IN THE MATTER OF:

NURSING AND MIDWIFERY COUNCIL ("NMC")

GOSPORT WAR MEMORIAL HOSPITAL

OPINION

Introduction

1. A number of complaints have been made to the NMC regarding the clinical practice of nurses at the Gosport War Memorial Hospital in the late 1990s. This hospital is a 113 bed community hospital. Elderly patients were generally admitted to it through referrals from local hospitals or general practitioners for palliative, rehabilitative or respite care. In all cases where complaints have been made the patients cared for at the hospital have sadly died. To avoid repetition I have not set out the alleged facts of those complaints here. I have relied on the summary of events succinctly set out in the report from the in-house legal team dated 14th November 2008.

2. Allegations were made in 2002 against a number of named nurses by the relatives of 5 patients. In September 2002 the Preliminary Proceedings Committee (PPC) considered complaints of the care of 3 of those named patients (Wilkie, Devine and Page). The cases were adjourned pending the outcome of the police investigation into these and the deaths of many other patients at the hospital. The allegations concerning the 2 remaining patients (Middleton and Carby) do not yet appear to have been considered by the PPC.

3. The police investigation examined the circumstances of 90 patient deaths. The care of each was considered by a number of experts. Their conclusions had then to be considered by the Crown Prosecution Service. During the course of the police investigation the experts were instructed to categorise their view of the treatment afforded to the patients in question. If the experts considered the treatment acceptable cases were put into category 1. Category 2 cases were those where the treatment was said to be sub-optimal but which did not present evidence of criminal activity. Category 3 cases were considered to warrant further investigation with a view to considering whether criminality was involved. The scale of the criminal investigation meant that it took some considerable time. In December 2006 the police announced the outcome of their final investigations into the category 3 cases. The Crown Prosecution Service had decided that no criminal charges should be brought.

4. In cases where relatives had made complaints to the police all but one (Devine) fell into category 2. In October 2004 the police had agreed to provide the NMC with all of the evidence gathered in category 2 cases. There were considerably more of these than the 4 patients already the subject of complaint to the NMC. In 2004-2006 the police sent files relating to all 80 cases in category 2. These have been reviewed with the exception of the

medical records as the lawyer concerned did not have the requisite medical expertise to be able to properly assess those.

5. The exercise conducted by the experts instructed by the police resulted in 10 cases placed in category 3. These are currently subject to a coroner's inquest. I understand that this is set down for March 2009. One of the cases (Devine) is also the subject of a complaint to the NMC. It is expected that nurses will give evidence at the inquest although the NMC has not yet had sight of a witness list. None of the nurses are represented. I do not know if this is because they are not considered "interested parties" entitled to take part in the questioning of witnesses at the inquest.

6. In addition some of the allegations also involve complaints against Dr Jane Barton who in 1988 took up a part time position at the hospital as Clinical Assistant in Elderly Medicine. I understand that the allegations are of serious professional misconduct based on inappropriate prescribing. These have been referred to the General Medical Council ("GMC") for their consideration. The GMC enquiry will focus on 12 patients. In 3 of those cases (Page, Wilkie and Devine) relatives of the patients concerned have also made complaints to the NMC. The GMC intends to call a number of nurse witnesses at their hearing into Dr Barton's conduct, including most of the nurses who have been named in complaints to the NMC. The GMC have decided to postpone their hearing until the conclusion of the inquest. 8 of the cases to be considered at the inquest form part of the evidence in the misconduct case. The GMC is of the view that the inquests could give rise to further fitness to practise allegations or lead to the GMC revising the charge it proposed to bring. Postponing the GMC misconduct hearing would also allow Dr Barton to concentrate on the preparing for the inquest.

Advice

I am asked to advise on a number of questions arising from this complex inquiry:

1. Whether any issues of misconduct arising from police files concerning patient deaths where the NMC has not received a complaint about named nurses should be dealt with under the old or new rules?

