The National Health Service Tribunal (Scotland)
Explanatory Note on Procedure
For Circulation among Health Boards and Defence Organisations

Background

The National Health Service Tribunal (Scotland) was created by the National Health Service (Scotland) Act 1978. It is an expert tribunal comprising a legally qualified chair, together with professional and lay members. It hears cases concerning the inclusion or continuing inclusion of doctors, dentists, opticians and pharmacists on the NHS approved providers list.

The procedures under which the Tribunal operates are to be found in The National Health Service (Tribunal) (Scotland) Regulations 2004 ("the Regulations"). As can be seen from the Regulations, the procedure is relatively flexible, although the Tribunal has in the past been frustrated by an inability to resolve matters by way of legal debate (standing the requirement upon it to issue a statement including findings in fact, in accordance with Regulation 21).

The way in which the Tribunal's procedures have operated historically has been found, in recent cases, to have been most unsatisfactory for the Tribunal itself, and no doubt for Health Boards and Respondents alike. Proceedings have taken an inordinately long period of time, both to hear and to determine. This has resulted from a number of factors, amongst which are:

(a) the fact that the Tribunal is part-time, with attendant challenges in getting members' and representatives' diaries coordinated;
(b) the scope and factual complexity of some of the cases recently before it;
(c) numerous appeals, of both interlocutory and final determinations;
(d) the time taken in the development of detailed written pleadings;
(e) the scope given to parties for the leading of evidence; and
(f) the time taken in drafting, circulating, approving and intimating decisions.

It is against this background that the Tribunal decided to undertake a review of its own procedures, in order to identify how the whole process could be streamlined. In doing so, the Tribunal recognised the need for its processes to operate much more quickly and efficiently, which will have the dual benefit of saving both time and considerable cost to the parties and to the Scottish Government (which funds the Tribunal).

As a party to that process, the Tribunal looked at and drew considerable assistance from some disciplinary processes operated by professional regulatory bodies, such as the General Medical Council and the General Dental Council. The way in which these bodies operate was seen as providing a helpful example of how the Tribunal might determine matters more efficiently, leading to far swifter and more economical (yet reliable) results. Whilst the Tribunal is aware of issues with the time it takes for some matters to be brought before professional regulatory bodies, and the time lost to adjournments etc, its belief is that the NHS Tribunal procedures can be greatly improved by the adoption of similar procedures.

The NHS Tribunal: future practice

Representations

Regulation 6(1) outlines the nature of Representations to be lodged by a Health Board (or any other party choosing to make representations). Representations require to be set out in accordance with Form 1, which is to be found in Schedule 2 to the Regulations.

Form 1 is in a very simple format, in which paragraph one sets out the statutory grounds on which the complainers rely; paragraph two sets out the facts and grounds upon which the representations are based; and paragraph three refers to the documentation to be relied on. It should be noted that the footnote to paragraph two, says that the statement of facts should be a "concise" statement of alleged facts and grounds. In future, when drafting representations the Tribunal would find it immensely helpful if, rather than following the traditional model of court pleading in Scotland, complainers could set out in a series of numbered paragraphs the facts upon which the rely. What is envisaged is one fact per numbered paragraph, akin to heads of charge in a professional regulatory matter. What would be set out would be those facts which the Complainers say meet, either individually or cumulatively, the statutory test for disqualification. This would give the Representations and any response a much clearer focus than has been the case previously, and would fit with the Tribunal's proposals to streamline the evidential hearing and decision making process (outlined below).

There is of course an opportunity through Regulation 7(1) for the Tribunal to require the complainer to furnish such further particulars as it may think necessary, and for that reason if the statement of facts in paragraph two of the Representations is considered to be lacking, then the Tribunal can call for further details / clarification prior to intimation on the respondent.

Any response to such Representations can then be similarly focussed, with each numbered statement of fact being met with an admission, a qualified admission, or a denial (including the "not known and not admitted" type of response"). That will make it clear to everyone precisely which facts are going to be contentious, and what evidence will be required.

Once a response has been called for and intimated, the Tribunal has the power under Regulation 12 to issue a Notice of Inquiry. Regulation 9 sets out the procedure at the Inquiry itself, and directs the reader to Schedule 1. Paragraph one of Schedule 1 gives the Tribunal discretion as to the procedure adopted at the Inquiry.

