

Council, 25 March 2015

Enhancing Independence in Fitness to Practise Adjudication

Executive summary and recommendations

Introduction

At its meeting on 25th September 2014, the Council endorsed the need for greater separation between the Health and Care Professions Council's (HCPC's) investigative and adjudication functions and agreed that the option of establishing the Health and Care Professions Tribunal Service (HCPTS) should be pursued further.

Following this meeting, the Executive has set out some further detail in relation to the proposed governance and operational arrangements for a separate tribunal service. In addition, the Executive has undertaken a review of the current adjudication facilities, as a dedicated tribunal site is key to the delivery of enhanced independence in fitness to practise adjudication and the establishment of the HCPTS.

There are a number of constraints to our current facilities which are set out in appendix three.

Decision

The Council is asked to consider the three papers in relation to the proposed governance and operational arrangements and agree that further work should continue in relation to the establishment of the HCPTS at a dedicated tribunal site.

Background information

Set out below is a link to the options paper considered by Council in September 2014:

www.hcpc-uk.org/assets/documents/100048A1Enc04-EnhancingIndependenceinFitnessToPractiseAdjudication.pdf

In January 2015, the Government published their response to the Law Commissions' review of the legislation covering the regulation of health and social care professions (which was undertaken jointly by all three UK Law Commissions). In this, the government welcomes the Law Commissions' recommendations regarding increased separation between the regulatory body's investigative and adjudicative role, which they highlight as being a long term policy objective for this and previous Governments. They agree with enabling regulatory bodies to adopt systems with a greater degree of separation, whether on the Medical Practitioners Tribunal Service (MPTS) or other model as appropriate. A link to the response can be found here:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_8995.pdf

In January 2015, the Department of Health published the consultation response on proposed changes to modernise and reform the GMC's adjudication of fitness to practise cases which included the proposal to establish the MPTS as a statutory committee of the GMC:

www.gov.uk/government/uploads/system/uploads/attachment_data/file/396205/Consultation_Response.pdf

Resource implications

Each paper contains broad information about potential resource implications.

Financial implications

Further work will need to be undertaken on the financial implications which will be informed by the outcomes of discussions relating to the setting of the 2015/16 budget.

Appendices

Appendix 1 – HCPTS proposed governance arrangements

Appendix 2 – HCPTS proposed operational arrangements

Appendix 3 – Review of adjudication premises for HCPTS

Date of paper

9 March 2015

Appendix One

Proposed governance arrangements for the Health and Care Professions Tribunal Service

Introduction

At its meeting on 25th September 2014, the Council endorsed the need for greater separation between the Health and Care Professions Council's (HCPC) investigative and adjudication functions and agreed that the option of establishing the Health and Care Professions Tribunal Service (**HCPTS**) should be pursued further.

The HCPC's adjudicative functions are performed in the name of the three HCPC Practice Committees, however, those committees only exist when a Panel is convened to conduct fitness to practise proceedings. Panels would perform that same function as the HCPTS, which would be part of the HCPC but operating at arm's length and with administrative arrangements which are (and are seen to be) operationally separate from the remainder of the HCPC.

Tribunal Advisory Committee

The Tribunal Appointments Committee (**TAC**) would be established as a non-statutory committee of the Council and comprise:

- three members from among the Tribunal Panellists; and
- three independent members (who are not and never have been Tribunal Panellists).

Members of the Council would not be eligible to be appointed as TAC members.

TAC members would be recruited by open competition and appointed for a fixed term of up to four years (to allow for staggered terms and thus some continuity of committee membership). They would be eligible for re-appointment but, in line with the arrangements for the Council and its other committees, could not serve for an aggregate of more than eight years in any twenty years.

The TAC would operate independently, reporting directly to the Council and be subject to its strategic decisions, notably budgetary and resource controls. As these arrangements are about increasing independence and transparency, and the TAC's functions are already undertaken by the HCPC, its work should not have a significant budgetary impact.

The TAC's terms of reference would provide it with three specific responsibilities:

1. Advising the Council on the qualities, abilities and competences required of

Tribunal Panellists and Legal Assessors.

The HCPC has done substantial work in this area in the past and, for example, has a competency framework for Panellists and Panel Chairs which was developed based upon work undertaken by the (then) Judicial Studies Board.

The expectation is that the TAC would consider and advise the Council on best practice in this area so that policy documents like the competency framework remain fit for purpose.

2. Establishing arrangements for the fair, open and merit-based selection of Tribunal Panellists and Legal Assessors and for their training and assessment.