2. The prospects of establishing misconduct likely to lead to removal in any case against any registrant against whom the NMC has already received an allegation (to include consideration of successfully rebutting any abuse of process argument)?

3. In any other case, the prospect of establishing misconduct likely to lead to removal/a case to answer in respect of impairment of fitness to practise by reason of misconduct (test to be applied to depend on whether the case is to be dealt with under the old or new rules).

4. The management of the existing allegations in light of the forthcoming inquest and GMC proceedings thereafter.

5. Whether, as the existing complaints are likely to be referred to the PPC, a legal assessor should be instructed by the NMC to assist the panel.

6. To advise whether, in considering whether to refer the case, the PPC are entitled to consider a potential abuse of process argument based on delay.

7. To draft a guidance note to assist the PPC in the steps that need to be taken in reaching the decision whether to refer any case.

Old or new rules.

1. The Statutory framework

This question arises as the rules which govern the procedure for allegations made to the NMC about the fitness to practise of any registrant changed in 2004.

a. The old rules

i. Prior to 1st August 2004 the NMC's fitness to practise procedures were governed by the Nurses, Midwives and Health Visitors Act 1997 and the Nurses, Midwives and Health Visitors (Professional Conduct) Rules 1993 Approval Order 1993 (SI 1993:893). These are together known as "the old rules."

ii. These governed the test to be applied by the PPC when determining whether any allegation should be referred to the Conduct Committee. Rule 9(3)(a) states:

(3) Where a Notice of Proceedings has been sent to a practitioner the Preliminary Proceedings Committee shall consider any written response by the practitioner and, subject to any determination under Rule 8(3), shall-

(a) refer to the Conduct Committee a case which it considers justifies a hearing before the Conduct Committee with a view to removal from the register;

iii. This test means that in looking at any allegation received by the NMC prior to 1st August 2004 the PPC must consider whether there is a real prospect of the factual element of the allegation being established and if so whether there is a real prospect that the Conduct Committee might decide to remove the registrant's name from the register as a result.

b. The new rules

i. The procedures for allegations received by the NMC on or after 1st August 2004 are governed by the Nursing and Midwifery Order 2001 (SI 2002:253) and the Nursing and Midwifery Council (Fitness to Practise) Rules Order of Council 2004 (SI 2004:1761). These are known together as "the new rules."

ii. The test to be applied by the Investigating Committee in determining whether to refer an allegation to the Conduct and Competence Committee under these rules is a different one. Rule 26(2)(d)(i) states:

(2) Where an allegation is referred to the Investigating Committee, it shall-

(d) consider in the light of the information which it has been able to obtain and any representations or other observations made to it under sub-paragraph (a) or (b), whether in its opinion-

(i) in respect of an allegation of the kind mentioned in article 22(1)(a), there is a case to answer.

iii. Article 22(1)(a) concerns allegations made against any registrant that his fitness to practise is impaired by reason of misconduct. The test set out in the new rules means that in looking at any allegation of misconduct received by the NMC on or after the 1st August 2004 the Investigating Committee must consider whether there is a case to answer in respect of impairment of fitness to practise by reason of misconduct.

c. The transitional provisions

i. The Nursing and Midwifery Order 2001 (Transitional Provisions) Order of Council 2004 (SI 2004:1762) covers the transition from the old rules to the new rules. Section 2 of this Order states:

> "Subject to the following provisions of this Order, where an allegation of misconduct has been received by the Council before 1st August 2004, the Council shall deal with allegation in accordance with Section 10 of the Act and the Conduct Rules as if they remained in force."

ii. Section 16 of Schedule 2 of the Nursing and Midwifery Order 2001 also states that where disciplinary proceedings are pending or have begun but have not been communicated the matter shall be disposed of as if the 1997 Act remained in force.

d. It is plain therefore that the rules which are to govern the procedure for any allegation and the test to be applied by the PPC/Investigating Committee depend on when the allegation was received by the NMC or when it can be argued that disciplinary proceedings have commenced.

