



Department  
of Health

# The General Medical Council and Professional Standards Authority: Proposed changes to modernise and reform the adjudication of fitness to practise cases

The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014 – a paper for consultation

August 2014

**Title:** The General Medical Council and Professional Standards Authority: Proposed changes to modernise and reform the adjudication of fitness to practise cases

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Strategy & External Relations, Professional Standards, Fitness to Practise

**Document Purpose:**

Consultation

**Publication date:**

31 July 2014

**Target audience:**

Doctors

Regulatory Bodies

Employer Representatives

Employee Representatives

Patients

General Public

Royal Colleges

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# The General Medical Council and Professional Standards Authority: Proposed changes to modernise and reform the adjudication of fitness to practise cases

The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014 – a paper for consultation

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# Foreword

Reforming the way that the General Medical Council (GMC) adjudicates on cases where a doctor's fitness to practise has been called into question has been a long-term policy ambition for both the Department of Health and the GMC.

The reforms are designed to increase the separation between the investigation of fitness to practise cases and adjudicating on what should happen in each case to enhance public and professional confidence in the system of medical regulation. The GMC have already taken a number of steps to reform their adjudication function, most recently establishing the Medical Practitioners Tribunal Service (MPTS), independent of the GMC's investigation arm, to manage the adjudication of fitness to practise cases involving doctors. Both the Department and the GMC agree that public and professional confidence can be further enhanced by placing the MPTS on a statutory footing, ensuring fundamental changes in the future would require Parliamentary approval. This requires a change to the Medical Act 1983.

The Department also agrees with the GMC that there are further opportunities to modernise the legislation and to reflect best practice in other jurisdictions. We are also drawing on the work that has been undertaken by the Law Commissions of England and Wales, Scotland and Northern Ireland in their review of the law governing the regulation of health professionals. This consultation outlines the detail of the proposed amendments to the Medical Act 1983 and to the National Health Service Reform and Health Care Professions Act 2002.

These proposed amendments will strengthen and modernise the GMC powers and systems to carry out its fitness to practise adjudication functions more effectively. They will place the MPTS on a statutory footing and, in addition to making improvements to the Medical Act 1983, enable the GMC to make amendments to their Fitness to Practise Rules (Scheduled to the General Medical Council (Fitness to Practise ) Rules Order of Council 2004 to further modernise the procedures which govern how fitness to practise cases are handled.

The GMC has already made significant progress in reforming its adjudication function. By making these changes to the Medical Act 1983, our aim is to enable the GMC to complete these reforms securing efficient and effective patient protection and public confidence in its fitness to practise procedures for the long term.

The draft Order also contains proposed changes to the power of the Professional Standards Authority for Health and Social Care (PSA) to refer cases to higher courts in line with proposals for a GMC right of appeal.

# Executive summary

The Department of Health is consulting on a number of proposals that aim to strengthen and modernise the GMC's adjudication systems. This consultation document seeks comments and views on the draft Order "The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014".

The Scottish Ministers are also jointly consulting by means of this consultation paper so far as the draft Order relates to the PSA's grounds for referral to the higher courts in respect of professions for whom responsibility is devolved in Scotland.

The GMC has undertaken full public consultation on modernising its adjudication processes which can be found at the following link: [http://www.gmc-uk.org/concerns/fitness\\_to\\_practise\\_consultations.asp](http://www.gmc-uk.org/concerns/fitness_to_practise_consultations.asp)

The outcome of the consultation was reported to the GMC's Council in July 2011 and can be found here:

<http://www.gmc-uk.org/about/council/10167.asp>

Where the GMC has powers to do so, they have already made changes to their day-to-day operational approach to support the principles of modernisation and separation. Further changes were addressed through amending the rules governing the GMC's fitness to practise procedures by the General Medical Council (Fitness to Practise and Constitution of Panels and Investigation Committee) (Amendment) Rules Order of Council 2013. This consultation paper covers the proposals that require changes to primary legislation which are set out in a draft Order made under section 60 of the Health Act 1999.

To strengthen and protect the separation between the investigation and adjudication functions of the GMC as well as modernising the adjudication process, the draft order contains measures on six main themes:

- Establishing the MPTS as a statutory committee of the GMC specifying its powers, responsibilities and duties.
- Modernising the MPTS' adjudication function including strengthening the case management arrangements.
- Addressing patient safety issues including strengthening the power of the Registrar to require the disclosure of information from a doctor and to refer a doctor to the MPTS for decisions as to whether to suspend that doctor in the event of non-compliance.

- Bolstering the objectives of the regulator and its fitness to practise functions to expressly take account of the need to promote and maintain public confidence in the profession and the need to promote and maintain proper professional standards and conduct, in addition to protecting, promoting and maintaining the health, safety and well-being of the public, and providing for an over-arching objective of the protection of the public which involves all of these.
- In line with the above, amending the grounds on which the PSA can refer a fitness to practise panel decision to the higher courts and introducing a corresponding new right of appeal for the GMC.
- Clarifying a number of areas of the Medical Act to make the procedures and their scope simpler to understand and more transparent.