Panellists and Legal Assessors are already recruited by open competition but the new arrangements would ensure that recruitment is undertaken at arm's length from the Council and, in particular, without the direct involvement of Council members.

As the TAC would be responsible for "establishing" the processes rather than operating them, it is not intended that TAC members would need to sit on selection panels or act as trainers, but there would no bar to them doing so.

3. Providing guidance to the Tribunal on matters of procedure and practice for the purpose of ensuring that tribunal proceedings are conducted efficiently and effectively.

At present the Council is responsible for setting high level policy in respect of fitness to practise proceedings. For example, this includes the Indicative Sanctions Policy and the Standard of Acceptance for Allegations. The Council also approves the Practice Notes, which are not strategic in nature but provide detailed guidance to Panels on practice and procedure. It is intended that approval of the latter would become the responsibility of the TAC.

The Health and Social Work Professions Order 2001 (Sch. 1, para. 13) requires the Council to determine the standing orders of any committee that it may establish. The TAC's standing orders would need to reflect the terms of reference set out above but, in addition, the TAC would be required to have regard to the following criteria in performing its functions:

- the need for Tribunal proceedings to be:
 - independent and impartial;
 - accessible, transparent and proportionate;
 - conducted quickly, fairly and efficiently;
- the need for Tribunal Panellists to have the appropriate knowledge and skills to perform their role;
- the need to develop innovative methods for managing and resolving allegations brought before the Tribunal.

The TAC would report to the Council as and when necessary in discharging its responsibilities but, as a minimum, would have to provide a written report on its work at least once every six months.

The Council would continue to receive the regular summary of all hearing outcome data and performance against key indicators as part of the Fitness to Practise management pack.

Appendix Two

Proposed operational arrangements for the Health and Care Professions Tribunal Service (HCPTS)

Operational Framework Agreement (OFA)

The HCPTS would be part of the HCPC but to a large degree treated as a separate entity. Consequently an OFA would need to be developed which sets out the relationship between the HCPTS and the other parts of the HCPC, how they would interact, the scope and levels of resources and services that the HCPTS would receive and the levels of service the HCPTS would be expected to deliver.

Tribunal employees

The Head of Adjudication (to be amended to Head of Tribunal Services) would continue to have management responsibility for the Tribunal Services team. The Director of Fitness to Practise would continue to have overall responsibility of the team who would remain under the Fitness to Practise Department.

The OFA would specify that the number of HCPTS employees and would be based upon the workforce currently performing adjudication-related functions within the FTP Directorate.

As the HCPTS would not be a separate entity from the HCPC, there would be no change to the terms and conditions or continuity of employment of any HCPTS employees. They would continue to be employed by, and subject to the terms and conditions of employment of, the HCPC. It is possible that some minor changes to job titles, etc. would may be made to reflect the new arrangements.

Budget and financial, etc. controls

The budget of the HCPTS would be set based upon the existing FTP caseload, performance expectations and adjudication-related expenditure. The HCPTS budget would be managed by the Head of Tribunal Services as a distinct part of overall FTP expenditure. The OFA would need to provide for appropriate budgetary, business and operational planning and risk reporting mechanisms. It would also specify that the HCPTS was subject to HCPC financial regime, including the Council's strategic decisions in respect of finance, the Financial Regulations, audit arrangements and oversight by the Chief Executive and Registrar as Accounting Officer.

Quality Assurance

The Fitness to Practise Department undertakes quality assurance and compliance audits on Panel decisions, to ensure that decision-making is of high quality, well-reasoned, adheres to applicable legislation, case law, policy and guidance and will withstand scrutiny, review or appeal. This includes challenge in the High Court by the Professional Standards Authority (PSA).

As the HCPC (rather than the relevant practice committee) is the respondent to any review or appeal (and therefore must make objective decisions as to whether a Panel decision should be defended), the quality assurance and compliance function will remain a HCPC responsibility. However, the OFA would need to provide for regular review meetings at which the HCPTS could be advised of, and respond to, the findings of the quality assurance and compliance audits.

Liaison arrangements

The HCPC will establish working relationships with the HCPTS that strike an appropriate balance in terms of their formality and which ensure that the independence, transparency and other benefits derived from separating the adjudicative function are not lost or harmed.

In consequence, formal liaison arrangements would need to be put in place and, as a minimum, the OFA would need to provide for:

- regular (at least monthly) review meetings to discuss issues of mutual interest;
- the production of monthly returns or similar reporting procedures;
- the establishment of service requirements, review of delivery and the recording of agreed outcomes;
- a mechanism for establishing corrective action plans to be agreed with the HCPTS;
- relevant escalation procedures.