2. The rules to be applied in this case.

a. Whether the proceedings should be governed by the old or new rules is not a difficult question when looking at the complaints already made to the PPC in 2002. These were plainly made before the rules changed and so fall to be dealt with under the old rules. Similarly the two complaints made in 2002 but not yet considered by the PPC (concerning patients Middleton and Carby) are governed by these rules.

b. There were a large number of additional cases referred to the NMC by the police piece meal in 2004-2006 (their category 2 cases). These have been reviewed by Code A Code A and I have seen a schedule prepared by her giving some basic information in relation to each case. I have not seen the evidence myself. I note that some of the named nurses in allegations already before the NMC are also named in these further cases. No actual complaints have been made to the NMC regarding the named nurses' care of these patients and I know not whether they are to form the basis of any allegation to the NMC. Should the PPC not close the current cases against these nurses and this occur it is arguable that these other allegations be dealt with under the new rules as they came to the attention of the NMC after 1st August 2004. I am however of the view that, given these nurses are already the subject of allegations before the NMC in the same time period, these should be dealt with under the old rules. The same should apply to any new allegations against those nurses which may arise from the inquest or GMC proceedings.

c. There is a final category to be considered. The schedule prepared by Code A contains cases involving alleged sub-optimal care of certain patients by nurses other than those currently the subject of allegations before the NMC. It is also possible that

the inquest and/or GMC proceedings could reveal fresh allegations against new nurses. If allegations were to be made to the NMC from either of these sources it seems to me that there is no reason why they could not be dealt with under the new rules. Parliament made its intention clear in the transitional provisions. These cases came to the attention of the NMC after 1st August 2004 and as such should be dealt with under the new rules.

The prospects of establishing misconduct likely to lead to removal in any case against any registrant against whom the NMC has already received an allegation (to include consideration of successfully rebutting any abuse of process argument)

1. I have not been asked to review the large volume of paperwork in this case. In answering the first question therefore I rely solely on the summary of the evidence prepared by Code A Code A
2. I have considered the conclusions of Code A in her report of 14th November 2008. I cannot fault her reasoning on the information that I have that there is insufficient evidence to proceed with any allegation of misconduct in the cases of Page, Carby and Middleton.
3. The situation is somewhat different in the cases of Wilkie and Devine. In each case there are a number of allegations made against named nurses relating to the care of the patient concerned. Code A has summarised these in her report. I cannot fault her reasoning in coming to the conclusion that there is insufficient evidence to proceed with any allegation relating to general care of these patients and communication between nursing staff and relatives. There are, however, concerns about the prescribing of drugs given to these 2 patients. Both these cases form part of the misconduct allegations against Dr Barton to be heard by the GMC. The case of Devine is to be considered at the inquest.

   a. <u>The allegations concerning Mrs Wilkie</u>

      i. It is plain from the Code of Professional Conduct in force at the time that each registered nurse had a duty to

         - Safeguard and promote the interests of individual patients;
         - Ensure that no act or omission on their part was detrimental to the interests, condition or safety of patients;
         - Report to an appropriate person or authority any circumstances in which safe and appropriate care for patients could not be provided.

      ii. This clearly included a duty to report poor prescribing on the part of the doctor concerned. If poor prescribing is proved and the nurse who administered the drug can be identified then in my view there would be sufficient evidence to proceed with an allegation of misconduct against the nurse concerned.

      iii. I note the evidential difficulties involved in proving such a charge so long after the event. However the issue of the prescription of these drugs is to be looked into by the GMC who must have come to the conclusion that there is sufficient evidence to prove their case. Of course the evidential issues are not

precisely the same and it is necessary to identify the nurse/s concerned. If that can be done then subject to any successful abuse of process argument an allegation of misconduct could be pursued.