Many of these proposals arise from the policy development work surrounding the establishment of the Office of Health Professions Adjudicator (OHPA). These proposals were developed with the GMC in light of Government plans to abolish OHPA (which was effected through the Health and Social Care Act 2012). OHPA was to have undertaken fitness to practise adjudication for the GMC, then the General Optical Council and, potentially, other health regulators. However, after consulting in 2010 on proposals not to proceed with the establishment of OHPA, the Government felt that reforming the GMC's adjudication function could deliver many of the same benefits for the medical profession as OHPA and protect patients and the public in a proportionate manner without proceeding with the establishment of a new body.

To achieve this, the GMC has established the MPTS, which is separate from the investigation arm of the GMC, to manage its adjudication function. The MPTS is responsible for the quality of decision making by medical practitioner tribunals, the day-to-day operational management of adjudication function, and the appointment and removal of tribunal members, legal assessors and case managers. It is also responsible for the provision of training and assessment for panellists and legal assessors. However to enhance and protect the separation between the GMC's investigative and the MPTS' adjudication functions, the Department and the GMC propose that the MPTS should be established on a statutory footing.

This consultation is being taken forward in accordance with the requirements of section 60 of the Health Act 1999. The Department is seeking to introduce changes to primary legislation by means of an Order in Council through the Privy Council for the approval of Parliament under section 60 of the Health Act 1999. The Health Act requires that the Secretary of State must consult on draft section 60 Orders prior to their introduction into Parliament. Following consideration of consultation responses, any proposals will be subject to Parliamentary scrutiny and debate.

As the proposed changes to the PSA's power to refer cases to higher courts will affect professions for whom responsibility is devolved in Scotland, the Health Act 1999 also requires the Scottish Ministers to consult in the same way and to lay the draft Order before the Scottish Parliament.

In its responses to the final report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, the Government noted that health and care professional regulatory bodies in the United Kingdom (UK), including the GMC, are hampered by an outdated legislative framework. The

strengthened powers introduced by this Section 60 Order will enable the GMC's adjudication procedures to be modernised, and improve timeliness and effectiveness of their processes, and allow it to better carry out its fitness to practise adjudication functions. This will enable the GMC to take swifter, more proportionate and effective action to ensure public protection while establishing the MPTS in statute will secure public and professional confidence in the regulation of medical professionals.



# Introduction

1. The GMC sets the standards of conduct, performance and behaviour that doctors who are registered medical practitioners are expected to meet. These standards are set out in the GMC's guidance *Good medical practice*. Doctors are expected to behave in accordance with these standards both in clinical and non-clinical settings.
2. Where a doctor does not meet these standards, it may give rise to an allegation that their fitness to practise is impaired. If the GMC finds that a doctor's fitness to practise is impaired it can take a range of actions to restrict the doctor's ability to practice whether by imposing conditions or in the most serious cases erasing that doctor from the medical register.
3. The process for dealing with complaints that a doctor's fitness to practise is impaired is called the fitness to practise procedures. The GMC's fitness to practise procedures consist of three stages:
  - Initial consideration
  - Investigation
  - Adjudication
4. The initial consideration stage enables the GMC to review information it has received and make a decision as to whether it amounts to an allegation that a doctor's fitness to practise is impaired and requires investigation. If a complaint is investigated, the GMC might seek evidence from the complainant, the doctor, the doctor's employer and any other person who might have relevant information or be able to offer an expert opinion. They might also require the doctor to undergo a health, performance or language assessment to enable them to make a decision as to whether that doctor is safe to practise.
5. If the GMC has a significant concern about the safety of the doctor's practice or consider it to be in the doctor's interest, or otherwise in the public interest, they may refer the case to an interim orders panel. The interim orders panel will make an assessment of risk based on the information provided by the GMC and adjudicate on whether it is necessary to impose an interim order restricting that doctor's practice while the investigation is ongoing.
6. Once all of the evidence has been gathered, if the GMC consider that there is a realistic prospect of establishing that the doctor's fitness to practise is impaired then they will refer that case for a public hearing (unless the concern can be managed safely by agreeing with the doctor restrictions on their practice known as 'undertakings') before a fitness to practise panel for consideration as to whether a restriction on that doctor's practice is necessary. Fitness to practise panels (and interim orders panels) usually consist of three people, one of whom must be a doctor and one whom must be a lay person. They are not employees of the GMC but are recruited, similar to persons who serve as magistrates, solely for the purpose of making decisions at the adjudication stage of the fitness to practise procedure. This ensures that there is a degree of separation between those that investigate a fitness to practise case and those that make the final decision as to the outcome, and that the procedure is fair to all parties.

7. The PSA is the body that oversees the statutory bodies that regulate health and social care professionals in the UK. Part of the PSA's role is to scrutinise decisions made by all of the healthcare professional regulators at the adjudication stage of the fitness to practise procedures. If they consider that a decision is unduly lenient, or should not have been made, and that it is desirable for the protection of members of the public in the public interest to do so, they may refer that decision to the High Court of England and Wales, the Court of Session in Scotland or the High Court in Northern Ireland as appropriate. In these circumstances the relevant court may remit the case back to the healthcare professional regulator to be considered again by a fitness to practise panel, make no change or substitute a new decision.

