



Unite the Union Response to:

Professional Standards Authority (PSA) Draft for Consultation; Guidance for regulators on fitness to practise hearings during the Covid19 pandemic.

This response is submitted by Unite in Health. Unite is the UK's largest trade union with 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport, local government, education, health and not for profit sectors.

Unite the union represents in excess of 100,000 health sector workers. This includes eight professional associations - British Veterinary Union (BVU), College of Health Care Chaplains (CHCC), Community Practitioners and Health Visitors' Association (CPHVA), Guild of Healthcare Pharmacists (GHP), Hospital Physicians Association (HPA), Doctors in Unite (formerly MPU), Mental Health Nurses Association (MHNA), Society of Sexual Health Advisers (SSHA).

Unite also represents members in nursing, allied health professions, healthcare science, applied psychology, counselling and psychotherapy, dental professions, audiology, optometry, building trades, estates, craft and maintenance, administration, ICT, support services and ambulance services.

Introduction

Unite represents members regulated with all ten health care regulators and welcomes the opportunity to comment on the PSAs draft *Guidance for regulators on fitness to practise hearings during the Covid19 pandemic*. This response builds on previous submissions produced in conjunction with trade union and professional body colleagues.

Comments on virtual hearings

Unite recognises the challenges presented by the Covid19 pandemic and the need to look at alternative modes of operation to enable regulators to continue to fulfil their primary aim of protecting the public during these unprecedented times. Indeed, since the beginning of the pandemic, along with trade union and professional body colleagues, Unite has been working in close collaboration with the Nursing and Midwifery Council (NMC) and Health and Care Professions Council (HCPC), to facilitate them to do so. This has demonstrated that this approach is extremely beneficial to all concerned.

However, Unite is concerned that the NMC's temporary rules, in particular those related to virtual hearings, brought into deal with the pandemic have become permanent without the usual consultation. We acknowledge that the NMC Council have committed not to use them until a formal consultation has taken place, but would request that the PSA review how the consultation is to take place, to ensure it is meaningful.

Consistency and accuracy in the approach to virtual hearings across the regulators is important to ensure fairness. There is evidence that in fitness to practise cases involving for example a doctor and a nurse, the nurse will in most cases, receive a more severe sanction. It is important that the approach to virtual hearings does not become another example of different treatment depending on which profession the registrant belongs to. Unite questions why it should be the case that if a hearing involves a HCPC or NMC registrant, observers can view the hearing virtually, with the risks this poses, whereas if it involves a GMC or SWE registrant they cannot. Unite considers that the draft guidance, if followed, would go some way to addressing such issues.

Again, we welcome the intention for the guidance to be used to assess the regulators approach to virtual hearings during their performance review and feel this is an important step in ensuring consistency in approach.

As stated in the draft guidance, the regulators have been conducting virtual hearings for a limited number of cases during the Covid-19 pandemic. As these have been relatively simple cases, Unite does not consider that the various approaches used by the regulators to date, have yet been

sufficiently tested. In particular they have not been tested with complex substantive hearings where facts are disputed, there are multiple witnesses or vulnerable witnesses or registrants.

It is important to state that Unite is not opposed to virtual hearings. We acknowledge that there may be cases where this is the preferred or most appropriate option. Indeed, as any delay to a resolution is detrimental to all involved, virtual hearings may help address the inevitable backlog of cases caused by the pandemic. In particular if there is the requirement for local lock downs. However, there are a number of concerns related to virtual hearings that as yet have not been addressed.

Consent

For the reasons previously highlighted, Unite does not consider that registrants should be compelled to have their case dealt with at a virtual hearing during this emergency situation. If following discussions, agreement cannot be reached then a physical hearing should be convened. The guidance needs to make clear that agreement has to be reached between all parties. This is especially important for unrepresented registrants who may not realise they can raise concerns about a virtual hearing, which could compound their already increased chance of a worse outcome.

There appears to be a view that if there was a requirement for a registrant to have to be in agreement with a virtual hearing, then they would seek to delay. This is certainly not our experience, rather registrants desire to conclude their case as soon as possible due to the negative impacts the fitness to practise process has on them. Indeed, we are suggesting that in the same way as NMC registrants can opt for their case to be dealt with at a meeting or a hearing, they should have a choice between a virtual or physical hearing, and not whether to have a hearing or not. As stated in the draft guidance, decisions should be taken on a case by case basis. In addition, we consider that while criteria can be a useful guide, it can also be problematic as if an issue is not on the list, it may not be considered.

Public access

Unite does not look to undermine the principle of open justice but remains concerned that the potential risks of allowing virtual public access to hearings are yet to be mitigated. The risks include taking screenshots, recording events and posting on social media and the potential to influence witnesses. A recent case highlights the latter as a risk; *on the third day of trial, during the cross-examination of a witness, the judge noticed that one of the remote witnesses was on one of the video screens and could obviously hear what was going on. The judge said that he was*

surprised to see the witness and had not authorised it [Gubarev & Anor v Orbis Business Intelligence Ltd & Anor](#)¹.

In terms of recording proceedings or taking screen shots, the draft guidance suggests the risks are the same if the observer is there in person or online. Based on the experience of observing NMC and HCPC hearings it is our view that it would be extremely difficult to do this at an in person hearing without being challenged. The guidance refers to how the courts operate, however, here it is a criminal offence should anyone seek to record, film or otherwise undermine a hearing. The regulators can only ask observers not to do so, but have no legally enforceable authority.

We would agree with the guidance that some of the issues are not insurmountable and consider that providing transcripts and or the option of attending a hearing centre to watch virtually would fulfil the requirement for open justice. Indeed, the Medical Practitioners Tribunal Service (MPTS) and SWE are only allowing observer's access if they attend a geographical designated hearing centre within which there is a secure virtual link provided and controlled by them.

Assessing risk

In terms of whether it is feasible for regulators to identify cases that may present an increased risk if virtual access is given to observers, Unite considers there are professions where hearings are more likely to be emotionally fraught. The professions that were required to continue during the pandemic for example, nurses, doctors, allied health professionals, are we would suggest, likely to be the ones whose cases may be more likely to attract potentially unwelcome interest. Whereas, cases involving professions who were prevented from continuing during the pandemic may be less contentious.

Virtual platforms

The regulators are using a range of virtual platforms to conduct hearings. Unite is concerned that a robust assessment has not been undertaken of each of these in terms of accessibility, functions, security and data ownership. Whilst the draft guidance states the importance of ensuring participants have the connectivity required in order to fully participate in the hearing, we are hearing of cases where this has not been the case and rather than ask for an adjournment that would delay their case, registrants have had to access Wi-Fi in a library or church. This of course is unacceptable.

As well as looking at issues related to equity, it is important that an equality impact assessment is also a requirement to avoid any unintended consequences. In addition, whilst the draft guidance

¹ City giant self-reports to SRA after trial streamed live on Zoom
[John Hyde](#)⁷ August 2020

does suggest a number of actions that could be taken to mitigate some of the risks, it is not clear whether all of the platforms will facilitate these.

Finally, we welcome the PSA's commitment to supporting a resumption of hearings through this guidance.

Submitted on behalf of Unite by;

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