

Council – 25 March 2010

The HPC approach to justice and impairment

Executive summary and recommendations

Attached as an appendix to this cover sheet is a paper which explores the concepts of fitness to practise and impairment in more detail. It invites the Council to re-articulate a broad statement of principles for all those involved in making decisions about fitness to practise.

Decision

The Council is asked to:-

- (a) Discuss and comment on the paper; and
- (b) Approve its content.

Background information

Provided in the attached paper.

Resource implications

None

Financial implications

None

Appendices

HPC's approach to justice and the promotion of public protection

Date of paper

15 March 2010

HPC’s approach to justice and the promotion of public protection

1.0 Introduction

- 1.1 At its meeting in February 2010, the Fitness to Practise Committee considered a paper which reviewed not well founded cases. That paper, along with the IPSOS Mori work on the expectations of complainants and the CHRE report on ‘Sharing the registrants’ response’, highlighted the need for the HPC to consider further the meaning of ‘fitness to practise’ and ‘impairment’ in the context of professional regulation.
- 1.2 This paper endeavours to explore those concepts in more detail. It invites the Council to re-articulate a broad statement of principles for all those involved in making decisions about impaired fitness to practise and to ensure that those who interact with the fitness to practise process fully understand what ‘impairment’ in the HPC context means.

2.0 Expectations of Complainants

- 2.1 The IPSOS Mori Expectations of Complainants research (ISPOS Mori 2010) highlighted the mismatch in complainants’ understanding of the purpose of a fitness to practise process compared to the purpose of a complaints resolution process. It recommended that further work needed to be done by the HPC to explain this difference.
- 2.2 The recommendation made by IPSOS in their report was that ‘improvements should be made (sic) to the information that is provided to complainants at the point of initial complaint. Such changes will help to ensure that complainant expectations are more closely aligned to the fitness to practise process. These improvements include: providing clearer information about the difference between complaints resolution and the fitness to practise process; making complainants aware of the list of other organisations that they may contact for advice and support; stressing that the HPC’s fitness to practise process will not resolve clinical healthcare issues for complainants;’
<http://www.hpcuk.org/assets/documents/10002C8520100225FTP-06-expectationsofcomplainants.pdf>

3.0 Expectations of Registrants

- 3.1 Anecdotal evidence suggests there is also a degree of confusion amongst registrants regarding the purpose of the fitness to practise process. There is often a perception that the purpose of the process is to punish

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registrants for mistakes they have made or harm they may have caused rather than to determine whether their acts mean that they cannot remain in unrestricted practice.

- 3.2 The CHRE report '**Handling complaints: Sharing the registrant's response with the complainant**' recommended that 'regulators ought to provide clear guidance to registrants on what is expected of them, and what should be included in their response when a complaint is made against them.'

<http://www.hpcuk.org/assets/documents/10002C8820100225FTP-09-sharingtheregistrantsresponse.pdf>

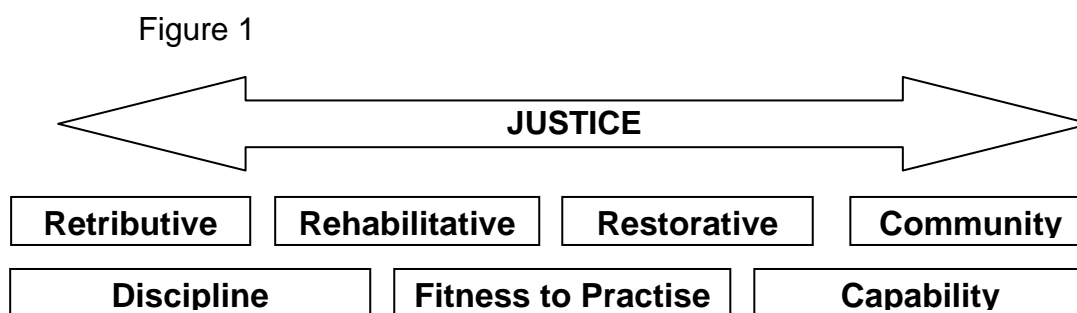
- 3.3 Work is already underway to address these recommendations in line with the fitness to practise department's strategic objective of improving accessibility and information provision.