# The Draft Order

9. The draft General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014 can be found at: <https://www.gov.uk/government/consultations/changing-how-the-gmc-decides-on-doctors-fitness-to-practise> This section summarises the effect of each of the provisions within the draft order.
10. This Order amends the Medical Act 1983 to make provision as outlined below and consequential changes.
  - Article 2 provides for a new over-arching objective for the General Medical Council (“the GMC”) in place of their existing main objective.
  - Articles 3 to 5 establish the Medical Practitioners Tribunal Service (“the MPTS”) as a statutory committee of the GMC to strengthen the separation between their investigation and adjudication arms, and place fitness to practise and interim orders tribunals (formerly fitness to practise and interim orders panels and also statutory committees of the GMC) under the administrative control of the MPTS. Provision is made for the tribunals to be required to have regard to the GMC’s over-arching objective in the exercise of their functions.
  - Article 6 amends the review powers of fitness to practise tribunals, including by introducing provision to ensure that reviews can be carried out before the expiry of sanctions and to enable reviews without a hearing where both parties are in agreement as to the outcome.
  - Article 7 includes provision enabling reviews of interim orders without a hearing where both parties are in agreement as to the outcome.
  - Article 8 makes provision for there to be an overriding objective for the making of procedural rules for fitness to practise proceedings of securing that cases are dealt with fairly and justly.
  - Article 9 amends the GMC’s rule-making powers to make express provision for investigations to continue once fitness to practise proceedings have started and for cases to be withdrawn. Provision is also made for rules to include provision for preliminary hearings and for the consequences of failure to comply with rules and directions, which may include refusal to admit evidence, the drawing of adverse inferences and the award of costs for unreasonable behaviour.
  - Article 10 confers express power to provide in rules for undertakings to be accepted by tribunals and for the consequences of breaches.
  - Articles 11 to 13 make express provision for health assessments alongside professional performance assessments and for sanctions for non-compliance with such assessments (i.e. suspension or conditional registration). Where relevant, corresponding amendments are made for knowledge of English assessments.

- Article 14 provides for the MPTS to appoint legal assessors in fitness to practise proceedings.
- Article 15 provides for the MPTS to appoint case managers in fitness to practise proceedings and for such case managers to have the power to give directions.
- Article 16 confers power on the GMC to require practitioners to provide information as part of investigations (subject to certain exceptions) and to impose suspension or conditional registration in the event of non-compliance.
- Article 17 makes consequential provision relating to appeals by practitioners.
- Articles 18 and 19 introduce a power for the GMC to bring appeals against fitness to practise decisions alongside the power of the Professional Standards Authority for Health and Social Care (“the PSA”) to refer such decisions to the higher courts under section 29 of the National Health Service Reform and Health Care Professions Act 2002. Provision is made to ensure that there can be only one such appeal or referral. The PSA’s grounds for referral are also amended, and the same grounds are applicable to the GMC’s power of appeal.
- Article 20 makes consequential changes relating to applications for restoration to the register.
- Article 21 provides for annual reports of the MPTS to be published and to be laid before Parliament.
- Article 22 makes express provision for the rejection of vexatious allegations, for allegations concerning facts that are more than five years old not to be investigated (except where investigation would be in the public interest) and for the review of investigation decisions.
- Article 23 makes provision for Registration Appeals Panels to be required to have regard to the GMC’s over-arching objective in the exercise of their functions.
- Article 24 makes provision to enable service of statutory notices relating to fitness to practise by electronic mail.
- Article 25 makes provision to ensure a direction for suspension or conditional registration will continue in effect during an appeal against a review decision which extends its effect until the final outcome of that appeal takes effect.
- Article 26 makes minor corrections.

# Consultation questions

## Establishing the MPTS as a statutory committee of the GMC

11. This section deals with the governance arrangements for the MPTS once it is established in statute. The relevant provisions are at articles 3–5 and 21 of the draft Order.
12. The MPTS, while remaining part of the GMC's governance structure, has its own governance processes distinct from the GMC's investigation arm, providing an adjudication function that is clearly separate from the investigation work of the GMC. The MPTS currently has responsibility for:
  - a. the quality of fitness to practice panel and interim orders panel decision-making in fitness to practise cases
  - b. the day-to-day operational management of adjudicating fitness to practise cases and associated functions
  - c. the appointment and removal of tribunal members and case managers
  - d. the appointment of and the provision of training and assessment for panelists, legal assessors and specialist advisers.
13. The Order will establish the MPTS as a statutory committee of the GMC, ensuring that fundamental changes to the MPTS or its functions would require Parliamentary oversight. This means that it will be statutorily responsible for the above activities rather than the Council itself. Members of the GMC council will not be entitled to be members of the MPTS. This will ensure that there is greater confidence that decisions supporting the adjudication stage of the fitness to practise procedures are being made appropriately and fairly.
14. The order will rename fitness to practise panels and interim orders panels as medical practitioner tribunals and interim orders tribunals.

