

Duncan McNeil MSP  
Convener  
Health and Sport Committee  
Scottish Parliament  
Edinburgh  
EH99 1SP

1 April 2015

Dear Mr McNeil,

**The General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015.**

**The Health Care and Associated Professions (Knowledge of English) Order 2015**

At the meeting on 10 March, which considered the above two affirmative Orders, the Cabinet Secretary for Health, Wellbeing and Sport committed to seek clarity on certain questions raised by the Committee. Accordingly, I have grouped the questions into two main areas and provided responses which I hope the Committee will find helpful:

*Q. Why can the Medical Practitioners Tribunal Service (MPTS) refuse to admit evidence and could award costs, which the Medical Defence Union thought was more of a punitive measure than an investigative measure. On what grounds would it refuse to admit evidence and on what grounds would it allocate costs?*

Having a power to 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, would support effective case management where an unreasonable failure to comply with a rule or direction had led to an adjournment or postponement of a hearing.

The power to refuse to admit evidence or award costs would come from rules which will also need to be made in accordance with the over-riding objective for proceedings to be just and fair. The General Medical Council (GMC) will need to ensure that any rules enabling a costs regime are made in accordance with that principle.

The tribunal would only be able to exercise these powers where rules have provided for them and it would be fair and just to do so and compatible with human rights. Such powers are not unprecedented and where they are used, by courts, tribunals and other regulatory jurisdictions, it is well established that their use should respect those principles.

If they were exercised in circumstances where that was not the case the parties concerned could seek to challenge this on appeal in the higher courts.

We consider that it is appropriate for the tribunals to have these powers to help manage the conduct of the parties and ensure effective proceedings which further the aim of public protection.

The GMC will need to consult further on the procedural rules which will govern the awarding of costs, adverse inferences and refusal to admit evidence which as stated above will need to reflect the over-riding objective of securing that cases are dealt with fairly and justly.

*Q. Will the order discourage or prevent a licensed doctor from chairing a Medical Practitioners Tribunal Service (MPTS) hearing?*

The Order will require the MPTS to appoint legal assessors to advise a Medical Practitioner Tribunal or an Interim Order Tribunal on legal issues that may arise where the chair of the Tribunal is not legally qualified or in any other case where they consider it appropriate to do so. The MPTS must determine the criteria for appointment of legal assessors.

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 the MPTS has appointed a legally qualified case manager to also act as a chair of a medical practitioner tribunal, the MPTS may consider that there is not also a need for a separate legal assessor. Given the separation of functions, the chair of the medical practitioner tribunal will be able to help with consideration of legal issues in the same way as a legal assessor. 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.

### *General comments*

Regarding the general comments raised by the Committee in relation to fitness to practise, the Scottish Government is clear that fitness to practise is of critical importance and considers that the GMC Order will strengthen and modernise the GMC's fitness to practice systems and make it more efficient, benefitting patients, practitioners and the health service.

The Scottish Government will continue to liaise closely with their colleagues in the Devolved Administrations and regulatory bodies to ensure that rules developed following the GMC and Knowledge of English orders are suitable for the Scottish context.

The Scottish Government will also provide the Committee with an update on the new processes and procedures in a year's time or at an appropriate moment in the analysis and review of the legislation.

Yours sincerely

**Jason Birch**  
Regulatory Unit