Information Governance

As the HCPTS would be part of the HCPC, it would be processing personal data in respect of which the HCPC is the data controller. The OFA would address the need for the HCPTS to comply with all HCPC data security arrangements and to process such personal data only so far as is necessary to perform the HCPC's adjudicative functions or any other purpose specified in the OFA. All freedom of information and data protection requests would continue to be dealt with by the HCPC.

Operational Delivery of HCPTS

Set out below are some broad activities that will enable the delivery of the HCPTS

Type of activity	Description	Dependencies/ constraints	Expected completion date/timescales
Naming of the Tribunal Service	<p>Relevant name change to adequately reflect separation of the service</p> <p>Authorisation has been obtained from Companies House to use 'tribunal' as part of HCPC's business name</p>	None - relevant approvals granted	Quarter 3 – 2015-16
HCPTS address	Separate postal address for HCPTS	Dedicated facilities	Quarter 3 – 2015-16
Logo/signage	Creation of logo/ identity for HCPTS – linked to HCPC	Comms input	Quarter 3 – 2015-16
Operating Protocol	Draw up operating protocol with case management – to agree working relationship in relation to the hearings service provided	Subject to case management input/ consultation	Quarter 3 – 2015-16

Operational Framework Agreement	Main responsibilities of HCPTS, scope, how interacts with rest of FTP, HCPC etc.	Legal advice	Quarter 4 – 2015-16
Liaison arrangements	Establish formal liaison arrangements with rest of FTP. To include quality assurance arrangements	Subject to input and consultation with rest of FTP	Quarter 4 – 2015-16
Revised scheme of delegation	Amend scheme of delegation to reflect changes	Council approval	Quarter 3 – 2015-16
Appointments to the Tribunal Advisory Committee	Appointment of members to the Tribunal Advisory Committee	Council approval of governance arrangements	Quarter 3 – 2015-16
Letterhead and Stationery	Changes to letterhead, other relevant stationery	Location and facilities	Quarter 3 – 2015-16
Brochures	Changes to witness brochure	Comms input	Quarter 4 – 2015-16
Budget split	Create separate budget for HCPTS (still part of overall FTP budget)	Current FTP forecast	Quarter 3 – 2015-16
Job title changes	Simple changes to Adjudication team job titles to accurately reflect HCPTS	HR input	Quarter 3 – 2015-16

E-mail addresses	Change to team e-mail addresses – ensure perceived as separate	IT resource	Quarter 3 – 2015-16
CMS changes	Review whether any changes to CMS are necessary to reflect independence	A&D/IT resource Already separate CM and ADJ sides	Quarter 4 – 2015-16
Web domain names	Purchase of relevant web domain names to ensure perception of separation	None – a number of relevant domain names were purchased in early 2014	Completed

Appendix Three

Independence in adjudication - review of adjudication premises in relation to the establishment of the Health and Care Professions Tribunal Service (HCPTS)

1. Introduction

1.1 At its meeting on 25th September 2014, the Council endorsed the need for greater separation between the Health and Care Professions Council's (HCPC's) investigative and adjudication functions and agreed that further work should be undertaken in relation to the establishment of the Health and Care Professions Tribunal Service (HCPTS).

1.2 As set out in the options paper considered by the Council in September last year, the HCPTS would provide a hearings service for the HCPC, creating a greater degree of separation between the investigation and adjudication of fitness to practise cases. The service would be operationally separate but still remain part of the Fitness to Practise Directorate and remain under the overall control of Council and the Chief Executive and Registrar. The HCPTS would be based on the Medical Practitioners Tribunal Service (MPTS) model, albeit on a smaller scale. At its meeting in September 2014, the Council agreed that further work should also be undertaken in relation to the proposed governance arrangements. Further detail on this is set out in appendix one.

1.3 Since September, the government has published its response to the Law Commissions' recommendations concerning fitness to practise. In this, the government welcomes the Law Commissions' recommendations regarding increased separation between the regulatory body's investigative and adjudicative role, which they highlight as being a long term policy objective for this and previous Governments. They agree with enabling regulatory bodies to adopt systems with a greater degree of separation, whether on the MPTS or other model as appropriate.

1.4 This paper sets out the current constraints and risks in relation to HCPC's current adjudication premises and what would be needed in order to enable us to move towards greater independence in the adjudication of fitness to practise cases and the establishment of the HCPTS. The paper will also look at the work of some of the other UK health regulators in relation to their adjudication functions and the facilities available to them.