**Q 1: Do you agree with the proposal that the MPTS should be set up as a statutory committee of the GMC to govern the adjudication of fitness to practise processes for doctors?**

15. The separation of the MPTS from the GMC's investigation arm will be protected in statute, but the GMC will have the necessary flexibility to make rules determining certain aspects of how the MPTS is structured and run (for example, the terms of office of MPTS committee members and quorum for committee meetings), subject again to the limits of the powers set out in the statute.

16. The GMC will also be able to make rules enabling some of the functions of the MPTS committee to be delegated to the MPTS Chair or an officer. This will ensure that the MPTS can make timely decisions about the day-to-day running of hearings. A further provision will also specify that a person acting as an officer of the MPTS may not make decisions outside of the MPTS' responsibility ensuring that the separation of functions between investigation and adjudication is preserved.
17. The GMC will be required to publicly consult on its rules so that there will be transparency around how the MPTS is expected to operate. The GMC will also be required to obtain Privy Council approval and for an order containing such approval to be laid before Parliament and to be subject to the negative resolution procedure.
18. The GMC will not be able to intervene in the areas falling within the MPTS's responsibility under the draft Order or in decision making on individual cases. If the GMC disagrees with a decision made by a fitness to practise panel, then the Government believes that the appropriate and transparent route to challenge that decision is through an appeal route. The Order makes provision for a right of appeal for the GMC against decisions made by a fitness to practise panel and this is discussed in more detail later in the consultation document.

**Q 2: Do you agree that the GMC should not have the power to intervene in the areas falling within MPTS responsibility?**

19. Currently GMC council members and panelists are required to declare their interests and the GMC is required to publish these interests as a public record. The order makes similar provision to ensure the MPTS maintain a system for the declaration and registration of private interests of their members. It will be required to keep a record of their members' and panelists' private interests, and ensure that this record is published. This will identify any areas where personal interests may conflict with MPTS members' public duty, and make sure the public can have confidence that the decisions made by members are not inappropriately influenced.

**Q 3: Do you agree that the MPTS should keep a record of its members' private interests, and publish this record in the public domain?**

20. The GMC publishes an Annual Report in order to provide a public record, and demonstrate accountability. This order proposes the MPTS also carries out this function. The MPTS will be required to publish an Annual Report and Accounts. The report will detail the nature and volume of cases it has dealt with that year, how it has undertaken its functions, and proposals for addressing learning points. The report will also demonstrate how the MPTS will adhere to equality and diversity legislation. Copies of the report will be provided to the Privy Council and laid before Parliament.

**Q 4: Do you agree that the MPTS should be required to publish an annual report and accounts, to provide a public record and demonstrate accountability?**

## Modernising the adjudication procedures

21. This section deals with modernising the adjudication stage of the fitness to practise procedures to increase efficiency and to bring them more into line with best practise in other jurisdictions. Articles 6, 7, 8, 9, 14, 15 and 24 of the draft order will put the proposals in this section into effect.
22. We propose introducing an over-riding objective of rules relating to fitness to practise procedures to secure that cases are dealt with fairly and justly. This objective is broadly parallel to that used in HM Courts and Tribunals Service and will help ensure the confidence of all those interested in the outcome of such proceedings.

**Q 5: Do you agree with the proposal that the over-riding objective of rules relating to fitness to practise procedures should be to secure that cases are dealt with fairly and justly?**

23. To support the efficient running of a hearing, there are number of procedural actions that need to have taken place before a hearing commences. This is known as pre-hearing case management. The person responsible for pre-hearing case management is called a case manager, appointed by the MPTS (statutory responsibility for doing would be given to them following the draft section 60 order) and is a legally qualified person.
24. These important pre-hearing case management tasks include: considering what evidence will be presented and how, the timetable for disclosing documents and confirmation of the doctor and witnesses attending, as well as setting time limits for the required procedural actions. Effective case management greatly enhances the efficiency with which cases can be dealt with and reduces the number of preliminary legal arguments made at hearings, consequently reducing the length of time (and consequent cost) hearings take, meaning quicker outcomes and less disruption and stress for both the doctor and witnesses.
25. Case managers issue case management directions which the parties (the GMC and the respondent doctor) are required to comply with. However there are currently only limited enforcement powers. We wish to strengthen pre-hearing case management to encourage compliance with case management directions.
26. One way to encourage compliance is to enable the chair of the medical practitioner tribunal considering the case to also act as the case manager. This would enable the chair of the medical practitioner tribunal at the hearing to make more informed decisions on procedural points. We would still require the case manager to be legally qualified in this circumstance.

**Q 6: Do you agree that to enhance the pre-hearing case management arrangements, we should enable the MPTS to appoint case managers, including using the chair of a medical practitioner tribunal (where legally qualified) as case manager?**

27. The Order proposes that the MPTS may appoint legal assessors to advise a Medical Practitioner Tribunal or an Interim Order Tribunal on legal issues that may arise where it considers it appropriate to do so. This could be done generally or in particular cases or types of cases. The MPTS must determine the criteria for appointment of legal assessors

28. The MPTS will be best placed to assess what kind of legal support a medical practitioner tribunal will need, and therefore what criteria legal assessors should meet. We feel that it is important that medical practitioner tribunals have appropriate support to make decisions based on strong legal knowledge where needed. As a result, the decision whether to have a legal assessor or not will be an operational decision depending on the qualifications of the available chair of the medical practitioner tribunal.

