland)

- Hazelhurst v SRA

Status and Legitimacy?

- Concerns raised by the joint law commissions in their 2014 report

- Practical approach of the Court in Bevan:

“doesn’t matter who drafted them provided their contents are sensible and helpful”

- doubts about status in Theodoropoulos
- underpinned by research?
- Consultation?

- Rule 31(14A) of the GPhC 2010 Rules

ISG part of the good decision making tool box, together with other Panel Guidance:

- The structured approach set out in Needham
- Approach to sanction set out in cases like Monji, Kibe and Wisniewska (“Assertions and conclusions are no substitute for the requisite reasoning”)
- “Model determination” endorsed in Ariyanayagam

Limitations to the ISG:

- Cannot encapsulate the entire range of registrant behaviour
- Lends itself to over broad generalisations

“violence covers a wide range of wrongdoing and the appellant’s behaviour, while clearly reprehensible, was not of the kind apparently contemplated by the Guidance” (Khan)

How to deal with Dishonesty

- ISG "…a somewhat blunt instrument when considering cases of dishonesty" (Watters case [2017] EWHC EWHC 1888 (Admin), paragraph 40)

- ISG "…took one of the most serious forms of dishonesty (fraudulent financial gain) as the paradigm, without alluding to the possibility that dishonest conduct can take various forms; some criminal, some not; some destroying trust instantly, others merely undermining it to a greater or lesser extent"

- "should not lump the thief and the fraudster together with the mere contract breaker" (Lusinga case [2017] EWHC 1458 (Admin))

How to achieve more nuanced decision making

- Back to Shipman: “clear standards, thresholds, and criteria”

Use of guideline case studies:

- Identified by internal audit groups
- Informed by Court decisions

“It is the decisions of this court, the Administrative Court, the appellate court, that provides the relevant sentencing guidelines in my judgment and those must be taken in combination with the Indicative Sanctions Guidance…” (Khan case [2015] EWHC 301 (Admin), at paragraph 34)

But:

- “each case turns on its own merits” and decisions of all tribunals are necessarily subjective based on the Tribunal’s view of the seriousness of the acts and omissions complained of, and its assessment of the remediation and mitigation put forward by the practitioner

- “…simply referring to other cases where a different panel on different facts have potentially been lenient, does not in any way assist in demonstrating whether or not this particular decision by this Panel was wrong…” (Oluyemi case [2015] EWHC 487 (Admin), paragraph 52)

- “…citations of sanction decisions by Panels in other cases does not generally assist as each case turns on its own particular facts and involves a careful assessment of the individual…consistency in decision making is achieved by the application of the “Indicative Sanctions Guidance”… (Moyo case [2015] EWHC 3547)

A potential solution?

Development of an inter-regulatory Sanctions Advisory Panel

Made up of patient and public representatives; regulators and defence organisations; experts; academics; and judges

- Rigorous research into a significant sample of similar cases across the various regulators
- Moderated by an expert group
- Producing guideline cases in which aggravating and mitigating features are clearly and accurately distilled
- Supported by research into public attitudes towards range of sanctions for particular categories of case
- Backed up by full consultation to provide legitimacy

The aim:

- to lend both objectivity and legitimacy to the sanctioning process; and
- to produce a “consistent body of jurisprudence” (the test in Shah [2011] EWHC 73, paragraphs 22-24)

QUESTIONS

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