King's Fund

Establishing the appropriate standard of proof for GMC hearings into conduct, performance and health:

Key issues for consideration

Steve Dewar
Jennifer Dixon

Health Care Policy Programme
King's Fund
11-13 Cavendish Square
London W1G 0AN

www.kingsfund.org.uk

email: S.Dewar@kingsfund.org.uk
tel: 020 7307 2546

October 2000

HOGE:FJ (Dew)

Summary

The purpose of this paper is to stimulate a thoughtful debate about the appropriate standard of proof to use in GMC hearings.

The GMC currently uses a criminal standard of proof (beyond reasonable doubt). The use of a criminal standard is a matter of custom and practice, it is not specified in the GMC rules, medical act, or statutory orders that govern the work of the GMC. Recently, there have been calls, from the government amongst others, for the GMC to consider introducing a civil standard of proof (balance of probabilities) to provide a better balance between public protection and fairness for the accused doctor.

A civil standard would lower the threshold of proof. However, the civil standard is and can be applied in a way that takes account of the gravity of the offence and the severity of the potential sanction. It may be more than a simple balance of probabilities (requiring, for example, a 51% degree of confidence in the likelihood that certain facts are true) and can demand a greater degree of 'sureness' from the 'jury'. This adjustment might mean a 'high' civil standard being set at an 80% - 85% test of probability.

There is an established line of legal authority to support the use of a criminal standard for judging allegations of a criminal nature. But this position raises questions about the use of the 'professional court' (at the GMC) as a substitute for the criminal system. It is also possible to question the contemporary relevance of this legal opinion to current social, professional and political values and the need to rethink a balance of public protection and individual rights.

Any review of standard of proof immediately triggers a consideration of the overall fairness of GMC proceedings. Standard of proof is, after all, but one part of an elaborate and interlocking set of procedures that constitute checks and balances on the rights and powers of the prosecution and the defence. Changes to one part will require giving consideration to the balance of fairness across the whole hearing process.

Questioning standard of proof raises wider questions about the system as a whole: should GMC hearings be inquisitorial or adversarial in nature? Should they be based on a 'jury' or a tribunal system? Should they have a legal chairperson? How should a 'jury' (however composed) reach its 'verdict' – through unanimous or simple majority decisions? And underlying each of these issues is the European Convention of Human Rights and the criteria that it stipulates for a fair hearing.

In section 1, this paper identifies the following legal positions:

(a) *The civil standard of proof is a flexible concept. There can be a sliding scale of probability commensurate with the gravity of the offence and the severity of the potential penalty.*

(b) *The civil standard of proof cannot be considered the same as a criminal standard.*

(c) Any variation in the civil standard of proof might be more influenced by the gravity of the offence than the severity of the potential sanction.
(d) The standard of proof may vary according to the type of professional misconduct.
(e) It is unclear how the standard of proof might apply to the different stages of screening complaints and hearing accusations
(f) The European Convention of Human Rights establishes criteria against which the fairness of GMC hearings can be tested

In section 2, the paper considers the following three areas of debate:

(a) arguments concerning the gravity of the offence and the severity of the potential sanction;
(b) arguments concerning GMC proceedings as a whole;
(c) arguments concerning the wider regulatory system.

The paper focuses on the work of the GMC particularly in relation to charges of serious professional misconduct (*spm*). The paper does not review the approaches of other professions and other countries.

Introduction

This paper aims to start an informed debate over the appropriate standard of proof to use in GMC hearings concerning fitness to practise. The debate is complex and the paper does not attempt to reach conclusive answers. Rather, it outlines key arguments and sets out questions for further consideration.

At its heart, the debate on standard of proof concerns fairness - the appropriate balance between new expectations for public protection and clear rights for individuals accused of wrongdoing. In turn this requires us to take stock of changing standards and expectations in society, in medicine and in the law, and raises questions of social, political and professional values.

When hearing allegations against doctors, the GMC applies a criminal standard of proof (beyond reasonable doubt). Neither the Medical Act of 1983 nor the GMC's rules make any statement about the appropriate standard of proof to use in such hearings.

