

# A Review of Kulkarni and Other Challenges to MHPS

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# Introduction and Overview

- Increasing legality of MHPS
- The key areas of risk / challenge to the process
- Kulkarni
- Potential practical solutions

# Problem 1 (1)

- Risk: Action when a concern arises

## Issues:

- Deciding whether to proceed under MHPS at all
- Should Part I and Part II be followed for all cases?
- Who should be involved at an early stage and will they then face challenge?

# Problem 1 (2)

## Practical Solutions:

- Consider informal resolution
- Think tactically – what do you want to achieve? How do you do so?
- Ensure local procedures are clear as to applicability of Part I and Part II
- Train those involved
- Consider carefully how much detail the Medical Director / Chief Executive need to know at this stage
- Document decisions and meetings

## Problem 2 (1)

- Risk: Right to be represented / accompanied under MHPS (Kulkarni)

### Issues:

- How far does this right extend?
- Who does it cover?
- Does it apply to other staff?

## Problem 2 (2)

- Issues:

- R (on the application of G) v X School and Y City Council
- Extends right to legal representation at internal disciplinary and appeal hearings (in this case to a music assistant in a school)
- Internal process seen as part of a wider process i.e. the outcome would have a substantial influence on the findings of the regulatory body (the ISA)
- Reasoning in Kulkarni was referred to

## Problem 2 (3)

### Practical Solutions:

- Seek to apply Kulkarni in its narrowest sense i.e. to representation at hearings / appeals by a lawyer retained / instructed by TU or defence organisations
- Know your opponent (BMA and MDU / MPS appear to have a different view)
- Seek to clarify representation at the earlier stages of the process with staff side

## Problem 2 (4)

- Consider amending local policies
- Consider the potential outcome and level of practitioner involved
- Consider representation for the management side
- Train panels in the handling of hearings

## Problem 3 (1)

- Risk: Exclusions and Restrictions

### **Issues:**

- Deciding when to exclude or restrict
- MHPS requires discussion between the Chief Executive, Medical Director, Head of HR (and NCAS) – can they sit on subsequent panels?
- Length of exclusions – leading to arguments practitioners become unskilled / breach of duty of trust and confidence (Qasim v Central Manchester Hospitals)
- Requirement to review and communicate with the practitioner

## Problem 3 (2)

### Practical Solutions:

- Have clear and documented reasons for any decision
- Always treat exclusion as a last resort – could you restrict clinical duties and achieve the same end?
- Ensure Chief Executive etc have minimal involvement / information
- Diarise dates and delegate the preparation of board reports / letters to the practitioner if the case manager does not have time to deal with them
- Ensure contact is maintained with the practitioner for professional development and appoint a mentor to avoid isolation

## Problem 4 (1)

- Risk: Distinguishing between professional / personal conduct matters

### Issues:

- What is a matter of professional conduct?
- Can it include interpersonal relationships? (Buxton v Swansea NHS Trust)
- When does this need to be decided?
- If it is professional misconduct, the investigation must include independent professional advice and an external clinician must be on any disciplinary panel

## Problem 4 (2)

### Practical Solutions:

- Seek to form a judgement at an early stage whether the matter has a professional element
- If the matter includes a clinical element or occurs in a clinical setting, it is likely to fall into this category
- The independent professional advice can be from an internal source
- Use your networks to find external clinicians for the panel (they need not be of the same specialty as the practitioner concerned)

## Problem 5 (1)

- Risk: The overlap between conduct and capability matters

### Issues:

- Part III Conduct and Part IV Capability seem to overlap, for example:

*“wilful, careless, inappropriate or unethical behaviour likely to compromise standards of patient safety or create serious dysfunction to the effective running of a service” (conduct)*

## Problem 5 (2)

*“Inappropriate clinical practice arising from a lack of knowledge or skills that puts patients at risk” or “ineffective clinical team working skills” (capability)*

