Thresholds for referral of concerns to regulatory bodies
September 2008

1 Introduction

This paper argues that attempts to harmonise the guidance available to employers on when to refer a case to a regulatory body would be of limited use. Instead, it proposes that efforts are focussed on signposting employers to regulatory bodies' own guidance and advice. It also proposes that CHRE's performance review should look closely at the way that regulatory bodies engage with employers to ensure their advice and guidance in this respect represents good practice.

2 Background

2.1 The Council for Healthcare Regulatory Excellence is an independent body accountable to Parliament. Our primary purpose is to promote the health, safety and well-being of patients and other members of the public. We scrutinise and oversee the health professions regulators[1], work with them to identify and promote good practice in regulation, carry out research, develop policy and give advice.

2.2 In 2007 we were asked by the Department of Health to consider protocols for investigation of concerns, with guidance to employers on when to refer to a regulatory body. This was set out in the White Paper *Trust Assurance and Safety*:

"To ensure greater consistency of approach to the investigation of concerns about health professionals, the Government will ask CHRE to work with stakeholders to develop common protocols for investigation across all the regulators, and provide guidance to employers on when cases should be referred to the national professional regulator. This will help to ensure that investigations at local level are conducted to a standard that avoids multiple investigations at local and national level"[2].

[1] General Chiropractic Council, General Dental Council, General Medical Council, General Optical Council, General Osteopathic Council, Health Professions Council, Nursing and Midwifery Council, Pharmaceutical Society of Northern Ireland, Royal Pharmaceutical Society of Great Britain

[2] Department of Health 2007 *Trust, Assurance and Safety*, paragraph 3.11/4.17

2.3 We conducted a preliminary consultation in 2008 with key stakeholders on both aspects of this paragraph: protocols for investigation and thresholds for referral.

2.4 As a result of the responses to the consultation we drafted a set of protocols that should apply at all stages of an investigation. These were submitted to the Department of Health, and incorporated into the report of the Tackling Concerns Locally Clinical Governance Working Group[3].

2.5 The question that remains therefore is what further work should be undertaken to provide guidance to employers on thresholds for referral of concerns to the relevant regulatory body. The report *Implementing the White Paper Trust Assurance and Safety: Enhancing confidence in healthcare professional regulators,* published in June 2008, remarked that "regulators need to ensure that all employers understand clearly when complaints should be referred"[4].

3 Existing guidance to employers and other considerations

3.1 All regulatory bodies offer guidance on their websites about the kinds of concern that should be (and should not be) considered under their fitness to practise processes; on what fitness to practise means; and on when and how referrals should be made. The following list, which is by no means exhaustive, illustrates the range of guidance that is available:

- General Dental Council

How to report a dental professional to us (August 2007)
http://www.gdc-uk.org/NR/rdonlyres/E6120863-88AE-453D-B3AA-1E7C7F718187/83450/HowtoReportEnglishfinal.pdf

- General Medical Council

A guide for health professionals on how to report a doctor to the GMC (November 2007)
http://www.gmc-uk.org/concerns/making_a_complaint/a_guide_for_health_professionals.pdf

How to complain about a doctor
http://www.gmc-uk.org/concerns/making_a_complaint/referal_England.pdf
http://www.gmc-uk.org/concerns/making_a_complaint/referal_Scotland.pdf
http://www.gmc-uk.org/concerns/making_a_complaint/referal_Wales_in_English.pdf
http://www.gmc-uk.org/concerns/making_a_complaint/referal_NIrland.pdf

[3] Department of Health July 2008 *Tackling Concerns Locally Clinical Governance Working Group Draft Report*
[4] Op cit paragraph 4.10

- General Optical Council

How to make a complaint (guidance on website)
http://www.optical.org/en/our_work/Investigating_complaints/How_to_make_a_complaint/index.cfm

Code of Conduct for business registrants (June 2005)
http://www.optical.org/goc/filemanager/root/site_assets/codes_of_conduct/code_business.pdf

- Health Professions Council

Information for employers: the fitness to practise process
http://www.hpc-uk.org/publications/brochures/indexd.asp?id=105

A guide for employers and registrants: managing fitness to practise
http://www.hpc-uk.org/publications/brochures/index.asp?id=142

- Nursing and Midwifery Council

Reporting unfitness to practise: a guide for employers and managers (August 2004)
http://www.nmc-uk.org/aFrameDisplay.aspx?DocumentID=65
Reporting lack of competence: a guide for employers and managers (August 2004)
http://www.nmc-uk.org/aFrameDisplay.aspx?DocumentID=66

- Pharmaceutical Society of Northern Ireland

Fitness to practise pages on website:
http://www.psni.org.uk/societyfunctions/fitnesstopractice.php

- Royal Pharmaceutical Society of Great Britain

Guidance in making complaints against registrants and owners of pharmacies
http://www.rpsgb.org.uk/pdfs/ftpcomplaintsprocsguide.pdf

Referral criteria in respect of fitness to practise allegations
http://www.rpsgb.org.uk/pdfs/ftpicreferralcriteria.pdf

Threshold criteria for single one off dispensing errors
http://www.rpsgb.org.uk/pdfs/ictcsingleoneoffdisperrors.pdf

Threshold criteria for cases other than single one-off dispensing errors
http://www.rpsgb.org.uk/pdfs/ictcother.pdf

Other cases suitable for non-referral to the Investigating Committee
http://www.rpsgb.org.uk/pdfs/icothernonreferral.pdf

3.2 Regulatory bodies offer telephone advice to assist employers or others with concerns about whether referral is appropriate, including assistance on how to submit the concern so that it meets the regulatory body's standard of acceptance.

