Consultation Response

November 2014

The General Dental Council - Proposed amendments to enhance the effectiveness and efficiency of its fitness to practise procedures

Introduction

Dental Protection Limited is a member of The Medical Protection Society Limited (MPS) group of companies. Dental health professionals can apply to become dental members of MPS, served by Dental Protection, with access to all the benefits of membership which are set out in MPS's Memorandum and Articles of Association. These discretionary benefits include access to professional indemnity, advisory and educational services. Serving over 64,000 members in 70 countries around the world, Dental Protection is the acknowledged international leader in dental risk management.

Dental Protection serves approximately 70% of UK dentists and a higher proportion of UK dental therapists and hygienists. We also have experience of managing claims in negligence worldwide, and we assist dentists with inquiries by Dental Councils and other Regulators in all of the jurisdictions where we operate.

MPS is not an insurance company, but a mutual (not-for-profit) organisation which exists to serve and protect its members and to safeguard their professional reputation, interests and integrity.

Context and background

Dental Protection broadly welcomes the proposals made in this consultation because we feel that a radical change of approach, and culture change, is needed within GDC fitness to practise (FtP) procedures. If in order to make the necessary culture changes, the proposed Section 60 Order is required, then we will support them. However, in order to ensure that these proposals have the intended impact the GDC must be committed to taking full advantage of these new powers.

It is important to note that this consultation is taking place against a background of great concern being voiced across the UK dental profession, regarding the GDC's performance in connection with (but not limited to) the operation of its Fitness to Practise procedures.

Recent attention has been focused upon the FtP procedures because the GDC's original proposals earlier this year, to increase the Annual Retention Fee payable by registered dentists by 64%, had been justified almost wholly on the basis of the escalating cost of the Fitness to Practise procedures.

Dental protection submitted a detailed response to the GDC's recent Consultation on its proposals for the Annual Retention Fee increases, identifying failings of the current arrangements and their operation. We concluded our response by expressing our view that the GDC has failed to exhaust all of the alternative options, especially in relation to the costs

associated with FtP procedures, before deciding that a substantial increase in the ARF was required.

We did acknowledge that the ARF had not increased for four years, and also the fact that the GDC's FtP workload has increased. We have had regular and constructive dialogue with the GDC, and we agree that to achieve some of the improvements and efficiencies that are now urgently required, the GDC would be assisted by some additional powers that would require a Section 60 Order.

However, we also expressed our further concern that the GDC has in the past failed to take full advantage of powers given to it. In the 2005 amendment to the Dentists Act 1984, the GDC had been given the option to refer dentists to a Professional Performance Committee (PPC) as an alternative to the PCC or Health Committee. Despite having been granted this additional power, at its own request, the number of PPC referrals in the ensuing years has proved to be very small. If the GDC has chosen not to take full advantage of the powers bestowed by a Section 60 Order of nine years ago, it is made more difficult for the GDC now to argue that it is hampered by having to wait for a Section 60 Order to give it additional powers to improve the current FtP procedures. One significant opportunity has been missed for almost a decade, and registrants are being asked to meet the much greater costs of running the same cases as matters of professional conduct rather than performance.

Our responses to the specific **consultation questions** are as follows:-

Q1 Do you agree the GDC should be provided with the power to introduce case examiners, who have the ability to exercise the functions of the Investigating Committee?

In principle, Dental Protection welcomes the proposal to introduce Case Examiners (CE) to carry out the function of the Investigating committee (IC). We believe that the use of CE at the first stages of FtP investigations has the potential to introduce consistency in file management and decision making. Our experience with the General Medical Council is that this is a reasonable expectation.

We do have some reservations about how the CEs would be appointed, trained and in particular, managed given that there would no longer be an expectation (indeed, requirement) for independent thought and decision making. They would be 'Officers of the Council' (sic). But we have had similar reservations about the practical reality of the existing IC arrangements in recent years and not least the influence that GDC employees have had, and have sought to impose upon, the supposedly independent decision making of the IC.
These concerns touch upon the wider issue of the regulatory culture that has prevailed at the GDC in recent years, the lack of proportionality demonstrated in its approach and the apparent absence of a genuine understanding of the working environment of registrants.

Without attention being given to these wider issues, the introduction of CEs into that same culture will not in isolation provide a complete and sustainable answer to the current problems.

It is possible that the proposals may address some of our concerns but this will require careful attention to the FtP Procedural Rules. The GDC will be required to consult appropriately on these Rules in due course and we hope that there would be a genuine engagement with all stakeholders that have an interest in these matters on behalf of registrants. This early stage of the FtP procedures has been in turmoil for

too long, to the extent that there is little or no remaining confidence in the fair and effective operation of this stage in the process. Every effort must be made to get it right this time.

Q2 Do you agree that the Investigating Committee should have the power to agree undertakings with a registrant?

Yes, we agree that IC (and CE) should have the power to agree undertakings with a registrant and in principle we would strongly support this approach.
The ability to agree undertakings might, in appropriate circumstances, provide a sensible alternative to a referral to the Interim Orders Committee in order to seek an order which might have the same material effect as that which could be achieved through consensual undertakings. We believe that many kinds of case currently considered by an IC would lend themselves well to this approach.