- Practitioners can push for matters to be dealt with as ones of capability so as to be afforded greater protection under the capability process

## Problem 5 (3)

### Practical Solutions:

- Carefully consider how the allegations are framed
- Have the courage to concentrate on the most serious allegation
- Encourage the case investigators to make recommendations as to the nature / setting of the issue

## Problem 6 (1)

- Risk: Treating issues as training matters for doctors in training

### Issues:

- This may cause possible arguments of discrimination where other staff are also involved
- It may not give the complainant adequate redress

## Problem 6 (2)

### Practical Solutions:

- Consider each issue carefully in determining the way forward
- Consult the PGD / Clinical Tutor
- Consider the wider picture in terms of potential claims / grievances that the complainant may have
- Attempt to treat all staff involved in the incident equally (assuming equal culpability)

## Problem 7 (1)

- Risk: When to action an NCAS assessment

### Issues:

- If a capability issue cannot be resolved internally / informally then the matter must be referred to NCAS to consider an assessment
- The Trust has no discretion in this situation
- If the practitioner agrees to the assessment there is a binding contract
- The Trust may be held in breach of contract if the assessment is not facilitated

## Problem 7 (2)

- Difficulties occur when the practitioner is excluded from clinical duties
- Significant delays often occur
- The practitioner may not agree to an assessment

## Problem 7 (3)

### Practical Solutions:

- Consult NCAS as to whether this is the right route
- Can the matter move directly to a capability hearing – “yes” if the practitioner does not agree to the assessment
- If excluded, seek to arrange the assessment at another Trust
- Help each other to allow assessments to take place
- Keep up the momentum to avoid delays

## Problem 8 (1)

- Risk: Where do team working / breakdown in working relationship issues fall under the procedure?

### Issues:

- It is often difficult to define these as conduct or capability
- Does MHPS apply at all or can you simply move to dismiss?
- Can alternative solutions be considered?
- Such matters often lead to internal grievances / counter-grievances

## Problem 8 (2)

### Practical Solutions:

- Consider attempting mediation / facilitated team-working
- The issues may fall under the capability “ineffective team working skills” or alternatively isolate matters of conduct that can be dealt with
- It may not be possible to dismiss outside MHPS framework for this reason

## Problem 8 (3)

- Seek advice from NCAS
- Seek an agreed solution (compromise agreement)
- Follow internal grievance procedures to resolve any complaints

## Problem 9 (1)

- Risk: How to handle health issues

### Issues:

- It is unclear whether Part I and II need to be followed for health matters
- There is reference in Part V to nominated managers

## Problem 9 (2)

### Practical Solutions:

- It would be appropriate for the Trust to ensure there is a case manager involved in the matter
- An investigation may be required subject to the nature of the concerns
- A distinction needs to be drawn between the roles of nominated manager / case manager / case investigator
- Remember to also refer to any ill health policy / procedure

## Problem 10 (1)

- Risk: Handling terminations that appear to fall outside MHPS

### Issues:

- MHPS does not cover certain situations where a termination may be required
- Example: practitioner is working in the country without permission
- Example: employment is dependent on external funding which is withdrawn
- Example: practitioner is retired under the retirement procedure

## Problem 10 (2)

### Practical Solutions:

- Ensure clarity at an early stage that MHPS is not being followed and the reasons for this
- Follow other applicable internal procedures and processes to ensure any dismissal is seen to be fair and reasonable in the circumstances
- Amend internal policy to capture these scenarios

# Further Problems (1)

- Risk: Further legal challenges to MHPS

## Issues:

- Challenge on the refusal of a request for legal representation for a non BMA / MDU member in an internal hearing
- Challenge on the “independence” of members of internal disciplinary and appeal panels

## Further Problems (2)

- Claim in relation to the extent of the application of Article 6 (right to a fair trial)
- Claim that a Dr's Article 8 (right to respect for home, family life etc) rights have been effected due to a failure to allow legal representation (the dismissal pre-dated Kulkarni)

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