

Separation of the adjudication function

Purpose of paper	To propose operational separation of the adjudication function, within the current legal framework
Status	Public session
Action	For approval
Corporate Strategy 2016-19	<p>Professionals - Objective 5: To take timely, fair and proportionate action through our fitness to practise process when dental professionals do not meet the required standards.</p> <p>Performance – Objective 1: To improve our performance across all our functions so that we are highly effective as a regulator.</p>
Decision Trail	The Chair's Strategy Group (CSG) exploration of options started in 2016 but was paused until key decisions had been implemented in relation to the Estates programme. The issue was discussed at the CSG in February, April, September and November 2019, where these proposals were finalised.
Recommendations	The Council is asked to approve the proposal to formally separate the GDC's adjudication function from the investigation and prosecution functions.
Authorship of paper and further information	John Cullinane, Head of Adjudication, jcullinane@gdc-uk.org Tom Scott, Executive Director, FTP Transition, tscott@gdc-uk.org
Appendices	<ol style="list-style-type: none"> 1. Policy context 2. Details of the arrangements at the MPTS and the HCPTS 3. Operational changes 4. Costs 5. Decision making and quality assurance in the GDC

1. Executive Summary

- 1.1. Since late 2016, the GDC has been further separating the adjudication function from the investigation and prosecution functions. The main benefits of a discrete adjudication function would be addressing the perception that the GDC is both prosecutor and judge, and securing cultural improvements to training, recruitment and how panellists make decisions.

- 1.2. Detailed and costed proposals for the establishment of an operationally discrete adjudication function have now been developed. These proposals are seen as the first part of a two-staged approach: a stepping-stone towards greater separation at a later stage should legislative change be available through a future Section 60 order. Without legislative change, the function must remain both in law and in terms of accountability and financial control, a part of the GDC.
- 1.3. To achieve this, the Council is invited to adopt new governance arrangements that provide the adjudication function with a discrete identity by:
 - Retaining the Statutory Panellists' Assurance Committee (SPC) with its current responsibilities for appointment of members and chairs of statutory committees; determining whether committee members should be disqualified from office; and removing or suspending committee members from office.
 - Appointing a Chair with knowledge and experience of judicial decision-making, who can advise the adjudications team on training, recruitment and culture
 - Agreeing the option of appointment or co-option of additional members with specific experience in recruitment, training and quality assurance who can help to improve the oversight of the current functions of the SPC and who can provide a source of advice to the adjudications function on their areas of expertise.
 - Approving the budget for the expected expenditure as set out in section 6.
 - Approving funding this expenditure from reserves, as it has not been incorporated into the CCP. On the basis of the forecast position at time of writing, this would reduce the current forecast for free reserves at the end of the planning period from 4.9 months to 4.8 months of operating expenditure; against our target level of free reserves of 4.5 months of operating expenditure. The level of free reserves, as adjusted for our assessment of financial risk, will remain at 3.1 months of operating expenditure, which is within the tolerance of the proposed Reserves Policy 2020.

2. Introduction and background

Adjudication and the Wider Regulatory Framework

- 2.1. The need for independent adjudication in fitness to practise proceedings has been the subject of attempts at reform since 2004, when the Shipman Inquiry recommended the establishment of a wholly independent tribunal, removed from the GMC. The background detail is set out for information in Appendix 1.
- 2.2. Other regulators have already made formal changes to their structures to underpin the independence of adjudication.
- 2.3. The General Medical Council (GMC) set up the Medical Practitioners Tribunal Service (MPTS) in 2012, which was placed on a statutory footing in 2016. The MPTS has an independent, judicially qualified chair and is managed on a day-to-day basis by an Executive Manager who takes direction from the Chair for operational management but who is accountable to GMC's Chief Operating Officer for effective use of resources.
- 2.4. The Health and Care Professions Council (HCPC) established a non-statutory Tribunal Advisory Committee (TAC) in 2017. Their Director of FTP continues to have overall responsibility for the adjudication function, which remains part of the FTP Department. FTP panel members and legal advisers are recruited, trained and appraised by the Partners team, part of the HR Directorate. TAC provides advice on the qualities, abilities and competencies required of panellists and Legal Advisers. The Head of Tribunal Services reports to the Director of FTP. Effectively this approach is similar to the GDC's present arrangements but with a stronger discrete identity for the adjudications function.