2. HCPC adjudication – current facilities

2.1 Currently, the majority of HCPC hearings are held on our premises at both Park House and 186 Kennington Park Road. Approximately 15% of HCPC hearings are held at external venues, either due to statutory requirements or due to the complexity of the case and the numbers of witnesses being called to give evidence, which means it is more viable to hold the hearing at an external location.

2.2 We are currently able to hold between six to eight hearings per day with the current internal resource available to us at HCPC premises. Two main hearing rooms are available within Park House, along with one smaller hearing room and three small rooms that are used for panel deliberations. One of the main hearing rooms can be split which means that where necessary we make use of this to maximise the number of hearings we can hold. Only one of the main hearing rooms in Park House has video link facilities. However, this does not provide an internal room to room resource and the video link facilities are not as cost effective or up to date as they could be (there are more up to date systems available).

2.3 We are currently using two rooms on the ground floor of 186 Kennington Park Road to hold hearings along with panel retiring rooms also located on the ground floor. We make use of two additional rooms within 186 Kennington Park Road for hearings (and smaller rooms for panel deliberations) but this only accounts for approximately 30-40% of their total use. We also hold all Investigating Committee panel meetings in a dedicated Investigating Committee Panel room in

the same building. There is no dedicated witness waiting room within 186 Kennington Park Road and it does not have any video link facilities.

3. Constraints of current adjudication facilities

3.1 Although we are able to hold up to eight hearings a day, due to the fact that two rooms within 186 Kennington Park Road are shared with other HCPC departments and the lack of dedicated witness space, means that approximately 5% of all hearings will be held at external London locations. So far this financial year, we have held approximately 43 hearings (excluding Registration Appeals) at external London locations.

3.2 The primary constraints with our current facilities are set out below:

- Hearing rooms are located within the main HCPC premises and close to general office space of HCPC employees.
- There is no dedicated witness waiting area. We have made use of the available resource as best we can, for example, we use the mezzanine area of Park House as a witness waiting area, however this isn't ideal as it isn't sound proof or particularly private. These facilities can be problematic especially for witnesses who may become distressed during the course of proceedings or have general anxieties about seeing the registrant concerned or giving evidence.
- A number of the hearing rooms are shared with other HCPC departments and are used for other events such as Council meetings and all employee meetings. This lack of dedicated resource limits the number of hearings that can be held internally on a particular day.
- Due to the high volume of hearings, it means that there are often limited meeting rooms available for the use of other HCPC departments to use on an ad hoc basis.
- We don't currently have any dedicated facilities available for the representatives of registrants to take instruction. We meet with representatives of the Trade Unions and professional bodies on a six monthly basis and feedback from hearings consistently focuses on the lack of available facilities for representatives, registrants and their witnesses. We will

always try to accommodate the needs of all parties involved in a case, but this can be difficult given the constraints of our current hearing facilities.

3.3 Since 2012, when HCPC took over the regulation of Social Workers in England, the complexity of cases has increased, meaning that the average length of a hearing has increased from 2.5 days in 2012-13 to 3.6 days. The average number of witnesses per hearing has also increased to between three and four. The days and numbers of parties involved in a hearing has increased but our hearing space has not been able to keep pace.

3.4 A primary concern for us is that our hearing facilities leave us open to reputational risk. Many of our hearings are high profile and attract media attention and as such they are subject to more public scrutiny than any other part of our process. Over a number of years we have worked hard to ensure that our hearings are conducted in an open, fair and transparent manner, reflecting the core values of HCPC. However, the lack of dedicated hearing space and modern facilities, means that we are at risk of falling behind other regulators and the values that we uphold could gradually be undermined. Given the move towards increased independence in adjudication, now is a good time for our hearing facilities to be enhanced and refreshed, bringing them in line with other regulators.

4. Current facilities of other healthcare regulators

General Pharmaceutical Council (GPHC)

4.1 In February 2015, members of the Adjudication management team conducted a visit to the hearing premises of the GPHC which are located along with their main office in Canary Wharf. The GPHC were able to design a bespoke hearings suite which is located on a separate floor to their main office. Their hearings centre provides a parallel set up so that Council and registrant parties enter the floor separately. Set out below are the main GPHC hearing facilities:

- Four main hearing rooms on site to accommodate approximately 10-15 people.