Procedural Hearing

The practice has been in the past, and will remain, that the Inquiry is commenced with what is essentially a Procedural Hearing. At that hearing, if the form of pleadings set out above is followed, then the Tribunal will be able to concentrate on the disputed issues of fact, identifying which and how many witnesses are to be called to prove/disprove those facts; what supporting documentation has been produced (or is still to be produced); whether any of that documentation is the subject of challenge; and how long parties estimate will be required for the evidential hearing. The aim would be to fix dates there and then, allowing sufficient time for the procedure set out below to be followed.

Any other preliminary motions can also be dealt with at that time, for example in relation to proceedings in absence, adjournments etc. Where documentation is not the subject of specific challenge, it will be taken as admitted, and therefore does not require to be

proved. Parties are also reminded that the Regulations specifically permit the use of written witness statements in lieu of oral evidence. This may be particularly useful in the case of an absent Respondent or where the evidence is uncontroversial. Practicalities of the evidential part of the Inquiry can also be considered. For example, the Tribunal will in general look favourably on witnesses giving evidence by skype/video conferencing so as to improve efficiency and minimise disruption to the witnesses, although crucial witnesses whose evidence will be the subject of challenge will still be expected to attend in person where possible. The Tribunal will expect parties to be able to give reasonable assessments of estimated duration of each witness, so that they can be timetabled appropriately with the assistance of the clerk.

Evidence

For the evidential stage of the Inquiry, the Tribunal intends to adopt the approach of professional regulatory bodies, whereby rather than having a proof of all facts and issues at the one time, it will look at the matter in three distinct stages.

Stage one will be findings in fact only. The intention is that, immediately following the leading of evidence on the facts, and using the numbered statements of fact in paragraph two of the Representations as its focus, the Tribunal will go into camera and consider whether it finds each head of claim ***proved*** or ***not proved***. The Tribunal would then, having deliberated on these matters, immediately announce its findings in fact to the parties. Assuming some facts are either admitted or proved, the Inquiry would then immediately go on to

Stage two, which would constitute submissions on, and a determination of, whether or not in light of the facts found proved or admitted, any of the statutory grounds for disqualification have been made out. Again, the Tribunal will go into camera, deliberate on this matter, and immediately announce its decision.

Stage three would then be the question of disposal, where the Tribunal would be invited to consider what Order, if any, is appropriate in the circumstances. Further evidence may be required at this stage for the purpose of enabling the Tribunal to consider the need for any Order at all, or appropriate conditions. Once more, the Tribunal will go into camera, deliberate, and then announce its determination.

In practice, is it anticipated that stages two and three might often be dealt with together, as it will often be apparent from the findings of fact whether any of the statutory grounds for disqualification are likely to have been made out or not.

The net effect of this is that parties will leave the Inquiry with a decision having been made, including reasons.

The Tribunal finds support for this procedure in Regulation 21, which sets out the requirement on the Tribunal to issue a Statement under the hand of the chairman *as soon as possible* following the inquiry. It contains a number of requirements, the first of which is that the Tribunal sets out its findings of fact. The second is that it sets out the conclusions which it has reached. The third relates to disposal. Those requirements appear to the Tribunal to fit neatly into the three stage process outlined above. In addition, many professional regulatory bodies operate a similar three stage process, for example in the medical professions where stage one consists of finding the facts; stage two consists of determining whether or not fitness to practice is impaired; and stage three determines sanction.

By adopting this procedure, it is anticipated that there will be enormous savings, both of time and cost, for all parties concerned. It is going to require a change of practice for

parties drafting Representations. It will also require substantial blocks of time to be set aside for factual Inquiries, in the sense that time will have to be allowed for the Tribunal to consider, write and announce its decisions. Parties will require to be alive to this in estimating the time required. Whether the allotted blocks of time will be necessary will depend upon the facts of each case.

This is considered far preferable to the Tribunal sitting for a few days, adjourning, and then coming back several months later for a few more days. Additionally, by focussing much more on the disputed facts rather than getting bogged down in other issues, such as justification for actions or excuses, it is anticipated that the evidence should be capable of being heard much quicker. Overall, this procedure ought to simplify the matter considerably, and it sits comfortably with much of the reported case law surrounding professional regulation.

Any questions in relation to this should be directed to the Clerk of the Tribunal, Fraser Geddes, Anderson Strathern LLP, 6th Floor, Lomond House, 9 George Square, Glasgow G2 1DY. Direct Line – 0141 242 7974.