iv. It is for the PPC to decide whether to pursue this allegation at this stage. The panel may take the view that given the passage of time a single allegation of failure to challenge or report inappropriate prescribing would be insufficient to lead to removal of the registrant concerned. If that is the panel's view it could deal with the case at this stage. If the panel were to take the opposite view and consider this could be sufficient to lead to removal then a prudent course would, in my view, be to wait for the outcome of the GMC proceedings. If inappropriate prescribing cannot be proved against the doctor there then there is clearly no prospect of any case against a nurse being proved at the NMC. This will result in further delay but I do not agree that the likely further delay will have a significant impact on the ability to prove misconduct likely to lead to removal. There has already been, for understandable reasons, significant delay in this case. A few further months will not substantially alter the position.

v. The remaining possible allegation is that of the falsification of records against Code A This, if true, is a serious matter. I agree with the concerns as to the ability to prove to the required standard the detail of exactly what was said in a conversation 10 years ago. It was also a time when Mrs Jackson was under considerable stress. I agree that the prospects of proving that the conversation alleged by Mrs Jackson at this point in time are slim.

b. The allegations concerning Mrs Devine

i. Much of what I have said in relation to Mrs Wilkie applies equally to the case of Mrs Devine. This is plainly a serious matter, and part of the subject of both the inquest and the GMC hearing. If the nurses can be identified it is for the PPC to decide whether the failure to challenge or report inappropriate prescribing could be sufficient to lead to removal of the nurse concerned. If that is their view they could deal with the case at this stage. If they are of the view that it could then again in my view it would be prudent to wait until the conclusion of the inquest and GMC hearing before deciding whether to refer the nurses concerned to the Conduct Committee.

4. Abuse of process

a. There has been a considerable delay between 2002 when these complaints were made and the likely date of any hearing should any individual case be referred to the Conduct Committee. It is likely that this will form the part of an abuse of process hearing by the defence, that is an argument mounted by them that by reason of the delay the nurses concerned can no longer have a fair hearing.

b. Putting aside the fact that the standard of proof to be applied by the Conduct Committee has changed from the criminal to the civil standard (see paragraphs (h) and (i) below), I have seen no evidence that would lead me to the conclusion that it is likely to succeed. There is a considerable volume of case law confirming that the staying of proceedings because of delay should only occur in exceptional circumstances. Even when the delay is unjustifiable, a permanent stay should be the exception rather than the rule. [See **R v S (SP) [2006] 2 Cr.App.R 341**].

c. A deliberate delay is likely to be held an abuse of process. [See **R v Brentford Justices ex parte Wong [1981] QB 445**]. That is far from the present case when in my view the NMC is not responsible for the delay and cannot be criticised for the course so far adopted. The reason that no decision has yet been made as to whether to initiate proceedings against the registrants has been based on the volume of material to be reviewed, the time at which such material was received and the outcome of other investigations, including the police investigation, the inquests and the GMC hearing. Indeed the GMC, which has decided to pursue allegations against Dr Barton dating from the same time period, has decided to postpone their hearing until after the inquests. Certainly it cannot be suggested that there has been any deliberate delay in bringing about proceedings given the lengthy and detailed investigations that have had to take place and the scale of the investigations undertaken. The Court of Appeal has held that there should be no stay where the delay has been caused by the complexity of the case. [**A.G's Ref (No. 1 of 1990) [1992] QB 630**]

d. Where delay has amounted to an abuse of process it has been held that two key elements would need to be present:

   i. The delay must cause prejudice to the accused; and

   ii. The delay must be unjustified [**R v Derby Crown Court ex parte Brooks (1985) 80 Cr.App.R. 164**]