Recently, there has been pressure on the GMC to review the standard of proof, in particular to consider adopting a civil standard (using a balance of probabilities) for all allegations.

- First, the NHS Plan called for the GMC to explore the introduction of a civil standard of proof. The Government sees the use of a civil standard as a potentially better way to protect patients and help boost public confidence in the profession. The implication is that the criminal standard is too high, and misconduct and deficient performance can go unproven.

- Second, the recent inquiry by Jean Ritchie QC into the conduct of Rodney Ledward recommended that GMC conduct hearings using a civil standard of proof in order to move away from an inappropriate use of criminal proceedings.

- Third, in 1999 the GMC itself recognised that the question of an appropriate standard of proof needed to be addressed as part of a review of fitness to practise procedures.

- Fourth, concerns have been raised by the public about many related aspects of GMC procedure, for example, the length of time to hear cases, the need for more transparent proceedings, the balance of lay representation in the process, and the desirability of having a legally qualified chairperson for the proceedings.

Any decision taken by the GMC about the appropriate standard of proof is likely to have far-reaching implications, for example in the way in which the civil, criminal and regulatory mechanisms for redress interact with each other. It is also relevant to other professions working in health care - the Government's recent proposals for the Nurses and Midwives Council and the Health Professions Council require these new bodies to work to a standard of proof consistent with the approach used by the GMC.

Given the importance and complexity of the debate, and the implications of any decision made by the GMC, it is necessary to ensure that change is considered carefully and takes into account the perspective of a number of stakeholders. A consideration of the legal authority using case law, and the possible implications of the European Convention of Human Rights (ECHR) is a good place to start. But how these principles are interpreted is a key part of the debate – a debate that will need to encompass the views of many different stakeholders.

This paper will focus on standard of proof in relation to a charge of serious professional misconduct (*spm*) considered by the Professional Conduct Committee (PCC) of the GMC. Section 1 considers legal definitions and relevant legal authority surrounding current practice. Section 2 outlines three main issues for debate.

Section 1: Legal authority

Definitions
The criminal standard of proof (i.e. the standard of proof required by a common criminal court) is usually described as being equivalent to that which is 'beyond reasonable doubt' or such that those making a judgement are:

> *''satisfied so as to be sure''.*
> (Phipson on Evidence, section 4-33 to 4-35).

The civil standard of proof is based upon the 'balance of probabilities' or 'preponderance of evidence'. The criminal standard is thought of as being a 'higher' standard of proof.

Application point
In *spm* cases, the standard of proof may be applied at one of three stages:

- in the finding of the facts;
- in deciding whether the facts constitute *spm*;
- in deciding the penalty if *spm* is proven.

In practice, the standard of proof (currently criminal) is only explicitly applied in the finding of the facts.

Type of charge
The PCC of the GMC deals with two broad categories of cases:
- criminal convictions (which are considered separately from allegations of spm);
- allegations of spm

Allegations of spm may be 'tantamount' to criminal matters or not tantamount to criminal. Currently a criminal standard of proof is used for all allegations of spm.

Key legal positions
Because there is no legal statute determining the appropriate standard of proof it is important to examine the judgements that have been made by legal authority. There are a number of different areas of law from which a useful synthesis of existing legal principle can be drawn: common law (includes case law); disciplinary tribunals; and judgements through the European Court, using the European Convention of Human Rights.

On a number of issues there is substantial weight of legal authority. In particular, a strong line of authority suggests the need to apply criminal standards of proof to accusations that contain criminal components. However, it needs to be remembered that public expectations of risk, and protection from risk, change – it is uncertain how much an opinion from even a few years ago might apply today.

There are a number of legal positions concerning appropriate standards of proof which are noted below.

(a) The civil standard of proof is a flexible concept. There can be a sliding scale of probability commensurate with the gravity of the offence and the severity of the potential penalty.

The civil standard of proof is often referred to as the application of a balance of probabilities. This balance is easily understood when the matter is whether, on the evidence, a fact was more likely than unlikely – or whether there is a 51% or greater probability, or likelihood, of it being the case.