**Q 7: Do you agree that the MPTS should have power to appoint legal assessors where it considers it appropriate to do so?**

29. To further support effective case management, the Order will include provision for the award of costs, against either party, by the MPTS in a case where a party has failed to comply with rules or directions or where a party's, or a party's representative's, conduct during the proceedings has been unreasonable. This will broadly follow the practice of allowing for costs awards in other jurisdictions such as the Solicitors Regulation Authority and the General Pharmaceutical Council, although it will be expressly constrained by only being available in those limited circumstances.

30. We also propose that there will be powers, following a party's failure to comply with rules or directions, to draw adverse inferences and refuse to admit evidence.

**Q 8: Do you agree with the proposal that the MPTS should have power to award costs, draw adverse inferences and refuse to admit evidence following a party's failure to comply with rules or directions or otherwise award costs for unreasonable behaviour?**

31. Where during an investigation, the GMC consider that an interim restriction may need to be put in place on a doctor's practice to protect patients, protect the doctor or is otherwise in the public interest then, a case may be referred to an interim orders panel. An interim orders panel can restrict or suspend a doctor's practice while an investigation is being carried out or a case is being prepared for a hearing. Interim orders must be reviewed every six months to make sure that the restriction on practice remains appropriate. Each review case must be heard by an interim orders panel (which the order would rename interim orders tribunal).



32. Sanctions imposed by fitness to practise panels are similarly subject to review.

33. Proposals would allow reviews to be agreed with the doctor without a hearing if the doctor agrees with the sanction. Agreement would need to be provided in writing by both the GMC and the doctor to the chair of the interim orders or medical practitioners tribunal (as interim order and fitness to practise panels will be called in the future) who would then consider the matter on the papers. If the chair decided that a hearing is necessary the chair would be able to order one. Similarly, where there is a dispute between the doctor and the GMC about the sanction, a hearing would still take place.

**Q 9: Do you agree with the proposal to enable reviews to be held by the tribunal chair without the need for a panel hearing when the GMC and doctor are in agreement, subject to the ability of the chair to nevertheless convene a full hearing?**

34. Currently, the GMC has to provide notification of key decisions by letter. In order to improve the efficiency of notifications the Order allows such notifications to be provided by email, where an individual has provided an email address for that purpose.

**Q 10: In order to improve efficiency do you agree that the GMC should be able to provide notification of decisions by email rather than letter, when an email address has been provided for this reason?**

## Enhancing confidence and accountability

36. This section strengthens the ability of the fitness to practise procedures to hold doctors to account. Articles 2, 4, 6, 7, 11–13, 16–20 and 23 of the draft Order would make the necessary changes to the Medical Act 1983.
37. Currently medical professionals who are subject to regulatory action can avoid serious sanctions in certain cases by demonstrating that they have learnt from their mistakes and are no longer a threat to public safety. While that may be appropriate in some instances, sometimes, in the most serious cases more serious sanctions may be justified in order to maintain public confidence in the profession and uphold standards. The proposal in the section 60 order is to make clear that the GMC's over-arching objective is the protection of the public, which involves the objectives of protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the profession and promoting and maintaining proper professional standards and conduct for members of that profession. This objective would broadly reflect existing principles in case law which underpin regulatory action in fitness to practise proceedings. We also propose that medical practitioner tribunals and interim orders tribunals must specifically have regard to these when exercising their fitness to practise adjudication functions.
38. For consistency we also propose to provide the same duty to have regard to this objective for registration appeals panels (RAP) as for medical practitioner tribunals.

**Q 11: Do you agree that the over-arching objective of the protection of the public, which involves the objectives of protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the profession and promoting and maintaining proper standards and conduct for members of that profession, should be the over-arching objective of the GMC and that medical practitioner tribunals and interim orders tribunals should have regard to it when making their decisions?**

**Q 12: Do you agree that we should require registration appeals panels to have a duty to have regard to the over-arching objective in the same way that a medical practitioners tribunal should have to?**

39. There will be occasions where the decision of a medical practitioner tribunal differs from that sought by the GMC in its role in presenting the case. Currently a respondent doctor has a right of appeal against panel determinations although the GMC has no such right. Once greater separation is introduced we believe that it would be appropriate for the GMC to also have a right of appeal. This will reflect the separation of investigation and adjudication and provide a transparent mechanism for decisions to be challenged in those instances where the GMC, as a party to the proceedings, disagrees with a decision made by a medical practitioner tribunal.
40. The PSA already has a power to refer determinations made by a Panel to a court under section 29 of the National Health Service Reform and Health Care Professions Act 2002.

We wish to broadly replicate this power for the GMC within the Medical Act 1983 to ensure that the GMC is empowered to appeal determinations in appropriate circumstances.

