

Non-compliance hearings guidance for medical practitioners tribunals

Introduction

- 1** The aim of this guidance is to promote consistency and transparency in decision making relating to non-compliance hearings.
- 2** This guidance is for use by Tribunals in cases that have been referred to the MPTS for a non-compliance hearing when considering what sanction to impose following a finding that the doctor has failed to comply with a reasonable requirement to provide information or a direction to undergo an assessment without good reason (referred to in this guidance as a “direction”). It outlines the decision-making process and factors to be considered.
- 3** The *Sanctions guidance*¹ sets out principles relevant to the imposition of sanctions in relation to findings of impairment by a Medical Practitioners Tribunal. Non-compliance sanctions differ from those outlined in the *Sanctions guidance*, in that a non-compliance tribunal will not make a finding of impairment. Wherever principles from the *Sanctions guidance* are relevant to non-compliance, they will be referenced appropriately.

The function of non-compliance hearings

- 4** Under the GMC (Fitness to Practise) Rules, 2004 (as amended) (the FTP Rules), at Rule 17ZA, the GMC may present evidence to a Medical Practitioners Tribunal (MPT) in relation to the question of whether-
 - the practitioner has failed to submit to, or comply with, an assessment under Schedule 1 (performance assessments) or 2 (health assessments);

¹ *Sanction guidance* <http://www.mpts-uk.org/decisions/1655.asp>

- having submitted to an assessment under Schedule 1, the practitioner has failed to comply with requirements imposed in respect of that assessment;
 - the practitioner has failed to undertake an assessment of knowledge of English in accordance with Schedule 3 or has undertaken such an assessment but has failed to provide the information requested in accordance with that Schedule;
 - the practitioner has failed to provide information required from him/her under section 35A(1)(a) of the Medical Act 1983 (as amended).
- 5** As part of an investigation, the GMC may direct that a doctor undergo an assessment of their health, performance, or knowledge of English Language. Furthermore, the GMC may require information from a doctor.
 - 6** Where a doctor is found to be consistently or explicitly refusing to comply with a direction to undergo an assessment or to provide information that is key to the progress of an investigation, they may be referred to a non-compliance hearing, where a tribunal can impose conditions of up to three years on a doctor's registration, suspend a doctor for a period of up to 12 months, or take no action.
 - 7** The restrictions imposed may be subject to review by a tribunal which will consider whether or not the doctor has complied in order to determine whether the restrictions should remain in place or be varied.
 - 8** If, on review, a doctor continues to refuse to comply with the direction to provide information or undergo an assessment or fails to engage with an assessment, after being suspended for two years, the tribunal will be able to suspend the doctor indefinitely. A doctor cannot be erased for non-compliance.
 - 9** A non-compliance hearing differs from an end stage MPT hearing in that there is no finding of impairment. A non-compliance hearing differs from an IOT in that a non-compliance tribunal will make findings of fact in relation to compliance.

General principles regarding non-compliance

Hearing process

- 10** In accordance with Rule 17ZA(2) of the FTP Rules, a hearing will include the following main elements:
 - presentation of the GMC case, i.e. evidence of failure to provide information required or failure to submit to an assessment or comply with requirements of an assessment

- presentation of the doctor's case
- the MPT's findings on the issue of non-compliance
- further submissions from both parties (including submissions on the suitable length of the order)
- the MPT's decision on whether to make an order for conditions or suspension following a finding of non-compliance
- consideration of an immediate order
- consideration, as appropriate, of whether any interim order already in place needs to be revoked; or (where non-compliance has not been found) whether, based on assessment of risk, any order needs to be made or varied to protect the public and/or uphold confidence in the profession while the GMC continues its investigation.

The purpose of sanctions

- 11** The main reason for imposing sanctions is to protect the public. This is the statutory overarching objective, which includes:
- a** protecting the health, safety and wellbeing of the public
 - b** maintaining public confidence in the profession
 - c** promoting and maintaining proper professional standards and conduct for the members of the profession²
- 12** Each subsequent reference to protecting the public in this document should be read as including the three limbs of the overarching objective set out in paragraph 11.
- 13** As explained at paragraph 15 of the *Sanctions guidance*, sanctions are not imposed to punish or discipline doctors, but they may have a punitive effect.