   That prejudice must be genuine and must cause unfairness. [**R v Bow Street Magistrates, ex parte DPP (1989) 91 Cr.App.R 283**]

e. The Court of Appeal have held that prejudice to the accused can be inferred from a delay of 15 or 16 years [**R v Telford Justices ex parte Badhan [1991] 2 QB 78**] but much will depend on the circumstances. However in some cases even a long delay will not justify a stay of proceedings. In **R v Central Criminal Court ex parte Randle and Pottle 92 Cr.App.R. 323** a delay of 20 years in bringing a prosecution was, on the exceptional facts, held not to amount to an abuse of process. In **R v Sawoniuk [2000] 2 Cr.App.R. 220** the delay was one of 56 years and the Court of Appeal said a fair trial was not impossible where the case turned on the eye witness evidence of 2 witnesses who had been cross examined and where the jury went to the location in question. Trials of historic allegations of sexual abuse going back 20 or 30 years are often tried in the courts and so the length of the delay does not of itself result in a successful argument. Where for example cases turn largely on documentary evidence (from which witnesses can refresh their memories) a delay in bringing the case has been held not to cause prejudice to the accused [**R v Buzalek [1991] Crim LR 115**].

f. As I have not seen all of the papers in this case I cannot advise specifically in each case whether the defence can show real prejudice. Much will depend on the documentary evidence available. Although it will have been 7 years before some of the present cases are dealt with by the PCC any possible inference of prejudice could be rebutted by the existence of medical notes that could aid the registrants' memories. It may also be that the registrants have made witness statements in the course of the other investigations and so would be able to refer to those. Clearly neither the inquest nor the GMC proceedings, both looking at events over the same time period, have been deterred by the possibility of an abuse of process argument. I can also say from personal experience in defending police officers at professional tribunals that it is not

infrequent for there to be some considerable delay in those hearings while criminal investigations are ongoing and indeed resulting from criminal trials first taking place. I have never been able to mount a successful abuse of process argument on the grounds of delay alone.

g. Of some concern is the fact that the nurses against whom allegations were made in 2002 were not notified of it at the time. I accept that there was no need to do so under the rules but had they been notified they could have thought about and prepared their case much closer in time to the events in issue. However whilst it is regrettable that this did not occur I am not of the view that the circumstances are sufficiently exceptional to make an abuse of process argument succeed.

h. There is one area of possible prejudice that may be argued by the defence in any abuse of process argument. The standard of proof to be applied in each case has changed since 2002 from the criminal to the civil standard. In any hearing after 3rd November 2008 it is for the NMC to prove on the balance of probabilities rather than beyond reasonable doubt that the registrant is guilty of misconduct. I am unaware of any transitional provisions to cover cases where the investigation began before that date. It may be that the registrant will seek to argue that she is prejudiced by that fact and the position would have been different if it were not for the delay. She may argue that had her case been heard earlier misconduct could only have been proved against her if the Conduct Committee were sure of her guilt. The delay, so the argument may go, has meant that now misconduct can be proved if the Committee is only of the view that her guilt is more probable than not.

i. I know not whether the change in the standard of proof for hearings before the NMC has been qualified in any way. There have been frequent changes to the law over the years which have changed the rights of those who are accused of criminal offences. For example the Criminal Procedure and Investigations Act 1996 changed the rules on disclosure and also reduced the defendant's right of silence in that adverse inferences could be drawn if he failed to answer questions in his police interview or failed to give evidence without reasonable excuse. However it was stated within the Act that this only applied to cases where the investigation began after 1st April 1997, thereby protecting the existing rights of the defendant where the investigation commenced before that date. If there is no such qualification in the amendment from the criminal to the civil standard of proof this is the area where the nurses concerned are most likely to be able to show prejudice. I have found no directly relevant authority on the point. It is not certain that such an argument would succeed but in my view the chances of an abuse argument succeeding are considerably increased by virtue of this change. It may be that the NMC would not wish as a point of principle to concede at this stage that the change in the standard of proof inevitably leads to any hearings after the 3rd November 2008 being an abuse of process where the investigation began some time before. This is a point which the NMC may wish to argue in due course.

j. Even if the exceptional course of staying the proceedings is not followed in this case the passage of time will still clearly affect the cases with which the PPC are concerned. The longer the delay between alleged misconduct and any misconduct hearing the less likely in many cases it will be for the allegations to be proved to the required standard. Over time witnesses' memories fade and it may become impossible to be precise about a piece of evidence which depends on memory alone, for example the precise words and meaning of a conversation which took place many years before.