4.0 Context for further improvements

- 4.1 In order to achieve the further improvements outlined above, the Executive has outlined below the key principles, standards and processes which underpin its work. The paper draws on wider contextual influences on all of these and concludes with a summary statement.

5.0 Principles of Justice

- 5.1 The approach that the HPC takes to its fitness to practise process is designed to balance public protection with the rights of the registrant. The Council has worked hard to ensure that, so far as possible, the principles of its fitness to practise processes sit at the rehabilitative/restorative end of the justice continuum (see Figure 1 below).



5.2 Restorative Justice

- 5.2.1 Restorative Justice is sometimes described as a 'problem solving approach' to crime or conflict. There are many definitions of restorative justice, and many ways in which it can be applied.

- 5.2.2 The area in which it has primarily been used in the UK is in the criminal justice system, where the process focuses on encouraging offenders to take responsibility for what they have done, apologising and making amends to their victims, and resolving to change their behaviour.

5.2.3 Where 'traditional justice' is about punishing offenders for committing offences, restorative justice is often about offenders making amends for their actions.

5.2.4 The Restorative Justice Consortium has set out the principles and processes of restorative justice and how it should function. Many of these can be adapted and applied in the regulatory setting and more detail on how the approach relates to the work of HPC is found later in this paper. Those principles are as follows:

- Primary aim to be the repair of harm;
- Agreement about essential facts of the incident and an acceptance of some involvement by the person who caused the harm;
- Participation to be voluntary for all participants and based on informed choice. This also applies to what is included in any outcome agreement, and any consequence for non-participation/ compliance to be made clear;
- Adequate time to be given to participants to decide whether to take part and to consult with others, if they wish;
- Acknowledgement of the harm or loss experienced by the person harmed, respect for the feelings of participants, and an opportunity for the resulting needs to be considered and where possible met;
- The person/s who have been harmed or suffered loss to be (if they wish) the primary beneficiary of any reparation agreed with the person who has caused the harm;
- Where harm is repaired or amends made, this to be acknowledged and valued;
- The person/s who has harmed and the person/s harmed are the primary participants of any restorative process
- Restorative practitioners to be seen as neutral by participants, and to act impartially.
- Participants not to be discriminated against for any reason;
- Diversity to be respected;
- Respectful behaviour to be maintained in restorative processes, whilst enabling emotions and needs to be expressed;
- The rule of law to be up-held;
- Respect for the dignity of all participants at all times;
- Access to information and referral to other organisations who might offer assistance to participants, before, during, after or if they decline participation in a restorative process;
- Opportunity to participate in a restorative process, except where there is a significant risk of further harm, there is disagreement about the critical facts, or parties do not wish to participate
- Ensuring choice is available to the participants regarding restorative processes, including direct and indirect forms of communication and the nature of any reparation;

- Safety of participants before, during and after participation in a restorative process;
- Additional protection and support for the particularly vulnerable to enable full participation;
- Restorative Practitioners to keep confidential the content of restorative communications and personal information, subject to the informed consent of participants, the requirements of the law, and their agencies policies; and
- Restorative agreements to be fair, appropriate to the harm done and achievable.

6.0 Principles of Professional Responsibility and Accountability

- 6.1 The standards and requirements placed upon HPC registrants are based on the principle of personal responsibility and accountability. Registrants are expected to be personally responsible for their own practice, and to engage in ongoing internal reflection as part of lifelong learning.
- 6.2 Each time a professional applies for entry to the Register or renews their registration with the HPC, they are required to make a number of declarations. This approach reflects the relationship of trust between registrant and regulator. The HPC will only take action when that trust breaks down.
- 6.3 Registrants are expected to act within the limits of their own competence. HPC's definition of scope of practice aims to be enabling rather than prescriptive, encouraging personal decision making and personal responsibility. For example, the guidance on 'Managing your fitness to practise' provides that

'After you have been registered with us, we recognise that your scope of practice may change so that you can no longer meet all of the standards of proficiency for your profession. This may be because of specialisation in your job, a move into management, education or research, or it may be because your fitness to practise in certain areas has become impaired. As long as you make sure that you are capable of practising safely and effectively within your scope of practice, and do not practise in areas where you are not able to do so, a changing scope of practice will not normally cause us concern.'