Equality and Diversity

- 14** The GMC has a statutory obligation to make sure that procedures set out in their rules for dealing with concerns about doctors before a Medical Practitioners Tribunals are

² The overarching objective set out in section 1(1A) of the Medical Act 1983 (inserted by the General Medical Council (Fitness to Practise and Overarching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015).

fair and just. Anyone who is acting for the GMC or the MPTS is expected to be aware of, and adhere to, the principles of equality and human rights legislation that are relevant to their role. Decision making should be consistent and impartial, and comply with the public sector equality duty.

Considerations for the tribunal

- 15** The considerations for a tribunal assessing non-compliance can be broken into three broad categories, all of which should be satisfied in order to make a finding of non-compliance and before the tribunal can proceed to consider imposing a sanction.
- Was the GMC's direction to provide information or to undergo an assessment reasonable given the circumstances of the case and the evidence available to decision maker(s)?
 - Is there sufficient evidence to show that the doctor has failed to comply with the direction?
 - Is there evidence to suggest that there was good reason for the doctor's failure to comply (i.e. was it unavoidable or otherwise excusable)?
- 16** In relation to each of the above considerations, the representative for the GMC must direct the attention of the Medical Practitioners Tribunal to any relevant evidence and may call witnesses. The practitioner in question may, in response, adduce evidence and call witnesses in relation to any question addressed by the representative of the GMC.

Reasonable directions

- 17** The tribunal must consider whether or not a direction to undergo an assessment or to provide information is reasonable given the particular circumstances of the case.
- 18** In most cases, a reasonable direction:
- will relate either to a direction to provide information or to undergo an assessment (as outlined at paragraph 4)
 - must have been made in line with the GMC's powers as laid out in the Medical Act 1983 (as amended) and the GMC (Fitness to Practise) Rules 2004.
 - is one proportionate to the allegations under investigation (e.g. concerns were sufficiently serious that that the GMC was justified in directing a health or performance assessment).
 - is one where a doctor's failure or refusal to comply would significantly impair the GMCs ability to investigate concerns and therefore fulfil its statutory objective.

19 The tribunal should not exercise hindsight at this stage of consideration and should only look to decide whether or not the direction was reasonable at the time the decision was made and based on the evidence available to decision maker(s) at the time of the request.

Failure to provide information

20 A reasonable direction to provide information may include, but is not limited to, a request for:

- details of a specific previous employer or placement
- details of specific times or dates relevant to an investigation
- details of a specific location related to an incident for example a pharmacy
- patient medical records where they are held only by the doctor under investigation.

21 The tribunal should be satisfied that, whatever form the information takes, the doctor's failure to provide the information would significantly impair the GMCs ability to investigate concerns.

22 Information as defined here excludes information or documents which a civil court could not compel to be produced in civil proceedings or that would be prohibited by or under any enactment.

Failure to comply

23 Before taking action, the tribunal should be satisfied that the doctor has failed to comply. In considering a doctor's failure to comply, the tribunal may wish to address the following points:

- has the doctor explicitly refused to comply with a direction to provide information or direction to undergo an assessment?
- has the doctor failed to respond to a direction to provide information or to undergo an assessment despite two reminders?³

³ The period of time allowed for a doctor to respond to the GMC varies and depends on the nature of the request. Having failed to respond to a request, a doctor will be sent a reminder and given a further 14 days to respond. If there is still no response at the end of this period, the doctor will be sent a final reminder and given a further 7 days to respond before a referral to a non-compliance hearing can be made.

- has the doctor submitted to a direction, but subsequently failed to comply with directions made in line with that assessment?
- is there any evidence before the tribunal to suggest that the doctor has complied with the request or direction?

Reason for non-compliance

24 If the tribunal is satisfied that the doctor has failed to comply, they should consider whether or not there was good reason for the doctor's failure to comply, i.e. it was unavoidable or otherwise excusable because:

- for reasons of adverse physical or mental health, a doctor was unable to respond to or comply with a request, even where the request is seen to be reasonable
- a doctor has demonstrated that he/she has not received an invitation to undergo an assessment or request for information
- a doctor can demonstrate that he/she is not in possession of the information or documentation requested by the GMC
- a doctor can demonstrate that, for reasons beyond his/her control, he/she was unable to comply with the direction.

25 Where a doctor is known not to have sought representation from a medical defence organisation or other body, the tribunal should consider whether or not the doctor appears to have understood the consequences of non-compliance.

Finding of non-compliance

26 Having considered the matters referred to at paragraphs 15-25, the Medical Practitioners Tribunal must announce its finding on non-compliance and provide reasons.