However, there is strong legal authority establishing the civil standard as a more flexible concept than this simple application of a 51% to 49% test of probabilities. Legal professionals suggest that the balance of probabilities used in the civil standard could be adapted according to the gravity of the offence and severity of the potential penalty – and that this adjustment might (if we wanted to think of it in these terms) mean a 'high' civil standard being set at an 80%-85% test of probability. This would mean needing to be at least 80%-85% sure that a particular fact was likely rather than unlikely. The criminal standard is not considered to have the same degree of flexibility and might be characterised as bringing something like a 98% test of confidence to bear on the facts.

In relation to the civil standard the degree of probability can be set so as to be:

> *"proportionate to the nature and gravity of the issue"*
> **(Reg v Home Secretary, exparte Khawaja 1984).**

Lord Denning's observations were as follows:

> *"The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case"*
> (Bater v Bater 1951 P.35)

In Hornal v Neuberger Products Ltd, the Court of Appeal considered the appropriate standard of proof where fraud is alleged in civil proceedings and accepted that:

> *"the very elements of gravity become a part of the whole range of circumstances which have to be weighted in the scale when deciding as to the balance of probabilities".*
> (1957 1 Q.B. 247)

and:

> *"... the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue".*
> (1957 1 Q.B. 247)

Lord Denning in a subsequent civil case went on to assert that :

> *"... the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought proof to be clear."*

(b) The civil standard of proof cannot be considered the same as a criminal standard.

Legal opinion suggests that in the majority of cases where this point has been at issue, the courts have held that whilst serious allegations (even those amounting to criminal conduct) raise the standard of proof required, that standard cannot be considered equivalent to the criminal standard (see Bater v Bater 21951 P35, at 37 per Denning LJ).

(c) Any variation in the civil standard of proof might be more influenced by the gravity of the offence than the severity of the potential sanction.

While case law indicates that the severity of the potential sanction might influence the standard of proof, there is a line of authority running against the notion that a severe potential sanction always requires a criminal standard of proof. For example, the case of *Brown v United Kingdom* heard in the European Court considered a solicitor facing disciplinary action for matters relating to professional behaviour and organisation (relevant to article 7 of the European Convention of Human Rights - against retrospective penalties). The Court recognised that the nature of the offences were not of a criminal character, but went on to consider if the nature and severity of the potential penalty might justify a criminal standard of proof and type of proceeding. It found that it did not do so. The argument that a single severe potential penalty justifies the uniform application of a standard of proof regardless of charge is therefore not clearly established.

(d) The standard of proof may vary according to the type of professional misconduct.

Looking at the case law relevant to professional disciplinary hearings it is clear that, by and large, these are conducted under the auspices of independent bodies each with their own rules and procedures. Where the rules are silent, as in the case of the GMC, the relevant case law has tended to support the use of a criminal standard of proof for allegations that might be considered 'tantamount' to a criminal charge. What exactly is meant by the term 'tantamount' is not made explicit.

One case suggests that the criminal standard should be used for most cases of misconduct. In Bhandari v Advocate's Committee, the Privy Council considered the appropriate standard for disciplinary proceedings:

> *"in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage any body of professional men (sic) sitting in judgement on a colleague who would be content to condemn on a mere balance of probabilities."*
> (1956 3 All ER 742)

However, it should be noted that this view (made in 1956) stresses the perspective of fellow professionals sitting in judgement. In the current debate the priority is balancing public protection and accountability with the rights of the individual - rather that seeking the 'contentment' of those professionals sitting in judgement.

A number of cases have held that where an alleged offence is considered 'tantamount' to a crime, then the criminal standard of proof should apply. For example, in the case of a solicitor being disciplined for alleged perjury, Lord Lane CJ, giving judgement for the Divisional Court, held that:

> *"We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof."*
> (Re A Solicitor 1993 QB 69 page 81F)

The case of McAllister v GMC (1993) went to appeal in the Privy Council. The judgement of Lord Jauncey of Tullichettle put the case for allegations 'tantamount' to criminal charges to be tested against a criminal standard of proof. However, the view also supported the applicability of a civil standard for cases without any criminal counterpart:

> *"In charges brought against a doctor where the events giving rise to the charges would also found serious criminal charges it may be appropriate that the onus and standards of proof should be those applicable to a criminal trial.*
>
> *However there will be many cases where the charges which a doctor has to face before the committee could not be the subject of serious or any criminal charges at all. What is of prime importance is that the charge and the conduct of the proceedings should be fair to the doctor in question in all respects. It is not without significance: (i) that rule 50 of the Rules of 1988 clearly contemplates that the committee may consider evidence which would not be admissible in criminal proceedings; and (ii) that the rules nowhere provide that criminal standards of proof and corroboration must at all times apply"*

(e) It is unclear how the standard of proof might apply to the different stages of screening complaints and hearing accusations

The choice of an appropriate standard of proof may not just apply to the final hearings stage of GMC proceedings – it could also impact on the work of GMC screeners. It might be supposed that their decisions about the viability and strength of the case should take into account the standard of proof that the facts of the case, if proven, will need to meet.

However, the judgement of Mr Justice Lightman (in the case of R v GMC ex parte Toth delivered on 23rd June this year) implies that it might be inappropriate to place any routine hurdle, such as a concern about the standard of proof that the facts would need to meet, in the way of a full hearing by the GMC's Professional Conduct Committee (PCC).

> *"The general principles underlying the Act and Rules are that (a) the public have an interest in the maintenance of standards and the investigation of complaints of serious professional misconduct against practitioners; (b) public confidence in the GMC and the medical profession requires, and complainants have a legitimate expectation, that such complaints (in the absence of some special and sufficient reason) will be publicly investigated by the PCC; and (c) justice should in such cases be seen to be done."*

(f) The European Convention of Human Rights establishes criteria against which the fairness of GMC hearings can be tested

Now that rights under the European Convention of Human Rights (ECHR) are fully incorporated into domestic law, the courts will have regard to the Convention when the common law is uncertain or incomplete. These rights, and especially those guaranteed by Article 6, are relevant in deciding upon the standard of proof and the nature of proceedings required when allegations of professional misconduct are being determined.

Article 6 provides as follows:

> "(1) In the determination of his civil rights or obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ....
>
> "(2) Everyone charged with an offence shall be presumed innocent until proved guilty according to law.
>
> "(3) Everyone charged with a criminal offence has the following minimum rights:
> "(a) to be informed promptly ... and in detail of the nature and cause of the accusation against him;

> "(b) to have adequate time and facilities for the preparation of his defence;
> "(c) to defend himself in person or through the legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> "(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf on the same conditions as witnesses against him...."

The question of which provisions might apply, and what they might mean in practice, will largely remain unanswered until a body of relevant case law becomes established. However, a number of cases, applying the Convention in the European Court, have held or assumed that regulatory proceedings that relate only to those engaged in a particular profession are civil (Wickramsinghe v United Kingdom Application 31503/96, 8 December 1997 - concerning GMC and Privy Council decisions).

If this position became established it would mean that the provisions under 6(3) above might not apply to GMC hearings. However, the provisions under 6(1) would still apply, and a case, either for a particular standard or proof or a particular set of procedural safeguards, could still be argued on the basis of the right to a 'fair hearing'. It is clear that the full impact of the European Convention of Human Rights is yet to be felt. The GMC should expect their procedures to be tested and challenged against all the elements of article 6.

Section 2: Three areas of debate

The legal positions outlined in the previous section are important touchstones when considering the appropriate standard of proof to be used in cases of *spm* dealt with by the GMC. In our view there are three main issues to debate:

(a) Arguments concerning the gravity of the offence and the severity of the potential sanction:
For example: is spm always 'tantamount' to a criminal charge? Does potential erasure from the professional register always warrant the use of a criminal standard?

(b) Arguments concerning GMC proceedings as a whole:
For example should GMC hearings be run along adversarial or inquisitorial lines?

(c) Arguments concerning the wider regulatory system:
For example, in what ways might a change in the standard of proof impact on the way the wider regulatory system works?

Each of these is considered below. Alongside a distillation of the arguments we raise a number of questions to focus debate.