<http://www.hpc-uk.org/assets/documents/10001344Managingfitnesstopractise.pdf>

- 6.4 In a similar way, the Council has designed the CPD audit processes to be targeted and proportionate. The Council's starting point assumes that all registrants who sign the declaration required of them on renewal of their registration meets the standard of CPD. The purpose of audit is to ensure compliance rather than to identify non-compliance. The flexible, outcomes focused approach to CPD reflects the Council's commitment to nurturing personal responsibility for learning and development.

7.0 Wider contextual influences

7.1 Case Law

7.2 There is a range of case law available on the topic of impairment which has to be taken into account in this debate. Council should be aware that their freedom to interpret legislation is constrained by the applicable case law.

7.3 GMC v Meadow (2006) EWCA Civ 1319

7.3.1 *GMC v Meadow* provides that the ‘purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.’

7.4 Cohen v GMC EWHC 581 (Admin)

7.4.1 *Cohen v GMC* provides that the Panel is ‘concerned with the issue of whether in the light of any misconduct (etc) proved, the fitness of the [registrant] to practise has been impaired taking account of the critically important public policy issues’. The critically important public policy issues were described by the court as ‘the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect...and that public interest includes amongst other things the protection of patients and maintenance of public confidence in the profession.’

7.4.2 *Cohen* goes on to conclude that not every finding on a ground of an allegation (misconduct etc) will automatically result in a Panel concluding that fitness to practise is impaired as ‘There must always be situations in which a Panel can properly conclude that the act...was an isolated error on the part of the practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired...it must be highly relevant in determining if ...fitness to practise is impaired that ...first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated.’

7.4.3 The HPC’s own Practice Note on ‘Finding fitness to practise impaired’ emphasises that Panels must recognise the need to address the critically important public policy issues identified in *Cohen* – to protect patients, declare and uphold proper standards of behaviour and maintain public confidence in the profession. This means that they cannot conclude that fitness to practise is not impaired simply on the basis that, since the allegation arose, the registrant has corrected matters or learnt his or her lesson.

8.0 Considerations by other regulatory bodies

8.1 Some of the other regulatory bodies have either made statements around the meaning of fitness to practise or are moving towards having a criteria for fitness to practise defined in rules.

8.2 The General Medical Council (GMC)

8.3 In November 2001, the GMC approved a statement of policy on the meaning of fitness to practise. In particular, it provides that *'All human beings make mistakes from time to time. Doctors are no different. Whilst occasional one-off mistakes needs to be thoroughly investigated by those immediately involved where the incident occurred and the harm put right, they are unlikely to indicate a fitness to practise problem.'*

8.4 The statement of policy also provides that, for the GMC, a question of fitness to practise is likely to arise if:

- A doctor's performance has harmed patients or put patients at risk of harm;
- A doctor has shown a deliberate or reckless disregard of clinical responsibilities towards patients;
- A doctor's health is compromising patient safety;
- A doctor has abused a patient's trust or violated a patient's autonomy or other fundamental rights; and;
- A doctor has abused a patient's trust or violated a patient's autonomy or other fundamental rights.

8.5 The Nursing and Midwifery Council (NMC)

8.6 The NMC website (<http://www.nmc-uk.org/aArticle.aspx?ArticleID=3021>) states that fitness to practise is *'a nurse of midwife's suitability to be on the Register without restriction.'*

8.7 The General Pharmaceutical Council (GPhC)

8.8 The Department of Health are currently consulting on a range of rules relating to the functions of the General Pharmaceutical Council (GPhC), the body that is due to take over regulatory responsibility from the pharmacists' professional bodies. This is the first time that any of the regulatory bodies' rules have expressly set out fitness to practise criteria. Rule 15 of the General Pharmaceutical Council (Fitness to Practise and Disqualification Rules) Order of Council 2008 sets out what should be considered in determining whether a registrant's fitness to practise is impaired.