It is unclear how the power to agree undertakings about future actions (for example, undertaking training in a particular area of dentistry and not carrying out certain procedures in the meanwhile) would address the separate situation of where such training had already been undertaken by the registrant in the intervening period before the matter came to the GDC's attention. A further practical question arises of whether the CEs would have the competence/power to make assessments as to the quality and/or outcome of that further training.

Although some practical examples have been provided, the full scope / range of the kind of undertakings being referred to has not been defined. Safeguards would need to be available to avoid any undertakings being subsequently misinterpreted as an acceptance of facts, implications or conclusions that might be contained within a case at this early stage in the FtP procedures.

It is not clear from the consultation document whether or not such agreed undertakings would always be placed in the public domain. We do not accept that this would routinely be necessary, especially in cases where there is no material risk to public safety.

There is clearly a significant amount of work to do in preparing rules that would govern this process and we look forward to considering these rules in due course, when the GDC consults upon them.

Q3 Do you agree the GDC should be provided with a power to review decisions of the registrar not to refer to the IC or case examiners and of the Investigating Committee not to refer to a Practice Committee?

Dental Protection welcomes the proposal to introduce a mechanism for a review of decisions of IC and CE not to refer a case on to an FTP hearing. It is fair that both a registrant and the informant (or any other interested party) is able to challenge the decision to close the case without a referral. However, the same concerns about the prevailing regulatory culture (as outlined in our response to Q1 above) also apply here.

We are worried that concern by the GDC over how it is perceived by the public (i.e. of being a rigorous and robust regulator) would take precedence over the underlying need for 'right touch' regulation. We are particularly concerned about this given the way it has operated its FtP procedures in recent years. The GDC should focus on getting fair and proportionate outcomes rather than ones that might satisfy a wish by some parties for increasingly higher levels of professional accountability, whether or

not they remain proportionate. The crucial issue at the heart of this question is whether the decision should be (and be seen to be) right and fair to the registrant, right and fair to the complainant, or right in terms of how the GDC itself wishes to be viewed externally.

This concern is one of the reasons why we fail to understand the proposed two year 'window' in which such reviews might be made. Other than in the rarest and most exceptional of circumstances, a timescale much shorter than this should be amply sufficient to avoid the potential for reviews to be ordered for the wrong reasons. If nothing else, it is wholly unreasonable for a registrant who endures the stress of FtP procedures, to have the possibility of a review hanging over their head for two years. Our significant concerns in this regard may be addressed in due course when the proposed rules are published and consulted upon, but until then we must make it clear that our concerns remain.

We are particularly anxious to make sure that vexatious and ill-motivated or ill-founded challenges are not accepted without question or challenge, given the stress upon the registrant in going through the FtP process. Whilst we note the four circumstances envisaged, we would like to see the GDC develop rigorous guidelines and tightly drafted rules giving proper protection to the registrant as well as the public.

This power should be carefully exercised and we believe that the GDC should issue clear and carefully drafted guidance as to what is meant by 'materially' flawed. It is accepted by the GMC that to be 'material' a flaw must be shown to be more than a minor mistake and must, if corrected, be something that 'would make a difference to the decision'.

We fully support this description, and believe that it is an essential pre-requisite for the proper working of this new power. Complainants often refuse to accept a decision not to proceed simply because they would have preferred a different decision and only the clearest evidence of a flaw which would have altered that decision should be accepted at review.

It must be recognised that at least some of the complaints made to the GDC by their employing organisations or other registrants are made with the specific aim of causing them to lose their registration. Such complainants are unlikely to be satisfied with any other outcome and there is a risk that they would take advantage of this new power to pressurise the GDC to get the outcome they wanted.

The threshold of 'might have led to a different decision' for the test for 'new information' is too low. The GDC should be required to apply the 'realistic prospect' test in relation to this.

Q4 Do you agree that upon the imposition of a warning, there should be the ability to review the decision taken, as described above?

We foresee that on occasion the registrant will challenge a decision to close a case with a warning or a letter of advice. This proposal is preferable for all concerned when compared to the current situation where a judicial review is necessary when a challenge is made. Therefore we welcome this proposal to permit an internal review of a decision to issue a warning.

In the past registrants have been asked to accept a warning not to repeat something which they strenuously deny having done in the first place. At the early stage of the

FtP procedures, it must be remembered that none of the evidence has been tested and great care must be taken not to accept everything stated in a letter of complaint, as being incontrovertible fact.

We welcome the proposal to invite the registrant to provide observations where a warning is being contemplated, before the decision to issue a warning has been made.

Q5 If the answer to question 4 is yes, should a limit be placed on the number of applications a person can make within the 2 year period to have the determination to issue a warning reviewed?

We agree that there should be a limit to the number of challenges that can be made by any party. There should also be a time limit within which an application must be made. The proposed over-arching window of two years needs to be viewed in the context of all of the review proposals collectively.
In order to make any further meaningful comment it will be necessary to see how the rules are drafted in due course.

