

# Remote hearings during the pandemic: Guidance on how to ensure a case is suitable for a remote hearing

## Disclosure Restriction:

None

### Executive Summary

1. This guidance is intended to support case officers, case presenters and the hearings team when listing a hearing to decide if a case is suitable for determination by remote technology including, for example, skype or Zoom. The guidance sets out the legal framework, the pandemic context, the risks and benefits of conducting hearings by remote technology, the factors to take into account, and the process to follow. Following this guidance should ensure that only cases which are suitable for hearing by remote technology will be listed as such.

### Introduction

2. The government announced a pandemic emergency and imposed a 'lockdown' on 23 March 2020. This imposed a severe restriction on any non-essential gatherings and has limited the ability of the GPhC to conduct hearings in person. The GPhC Order and Rules require most hearings to take place in person, although there are limited provisions to allow some evidence to be taken by remote means. This is usually done at the discretion of the Fitness to Practice Committee (FtPC) panel hearing the case under the Rules. The GPhC is to be granted a temporary amendment to its Rules<sup>1</sup> to enable a hearing in its entirety to be conducted by remote means. This means that all parties, witnesses, the panel and the panel secretaries can participate by remote means. The GPhC has also been granted a permanent amendment to its Rules to enable it to serve and rely on notices, documents and evidence by electronic means.
3. This has brought the GPhC in line with other healthcare regulators, tribunals and the court service in enabling hearings to continue whilst varying degrees of restrictions remain in force preventing full hearings in person to take place. Although powers to hold hearings in their entirety by remote

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<sup>1</sup> *The Rules amendments are effective from 4 March 2021.*

means are to be provided, it does not follow that it will be appropriate to hold hearings by remote means in every instance.<sup>2</sup>

## The risks

4. The inherent risks of holding a remote hearing include the restrictions placed on participation by parties through the limitations of video or computer screens. It will not replicate or replace the experience or advantage a panel and parties will have of being in a hearing room and having the ability to engage in person. Furthermore, there are the obvious and potential limitations placed by internet access and bandwidth which could have an impact on the quality and continuity of the video link and consequentially on the continuity of evidence. A registrant or witness might not be in an environment conducive to the privacy required to engage in or focus on a remote hearing. Remote hearings will limit the natural opportunities of a registrant and their representative to communicate and go through paper documents together as evidence is being heard. That is, there are likely to be more formal interruptions. Finally, where the case is complex the remote technology will need to allow for the panel to convene for a significant period of time to consider its decision and draft and agree its reasons.

## The benefits

5. The most significant benefit is that cases which need to be determined both in the public interest but also in the interests of the registrant (who might be subject to an interim order) are heard and completed. The pandemic and restrictions are ongoing and there is no clear indication when and in what circumstances regulators will be able to return to full oral hearings. The courts and the tribunal system recognise that cases cannot remain on hold and that the interests of justice require that cases are completed wherever possible.

## Factors to take into consideration

### Access to Information Technology (IT)

6. In any case being considered for a remote hearing it must be established that the registrant, representative and any witness has the IT capability to effectively engage in a remote hearing. Consideration should be given to the IT equipment available to the parties and also to the internet access available to them. This should also include a consideration of the physical environment, for example, are they in shared accommodation, will they have sufficient privacy or freedom from noise and other distractions. It should be borne in mind that not all registrants or witnesses will have the necessary IT equipment or the confidence to use IT resources to be able to meaningfully engage in a hearing.

### The type of allegation

7. Conviction, caution or health cases where the allegation necessarily is focussed on a single or limited factual issue (the conviction or the health condition) are ordinarily shorter cases where key factual issues are not in dispute and where any witness evidence is likely to be limited. Conversely,

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<sup>2</sup> *Exceptionally and with the full consent of the parties we have already held fully remote hearings and this guidance note is to reassure that the process for selecting cases is a robust process and we will use it pending formal rule changes.*

a misconduct or Director of Public Prosecution (DPP) allegation might well involve a range of distinct factual issues leading to a longer or more involved hearing.

### **The extent to which any facts or factual issues are in dispute or agreed**

8. Whereas the decision on impairment and sanction is a question of judgement for the FtPC, decisions on disputed facts or factual issues require proof to a civil standard. This in turn might involve consideration of witness, documentary and other evidence. Where witness evidence and credibility are central to determining a factual issue, and where seeing and assessing the demeanour of the witness is more important, the limitations of laptop or computer screens are likely to make a remote hearing unsuitable.