9.0 The HPC's approach to fitness to practise

9.1 Whilst each case needs to be considered on its merits, taking account of relevant case law, a presumption should be made that fitness to practise is impaired where the evidence, if proven, would establish

- serious or persistent lapses in the standard of professional services;
- incidents involving
 - o reckless or deliberate acts;
 - o concealment or acts of omissions, the obstruction of their investigation, or attempts to do either;
- sexual misconduct or indecency (including any involvement in child pornography);
- improper relationships with, or failure to respect the autonomy of, service users;
- violence or threatening behaviour;
- dishonesty, fraud or an abuse of trust;
- exploitation of a vulnerable person;
- substance abuse or misuse;
- health problems which the registrant has but has not addressed, and which may compromise the safety of service users; and
- other, equally serious, activities which undermine public confidence in the relevant profession

9.2 The HPC seeks to ensure that its fitness to practise processes are philosophically aligned to the principles of rehabilitative/restorative justice whilst recognising that, given the range of reasons for impairment, the process itself can not encompass all of those principles all of the time. Terminology already in common use by the HPC has endeavoured to ensure that this ethos is a core part of the Council's approach towards fitness to practise.

9.3 The approach that HPC has taken is to phase out the language of the criminal justice system such as:

- "prosecution"
- "guilty"
- "sentence"
- "charge"

9.4 Where panels identify that a registrant's fitness to practise is impaired, they must determine what degree of public protection (if any) is required. Panels should approach this in a proportionate manner and as so far as possible, registrants should be allowed to remain in practice subject to any necessary restrictions if that is consistent with public protection.

- 9.5 In considering whether HPC can prove impairment, decision makers should also consider the personal and public components as set out in *Cohen* and weigh those components accordingly. Decisions should also take into consideration the culpability and seriousness test set out below.

Personal components

- whether the registrant has disregarded previous warnings about conduct or behaviour of the kind proven as a ground of the allegation;
- any action taken by the registrant to remedy the behaviour alleged;
- the registrant's insight into the allegations found proven; and
- the extent to which the issue is being managed by the registrant and their insight into the issue

Public components

- the relevance of the conduct to the practice of the registrant's profession;
- whether the behaviour proven has undermined public confidence in the profession;
- whether the registrant concerned has failed to comply with the standards of conduct, performance and ethics whilst noting that failure to comply with the standards shall not of itself establish that fitness to practise is impaired; and
- whether the dishonesty or abuse indicative of future behaviour

10.0 HPC's Standards of Conduct, Performance and Ethics (SCPE)

- 10.1 The SCPE provides the definition of fitness to practise. It states that '*when we say someone is 'fit to practise', we mean that they have the skills, knowledge, character and health to practise their profession safely and effectively.*' <http://www.hpc-uk.org/assets/documents/10002367FINALcopyofSCPEJuly2008.pdf>

11.0 HPC's Decision Making Processes

11.1 The Standard of Acceptance

- 11.1.2 In order for a case to be considered by the HPC, it has to meet the standard of acceptance for allegations. The practice note 'Standard of Acceptance' sets out in more detail what that standard is, but in effect an allegation is regarded as meeting that standard if it:

- is made in the form required by Council;
- concerns a current HPC registrant; and
- relates to the fitness to practise of that registrant.

