RESPONSE TO

Consultation on

PROPOSED CHANGES TO THE GMC FITNESS TO PRACTISE RULES

May 2009

Introduction

Action against Medical Accidents (AvMA) welcomes the opportunity to respond to this consultation. AvMA is the UK charity which works for patient safety and justice. Established over 25 years, AvMA provides advice and support to approximately 4,000 people a year who have been affected by things going wrong in healthcare. Many of these cases involve possible referral of health professionals to regulators such as the GMC, and AvMA has acquired considerable knowledge and experience of the fitness to practise procedures, and patients' experience of them. The operation of health professional regulation is a key priority for the charity as it is so central to our charitable mission. We have contributed extensively to discussions over reforms to the system and regularly input into GMC discussions and consultations.

Overview of AvMA's position regarding the Fitness to Practise Rules

Whilst we have taken this opportunity to comment on the GMC's specific proposed changes to the rules as part of this consultation we believe that the opportunity should be taken to review the rules as a whole to assess their appropriateness for the regulation of doctors in the 21st century. It is difficult to achieve this through a piecemeal approach of tinkering with the rules here and there. Even before this consultation had expired a further consultation was announced about other proposed changes. In our view the rules as a whole should be reviewed and appropriate changes made so as to:

- refocus the rules with the primary objective of protecting patients and upholding standards and eliminating elements within the rules which mitigate against this primary objective
- create consistency between the fitness to practise rules of the GMC and those of the other health professional regulators
- take account of the forthcoming introduction of the Office of Health Professional Adjudication

Comments on specific proposed Changes to Rules

We have limited our response to those proposals on which we have comments or suggestions to make.

Rule 4: Vexatious complaints

We strongly disagree with the proposal to create a power to deal with so-called 'vexatious' complaints differently. We believe that this would introduce an inappropriate and dangerous element of subjectivity to the decision making process. It is not that we do not believe that there are some complaints which are vexatious. We do not believe that such a power is necessary anyway, as the screening conducted of each and every complaint would in any case ascertain whether or not this complaint should be further investigated (i.e. if it concerns a potential fitness to practise issue). It is not appropriate for GMC staff to second guess what a complainant's motivation

for complaining is, and even if the motivation was vexatious it still justifies examination as to whether there is a potential fitness to practise issue. There is a danger that complaints made by vulnerable people (for example those with mental health problems) might be misinterpreted as being 'vexatious'. In our experience, there are from time to time extremely serious issues which have the potential to be seen in these terms until they are properly looked into.

Rule 4(4) and 4(5): Five year Rule

We do not believe that rule 4(4) needs to be changed. In our experience, the GMC already exercises its existing power to investigate whether or not a complaint should be investigated which comes under rule 4(5). We would however welcome any change which made it clearer that such an investigation can in no way substitute for an investigation into the substantive allegation of unfitness to practise.

We believe that more fundamental changes are needed to rule 4(5) (the 'five year rule'). Ideally we believe that the GMC should be consistent with the Nursing & Midwifery Council which does not have a time limit. The introduction of a time limit skews the primary focus of the GMC away from protecting the public and the public interest. It is also unclear and quite confusing to the public and other health professionals as to why there should be a time limit on bringing cases against a doctor and not a nurse or other health professional.

If the five year limit remains in some form, we believe that this rule needs to be changed to deal with problems identified with it in AvMA's current judicial review of a GMC decision not to investigate allegations. It must be right, given the GMC's role, that the GMC should investigate where the ongoing fitness to practise of a doctor is called into doubt not only by the original 'events giving rise to' the allegation of unfitness to practise, but by behaviour since, even if it is linked to the original 'events'. However, the GMC's legal advisers have interpreted the current wording of the rule to the effect that if allegations of (in this case) dishonesty involving acts of forgery of medical records involve the original act being conducted over five years before coming to GMC's attention, even if subsequent acts connected to it such as alleged perjury by relying on the allegedly forged documents at an inquest are alleged, it is only the date of the original act which counts for the purposes of the rules. To most people this seems ridiculous. The rules should be designed so as to facilitate the investigation of a doctor's <u>current</u> fitness to practise. In other words, rather than focussing on the date of the last acts 'giving rise to the allegations' the GMC should consider whether there is a case to answer regarding current fitness to practise - whether the allegations, if proven, would call into question fitness to practise.