41. The GMC's appeal right would not supersede the PSA's power of referral. Rather we intend these powers to be complimentary with the PSA having an oversight role and able to make its own referral to the court if it felt that the GMC should have appealed a decision but had not done so. Additionally the PSA would have the ability to intervene as an interested party in any such appeal instigated by the GMC, for example if they wanted to challenge a decision on a different point from those put forward by the GMC. We would enable a similar power for the GMC to intervene or join as an interested party in the event that the PSA had made a reference to the court in the first instance. This will ensure that we do not create a situation where a respondent doctor faces the prospect of two separate appeals concerning the same decision.

**Q 13: Do you agree with the proposal that the GMC should have a right of appeal, corresponding to the PSA's power to refer cases, to the higher courts in order to challenge MPTS decisions?**

42. Under section 29 of the National Health Service Reform and Health Care Professions Act 2002, the PSA is able to refer fitness to practise decisions at the adjudication stage to the relevant court if a determination is considered to be unduly lenient and it would be desirable for the protection of members of the public for the PSA to make a referral.
43. However, work undertaken by the Law Commissions of England and Wales, Scotland and Northern Ireland have recently recommended a change to the law enabling the PSA to be able to reference a case to the relevant court on different grounds to 'undue lenience'. They recommended that the grounds of appeal should be simplified so that a reference could be made if the PSA considered that a determination was not sufficient to protect the public.
44. The Government agrees with the proposal to simplify the grounds of the right to refer a case to the relevant court for the PSA but that those grounds should also expressly include the circumstances reflected by the proposed over-arching objective of the GMC discussed above. This would mean that the PSA could refer a case if they considered that a determination is not sufficient for public protection through not sufficiently protecting the health, safety and well-being of the public, maintaining public confidence in the profession concerned, or maintaining proper professional standards and conduct for members of that profession.
45. This will go some way to establishing an explicit link for PSA referrals with the objectives of fitness to practise recognised in case law (and which are to be expressly stated for the GMC as mentioned above) for all the relevant professions. This will mean that healthcare professionals can better be held to account.

46. This amendment will affect the ground as it applies to all of the health care professions and social workers in England. This would include professions where responsibility is a devolved matter and we are also consulting on this particular issue on behalf of the Scottish Government.

47. The proposed grounds of appeal for the GMC would mirror these revised grounds.

**Q14: Do you agree that we should amend the grounds of the PSA's power to refer fitness to practise cases for consideration by the relevant court for all regulated healthcare professions and social workers in England in the manner described and also reflect those grounds in the GMC's new right of appeal?**

48. In order to fully investigate allegations, the GMC may need to seek information or documents from the doctor concerned. The order allows the GMC Registrar to make such a request in writing, with a timeframe for receipt of the requested items.

49. Where a doctor fails to respond to the requests for information, investigations become protracted, creating delays in appropriate regulatory action, and additional stress for both the doctor concerned and the person who made the complaint.

50. *Good medical practice* requires doctors to engage with GMC fitness to practise investigations as part of the standards they are expected to meet. We propose to supplement this with legislative provision so that if the doctor fails to provide the information required (subject to safeguards so that the doctor cannot be required to produce information that could not be required in civil proceedings in the courts or which would be in breach of other legislation) the Registrar may refer the matter to the MPTS to arrange for a medical practitioner tribunal to consider whether it would be appropriate to suspend that doctor for up to a maximum of 12 months or make the doctor's registration subject to conditions for up to a maximum of 3 years. If necessary, these could be extended on review.

51. This will enable the GMC to take swifter action, to ensure the protection of patients, where a fitness to practise concern has been raised about a doctor but they are unable to ascertain whether that doctor is safe because the doctor has failed to respond to requests for information.

**Q 15: Do you agree that the GMC should be able to request, in writing, information or documents to assist with the investigation of allegations, and where such a request has been made the registrant fails to comply, the GMC should be able to refer the case to a medical practitioner tribunal?**

52. Similarly when a doctor fails to comply with the requirement to comply with the reasonable requirements of an Assessment Team in a performance assessment as part of the investigation, the GMC already has powers to refer that doctor to a fitness to practise panel to consider the case.

53. We propose to amend these powers so that such a referral to a medical practitioners tribunal can be made in any case of non-engagement or non-compliance with a performance assessment for the consideration of a suspension order of up to 12 months or conditional registration for up to 3 years. If necessary, these could be extended on review.

54. We would also apply this to health and language assessments. We believe that this is necessary to close a regulatory gap where there may be a serious concern about a doctor's fitness to practise but because the doctor is not engaging at all with the GMC or is not complying with the reasonable requests of the assessment, the GMC is unable to gather the necessary information to enable it to reach a decision.

**Q 16: Do you agree that where a doctor fails to engage or comply with a direction to undergo a performance, health or language assessment, the GMC should be able to refer the case to a medical practitioner tribunal to consider a suspension order or conditional registration?**

55. We propose to provide a new power for medical practitioners tribunals to require that their directions must be reviewed before they are due to expire, to ensure active consideration of whether it is appropriate for the sanction to be lifted before that occurs.