Q6 Do you agree with the changes to the legislation permitting the Registrar to refer an allegation to the IOC at any time provided that, in cases which are referred to the IC, the IC has not yet commenced its consideration of the allegation?

We do recognise the necessity for the Registrar to have the ability to refer a registrant to the Interim Orders Committee at any time up to the point that the IC has commenced its consideration of any allegations. However, it seems perverse that this proposal seems not to be balanced by the same kind of option as that covered in Q2 above. That is, the ability to agree undertakings that would be sufficient for the protection of the public without the need for the Registrar to refer the case to the IOC. We would suggest that this be considered as a modification or clarification of this proposed power.

Because of our stated concerns about the over-use of the IOC in circumstances whether there cannot be any material risk to public safety, we believe that any such power would need to be balanced by a requirement for adequate justification. A number of quite severe consequences for the registrant result from an IOC referral, with little or no remedy if the allegations are later proved to have been without justification. Introducing this power might need to be balanced by the ability of a registrant to seek an appropriate remedy from the GDC in such a situation.

As we stated in response to an earlier question, we are worried that concern by the GDC over how it is perceived by the public (i.e. of being rigorous and robust regulator) would take precedence over the underlying need for ‘right touch’ regulation. We are particularly concerned about this given the way it has operated its FtP procedures in recent years. The GDC should focus on getting fair and proportionate outcomes rather than ones that might satisfy a wish by some parties for increasingly higher levels of professional accountability, whether or not they remain proportionate.

The crucial issue at the heart of this question is whether the decision should be (and be seen to be) right and fair to the registrant, appropriate in terms of protecting the public proportionately or right in terms of how the GDC itself wishes to be viewed externally.

Q7 Do you agree that the IC should be able to refer an allegation to the Interim Orders Committee at any time, provided that, in cases which are referred by the IC to a Practice Committee, that Practice Committee has not yet begun its consideration of the case?

We recognise the necessity for IC (or CE) to have the ability to make a referral to IOC at any point up to the consideration of a case to a Practice Committee. If that decision is being made, however, after the point at which the IC has taken the decision to refer the case to a Practice Committee, then the associated rules should make it very clear what the basis is for that further step of a referral to IOC when this referral was not thought necessary at the time when the case was considered by IC and the referral was made. We also question whether this power would be needed, if the separate power covered by Q6 above was in place.

The key to an IOC referral is the proper consideration and application of the "necessity test" prior to making a referral. We are concerned that presently too many inappropriate referrals are made to IOC, which cost significant sums of money and cause enormous stress to the registrants. It should be a benefit of the CE system that consistent decision making will extend to decisions about IOC referrals.

Q8 Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:

- **An increase ?**
- **A decrease ?**
- **Stay the same ?**
- **Unsure ?**

Please explain your answer.

There will be a financial and administrative impact on Dental Protection and our members because of these changes. However, the proper application of the tests applied to the facts at the early stages of FtP would have a far greater impact. If Case Workers, IC and CE properly consider whether the facts of any case can be proved, whether if proved would amount to misconduct and whether there is likely to be a finding of current impairment, far fewer cases than recently seen will be referred. These improvements can be brought about with the changes proposed by the consultation.

Once a steady state has been achieved, there could be a marginal saving in the costs for Dental Protection in the event that undertakings are agreed. We would, however, still be involved in settling and agreeing those undertakings. This potential saving would almost certainly be exceeded by the increased costs of dealing with cases where a warning has been contemplated, and decisions of the IC and CE are being challenged. We see a similar pattern for the GDC's own costs.

There will be many fewer challenges if the correct legal tests are applied from the outset by the GDC. As we stated in our response to the GDC's Consultation on the Annual Retention Fee, there is great potential for cost savings for all parties, which could be achieved without any of the additional powers provided for within the proposed Section 60 Order. However, we would not wish this fact to detract from the other benefits that could result from some of the proposed changes, which we support as outlined elsewhere in this response.

The GDC's registrants will have to pay for the additional cost of the changes proposed in this consultation. Whilst we welcome the proposals if they will improve

the operations of the GDC it needs to be recognised that registrants have already been paying for the unacceptable operation of the FtP in the past. If these measures prove successful any future cost savings resulting from them should be passed back to registrants in reduced ARF fees in future years. It is inequitable that the people most affected by the recent failures of the FtP procedures should pay for past failures and the cost of the GDC's own remediation.

Q9 Do you think that any of the proposals would help achieve any of the following aims:

i. eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010?
ii. advancing equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it?
iii. fostering good relations between persons who share a relevant protected characteristic and persons who do not share it?

If yes, could the proposals be changed so that they are more effective in doing so? If not, please explain what effect you think the proposals will have and whether you think the proposals should be changed so that they would help achieve those aims?

It would not appear that the proposals are designed primarily to achieve these aims although they may have that secondary effect in some individual situations. We have no other comments to make in this regard.

Q10 Do you have any comments on the draft Order?

No further comments.

CONTACT

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

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