Arguments concerning the gravity of the offence and the severity of the potential sanction

(i) The gravity of the offence

One legal principle, noted earlier, is that the gravity of the offence should influence the choice of standard of proof and the proceedings used to find the facts of the case.

The PCC considers two distinct types of cases: criminal convictions, and charges of serious professional misconduct (*spm*).

If allegations against a doctor have already been proved in the criminal courts they do not have to re-proved before the PCC. In these cases, the PCC's function is limited to considering whether, given the fact of the conviction and taking account evidence of previous history and mitigation, the doctor's registration should be restricted or removed.

A charge of *spm* may be based on a number of specific allegations. For these allegations to amount to *spm* the judgement has been made that, if proven, they would justify either placing restrictions on the doctor's registration, or possible erasure from the register. The charge of *spm* is therefore by definition severe – involving the potential deprivation of livelihood through professional medical practice.

A charge of spm may include:

(1) allegations that have not been proven in a criminal court but might be considered to be 'tantamount' to a criminal charge, e.g. alleged indecent conduct during a clinical examination;
(2) allegations that are neither potentially criminal nor 'tantamount' to any criminal charge, e.g. failure to visit patients.

The pertinent arguments for each type of allegation (bearing in mind that the same charge of *spm* could include both) is considered below.

Allegations which are criminal, or tantamount to criminal

If the GMC is referred a case that includes allegations that could form the foundation of a criminal prosecution it may well suggest to the complainant that he or she report the matter to the police for investigation. Where the allegation is of rape or murder, no difficulty arises as that is obviously the only appropriate way forward. But there are some kinds of allegations, for example, falsifying a CV, which could conceivably form the basis of a criminal charge but which traditionally have been dealt with by the GMC. The question arises of whether there is a shared understanding among those involved of where the boundary is between the criminal justice and regulatory systems .

If a case of *spm* includes criminal components it may be argued that the 'professional' court (via the GMC) is being used as a substitute for criminal prosecution and sanction in the courts. This raises questions of why potentially criminal charges are being heard by the GMC at all.

Should 'criminal' allegations be pursued by the Police, the CPS, and the criminal courts rather than by the GMC through a professional hearing?

If the GMC is to continue to consider allegations which are quasi-criminal in nature, should it continue to apply the criminal standard of proof? In these cases, given the seriousness of the allegation, it could be argued that the appropriate standard of proof is a criminal standard. This is one that would apply to any criminal allegations if considered in common law, and the professional regulatory body should, in all fairness, apply the same standard.

This is a strong argument with considerable face value. It is based upon the premise that the professional body should use procedures that are consistent with the courts. However, hearings conducted by the GMC are not the same as hearings conducted in a criminal court of law - a judge does not lead them, they have no conventional jury, and there is no requirement for unanimous or 10:2 majority verdicts in order to convict. In addition, the procedural rules specifically allow the GMC to be more lenient than the criminal court about admissibility of evidence in order to pursue 'due inquiry'.

Are GMC hearings sufficiently similar to criminal proceedings to justify using the analogy with the courts to defend the standard of proof?

*How does the argument for consistency with the courts apply to misconduct that does **not** include any criminal component?*

Some suggest that consistency between the GMC and the criminal courts avoids possible problems of 'double jeopardy'. If the GMC were to introduce a civil burden of proof the possibility arises of the GMC re-hearing cases that might not have reached a criminal standard in the criminal courts. Defendants cleared of criminal charges might find themselves facing a new test of the same facts against a new (lower) standard in the professional hearing for a charge of *spm*.

Allegations that are neither criminal nor 'tantamount' to criminal

How might the arguments used above apply to those cases in which the allegations cannot be described as potentially criminal? The logic of using an analogous process to that adopted in the courts would suggest using a civil standard of proof. The consequences of such a position would include the need for the GMC to introduce a sifting process to separate cases with and without criminal components to be tested to different standards.

Introducing any division of charges, to be judged to different standards, will risk some unfairness. Clearly, problems could arise in making decisions about which category any set of allegations falls into, especially when the allegations are a mixture of the serious and the less important. Perversely, it might create incentives for the accused to argue that the allegations were of the most serious (criminal) nature, in order for the defendant to receive the relative protection of a higher standard of proof.