- 2.5. In addition, it should be noted that the adjudication function of the General Pharmaceutical Council (GPhC) sits under the Director of People, rather than under the Director of Fitness to Practise. The Director of People is responsible for the statutory panellists and is assisted by the Appointments Committee Chair and the Head of Adjudication. The Chair is contracted to work one or two days per week. The current Chair is not legally-qualified. The role of the Appointments Committee is broadly similar to the GDC's – selection, recruitment, training and performance reviews of committee members - but in practice, much of the work is done by the Chair and the members of the Committee, who lead in recruitment and training rather than having oversight as is the case at the GDC.
- 2.6. Further details of the arrangements at the MPTS and the HCPTS are attached for information as Appendix 2.

The GDC

- 2.7. The GDC's fitness to practise process is set out in the Dentists Act 1984 and the GDC (Fitness to Practice Rules) 2006, revised in 2016. Legislative change would be necessary to amend the Rules, which are very prescriptive. Part of the restrictive nature of the Rules is that there are few effective case management powers for Committee members. This limits the sanctions that Committees can impose on parties, for example if they fail to disclose material on time - the GDC currently has no legislative powers to enforce directions, nor does it have the Rules in place to impose orders for costs. Fully effective case management would require different powers for panellists, and so amendments to the Act and Rules.
- 2.8. The GDC has the power to delegate the appointment of panellists, which it has elected to exercise to create the SPC in making the GDC (Constitution of Committees) Rules Order of Council 2009. Those Rules provide that there shall be an Appointments Committee and that this Committee must perform the following functions:
- Appointment of members and chairs of statutory committees;
 - Determining whether committee members should be disqualified from office; and
 - Removing or suspending committee members from office.
- 2.9. Removing any of the current functions of the SPC, or abolishing it completely, would require an amendment to the 2009 Rules. While this is possible using powers under the Dentists Act, it would also require Privy Council approval. The estimate from the In-house legal advice team is that this would take between 18-24 months to achieve. Given the possibility of a Section 60 opportunity to amend the FTP rules, we do not propose to seek to introduce legislative change to this area at this time. However, should this proposal be adopted we will prioritise the drafting of new legislation for this area in case the Section 60 opportunity does not arise. In order to make any further meaningful changes to the separation of the adjudication function, the role and composition of the SPC would need to change. This is discussed further in Section 4 below.
- 2.10. The proposal to give the adjudication function operational separation is not new. The Chair's Strategy Group has been exploring the options available to the GDC in respect of delivering the adjudication function since 2016:

November 2016	CSG and EMT started exploring options available in respect of future delivery of the GDC's adjudication function.
July 2017	Chair's Strategy Group discussed a paper providing a high-level view of the procedural steps which would need to be taken in order to set up a tribunal function similar to the MPTS. Work focused on exploring the possibilities for operating the function at arms-length, through a contractual agreement for services with a Special Purpose Vehicle (SPV) established by the MPTS.
Between October	GDC discussed this option with the GMC and MPTS. Those discussions came to an end as it was not feasible within the timetable which estates

2017 & Jan 2018	considerations imposed upon the GDC, to reach the point at which in invitation to tender could be issued.
February 2018	Paper updated Council on the exploration of alternative adjudication options undertaken in 2017 and proposed next steps.
February, April, September & November 2019	In 2019 papers were presented to the CSG on four occasions. Initially they provided a high-level summary of the review activities undertaken to-date and set out the legal parameters of possible changes and invites views on next steps. A subsequent paper provided a number of options for adjudication reform for discussion. The final paper provided an update on the proposal to Council to give the adjudication function operational separation within the current legal framework. It set out the legal position regarding the role and status of the SPC and set out options for oversight of the separated function, including the appointment of a Chair with judicial experience.

- 2.11. This is an opportunity to move forward as far as possible within the current legislation in order to be able to take maximum advantage, in good time, of any future changes to the legislation. The proposal in this paper is not seen as the final position for the function, but an important staging post on the route toward a fully-independent hearings service.
- 2.12. Independence in adjudication has long been an important consideration for the GDC - and the organisation has made several changes over the last decade which have contributed to the adjudication function being more visibly and operationally separate. These include three significant changes:
- Independent appointments/oversight of panellists/decision makers through the creation of Appointments Committee (known as Statutory Panellists Assurance Committee, or SPC) in 2009;
 - Separation of prosecution and adjudication functions through the re-structure of the FtP and legal teams in 2017;
 - Independent oversight of the quality assurance of decision-making through the appointment of an external independent chair of DSG and the chair of QAG passing from FtP to the ED, Strategy - and currently to the Registrar (2017).

These three changes have laid the platform on which we can build further changes to enhance the separation of functions.

- 2.13. A working group to explore the development of a discrete adjudication function was set up in May 2019, tasked with developing costed proposals and indicative timescales for the implementation. The working group identified the issues that needed to be resolved including lines of accountability, IT, branding and business support. We have also worked closely with the Head of In-House Legal in order to understand the legislative framework around the SPC and the adjudications function, and the constraints on how this can be amended.