The Practice Note provides that *'although allegations must relate to impairment of fitness to practise, an over-strict interpretation of that term should not be adopted. Fitness to practise is not just about professional performance but also encompasses acts by a registrant which may have an impact upon public protection, the reputation of the profession concerned or confidence in the regulatory process. There will often be circumstances in which matters seemingly unconnected with professional practice may nonetheless have a bearing on fitness to practise.'*

<http://www.hpc-uk.org/assets/documents/1000289CAllegations.pdf>

11.2 Case to Answer

11.2.1 If an allegation meets the standard of acceptance, then the case will be considered by a panel of the Investigating Committee to determine whether there is a case to answer. The test applied when determining whether there is a case to answer is whether there is a 'realistic prospect' that the HPC will be able to establish that the registrant's fitness to practise is impaired. In applying the test, Panels need to take account of the wider public interest, including protection of the public and public confidence in both the regulatory process and the profession concerned, and must apply the test to the whole of the allegation. This means that the test has to be applied to:

- the facts set out in the allegation;
- whether those facts amount to the "ground" of the allegation; and
- whether in consequence, fitness to practise is impaired.

11.2.2 When reaching a decision as to whether there is a case to answer, panels consider both the nature and severity of the allegation. The Practice Note on this subject provides that *'people do make mistakes or have lapses in behaviour and HPC would not be enhancing public protection by creating a 'climate of fear' which leads registrants to believe that any and every minor or isolated lapse will result in an allegation being pursued against them.'*

http://www.hpc-uk.org/assets/documents/10002478PRACTICE_NOTE_CasetoAnswer.pdf

11.3 Finding Fitness to Practise Impaired

11.3.1 The Practice Note on 'Finding fitness to practise impaired' makes express reference to the fact that panels should note that 'the test of impairment is expressed in the present tense; that is fitness to practise **is** impaired and although the panel's task is not to "punish for past misdoings", it does need to take account of past acts or omissions in determining whether a registrant's present fitness to practise is impaired'.

<http://www.hpc-uk.org/assets/documents/1000289FFindingthatFitnessToPractiseisImpaired.pdf>

12.0 Culpability and Seriousness

- 12.1 In determining whether fitness to practise is impaired, Panels need to consider the potential risk of continuing or future harm which is posed by the registrant. The task for the Panel is to determine the likelihood of the registrant causing similar harm in the future, taking account of:
- the degree of harm previously caused by the registrant; and
 - the registrant's culpability for that harm.
- 12.2 In considering the degree of harm, a panel's starting point must be the harm actually caused by the registrant, but the Panel should also have regard to the harm that was intended to be caused or might foreseeably have been caused by the registrant's actions. The harm that occurred may have been greater or less than the harm intended or which was foreseeable.
- 12.3 The degree of harm cannot be considered in isolation, as serious harm - including death or serious injury - may result from an unintentional act which is unlikely to be repeated. Panels also need to consider the registrant's culpability for that harm and other relevant factors, such as the degree of insight shown or remedial action taken by registrant.
- 12.4 In assessing culpability, Panels should recognise that harm which is inflicted deliberately and intentionally is more serious than harm arising from the registrant's reckless disregard of risk, which in turn is more serious than that arising from a negligent act where the harm may not have been foreseen by the registrant.
- 12.5 Although each case must be decided on its facts, as a general principle, the 'risk spectrum' is a combination of the degree of harm and culpability for that harm and should be regarded as having serious harm which is inflicted intentionally at one end and minor harm caused unintentionally at the other end.

13.0 Guidance for Presenting officers

- 13.1 One of the recommendations from the internal review of not well founded cases was that, in presenting cases, the HPC (which has the burden of proof) should give a clear and early indication to the Panel, using clear assessment forms and criteria, that it is unlikely to be able to prove its case. By proving its case, this means on the facts, the ground **and** whether fitness to practise is impaired.
- 13.2 The ultimate decision would remain with the Panel but the indication provided would allow panels to take account of the underlying principle that the fitness to practise process is not designed to punish but to only take action that is necessary to protect the public.

14.0 Summary

- 14.1 This paper has outlined the principles, standards and processes by which the Fitness to Practise Department delivers the Council's commitment to public protection. It describes the underlying philosophy and processes, based on restorative rather than punitive models of justice. It should in time provide a platform for further improvements in accessibility and understanding of the HPC's approach to regulation.
- 14.2 The Council is invited to comment on the paper and to approve its content.