The current GMC interpretation of the rules is that it matters not whether a doctor is still displaying the same unfitness to practise now if it relates to his/her original act, which was more than five years before coming to the GMC's attention. In the case of alleged dishonesty, this effectively means that

if a doctor is successful in delaying his/her dishonesty coming to the GMC's attention for more than five years, they are unlikely to be investigated. This amounts to a 'liar's charter'. We are challenging the interpretation of the rule anyway, but future confusion can be avoided by a re-wording of the rule.

The rules should stipulate that when decisions are to be made under this rule that the complainant / maker of the allegation and the doctor are invited to make representations, and that they are entitled to receive a detailed written explanation of the rationale for the decision.

There should be clear criteria and guidance provided about the application of the five year rule and circumstances in which exceptions should be made. The current 'Aide Memoire' should be reviewed.

We also question whether the Registrar should be involved in decisions about investigations as this could compromise his / her role subsequently. Other regulators do not allow the Registrar a role at these stages for this reason. Further consideration of such jurisdiction issues is needed.

Rule 10: Undertakings

We believe that the power of the Registrar to amend or lift undertakings agreed by a Fitness to Practise panel (FtP) should be limited to circumstances in which the conditions have been fully met. We do not think that the Registrar should be able to overturn undertakings agreed by a FtP panel. Also, any variation in undertakings which were agreed either at the investigation or adjudication stage should be transparently discussed, including with the complainant / maker of an allegation.

Rule 12: Review of decisions

We welcome the proposal to extend the circumstances in which a decision can be reviewed. We have been at the fore of pointing out the existing inconsistency, based on our experience of advising and supporting complainants. Rather than the Registrar simply having a power to review decisions, it should be a right for complainants/makers of allegations to have a review of a decision by the Registrar and to receive a written explanation of the Registrar's decision following the review. It is a serious weakness in the current procedures that the GMC has no power to review a decision not to investigate, however flawed that decision is later seen to be. In the case which is currently subject to a judicial review, it was confirmed to AvMA that the only way that a decision could be reviewed was via a judicial review. Where it is a doctor who requests a review of a decision, the circumstances in which the Registrar can conduct a review should be restricted to allegations of abuse of process. The investigation process itself provides ample opportunity to defend allegations, whereas if allegations are not even investigated there is a danger that doctors who are a danger to patients and professional standards will slip through the net.

Whilst this is a sensible change, it is no substitute for a right to an independent appeal for complainants / makers of allegations over decisions not to investigate. We would appreciate the support of the GMC in calling for there to be an independent appeal mechanism for decisions not to investigate or refer to a panel / adjudication. We believe this is necessary for the public to have confidence in the system. In our experience, the greatest problems arise over such decisions rather than findings of panels, which the CHRE can challenge. We recommend giving the CHRE the role of considering appeals about decisions not to investigate.

Rule 17: Fitness to Practise Panels

We recommend that the rules are changed to end the current practice, which is not actually provided for in the Act or rules, of Fitness to Practise panels adjudicating over claims of abuse of process. We consider it to be inappropriate for FtP panels to make such decisions. It is not in their terms of reference and they are not trained or experienced to make such decisions. The current practice also means that doctors' lawyers have an opportunity to convince a panel to drop a case about a doctor over whom there are serious concerns because of a technicality / earlier abuse of process. This has happened in a recent case in which AvMA have been supporting a complainant. Despite having failed to appeal (by request to the registrar or by judicial review) over the decision to refer to a FtP panel, the doctors' lawyer persuaded the panel to cease proceedings due to a procedural technicality. This leaves the public potentially at risk, purely because of an alleged breach of process by the GMC itself. The rules should reflect that patient safety take precedent over procedural matters.

May 2009