*If a civil standard of proof were to be used for spm **without** criminal components while a criminal standard still applies for spm **with** criminal components, how would any screening process operate?*

*If a charge of spm involved a set of allegations that included criminal **and** non-criminal components, would different standards of proof need to apply to proving different allegations?*

Would such a complex system be practicable? Would it take an experienced judge to ensure the meaningful application of variable standards of proof within one hearing?

(ii) Arguments concerning the severity of the potential sanction

One perspective on the debate emphasises the severity of the potential penalty following a proven charge of *spm* (possible erasure from the register and therefore the loss of livelihood though professional practice) and puts this at the centre of justification for the highest (criminal) standard of proof. But as noted in section one, the argument that a single severe potential penalty justifies the uniform application of a standard of proof, regardless of the gravity of the offence, is not clearly established in law.

The GMC currently uses just one charge (*spm*), which always carries the potential for applying the severest penalty – erasure from the register. If a case, once proven, is only likely to justify a less severe penalty such as a restriction to registration or admonishment, then the link with the severest penalty is only theoretical and the justification for the higher burden of proof is inappropriate.

Do doctors facing a loss of livelihood through professional practice require the same standard of proof (criminal) as a criminal defendant who is often facing the loss of liberty?

Would a range of sanctions, aligned with a range of charges, enable standards to be matched against different potential (charges and) penalties?

Is the loss of professional registration of a different order (requiring a higher standard of proof) to the loss of immediate employment through an employment hearing or tribunal?

Arguments concerning GMC proceedings as a whole

The question of standard of proof cannot be isolated from wider questions concerning the nature and purpose of GMC proceedings as a whole. It can be argued that the values and procedures of the courts provide one model of how to balance the chances of prosecution and the risk of wrongful conviction. A host of procedural issues such as the composition and role of the panel, the strictures over admissibility of evidence, and the need for more than simple majority verdicts are all part of that balance. But these components of the criminal court are not all present in GMC hearings.

Should GMC hearings be conducted along the lines of a criminal court?

Is it appropriate for the GMC to select elements of the common criminal procedure to imitate?

It is relevant here to consider the principle which is at the heart of the European Convention of Human Rights – fairness. This is embodied in the Human Rights Act by rights to a number of procedural safeguards, for example, timeliness and transparency of proceedings.

It may be prudent for the GMC, and other regulatory bodies, to afford the full panoply of procedural safeguards specified under the act – particularly when judging allegation of a criminal nature. Not only might this have a bearing on the appropriate standard of proof but it would also impact on the proceedings, including issues such as the admissibility of evidence, the provision of free legal assistance (if the defendant has insufficient means), and the right to silence for the defendant.

A number of issues need to be considered: the general approach to fitness to practice proceedings; the composition and role of the GMC 'jury', and; support for complainants and public. These are considered separately below.

The general approach to fitness to practise proceedings

The general approach must be that which is most fair, that which makes an appropriate balance between public protection and individual rights of the doctor, and that which meets expectations (of the public and the rights enshrined in the ECHR) for transparency and timeliness. With respect to these broad criteria, criminal and civil proceedings are different in a number of ways, the benefits and drawbacks of each need to be debated. For example the:

- effect on witnesses: there is some debate on the impact of criminal proceedings (in which a more adversarial approach may be adopted) on witnesses compared to civil proceedings. Some argue that the more adversarial approach is damaging for witnesses. But others in the legal profession suggest that examination in civil courts can be just as traumatic;

- choice of chairperson: a judicial chairperson is more likely to be skilled in adversarial processes but may be less experienced in managing an inquisitorial and investigative way of working. If a sliding civil standard of proof were to be applied to different allegations an experienced judge may be required to guide the GMC on the appropriate application of such a flexible standard even within a single case. It could be argued that GMC proceedings cannot be considered fair without a judge or experienced recorder to ensure the independent and fair application of complex rules;

- duration of the proceedings: a challenge under the ECHR could proceed on the basis that GMC procedures take too long – the Convention states that people have a right to 'a fair and public hearing within a reasonable time…';

- possibility of adapting procedures in *spm* cases: the standard of proof used in reaching a judgement on the facts of a case does not necessarily imply that the proceedings (by which the facts are, or are not, elucidated) should be wholly similar to the criminal or civil courts. In disciplinary hearings a criminal standard of proof may be used alongside proceedings that most resemble a civil court. Similarly, a civil standard may be used with proceedings that reflect the rules used

in a criminal court. However, it may be difficult to adapt criminal proceedings to a more inquisitorial style of hearing.