27 Where the tribunal considers that:

- the GMC's direction was not reasonable
- the doctor did comply, or there is insufficient evidence to show that he failed to comply, or
- the doctor had good reason for not complying,

no finding of non-compliance should be made and it will not be necessary to go on to consider sanction.

- 28** Where a tribunal finds that a doctor has refused or failed to comply with a reasonable request (without a reasonable excuse), it should make a finding of non-compliance.

Sanction

- 29** If a finding of non-compliance is made, the tribunal may receive further evidence and hear any further submissions from the relevant parties as to its decision whether to impose a sanction.
- 30** In considering whether or not to impose a sanction, the tribunal must consider not only whether or not the doctor has failed to comply, but also whether, on the basis of the findings, conditions or suspension are required in order to protect the public.
- 31** Where a tribunal finds a doctor has failed to comply with a reasonable direction and had no good reason for non-compliance, some action against the doctor's registration is likely to be necessary in order to protect the public.

Conditional registration (maximum 3 years)

- 32** A tribunal may direct that a doctor's registration is to be conditional on his or her compliance with a specific direction or invitation and can impose a condition to this effect. This condition will specify the direction with which the doctor must comply and will stipulate a period of time within which the doctor should comply. This will be the only condition relating to a finding of non-compliance. Further conditions can be imposed in order to protect the public (see below).
- 33** Conditions might be appropriate where the doctor has provided some mitigation for non-compliance that, while not sufficient to provide good reason for no finding of non-compliance, satisfies the tribunal that conditions are sufficient.
- 34** Conditions are unlikely to be appropriate where a doctor has refused to comply or failed to respond to a direction plus two reminders and there is no mitigating information to suggest that conditions are likely to be sufficient.
- 35** Conditions may be imposed up to a maximum of three years, reviewable in periods as seem appropriate to the tribunal, or at the request of either party. Further guidance about review hearings is set out at paragraphs 62-70 below.
- 36** The objectives of any conditions should be made clear so that the doctor knows what is expected of him or her. Any conditions should be appropriate, proportionate, workable and measurable.

- 37** The condition relating to non-compliance, and any further conditions put in place for the protection of the public should be drawn from the non-compliance conditions bank⁴.
- 38** Tribunals must also consider, as required by Rule 17ZA(1)(h), whether any conditions imposed should take effect immediately (rather than taking effect after the 28 day appeal period). When doing so, tribunals must consider any evidence received and any submissions made by the parties before making and announcing their decision. Tribunals should exercise caution when considering an immediate condition to comply, since any dates specified in the substantive condition are unlikely to be appropriate to an immediate order. Tribunals should explain fully the reasons for any decision reached. Further guidance on when an immediate order might be appropriate is set out at paragraphs 48 - 54 below.

Suspension (up to twelve months and potentially indefinite after a period of two years)

- 39** As outlined in the *Sanctions guidance*⁵, 'suspension has a deterrent effect and can be used to send out a signal to the doctor, the profession and public about what is regarded as behaviour unbecoming a registered medical practitioner. Suspension from the register also has a punitive effect, in that it prevents the doctor from practising (and therefore from earning a living as a doctor) during the period of suspension, although this is not its intention'.
- 40** When considering a period of suspension, the tribunal might consider the following factors:
- the previous opportunities for the doctor to comply
 - whether the doctor has refused to comply or failed to respond to a direction plus two reminders and there is no mitigating information to suggest that conditions are likely to be sufficient.

Indefinite suspension

- 41** If a doctor continues to refuse to comply with the direction after being suspended for two years, the tribunal can suspend the doctor indefinitely. If the tribunal decides to direct indefinite suspension, there is no automatic further hearing of the case, although it is open to the doctor to request a review after a period of two years has elapsed from the date when the indefinite suspension took effect.

⁴ *Non-compliance conditions bank* <http://www.mpts-uk.org/decisions/1655.asp>

⁵ *Sanctions guidance* <http://www.mpts-uk.org/decisions/1655.asp>

42 Tribunals must also consider, as required by Rule 17ZA(1)(h), whether the suspension imposed should take effect immediately. When doing so tribunals must consider any evidence received and any submissions made by the parties before making and announcing their decision. Tribunals should explain fully the reasons for any decision reached. Further guidance on when an immediate order might be appropriate is set out at paragraphs 48 - 54 below.