**Q 17: Do you agree with the proposal to enable medical practitioners tribunals to require review of their directions before expiry?**

## Rationalising the Medical Act 1983 and Fitness to Practise Rules 2004

56. The Medical Act has been amended a series of times since it was enacted in 1983. This means that a number of sections in the Act are not clear having either been altered or drafted in a different style, particularly as regards fitness to practise. There has also been a move in more recent years towards drafting legislation which is more specific in its intention. We want to use this opportunity to amend the fitness to practise parts of the Medical Act 1983 to address some areas where the wording can be modernised and to express some powers in a way that is more clearly understood and transparent.
57. The areas we want to rationalise, simplify and clarify through this section 60 order are:
- the powers of the GMC to close a case at the initial stages of an investigation and powers to review an investigation stage decision
  - when undertakings can be agreed and by whom
  - to confirm that the GMC can continue to investigate following a referral of a fitness to practise case to the MPTS and the circumstances in which that referral can be cancelled
  - preventing an order imposed at a review hearing from lapsing during an appeal
  - providing greater flexibility in how performance assessments are conducted
  - the evidence that the GMC can seek as a prelude to restoration
58. Articles 9–13, 22 and 25 of the draft Order make the necessary amendments.
59. At the investigation stage, the GMC has a general power to make procedural rules governing the steps that the GMC must take to investigate an allegation that a doctor's fitness to practise is impaired. This includes a power to review investigation stage decisions and not to proceed with investigating allegations where the GMC either believes it to be vexatious or the incident took place more than five years previously and the evidence is likely to be stale.
60. We are proposing to use this order to provide for these powers expressly on the face of the Medical Act itself. As regards the power to close cases where the incident giving rise to the allegation took place more than 5 years ago, the rules currently require the GMC to consider whether opening an investigation, despite the age of the case, may be in the public interest given the exceptional circumstances of the case. There has been a developing body of case law which demonstrates that the additional test of having to prove that a case has an 'exceptional circumstance' has prevented the GMC from taking forward investigations even when they considered it in the public interest to do so. As a result we also propose to use this order to remove the 'exceptional circumstances' test to enable the GMC, if it is in the public interest, to investigate cases even if the matters giving rise to the allegation are more than five years old.

**Q 18: Do you agree that we should confirm expressly on the face of the Medical Act the powers to close cases at the initial consideration stage, the power to review investigation stage decisions and the public interest test which applies where the matters giving rise to the allegation are more than five years old, but that we should remove the 'exceptional circumstances' element from that test?**

61. Under the new procedures, the GMC will refer a fitness to practise case if appropriate at the end of an investigation to the MPTS for it to arrange a public hearing before a medical practitioners tribunal rather than directly to the medical practitioner tribunal itself (which is currently the case as regards a referral directly to a fitness to practise panel). This greater separation between the investigation and adjudication stages means that an additional step is required in the procedures.
62. This additional step might have implications as to when the GMC can continue to investigate if they receive information which suggests there are further matters that need to be investigated and at what point they can cancel a referral if they receive new information that indicates a hearing is no longer required.
63. As a result we are proposing to add two specific rule making powers in regard to the GMC's ability to continue investigating following a referral for a public hearing (but before the hearing itself takes place) and in relation to how a referral is cancelled to reflect that the referral is to the MPTS rather than directly to a fitness to practise panel hearing as is currently the case.

**Q 19: Do you agree that we should specifically reflect the new arrangements of the GMC referring a case to the MPTS (rather than directly to a medical practitioner tribunal) by making express provision for their powers to continue investigating and the procedure for cancelling a referral?**

64. Once the GMC has completed its investigation into a doctor's fitness to practise, if they believe it appropriate and as an alternative to referring a case to a fitness to practise panel hearing, they may agree undertakings with that doctor. Undertakings, which are in effect the same as conditions imposed by a fitness to practise panel, enable the GMC to agree restrictions on a doctor's practice to enable that doctor to remediate or rehabilitate and eventually, return safely to unrestricted practice without the stress of a public hearing.
65. We consider there is a need for more clarity around when the GMC and fitness to practise panels can agree undertakings. We propose to make it clear that undertakings can be agreed by the GMC and the doctor up to the point that a finding of impairment has been made by a medical practitioner tribunal. After the finding of impairment, such undertakings can only be agreed by the medical practitioners tribunal. Undertakings at this stage are effectively in lieu of conditions and we believe that it is appropriate to reserve this decision to the medical practitioners tribunal once they have determined that the doctor's fitness to practise is impaired and a restriction is required on their practice to ensure that there is transparency of decision-making and confidence in the decision. We propose that such decisions should be subject to appeal and the right of the PSA to refer them to the higher courts.

**Q 20: Do you agree that we should clarify that undertakings can be agreed between the doctor and the GMC at any point following a referral for a public hearing until a determination on impairment has been made and subsequently undertakings should only be agreed by the medical practitioner tribunal itself and subject to appeal/referral to the higher courts?**

66. Where a fitness to practise panel (and in future a medical practitioner tribunal) have agreed undertakings, imposed conditions or suspension, they may also decide that it is necessary to review that order after a certain period of time. They may take a number of actions on reviewing an order including changing or extending that order. This is known as a 'review order' and the doctor has a right to appeal such an order.
67. Because of the way that the Medical Act is drafted, if a review order is appealed, then the order that is in place at the time that the new review order was made may in certain limited circumstances (i.e. where an appeal remits a case to the tribunal) lapse before the appeal is finally determined and the new review order can take effect.
68. We believe that this issue creates an unintended regulatory gap and the draft order includes a provision to address this issue.

