



Performers List hearings

A briefing from our Health, Risk and Regulatory team - February 2010

Legal representation at Performers List hearings in Wales

What is the position?

It is not uncommon for LHBs engaged in the process of considering whether to remove, conditionally remove or suspend performers under the NHS (Performers List) (Wales) Regulations 2004 ('the Regulations') to receive requests from practitioners or their representatives to allow practitioners to be legally represented at Reference or Performance Panel hearings. The Regulations are silent on this issue, merely stating that the practitioner is entitled to an oral hearing. So what is the position?

The Operational Policy for LHBs on the Management of Performance Procedures for Doctors on the Performers List ('the Operational Policy'), which was agreed in 2007, states at paragraphs 2.5 and 3.6 that support and representation for the performer should be available at every stage. This includes the LMC, BMA, a Medical Defence organisation or a friend or colleague, but makes no mention of legal representation.

The Operational Policy was developed in accordance with the Welsh Assembly Government Circular WHC (2005) 059 - Guidance for LHBs on Local Procedures for General Medical Practitioners ('the Circular'). The Circular states that '[At any stage of this process - or subsequent disciplinary action – the practitioner may be accompanied in any interview or hearing by a companion. Without prejudice to the procedure set out in Schedule 2 to the Employment Act 2002¹, the companion may be an official or lay representative of the British Medical Association or defence organisation; a representative of the LMC, or a friend, partner or](#)

¹ The Employment Act 2002, Schedule 2 was repealed by the Employment Act 2008.

[spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.'](#)

Wording which was substantially akin to '[may be legally qualified but...not acting in a legal capacity](#)' was given judicial consideration by the Court of Appeal in the case of [Kulkarni v Milton Keynes Hospital NHS Foundation Trust \(2009\)](#). In that case, the Court was concerned with the wording in a Department of Health policy document entitled 'Maintaining High Professional Standards in the Modern NHS', otherwise referred to as 'the MHPS'. The MHPS is concerned with misconduct, health and capacity proceedings against doctors. The MHPS is only applicable to the NHS in England, however, given the similarity in the wording to be found in the MHPS and the Circular, the Court's comments are of relevance when considering appropriate procedure in Wales.

The relevant section of the MHPS stated that '[The practitioner may be represented in the process by a friend, partner or spouse, colleague or a representative who may be from, or retained by, a trade union or defence organisation. Such a representative may be legally qualified but they will not, however, be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence](#)'. It was the view of the Court of Appeal that this paragraph permitted a practitioner to be represented by a legally qualified person, employed or retained by a defence organisation, but that the doctor was not permitted to be represented by a legally qualified person whom he had instructed or retained independently. If the practitioner happened to have a friend, spouse or partner who was legally qualified and willing to act, then this was also permitted.

The words '[not representing the practitioner formally in a legal capacity](#)' was considered by the Court of Appeal to be '[devoid of meaning](#)'. The Court commented that once a lawyer is admitted as a representative, then he or she was entitled to use all his or her professional skills.

The Court of Appeal recognised that this decision did not assist in circumstances where a practitioner was not a member of a defence organisation or where, for some reason, the defence organisation could not or would not provide representation. The Court therefore went on to provide some comments, which whilst not binding on other courts, were intended to provide some guidance.

In particular, the role of Article 6 of the European Convention on Human Rights was considered. Article 6 provides for a right to a fair trial and that all individuals are entitled to a fair and public hearing in relation to the determination of civil rights or obligations. After considering European case law, the Court of Appeal commented that in ordinary disciplinary hearings where all that would be at stake was the loss of a specific job, then Article 6 is not engaged. If the effect of the proceedings would be to deprive an individual of the right to practice his or her profession, then the Article would be engaged.

It was noted by the Court of Appeal that only proceedings before the GMC can deprive a practitioner of the right to practice, however, the Court considered that where a NHS doctor faces charges of such gravity that, if proved, the doctor would be prevented from employment in the NHS, then Article 6 was relevant. In such circumstances, Article 6 implies a right to legal representation and it would be unlawful to refuse a request for legal representation. Any request for legal representation should be considered carefully for these reasons.

The question of the use of legal representation in the context of Performers List proceedings was considered by the High Court in the cases [R \(on the application of Dr SS\) v Knowsley NHS PCT](#) and [R \(on the application of Dr Ghosh\) v Northumberland NHS Care Trust \(2006\)](#). The Court acknowledged that hearings held by PCTs and LHBs under the Regulations served an important public purpose of keeping inefficient and unsuitable people from performing as doctors. The scheme is intended to ensure that doctors removed from one list will not be accepted onto another unless circumstances have changed. Article 6 could therefore be engaged by such proceedings by virtue of the considerations discussed in the context of the [Kulkarni](#) case.

The High Court considered that the key question as to whether to allow legal representation was whether the doctor could fairly be expected to represent themselves or whether legal representation was necessary to enable them to be able to properly present their case. The High Court made comments which could be taken as indicative of some sets of circumstances where legal representation would be appropriate or necessary, including where there are a large number of allegations, where there is voluminous paperwork or where the nature of the complaints are such where it

might be inappropriate for the doctor to question the witnesses directly. These scenarios are not intended to be exhaustive.

It would seem, therefore, that despite the wording of the Circular and the Operational Policy, that any request for legal representation should be subjected to careful consideration and clear decision making, particularly where one of the options to be considered by the Panel is removal from the list or where an application for national disqualification is a possible consequence. The [Kulkarni](#) decision suggests that where there is a medical defence organisation involved which is able to arrange legal representation, or where the circumstances are such that a determination by the Panel may have implications for the practitioner's ability to continue with his or her career as a doctor, then such a request may be difficult to refuse. Equally, particular consideration should be given to such a request where the kind of considerations mentioned by the High Court in the [Knowsley](#) and [Northumberland](#) cases arise.

More information

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