3. Potential benefits of a discrete adjudication function

- 3.1. There are potential benefits in appointing a Chair with a judicial or tribunal background, who could use their experience to offer more robust oversight to the remit of the SPC (although we need to be mindful that the delegated powers are to the committee rather than the Chair). In particular, they could offer insight into the culture and professionalism needed to operate an adjudication function, given their experience within the context of Hearings. This could include increased knowledge of training, recruitment and experience of making adjudication decisions. To quote Judge Pearl, first independent Chair of MPTS, 'There has been a major cultural change during my time at the MPTS. Tribunal members are now treated as professional decision makers rather than as members of a jury.'

- 3.2. While the function will remain within the same regulatory framework, given the very limited case management powers, it is anticipated that enhancements in training and culture will assist panels to manage cases by working with parties to establish clear directions, even if these are not legally enforceable. Implementing these enhancements will also mean the transition to an independent adjudications function and a culture of robust case management will be easier in the future.
- 3.3. There are potential reputational benefits for the GDC to be gained from the greater separation of the investigation and adjudication of fitness to practise cases. With a discrete identity, the separation of these functions would be publicly visible, which could in itself promote increased levels of confidence in the independence of decision making. It will make it very clear to the registrants and their defence teams that cases are scheduled by an adjudication service which is distinct from the enforcement function and that any applications for postponements will be treated impartially.
- 3.4. Currently the operational and administrative functions associated with the adjudication of fitness to practise cases are carried out by the Hearings Team, who sit within the FTP Directorate. All correspondence regarding a registrant's fitness to practise is sent by the GDC, and the adjudication function also shares the same website, logo and telephone contact numbers. This apparent lack of separation may lead to a reluctance on the part of registrants to engage in the final hearing process. A discrete identity could lead to an increase in engagement by registrants, who would be more likely to understand that they are not disclosing information to the prosecutor. This is particularly relevant at a time when a significant percentage of the registrants who are subject to a fitness to practise cases are unrepresented and/or do not attend. Their understanding that the adjudication service is a distinct function from the enforcement function is likely to increase confidence and promote fairness for unrepresented registrants and may mean that they are more likely to engage. This will, in turn, assist with the scheduling of cases.
- 3.5. Similarly, the public (complainants and witnesses) will understand that they are dealing with a distinct adjudication body rather than the 'prosecutor', which should increase their willingness to co-operate.
- 3.6. The establishment of an informal framework agreement between the adjudications function and the remainder of the GDC would set out the methods of communication for case matters. This should remove any impression of 'cosiness' between the two teams. It will make it clearer that the adjudication service does not take instructions from Prosecutions or FTP.
- 3.7. Finally, as noted above, several other healthcare regulators have already sought to make their adjudication functions distinct from the enforcement arms of the organisation. They have achieved this in different ways, depending on the legislative schemes they operate within. Section 4 sets out why the GDC is limited by its statutory framework as to how far we can create a distinct function. However, with a possible opportunity to amend our FTP rules being discussed, this would be a first step to on the path to a legislatively separate adjudications function

4. Proposal – oversight of the adjudication function

- 4.1. This proposal essentially consists of:
 - revised governance arrangements for the oversight of the adjudication function in order to provide the adjudication service with a higher degree of transparency; and
 - administrative arrangements which are operationally separate from the remainder of the GDC and are seen to be so.
- 4.2. At the heart of the arrangements would be a body overseeing the adjudication function. The body would remain part of the GDC but at arm's length and with administrative arrangements which are (and are seen to be) operationally discrete from the remainder of the GDC.
- 4.3. The proposal is that, in terms of oversight, the GDC should

- Retain the SPC with its current responsibilities and consider an additional responsibility for the oversight of the implementation of quality assurance of decision-making of committees. Currently, there are two quality processes for decision-making – Quality Assurance Group and Decision Scrutiny Group. Both groups produce action plans for improvement, and SPC could ensure that these actions are fully developed throughout the adjudications process. (See Appendix 5 - Decision making and quality assurance in the GDC)
- Appoint a Chair with knowledge and experience of judicial decision-making, who can advise the adjudication team on training, recruitment and culture
- Agreeing the option of appointment or co-option of additional members with specific experience in recruitment, training and quality assurance who can help to improve the oversight of the current functions of the SPC and who can provide a source of advice to the adjudications function on their areas of expertise.

The reasons for these proposals are set out below.