**Q 21: Do you agree that we should close the regulatory gap where, in certain circumstances, an order might lapse during an appeal against a subsequent review order?**

69. Currently the Medical Act is very prescriptive as regards how performance assessments are conducted. Particularly, the Act requires that a performance assessment team undertake a performance assessment. This requires the GMC to make procedural rules about the membership of a performance assessment team meaning that they have limited flexibility to tailor a performance assessment to the circumstances of an individual case.
70. The draft order would enable greater flexibility for the Registrar to direct the form and content of a performance assessment and whether it should be carried out by an individual assessor or an assessment team. This will enable the GMC to design performance assessments which are more proportionate and specifically targeted to the circumstances of the case.

**Q 22: Do you agree that the Registrar should be able to direct the form and content of professional performance assessments and whether it should be carried out by an individual assessor or an assessment team?**

71. Currently a doctor who has been erased from the medical register for fitness to practise reasons can make an application to be restored to the register after five years. The application has to be considered by a fitness to practise panel (and in future a medical practitioners tribunal). The burden of evidence, unlike in other fitness to practise proceedings, is on the doctor seeking restoration to demonstrate they are fit to practise (rather than on the GMC to demonstrate that their fitness to practise is impaired).
72. Although the burden is on the doctor rather than the GMC, the GMC should also have powers, in the interests of public protection, maintaining confidence and upholding standards, to undertake investigation in these circumstances. We consider this should include for example power to require the doctor to undergo a health, performance or language assessment. We wish to expressly specify the power to do so on the face of the Medical Act alongside the other changes that we propose in relation to such assessments.



**Q 23: Do you agree that the GMC should have the described power in order to investigate the fitness to practise of a doctor who has been erased from the medical register but subsequently makes an application for restoration?**

**Q 24: Do you have any other comments on the proposals contained in the draft Order?**

## Costs and benefits

73. During the development of our proposals we have looked at the costs and benefits and the possible impact they might have. We believe that the changes will have an overall relatively small monetary impact and no direct impacts on business.
74. Most of the costs and benefits will fall on the GMC as a professional regulator and the PSA, as an Arms Length Body, and are not considered as a business in the better regulation processes. Owing to the proposals to amend the right of appeal, it is expected there will be a small increase initially in the total number of referrals by the PSA and appeals by the GMC, but this is expected to settle as new case law begins to set new precedents as to acceptable decisions. In the case of the GMC this would be offset by net cost benefits from the other measures.
75. We intend to gather further evidence on any potential issues and impact of this policy as part of this consultation. Following this consultation, the impact assessment will be reviewed to take account of the consultation responses.

**Q25: Will the proposed changes affect the costs or administrative burden on your organisation or those you represent, by way of:**

- An increase;
  - A decrease; or
  - Stay the same
- 
- Please explain your answer.

## Equality

The general duty in section 149(1) provides that a public authority must, in the exercise of its functions, have due regard to the need to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The expression 'protected characteristic' in this context means:

- age
- disability
- gender reassignment
- pregnancy and maternity
- race
- religion or belief
- sex and
- sexual orientation.

**Q 26: Do you think that any of the proposals would help achieve any of the following aims:**

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

# Responding to this consultation

## Consultation process

This document launches a consultation on a number of proposals that aim to strengthen and modernise the GMC's adjudication systems. This consultation document seeks comments and views on the draft Order "The General Medical Council (Fitness to Practise etc.) and the Professional Standards Authority for Health and Social Care (Referrals to Court) Order 2014".

The consultation is being run, as far as is practical, in accordance with the Cabinet Office Code of Practice on Consultations (reproduced below). The closing date for the consultation is 25th September 2014.

There is a questionnaire on the GOV.UK website which can be printed and sent by post to: **Adjudication Consultation, Professional Standards, 517, Department of Health, Richmond House, 79 Whitehall, London, SW1A 2NS.**

Completed questionnaires can also be sent electronically by e-mail to: [HRDListening@dh.gsi.gov.uk](mailto:HRDListening@dh.gsi.gov.uk)

It will help us to analyse the responses if respondents fill in the online consultation response document but responses that do not follow the structure of the questionnaire will be considered equally. It would also help if responses were sent in Word format, rather than in pdf format.

## Criteria for consultation

This consultation follows the Government Code of Practice, in particular we aim to:  
Formally consult at a stage where there is scope to influence the policy outcome;  
Consult for a sufficient period.

Be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;

Ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;

Keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;

Analyse responses carefully and give clear feedback to participants following the consultation;

Ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at:  
[www.bis.gov.uk/policies/better-regulation/consultation-guidance](http://www.bis.gov.uk/policies/better-regulation/consultation-guidance)

# Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter ([www.dh.gov.uk/en/FreedomOfInformation/DH\\_088010](http://www.dh.gov.uk/en/FreedomOfInformation/DH_088010)).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

## Summary of consultation responses

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the GOV.UK website ([www.gov.uk/dh](http://www.gov.uk/dh)).