3.3 The General Osteopathic Council and the General Chiropractic Council also offer guidance on how to make a referral; as their registrants are principally self-employed for the most part they fall outside the scope of this paper.

3.4 The report of the Clinical Governance Subgroup of Tackling Concerns Nationally contains the following advice in its section on investigations, which was included in our submission on how investigations should be conducted:

"An initial assessment must be made as to whether the case should be handled internally to the employer, or should be referred to the regulatory body. Employers should consult the relevant regulatory body for advice on the kinds of case for which they will receive referrals, both from published guidance available on regulatory bodies' websites and from seeking direct advice on the specific case"[5].

3.5 Employers are also advised to be prepared for the possibility of new material arising in the course of an investigation which may then warrant a referral to the regulatory body.

4 Could the different pieces of guidance be harmonised in some way?

4.1 In our preliminary consultation, we asked for views on whether there was any scope for simplifying the definition of when a case should be referred to a regulatory body, and therefore scope to develop common guidance on when to refer and when to manage a case at local level. Would it be possible to produce a common definition of what is meant by impaired fitness to practise?

4.2 Responses back indicated that this would be extremely difficult, if not impossible to achieve in any meaningful way. Regulatory bodies work under different pieces of legislation, and with different rules for how fitness to practise cases should be handled. The profiles of their registrants, in relation to their employment setting, are markedly different from each other. Impaired fitness to practise is a concept which is defined within the context of the standards of each individual regulatory body; cases will often relate to the specifics of a profession and of a given case. Respondents felt therefore that any common definition would be of little practical use in guiding an employer on how to act.

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[5] Department of Health (August 2008) *Tackling Concerns Locally Clinical Governance Working Group Draft Report* Chapter 4

4.3 Accurate categorisation at the initial referral stage is not about making a final determination about whether fitness to practise is impaired or not, but about judging whether it is likely that an FTP panel will find that fitness to practise has been impaired. In some cases and as a result of certain categories of misdemeanour this may be clear, but where there is uncertainty – for example where there have been persistent low-level performance concerns over a long period of time which have been difficult to address – expertise is needed to judge whether or not the case is a regulatory matter. This expertise is already located within the regulatory bodies; it would not be cost effective to attempt to duplicate it in some way within employing organisations where the expertise might only rarely be called on.

4.4 In future, for doctors, the network of GMC Responsible Officers and Affiliates (to be piloted in England in the first instance) will play a major role in managing the threshold at which cases are referred to the regulatory body, and when they are addressed at local level.

4.5 In Scotland, there is specific guidance to Health Boards on referral circumstances[6]. Where the NHS Tribunal makes an adverse finding against a practitioner, it is set out in statute that the Scottish Government Health Directorates forward the Tribunal's decision or report automatically, on behalf of Scottish Ministers, to the relevant regulatory body. DHSSPSNI alerted us to the guidance *Maintaining High Professional Standards in the Modern HPSS, a framework for the handling of concerns about doctors and dentists in the HPSS.* In Wales, we understand that although no specific central guidance is issued, some trusts have their own policies on referral.

4.6 Taking these considerations together, we do not believe that attempts should be made to produce common guidance on when cases should be referred. Instead, efforts should concentrate on ensuring that the regulatory bodies' guidance and advice is accessible and available to those, including employers, by whom a referral might be made. This is discussed further in the next section.

5 Future work

5.1 It would be advantageous if rather than producing common guidance, steps were taken to ensure that individual regulatory bodies' guidance documents on their fitness to practise systems and processes are easily available, widely publicised, written in an accessible way, and backed up by telephone advice to discuss the details of an individual case. Employers need to be aware that if they are in any doubt, advice is freely available. This is already being achieved to some extent, as observed in CHRE's *Performance review of health professionals regulators 2007/08 Helping regulation to improve*[7]*:*

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[6] Scottish Government Health Directorates *Guidance to Health Boards on NHS Discipline Committees and the NHS Tribunal,* Chapter 14

[7] CHRE (August 2008) *Performance review of health professions regulators 2007/08 Helping regulation to improve* pg 9 para 2.4.1

"the regulators all have a process by which people can make complaints about a registrant's fitness to practise, and in most cases these complaints processes are clear. The best systems provide either a named caseworker or a central contact centre for processing initial complaints or concerns about a registrant".

5.2 With these objectives in mind, we strongly support the recommendation in the report of the Tackling Concerns Locally Clinical Governance Working Group for a single web portal of advice for employers[8]. With good signposting this will assist employers in identifying where their case should properly be addressed.

5.3 In order to promote best practice in this respect, it is proposed that our performance review of the regulatory bodies considers in some detail the way in which regulators engage with employers to ensure that their role in handling concerns is understood, and to ensure that the guidance that they offer on their fitness to practise processes represents best practice.

5.4 Taken together activity on these two fronts will represent the most cost effective and proportionate ways to ensure that cases are correctly categorised and handled appropriately.

[8] Department of Health (August 2008) *Tackling Concerns Locally Clinical Governance Working Group Draft Report* Chapter 7 paragraph 5