There are already examples of witnesses dying in the intervening period (in the case of Devine) and it may be the case that allegations which could have been proved in 2002 will falter in any hearing in or after 2009. In my view the PPC should look at the evidence in each case. Where the allegation rests on memory of a specific piece of evidence alone the panel should in my view take into account the realistic chance of that allegation being proved to the required standard (that is it is more probable than not that the allegation is true) should the case be referred.

In any other case, the prospect of establishing misconduct likely to lead to removal/a case to answer in respect of impairment of fitness to practise by reason of misconduct (test to be applied to depend on whether the case is to be dealt with under the old or new rules)?

1. This is a difficult question to answer given that I have not been sent the papers in respect of any of the cases in question. I have only the schedule prepared by Code A giving only basic information about each case. There are clearly a large number of cases which do not form the subject of any complaint made to the NMC at this point in time. These are cases which currently fall into the police category 2 and those in category 3 other than the case of Mrs Devine.

2. I have advised that if there are to be any investigations into cases against nurses other than those named in cases currently before the NMC they should be dealt with under the new rules. The test will therefore be whether or not there is a case to answer in each case.

3. I have not seen any evidence or summary in relation to these cases. Clearly if the question of misconduct is to be considered there will need to be an analysis of the evidence in each case to determine the strength of the evidence and whether a case to answer exists. I am happy to further advise if those instructing wish me to look at the evidence in these cases.

The management of the existing allegations in light of the forthcoming inquest and GMC proceedings thereafter.

1. In my view the cases adjourned by the PPC in September 2002 and the additional 2 complaints made in 2002 should be placed before the PPC as soon as possible. The cases were originally adjourned pending the outcome of the police investigation. That is now complete although legal proceedings are still to take place in relation to some of the cases in the form of the inquests and GMC hearing.

2. Placing the cases before the PPC will enable the panel to decide on the best course at this stage. It seems to me that the possible courses are these:

    a. The PPC could decide to further adjourn all of the cases until the conclusion of the inquests and GMC hearings. This would be the appropriate course if the panel decided that all of the cases were so closely linked that it wished to deal with all matters together once those hearings have taken place and evidence has been heard in relation to them.

b. The PPC could decide to look at the cases individually and form a view in relation to them. Code A has advised, and I agree with her reasoning, that there is insufficient evidence to proceed against nurses in relation to 3 of the cases currently before the NMC. The PPC could decide to close the cases in relation to nurses named in these 3 complaints at this stage.

c. If the second course were adopted it leaves the cases of Wilkie and Devine which are both in a different category. The PPC could decide to deal with those cases now. If the panel are of the view that these could not amount to misconduct which would lead to removal then it could close the case. Otherwise in my view it would be prudent to await the outcome of the GMC proceedings. Any possible charges are likely to relate to failure to challenge/report inappropriate prescribing. If inappropriate prescribing cannot be proved against Dr Barton in these cases there can be no NMC case. If it is proved then an important part of the NMC case can be proved.

d. It would clearly be prudent to have a lawyer attend from the NMC at the inquests and GMC hearings in order that decisions can quickly be made as to any allegations that may arise from the evidence given at these. If any case is further postponed by the PPC until the conclusion of those hearings again a decision should be quickly made as to whether the evidence given at them strengthens or weakens the case against any named nurse.

The question of a legal assessor.