Would the adoption of a more inquisitorial style of proceeding help establish greater transparency and public confidence in GMC hearings?

Would the adoption of a more inquisitorial style of proceeding be fair to witnesses and to defendants?

If a criminal standard is maintained (at least for the judgement of spm with criminal components) is it fair that: -

i) GMC rules for the PCC allow evidence to be admitted that could not be admitted in a criminal court?

iii) GMC procedures are not necessarily presided over by a judge or experienced recorder?

Do GMC hearings currently match up to the test of timeliness that is part of the ECHR?

Would a change in proceedings or standard of proof have an impact on timeliness?

The composition and role of the GMC panel

Part of the debate about the fairness of GMC proceedings concerns the composition and the role of the panel. Although this is the body that applies the standard of proof, it does not resemble a conventional jury. It always includes lay members of the GMC but does not include (randomly selected) members of the public. A unanimous or majority verdict needs to be reached but there is no need for ten out of twelve jurors to agree – a simple majority of three out of five members is considered sufficient.

The size and representation of the PCC, alongside the degree of agreement required to 'convict', are all part of the overall balance of fairness. When it comes to defining the exact mix of checks and balances these issues are all linked. In current GMC procedures the impact of a criminal standard and the adoption of broadly criminal proceedings, is in some ways mitigated by the use of a simple majority verdict in order to 'convict' or to dismiss a case.

However, there is no reason why the rules on what constitutes an appropriate majority could not be changed - depending upon the number of people on the panel, the standard of proof and the overall set of procedures.

Is the current composition of the GMC 'jury' and the use of simple majority decisions appropriate?

Support for complainants and the public

Those who advise complainants and their families about the possibility of redress through the GMC, as well as those who have direct experience of GMC proceedings, make the point that it is hard to understand the rules surrounding the proceedings. That while the GMC has legal support to press home its case and the doctor may have a lawyer to defend them, complainants are not always legally represented.

Complainants and public may be confused by a process that allows the doctor the protection of a higher standard of proof in front of the GMC than a local NHS disciplinary hearing. The latter are held under the rules established in Health Circular 90/9 (HC90/9) and are run differently, and often to a different standard of proof. It may not be clear to the complainant or the public why evidence may have to be given on repeated occasions and why one part of the regulatory system is not linked to other parts, so that the trauma of such duplication is avoided.

These experiences raise questions of the support available to complainants, of whether the regulatory system should be made simpler, more transparent, and be better explained. They also challenge the appropriate balance between public protection and the rights due to accused members of the medical profession.

How can complainants be better supported through disciplinary proceedings?

To what extent should a guiding principle to the reform of regulation be simplicity? How can the process of professional regulation be made more transparent?

Is the balance between public protection and the rights of accused doctors skewed in favour of the profession?

Arguments concerning other parts of the regulatory system

This area of debate includes the work of the GMC's other committees which examine charges of seriously deficient performance and serious impairment due to ill health. It also considers the way in which the wider UK system of healthcare regulation works (particularly but not exclusively in the NHS). These two issues are considered below.

(i) Standard of proof in the work of different GMC committees

This paper has focused on the charge of *spm*. However other types of hearings at the GMC might also lead to restrictions on a doctor's registration, for example those relating to the health of the doctor (dealt with in the Health Committee - HC), or concerning overall performance (in the Committee on Professional Performance – CPP).

In both these areas the consideration given to particular incidents and specific allegations is not the same. In both areas a more general assessment is made of the doctor's health or performance and a judgement reached broadly on the basis of that assessment. This judgement does not relate to whether particular facts are or are not proven but to a more holistic judgement of the individual.