- Four associated panel retiring rooms that are located directly off the main hearing rooms so that panels do not have to pass or share facilities with registrants or witnesses.
- Internal/ room to room video link facilities via four large TV screens which are multi use in each hearing room. These screens can also be used to view documents in the hearing rooms.
- Hearing rooms are also equipped with a projector and screen, teleconferencing facilities, privacy screens and CCTV with face and voice recognition (not currently in use). The IT equipment is controlled by the Committee Clerk via an Ipad. One of the main hearing rooms can also be opened up into a larger hearing room for hearings attracting media/ public attention. This allows for greater flexibility of use.
- Two large waiting rooms for each respective side (for Council witnesses and advocates and for registrants, defence and their witnesses). As these have separate and distinct entrances there is minimal risk that registrants and Council witnesses will come into contact outside of the hearing. In addition, they are able to use separate lift banks for witnesses and registrants.
- There is a dedicated video link room for vulnerable witness use, several multi-use rooms that are used either for registrants and their representatives, witnesses or Council Presenting Officers.

5. Nursing and Midwifery Council (NMC)

5.1 The NMC have facilities to hold fitness to practise hearings at four London locations. There is a dedicated NMC hearings centre in Stratford, East London which is the most recent site and has moved to become the NMC's main hearing centre, with modern facilities similar to those of the GPhC that are able to keep pace with the high volume of hearings being held (they currently hold in the region of 25 hearings a day).

5.2 Members of the Adjudication management team recently visited the NMC's new hearings centre in Stratford which opened in October this year. The main facilities included:

- 14 large hearing rooms, all with facilities for video link (although these are not currently in use) and the associated panel retiring rooms
- Witness waiting room
- Registrant waiting room
- Panel member lounge
- Case presenter room
- Large reception area
- Private registrant and representative rooms
- Kitchen facilities for all parties

5.3 A number of the rooms are multi use and are also used for panel training, seminars and staff briefings as necessary. Employees of the NMC's adjudication team are all located within the Stratford hearings centre, separate to the NMC's investigation and in house legal teams who are based at other locations. This allows for a greater degree of separation and importantly that separation should be clearer to registrants, witnesses and members of the public who attend the hearings.

6. Medical Practitioners Tribunal Service (MPTS)

6.1 The MPTS provides a hearing service that is independent in its decision-making and separate from the investigatory role of the General Medical Council (GMC). The MPTS is part of, and funded by the Council but is operationally separate.

6.2 In August 2013, members of the adjudication team undertook a visit to the MPTS who are based in a dedicated hearings centre in Manchester. They currently have over 15 meeting rooms on two floors, including defence and prosecution rooms. The MPTS have their own portable video conferencing units and dedicated vulnerable witness rooms. They also have in-house digital recording facilities in each of their hearing rooms which removes the need for an external transcriber or logger to attend proceedings. However, the system requires in-house management and the necessary IT infrastructure.

6.3 In relation to the MPTS and the reform of the GMC's adjudication functions, a section 60 order has been laid before Parliament. The Order is intended to enhance and protect the independence of decision making at the adjudication stage of fitness to practise procedures involving doctors by establishing the MPTS in statute. It also amends the Professional Standards Authority for Health and Social Care's grounds for referring final fitness to practise decision to the High Court for consideration and provides a right of appeal for the GMC against final fitness to practise decisions on the same grounds.

7. Moving forward

7.1 Key to the operational delivery of a separate tribunal service for the HCPC will be the facilities available, including a separate location, modern tribunal and break out rooms for panels, advocates/representatives and separate waiting rooms for witnesses. This, along with a clear corporate identity will ensure that the service is seen to be separate.

7.2 As set out in September's Council paper on options to enhance independence in fitness to practise adjudication, there would be substantial benefits to the adjudication function moving to dedicated facilities within close proximity to our current premises and operating as the HCPTS. It would ultimately provide a greater degree of transparent independence, allowing all correspondence regarding a registrant's fitness to practise hearing to be sent to and from a separate address to that of HCPC as well as having separate telephone contact numbers. Fitness to practise panels are independent decision makers and a greater physical separation would enhance confidence and continue to promote fairness in the adjudication of fitness to practise cases.

7.3 A move to dedicated accommodation with modern, high quality facilities would also bring us more in line with the other large regulators, to not do so would increase the risk of HCPC falling behind in this important public facing area. Having a dedicated HCPC hearing site would also mean that we would be able to hold the maximum number of eight hearings per day (in line with current employee resource), with limited or no need to make use of external London locations which will save costs. The venue costs for an average external London

hearing are in the region of £855 per venue, with approximately 5% of our current hearings being held at an external London venue. This amounts to a total cost of £36,765 for the 43 hearings that have been held externally in London so far this year.

7.4 As set out in this paper, the transition of hearings to a dedicated site will allow us to gradually make a move to independent adjudication, through the establishment of the Tribunal Advisory Committee and the other operational changes identified in appendix two.