It seems likely that the allegations adjourned by the PPC in 2002 and the 2 additional cases not yet placed before them will be referred to the panel in the very near future for their consideration. Given the history of these cases, their complexity when looked at against the background as a whole and the likely legal issues to arise at this early stage, I am firmly of the view that a legal assessor should be instructed by the NMC to assist the panel.

Are the PPC entitled to consider a potential abuse of process argument based on delay in considering whether to refer any case?

1. Although in my view it is not certain that any abuse of process argument would succeed in this case, the fact that it could be mounted is something which the PPC could take into account at this stage when deciding whether to refer any case to the Conduct Committee. When considering the PPC's powers in this regard it is perhaps useful to compare the position of the PPC to that of magistrates in cases that are triable either way or are indictable only where there is a suggestion that an abuse of process argument may be made.

2. That magistrates have the power to consider abuse of process arguments in cases that are triable either way and where the defendant is to be committed/sent to the Crown Court for trial is well established in case law. [**R v Telford Justices ex parte Badham [1991] 93 Cr.App.R 171**, **R v Horseferry Road Magistrates Court ex parte Bennett [1994] 98 Cr.App.R 114**]. Where the issue is raised at the stage at which the magistrates are contemplating the transfer of the case to the Crown Court, the magistrates should

however refuse to transfer the case on the basis of delay only in very clear cases where it is established that a fair trial could not take place. Where it is not clear the magistrates should send the case to the Crown Court and allow the judge there to consider whether any steps can be taken to enable the accused to have a fair trial. It should be remembered that a stay should be the exception rather than the norm and it is for the defence to show that they will suffer real prejudice by reason of the delay. In many hearings where the defence are disadvantaged by the delay a fair trial can take place with the tribunal of fact taking into account any problems that face the defence in this regard in their favour.

3. Even in cases where the magistrates are required to send cases to the Crown Court "forthwith" under Section 51(1) of the Crime and Disorder Act 1998, they are still entitled under certain circumstances to stay the proceedings as an abuse of process. [**R (Salubi) v Bow Street Magistrates Court [2002] 1 WLR 3073**]. However the Divisional Court also stated that complex or novel points should be left to the Crown or High Court and consideration should be paid to the fact that abuse of process applications can be made immediately after the case arrives at the Crown Court.

4. In my view the PPC is in a comparable position to that of magistrates and can therefore take account of whether a case amounts to an abuse of process when deciding whether to refer the case to the Conduct Committee. However the panel should refuse to refer for this reason only if there is a very clear case that the nurse in question could not receive a fair hearing because of the delay. Otherwise the fact that such an application may be made should form no part of their decision and the matter should be left to be raised before the Conduct Committee.

5. The course that the PPC should adopt in their deliberations is as follows:

    a. The PPC must first consider whether there is a real prospect of the allegation being proved. In undertaking this task the panel should consider the strength of the evidence and in particular whether the delay is likely to have a substantial impact on the ability to prove the allegation. For example if the allegation is of something said 10 years ago where the content of the conversation is disputed, there are no witnesses to the conversation and there is no record of it the panel could properly consider how likely it is for the Conduct Committee to be able to resolve the issue. If the panel forms the view there is a real prospect of the allegation being proved against a registrant then it must decide whether there is a real prospect the committee might decide to remove her name from the register as a result. If the answer to either question is no then the PPC should not refer the case.

    b. If the answer to both questions is yes then the PPC is entitled to consider the question of whether the delay in this case has created such prejudice that the proceedings would amount to an abuse of process. In my opinion the PPC should be slow to reach such a view for the following reasons:

        i. The fact that there may be a successful abuse argument would not in itself be a reason to refuse to refer the case.

        ii. Staying the case is the exception rather than the norm. Even where there has been considerable delay the panel (or any tribunal) should be slow to stay the proceedings.

iii. For an abuse of process argument to succeed there has to be real prejudice caused to the registrant by reason of the delay. The answer to that is likely to depend on a number of factors, for example:

- On what evidence could have been available but which is now lost;
- On whether there are documents in existence from which the registrant could refresh her memory;
- On whether the registrant has made witness statements for other hearings and has therefore a document from which she can refresh her memory;
- On whether the registrant is to give evidence in other hearings;
- On whether the change in the standard of proof for hearings after 3rd November 2008 can in fact amount to prejudice sufficient for a case to be stayed for abuse of process.