The key question is the relevance of standard of proof to this process of holistic assessment and judgement. If judgements are based on some consideration of the strength of evidence provided by the assessments, and the likelihood of alternative conclusions - then the question of standard of proof might be pertinent. What degree of confidence or satisfaction should the health or performance committee have in relation to these assessments?

This has been the subject of disagreement between counsel for the GMC and a defendant in a recent performance case –GMC counsel argued against a simple application of a criminal standard of proof and for a more flexible civil standard:

> *"These procedures are designed and intended to be very far removed from the criminal. ... Can I therefore invite the Committee not to look at it with the criminal analogy "sure; beyond reasonable doubt"? No doubt, given the sanctions which are possible should you find the standard of professional performance to have been seriously deficient, you will wish to be satisfied to a high standard and that I think is in keeping with many procedures even in the civil courts where, whether it be an allegation of fraud or an allegation relating to the abuse of children – one could give many examples – some sort of sliding scale is applied...*

When the legal assessor sought to clarify the position, a similar line of argument was recommended to the CPP:

> *"it is ... quite clear to me that the structure of this procedure is one which is not constrained in the normal way that criminal procedures are. ... In those circumstances it appears to me to be inappropriate to adopt the criminal standard of proof of beyond reasonable doubt in the traditional phrase. ... There are a number of civil cases in which an issue arises about something which is, in fact, a criminal matter ... and the phrase that is used is similar to*

"be satisfied to a high standard" without importing the criminal standard, and I would advise the Committee that that is the appropriate way in which to proceed..."

How does the standard of proof apply to the work of the Health and Performance Committees?

(ii) The relationship between standard of proof and the wider system of UK health regulation

The overall system of regulation is complex, possibly involving the local employer, the national regulator and the civil and/or criminal legal systems in the UK and abroad. Activities in different parts of the regulatory system are not necessarily integrated. As a result, the sort of duplication of inquiry found in the Ledward case is likely to reoccur. This duplication may be unfair to witnesses and defendants who have to relive testimony and undergo repeated examination and cross-examination.

Duplication leads to delay, whereas quick action is the real tenant of public protection. Duplication and delay may lead potential complainants to believe that it is not worth pressing charges. Duplication could be reduced if some of the work done at early stages of the regulatory process could be transferred and used by those involved in proceedings for subsequent stages. This is subject to a number of legal and practical barriers.

The first barrier is the legal challenge that can always be made to any transfer of evidence from one forum to another. The point of legal principle concerns the question of 'hearsay'. Only when a matter is proved in a criminal court are the facts considered proven – up to that point any evidence transferred from one inquiry or hearing to another may only be considered hearsay and is subject to robust legal challenge.

The second, practical barrier, concerns the variability of quality, procedure and standards of proof applied by different parts of the regulatory system. HC90/9 hearings, used by the local employer, are seen as being highly variable in quality and are currently under review. A range of different rules is seen to determine the nature of each individual inquiry, depending on who is chairing and the action of the Trust. In some cases the standard of proof to be applied is clear, in others it is not. To take findings or even the evidence from an earlier setting with differing procedures and transfer them to another court or hearing may introduce considerable unfairness.

The question then arises as to whether procedures and rules (especially regarding admissibility of evidence, and the standard of proof) should be made consistent across the different areas of the regulatory system to allow the transfer of evidence. But even a

change to a consistent standard of proof, while it may help, may not be sufficient to resolve the problem. Some argue that there should be a progression through the regulatory system whereby allegations, if proven, bring greater potential sanctions and therefore demand higher standards of proof (even though the facts and the incidents at issue may be the same).

Should the balance between public protection and the individual rights of the doctor be different at the local and the national levels?

Should consistent standards of proof and procedural rules apply across the regulatory system?

Should an employer (NHS) have the right to judge employees to different standards than those used by the professional body?

Endnote

This paper has outlined the relevant legal positions (section 1) and the key areas for debate (section 2). The paper aims to promote an informed discussion of a complex issue.

Steve Dewar
Jennifer Dixon

Health Care Policy Programme
King's Fund