Determining the length of sanction

- 43** The tribunal has the power to suspend a doctor for up to 12 months or to impose conditions for up to 36 months. The following factors will be relevant when determining the length of sanction:
- the nature of the original direction (i.e. what is it the doctor has failed to comply with?)
 - the amount of time the doctor is likely to require in order to evidence full compliance
 - the risk to members of the public or confidence in the profession.
- 44** Whilst each case should be considered on its own circumstances, the GMC expects that a Performance Assessment will take at least 6 months to complete, and a Health Assessment or English Language Assessment will take at least 3 months to complete. Any scheduled review should allow sufficient time for these assessments to be completed.
- 45** Where a non-compliance sanction is put in place as a result of a failure to provide information, consideration should be given to the length of time it might take a doctor to provide the information. If the information is already in the doctor's possession (e.g. employment details), a period of one month should allow the doctor sufficient time to demonstrate compliance. If the doctor needs to acquire the information from a third party, a period of three months might be more appropriate.
- 46** Given that a matter will only be referred to a non-compliance tribunal when a doctor has been persistently non-compliant with a request that is material to a GMC investigation, compliance should be demonstrated and reviewed by the tribunal before a sanction is revoked. The review period should be long enough for a doctor to comply with all requirements of any assessment or request for information. The tribunal may wish to make clear what it expects the doctor to do during the period of conditions/suspension and the information he/she should submit in advance of the review hearing. This information will be helpful both to the doctor and to the tribunal considering the matter at the review hearing.

- 47** Tribunals must provide reasons for the period of sanction chosen, including the factors that led them to conclude that the particular period, whether the maximum available or a shorter period, was appropriate.

Immediate orders

- 48** A doctor is entitled to appeal against any direction affecting his/her registration. This includes conditions or suspension imposed in respect of non-compliance. A sanction does not take effect during the appeal period (28 days) or, if an appeal is lodged, until that appeal has been disposed of. During this time, the doctor's registration remains fully effective unless the tribunal also imposes an immediate order.
- 49** The tribunal may impose an immediate order where it is satisfied that it is necessary for the protection of members of the public, or is in the public interest, or is in the best interests of the practitioner.
- 50** An immediate order might be particularly appropriate in cases where the doctor poses a risk to patient safety, or where immediate action is required to protect public confidence in the medical profession.
- 51** It is sometimes argued by doctors, or their representatives, that no immediate order should be made as the doctor needs time to make arrangements for the care of his/her patients before the substantive order for suspension takes effect.
- 52** In considering such arguments, tribunals will need to bear in mind that any doctor whose case is considered by a non-compliance tribunal will have been aware of the date of the hearing for some time and consequently of the risk of an order being imposed. The doctor will therefore have had time to make arrangements for the care of patients prior to the hearing should the need arise. In any event, the GMC also notifies the doctor's employers, or in the case of general practitioners, NHS England, of the date of the hearing and they have a responsibility to ensure that appropriate arrangements are in place for the care of the doctor's patients should an immediate order be imposed.
- 53** Where the tribunal has directed a period of conditional registration as the outcome of the hearing, it may impose an immediate order of conditional registration. Where the tribunal has directed suspension as the substantive outcome of the case, it may impose an immediate order to suspend registration. Before making a decision the tribunal must consider any submission or evidence and will need to invite these from both parties in advance of making a decision.
- 54** Having considered the matter, the decision whether to impose an immediate order will be at the discretion of the tribunal based on the facts of each case. The tribunal should, however, have regard to the seriousness of the matter which led to the

substantive direction and consider carefully whether it is appropriate for the doctor to continue in unrestricted practice pending the substantive order taking effect.

Existing interim orders

- 55** A doctor may have interim restrictions in place at the point of referral to a non-compliance hearing. Whilst these may relate to the same allegations that led to the non-compliance referral, they may also arise from concerns relating to other heads of impairment.
- 56** Where the tribunal decides that the doctor has, without good reason, failed to comply with a reasonable direction, and they go on to put a sanction in place, they should, at the sanction stage, also consider the existing interim order.
- 57** Where a doctor's registration is made conditional by a non-compliance tribunal, the tribunal should ensure that any restrictions necessary for the protection of members of the public or in the doctor's interests are put in place. Where the doctor is currently subject to an interim order, the tribunal should consider what restrictions are necessary to protect against the same risks identified by the IOT where the tribunal considers these risks still to be present, or against any new risks identified by the tribunal. The tribunal, having made such an order, should then revoke the interim order.
- 58** The tribunal will already have had sight of all relevant documents relating to the ongoing investigation, including those viewed by the preceding IOT where these relate to the matter before them, since this will form part of the bundle presented to the tribunal for their consideration in relation to non-compliance. On consideration of sanction, the tribunal will be referred to any further documents which may be pertinent to their consideration of risk, including a copy of the most recent IOT determination, together with any further relevant documents received by the GMC in the intervening period.
- 59** In multi-factorial cases, where the doctor has failed to comply with a direction made in respect of one head of impairment, but other heads of impairment are under investigation, the tribunal will need to consider any risks that arise from all allegations when imposing a sanction.
- 60** In order to assess the nature and seriousness of the risk, the tribunal will carry out a risk assessment. The tribunal will **not** make any findings of fact in order to assess the nature or seriousness of the risk but will decide what action, if any, is needed to protect the public based on the information that is available to the tribunal. As the role of the tribunal in this respect is akin to the role of an interim orders tribunal, the tribunal should consider the factors contained in the *Imposing interim orders* guidance:

- The seriousness of risk to members of the public if the doctor continues to hold unrestricted registration (during the term of the non-compliance order).
- Whether public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration (during the term of the non-compliance order).
- Whether it is in the doctor's interests to hold unrestricted registration. For example, the doctor may clearly lack insight and need to be protected from him or herself.

61 The order will remain in force until the tribunal, on review, is satisfied that an order is no longer required because the risk has been mitigated or the doctor has fully complied with the original request and the non-compliance order can be revoked.

Review Hearings

- 62** Rule 22A sets out the procedure a tribunal must follow at a review hearing. The tribunal will need to consider and make a finding as to whether the doctor has complied with the direction that led to the non-compliance sanction or whether he/she has failed to comply with any conditions imposed at the previous hearing (giving reasons for its decision) before determining whether to impose a further sanction.
- 63** The tribunal should make clear in their initial determination that the onus is on the doctor to demonstrate compliance at a review hearing and that the doctor can, if they feel they have fully complied, request an early review of their non-compliance sanction.
- 64** A review of conditions must take place within 36 months of the original determination. A review of suspension must take place within 12 months.
- 65** When reviewing the non-compliance sanction, the tribunal may wish to consider the following factors:
- Whether or not the doctor has complied with the original direction that led to the imposition of the sanction or any requirements contained in a non-compliance condition.
 - Whether there is any new information before the tribunal that might affect the tribunal's decision on a sanction.
 - Whether or not the doctor has complied with any further conditions put in place by the previous tribunal for the protection of the public during the term of the non-compliance order.
- 66** In making its decision, the tribunal can decide to:

- revoke the sanction
- vary the sanction
- extend the sanction

Alternatively the tribunal may allow the current sanction to remain in effect until its expiry date. Justification should be provided for following this course, where no finding of non-compliance has been made.

- 67** Where a tribunal has found that the doctor has not complied with a non-compliance condition, a further order of conditions is unlikely to be sufficient. An order to direct a suspension (up to 12 months) is likely.
- 68** Where a doctor’s registration is suspended, the tribunal may direct that the current period of suspension be extended (up to 12 months). Where a doctor has been suspended for a period of two years, it is also open to the tribunal on review to suspend the doctor’s registration indefinitely.
- 69** A case can be referred for an early review if evidence of compliance is available before the scheduled review. An early review may be directed by the Registrar, where such evidence becomes available.
- 70** Where the tribunal decides to revoke a non-compliance order it should consider, where appropriate, whether an interim order is required to protect the public.

Power of the tribunal to impose an interim order to protect the public following revocation of a non-compliance order

- 71** Upon review of a doctor’s non-compliance at a review directed by the tribunal, or at an early review prompted by evidence of compliance from the doctor, the tribunal must decide whether or not a sanction is still required.
- 72** Where a non-compliance sanction (conditions or suspension) is revoked, the tribunal must consider whether or not they feel an interim order is required in order to protect members of the public or in the doctor’s interests during the GMC’s ongoing investigation. The tribunal will have sight of all documentation as would be required by an interim orders tribunal and should apply the same test as would such a tribunal. Any interim order imposed would be subject to the usual requirement for interim orders to be reviewed every six months, up to a maximum of 18 months.
- 73** The non-compliance tribunal will need to consider the doctor’s compliance and any information presented as evidence of that compliance when considering an interim order. In a health case, for example, the tribunal would likely need to see health reports as evidence that the doctor has complied with the GMC’s request to undergo

an assessment. As such, their considerations on interim orders should take these reports into account.

- 74** Tribunal members should refer to the *Imposing interim orders* guidance in making these considerations⁶.

⁶ Available at: www.mpts-uk.org/guidance.