There are numerous factors which could be of relevance to this issue.

iv. The PPC is unlikely to have answers to all of these questions or to be able to make a decision as to whether or not any prejudice from which the registrant may be found to suffer is so great that it cannot be rectified by the hearing itself.

v. In addition the PPC, sitting in private, will not have had the benefit of hearing argument on both sides to assist in any decision.

vi. It is for these reasons that the PPC cannot refuse to refer on grounds that proceedings would be an abuse of process unless it is clearly established that a fair hearing cannot take place. It is only if the PPC came to the view that a fair hearing could not take place that the possible question of abuse of process should form any part of their decision at this stage. If they are not of that view then the question of a possible abuse argument is irrelevant and can be left to the Conduct Committee who will be in possession of all of the facts.

The drafting of a guidance note to assist the PPC in the steps that need to be taken in reaching the decision whether to refer any case.

I enclose a guidance note for the assistance of the PPC when considering the 5 cases put before them for their consideration.

Conclusion

1. I am of the view that any proceedings brought against the named nurses in the cases currently before the PPC and the additional 2 cases should be dealt with under the old rules. Any new allegations against these nurses arising from the inquests or other proceedings about their conduct in the same time period at the Gosport War Memorial Hospital should also be dealt with under the old rules.

2. Any allegations which may arise against other named nurses either as a result of paperwork sent to the NMC by the police in the course of their investigation or because of evidence heard at the inquests or GMC hearings should be dealt with under the new rules.

3. Having considered the case summaries and reasoning of Code A I am in agreement that there is little prospect of proving misconduct leading to removal of the named nurses in the allegations made in the cases of Page, Carby and Middleton. This is also true of some of the allegations made against nurses in the Wilkie and Devine cases. There is a possible case of failure to challenge/report inappropriate prescribing in these 2 cases. As the case of Devine forms part of the inquests and both are the subject of the GMC inquiry into the prescribing of Dr Barton the PPC could properly decide to postpone any decision until after the conclusion of these hearings. If, however, the PPC is of the view that, even if proved, an isolated example of this behaviour on the part of a named nurse is unlikely to lead to her removal from the register it could close the cases at this stage.

4. Given the delay in this case if a case is referred to the Conduct Committee the defence are likely to argue that a named nurse cannot face a fair hearing and that the proceedings should be stayed for abuse of process. On the information I have I am not of the view that such an argument will inevitably succeed. The NMC have acted entirely properly in postponing disciplinary proceedings pending the outcome of investigations by the police and the subsequent inquests and GMC proceedings. However the level of prejudice faced by each registrant is likely to be in part dependent on the medical notes and statements available from the investigations and their value in assisting the nurses in their recollection of events and practices. The existence of such documents certainly has the potential to mitigate the effects of the delay in bringing the proceedings. Plainly any nurse who has sufficient recollection to give evidence at the inquest or GMC hearing would have difficulty arguing that the delay has materially affected her recollection of events. The registrants may be able to argue that they have suffered prejudice by reason of the change in the standard of proof for hearings which take place after 3rd November 2008.

5. The PPC are entitled to form a view as to whether an abuse of process argument is likely to succeed should the case be referred to the Conduct Committee. They should refuse to refer a case only where it clearly falls into the exceptional category of cases where the nurse is so prejudiced by reason of the delay that no fair hearing is possible.

6. A legal assessor should be appointed to assist the PPC with their task.

7. If I can be of any further assistance please do not hesitate to contact me.

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Johannah Cutts QC
9th February 2009