

**Response from the Board of the Office of the Health Professions Adjudicator (OHPA) to the Department of Health consultation:
*Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery***

The Written Ministerial Statement on 26th July 2010 announced that the Government is not so far persuaded that the creation of OHPA is the most appropriate and proportionate way of delivering fitness to practise adjudications for doctors, despite the strong case for it made by the Shipman Inquiry, and all party support during the Parliamentary process.

It is clear from the consultation paper that the establishment of OHPA and its development work have been catalysts for change. In this response we propose a version of the original OHPA programme that delivers the key objective of independent adjudication at greatly reduced cost.

In response to the two questions contained within the consultation:

Q1. Should the Government proceed with its preferred option (2)? **No – we suggest there is an alternative option**

Q2. Do you have any comments on the identified benefits, costs and risks of the options that are detailed, and are there any other considerations that the Government should consider? **Yes**

An alternative option

We believe that the full OHPA model remains the most intellectually coherent approach to the adjudication of doctors initially, and of healthcare professionals more generally. However, we acknowledge the current pressures on the public purse. We suggest that there is a further option worthy of consideration that has not been included in the consultation, and which we will describe below. This option could substantially reduce the cost to Government and the GMC, but nevertheless bring about judicial independence of decision-making in medical (and potentially in other health professional) disciplinary cases. This further option would:

- address the public concern and lack of legal soundness inherent in a system where the disciplinary body bringing the proceedings is also responsible for judicial decision-making
- provide a sound structure that would allow the GMC a right of appeal against decisions it believes are wrong.

A further consequence would be modern, effective, independent case management, the lack of which has allowed the length of GMC hearings to grow alarmingly, with consequent increases in cost and delays for all concerned.

Independence

The independence of the body making the final decision on FtP cases is a fundamental principle of modern judicial practice and was a key objective of the Shipman Inquiry. A tribunal is either independent or it is not. There is no halfway house. The Doctors Disciplinary Tribunal (DDT) as proposed by the GMC still falls short of being an independent body. We understand the Government's wish to reduce the number of independent statutory bodies, and its need to reduce public expenditure. But here it faces a dilemma. It is possible that legislation will be needed to establish the DDT as a statutory tribunal independent of the GMC. If so, this would simply substitute one statutory body for another. On the other hand, if the GMC uses non-statutory means to set up the DDT, and it is established "within the GMC" (as the Consultation Paper puts it), it would not be seen to be independent and the benefits identified above might not be realised.

A different model

Can the objectives, which led to the establishment of OHPA, be delivered without the set-up and on-going costs that were originally projected? We believe there is a way of combining the best of what OHPA can deliver with the best of that which the GMC itself is now proposing.

The starting assumption from the Department of Health and the GMC was that OHPA would operate not only by appointing panellists, but also by managing the entire adjudicatory system, employing the GMC's administrative staff who currently support the adjudication function. Costings for OHPA's establishment therefore included accommodation and employment costs, and the infrastructure necessary to support an organisation of around 80 staff – finance, IT, personnel, legal, policy and communications.

Under a different model, OHPA would be retained in existence, but structured at a much lighter level. It would be limited to establishing and overseeing the proposed Tribunal, appointing and leading its judicial members (including its President); assessing, training and appraising those members; and having responsibility for the judicial functions that they perform. OHPA would determine the competencies and qualifications required (a further guarantee of the Tribunal's independence from the GMC). OHPA would be responsible for procedural rules (so the rules would be those of the OHPA Tribunal not those of the GMC) and oversight of the Tribunal as a whole to see that it was performing effectively. However, it would not acquire the adjudication support staff or separate accommodation. Such staff as it required could, very largely, be seconded from the GMC.

The GMC would continue to employ the staff who support the adjudication function, and would provide the premises and supporting systems. This functional split is widely found in other tribunals. For instance, in the Tribunals Service itself the judicial members and the administrative staff have separate lines of accountability: the former through Chamber Presidents to the Senior President, and the latter through a management structure to the chief executive.

Advantages

- **Cost:** The key advantage over the original model of envisaging OHPA in this way would be the minimal cost to the public purse or to the GMC. The GMC would incur little additional expense above that which it incurs now, or would incur under its own proposals. Its funding to support OHPA would be modest.
- **Speed:** This proposal requires minimal legislative change. The OHPA procedural rules have already been drafted and are ready to be consulted on. The new system could be up and running faster than the proposed GMC model, which does require significant legislative changes.
- **Flexibility:** This model could be expanded and built on over time – either horizontally to provide independent panels, leaders and case management for other health professional tribunals, or vertically by employing a wider range of adjudication support staff if that seemed appropriate.
- **Legal soundness:** OHPA's contribution to the proposed Tribunal would ensure it was legally sound and a properly independent judicial body. It is a matter of historical record that the procedures of health care regulator FtP panels do not by themselves meet the requirements of Art.6(1) EHRC. Only a rehearing by appeal avoids such a breach. OHPA would provide a legally compliant process.
- **GMC appeals:** It would resolve the question of appeals by the GMC against Tribunal judgements. Many would not see a GMC established DDT as sufficiently independent of it for the GMC as prosecutor to be given the right to appeal against the decisions of its (own) Tribunal. This proposal may be contentious and could encounter difficulties during Parliamentary consideration of such a provision.

Disadvantages

Clearly, the original OHPA model would have had the effect of removing from GMC employment and direct influence the adjudication support staff. It would have created, under OHPA leadership, a visible alignment of purpose and direction between the administrative and the judicial members of the tribunal. This will be lost. However, it is clear that the GMC has now committed itself to much of the modernisation programme that OHPA had planned to introduce, and has already expressed a desire to benefit from the learning that OHPA has developed.

The further outlook

As the economy recovers and the OHPA system is demonstrated to be effective in reducing cost and delays, a world can be imagined in which OHPA develops to cover all health professional adjudication in something that the public could recognise as a coherent and consistent system.

At that point, it would be sensible to consider migrating OHPA into the mainstream tribunals system within the Ministry of Justice. This might either be as a separate Chamber, or perhaps for greater consistency and cohesion, by joining the Health,

Education and Social Care Chamber where the Primary Health Lists Tribunal also resides. There the appointment of judicial members would be the responsibility of the Judicial Appointments Commission, and their leadership would come under the Senior President of Tribunals. The staffing, accommodation and administration could be integrated into the central Courts and Tribunals Service with the economies of scale it can provide.

OHPA has the potential to drive progress in health regulation more generally. Regulatory performance continues to lag behind developments in the health care system. Working with the CHRE, OHPA can become an exemplar of better regulation principles in the area of health profession adjudication. For example, it can establish transparent performance targets for the timeliness of case management and adjudication.

Ultimately, if this revised option were taken forward and successfully extended to embrace all of the health profession regulators, there is the potential for the regulators to cooperate much more closely on their professional standards and codes, and to develop joint investigatory methodologies.

Conclusion

We believe this further option warrants serious consideration alongside the case for the full OHPA model:

- (i) OHPA is a statutory body with powers already enacted to make appointments and which require minimal amendment to deliver this different model
- (ii) OHPA can make procedural rules for the Tribunal under existing legislation, including exercising its costs jurisdiction
- (iii) minimal legislative change is necessitated, and when compared to that required by the consultation paper's 'preferred option', requires significantly fewer parliamentary resources, and,
- (iv) the approach lends itself to review over time and a further consideration on whether OHPA should take on other functions undertaken by the GMC (eg listings for hearings), and/or take on panellists from other regulators to provide a broader Tribunal service.