### **Whether the registrant is represented or not**

9. The challenges to a registrant who is unrepresented can of course be managed and supported by a panel of the FtPC, the panel secretary and the case presenter. However, a remote hearing might pose a greater challenge to the unrepresented registrant's ability or perception of being able to properly put forward their case. Here, the complexity of the case, the type of allegation, and the extent to which there are admissions is also likely to be a key consideration as these all have the potential to exacerbate the challenges to an unrepresented registrant.

### **Witnesses**

10. Where any issues remain in dispute and witness evidence will need to be considered the background of the witness should be taken into account. Professional witnesses, for example, super intendants (SIs) or pharmacy inspectors, or expert witnesses should be in a better position than members of the public to manage the challenges of giving evidence by remote means. Where the witness is a member of the public or a patient, consideration will include whether their credibility is in issue, the length and complexity of their evidence, and how much of their evidence is linked to other documentary evidence which they will need to be taken through. Where the witness is a vulnerable witness further consideration should be given to how any support will be provided bearing in mind the added factor of social distancing restrictions. As with health cases below, the specific vulnerability might in itself make a remote hearing more stressful and difficult to manage than in a fully supported in-person hearing.

### **Complexity of the case**

11. Complex cases are cases where there are a number of limbs of allegation to be determined, where the evidence includes a large volume of documentary evidence, where there is more than one type of allegation, where there are more than two or three witnesses, and where the hearing is likely ordinarily to have required a listing of at least five days. Although complexity in itself should not be a bar to a remote hearing the other factors listed above will need more careful consideration.

### **Interim order status**

12. In all cases where a registrant is subject to an interim order particular consideration should be given to ensuring a hearing can go ahead by remote technology. Where a registrant is able to continue to practise under conditions this should be taken into account. However, the ongoing prejudice to a registrant who is suspended and cannot practise should require those cases to be listed for a hearing wherever possible.

## Health cases

13. Health cases where on the face of it we are dealing with a registrant with ongoing health issues will require particular consideration of the impact on and the ability of the registrant to cope with either attending an in-person hearing or alternatively in being able to manage a remote hearing. The registrant might find it difficult to attend a hearing in person due to health issues. However, in contrast the extra demands of managing the IT could be more stressful than the carefully managed in-person environment. The health issues might in themselves raise challenges to picking up on visual cues if having to engage through a computer or phone screen.

## The process

14. In the first instance it shall be the responsibility of the case presenter to review and assess a case ready for a final hearing for its suitability for a remote hearing. The review will be completed at the initial case plan completion stage. For any cases where the initial case plan has been completed, the case plan will be updated to include this review.
15. The review will require proactive and collaborative communication with the registrant, representative and, if necessary, any witnesses to discuss and agree that the case can be heard by remote technology. Discussions will include consideration of the factors listed above, agreeing where possible any issues or facts in dispute, but also a framework for how the remote hearing will be conducted. In negotiating and deciding a framework for how the remote hearing will be conducted the views of the panel secretaries and hearings team should also be considered.  
  
Given the range of factors to consider and take account of, in most cases a discussion will be more appropriate rather than relying on email correspondence. However, once a discussion has taken place any areas of agreement or non-agreement should be recorded in writing.
16. Where a registrant has not engaged or responded, the case presenter will nonetheless, give full consideration to the factors listed above before deciding if a remote hearing is suitable. A written record should be saved into the case file setting out the factors which have been taken into account, the reasons for why a remote hearing is appropriate, including references to any framework or plan on how best to conduct the remote hearing.
17. If a case is deemed suitable for a remote hearing, then the advocate will inform the hearings team. The advocate will also inform the hearings team of any agreement reached with the registrant or the representative. The hearings team will then ensure that appropriate arrangements can be made for listing the remote hearing.
18. Where there is any dispute or disagreement between the case presenter and the registrant or their representative about a remote hearing, a case management hearing must be listed to seek directions from the Chair of the Panel due to hear the case.
19. Where a remote hearing is to be listed which appears to fall into the complex case category as set out above, a case management hearing should be listed before the Chair of the Panel due to hear the case. This will ensure that the Chair and the Panel who are to ultimately conduct the hearing have an opportunity to review and consider, having regard to the factors set out above, if they will be able to discharge their obligations.