- 4.4. As mentioned earlier, removing the current functions of the SPC would require an amendment to the 2009 Rules which established it. As this will take 18-24 months, the proposal is to take a first step towards a fully-independent adjudication function in order to be in advanced position to do so when a legislative opportunity arises.
- 4.5. Other regulators have demonstrated various models for their adjudication function being independently chaired, to differing degrees depending on their legislative schemes. The Chair is often actively involved in process and cultural improvements, as well as leading on delivery of training, recruitment and performance rather than having an oversight role. The degree of involvement that would be possible at the GDC is limited by our current legislation and the Terms of Reference of the current SPC – for example, delivery of training and recruitment which is an executive function (so, answering to the Chief Executive), While a Chair could have an increased role in the development, planning and delivery of training and recruitment, they could not have responsibility for the direction or execution. A chair with a judicial background is likely to cost more than non-qualified, although there are likely benefits in improving culture and how panellists think about decision making. Based on the current proposal, this role is likely to require a commitment of two or three days per month. This is based on the time commitments of similar roles at MPTS and GPhC, the relative size of those organisations, and the difference in scope of these roles.
- 4.6. There are currently three members of SPC in addition to the Chair. There is provision for up to eight members to be appointed to SPC, and it might enhance the effectiveness of the Committee if specialists were appointed or co-opted who could assist the Chair to provide robust oversight on their areas of responsibility. In particular, given the current remit of the committee, expertise in recruitment, training and disciplinary procedures would help provide increased levels of assurance against the committee's remit.
- 4.7. There are also some operational changes which could be undertaken as part of the optical separation of the adjudication function. These are summarised in the table at Appendix 3.

5. Timelines

- 5.1. A working group consisting of senior staff from across the GDC considered the operational plan required to establish the distinct identity for the adjudications function. Once approved by Council it is anticipated by the working group these changes could be implemented between 12-18 months. This is to allow time for recruitment activity for the Chair and the operational changes.
- 5.2. A project relating to the separation of the adjudication has been incorporated in the CCP and staff time is available for the majority of the work needed to complete the project. However, timescales are not currently in the CCP and the phasing of these may need adjustment once

further scoping of work is done. Determining the Corporate Project resource required for Programme Management/Project Management also might change timescales.

6. Costs

- 6.1. There will be costs associated with the proposed changes. The costs could not be included in the budget for 2020 and no budget provision could be made in the CCP as this initiative has not yet been agreed by Council. Therefore, the costs of this activity in 2020 will constitute a call on the reserves. On the basis of the forecast position at time of writing, this would reduce the current forecast for free reserves at the end of the planning period from 4.9 months to 4.8 months of operating expenditure; against our target level of free reserves of 4.5 months of operating expenditure. The level of free reserves, as adjusted for our assessment of financial risk, will remain at 3.1 months of operating expenditure, which is within the tolerance of the proposed Reserves Policy 2020.
- 6.2. Much of the cost of this proposal is based on fees for the Chair. It should be noted that, if the proposal is approved, the costs of the Chair will be less in 2020 than in subsequent years (as they will not serve a full year in 2020); but that if there is legislative change which changes the nature of the role, then this cost is likely to increase as the Chair's role (and therefore time commitment) would increase.
- 6.3. Operational and capital of expenditure is estimated as follows:

First year costs	
Activity	Cost
Capital expenditure	£60,000
Operational costs	£108,800
Total costs for first year	£168,800

Subsequent years' additional costs	
Activity	Cost
Operational costs	£106,900

7. A full breakdown of costs is set out in Appendix 4.

Recommendations

- 7.1. The Council is invited to:
- 7.2. Adopt the new governance arrangements that provide the adjudication function with a discrete identity by:
- Retaining the SPC with its current responsibilities for appointment of members and chairs of statutory committees; determining whether committee members should be disqualified from office; and removing or suspending committee members from office.
 - Appointing a Chair with knowledge and experience of judicial decision-making, who can advise the adjudications team on training, recruitment and culture.

- Agreeing the option of appointment or co-option of additional members with specific experience in recruitment, training and quality assurance who can help to improve the oversight of the current functions of the SPC and who can provide a source of advice to the adjudications function on their areas of expertise.
- Approving the budget for the expected expenditure as set out in section 6.
- Approving funding this expenditure from reserves, as it has not been incorporated into the CCP. On the basis of the forecast position at time of writing, this would reduce the current forecast for free reserves at the end of the planning period from 4.9 months to 4.8 months of operating expenditure; against our target level of free reserves of 4.5 months of operating expenditure. The level of free reserves, as adjusted for our assessment of financial risk, will remain at 3.1 months of operating expenditure, which is within the tolerance of the proposed Reserves Policy 2020.