

Council, 20 May 2016

## HCPC's Approach to Fitness to Practise

### Executive summary and recommendations

#### **Introduction**

This paper provides an overview of HCPC's approach to fitness to practise, including the legislative framework upon which it is based, with the intention of helping to inform future discussions the Council may have in relation to the HCPC's fitness to practise process and adjudication function.

#### **Decision**

The Council is requested to discuss this paper. No decision is required.

#### **Background information**

None

#### **Resource implications**

None

#### **Financial implications**

None

#### **Appendices**

Appendix One – HCPC's approach to Fitness to Practise

#### **Date of paper**

6 May 2016

## **HCPC's Approach to Fitness to Practise**

### **1. Overview and background**

- 1.1 The Fitness to Practise process is not designed to punish registrants for harm done, nor to resolve disputes between them and service users. Its focus is on whether, despite what may have occurred, a registrant remains fit to practise; in the sense of having the knowledge, skills and character needed to continue practising their profession safely and effectively.
- 1.2 The HCPC's governing legislation, the Health and Social Work Professions Order 2001 (the Order) provided the HCPC with an opportunity to adopt a progressive and innovative approach to fitness to practise. It was an opportunity that was seized by the original HPC (as it then was) Council, many of whom had served on the predecessor body, the Council for Professions Supplementary to Medicine (CPSM).
- 1.3 The CPSM's governing legislation, the Professions Supplementary to Medicine Act (the PSM Act) provided for a very different form of "disciplinary" process. The new HPC (as it then was) Council were keen to move away from that outmoded approach, recognising that "fitness to practise" should represent a fundamental change in regulatory philosophy rather than merely being discipline by another name.
- 1.4 Their vision was to create a fair, open and transparent process which a registrant could navigate without being intimidated, founded upon the proper administration of justice. Many of the changes which they introduced were innovations at the time but are now commonplace in other settings. For example, HCPC Panels do not 'process' into the room to the call of "all rise" and registrants are not made to stand while lengthy 'charges' against them are read out.
- 1.5 This paper outlines the development and key features of HCPC's approach and philosophy, underpinned by the Order, to upholding professional standards and ensuring public protection through its fitness to practise process.

### **2. The HCPC's legislative framework**

- 2.1 Article 3 (4) of the Order sets out the HCPC's main objective in exercising its functions:  
  
'...to safeguard the health and well-being of persons using or needing the services of registrants.'

- 2.2 The Order establishes four key processes which support the delivery of that objective:
- Establishing standards for entry to the Register (and for continuing behaviour).
  - Approving education and training programmes that meet those standards.
  - Maintaining a Register of professionals that have successfully completed those programmes.
  - Holding registrants to the standards, including through CPD standards and audits and, for a small minority of registrants, the fitness to practise process.
- 2.3 Article 21(1)(a) of the Order requires the Council to:
- “establish and keep under review effective arrangements to protect the public from persons whose fitness to practise is impaired”*
- 2.4 In contrast to the PSM Act, the Order allows for the setting of standards of competence or proficiency as well as conduct. It also allows for the investigation of competence as well as conduct and provides a wider range of sanctions, not just removal of a registrant from the register. Having been passed after the Human Rights Act 1988 was enacted, the Order is also ‘Convention compliant’. This means that all aspects of HCPC’s legislation – both the order and the rules made under it - comply with the European Convention on Human Rights and are thus underpinned by principles of accessibility and transparency.
- 2.5 In respect of fitness to practise, the Order establishes three practice committees – Investigating, Conduct and Competence, and Health - and stipulates which cases are to be heard by which committee. The Order also gives the Council powers to appoint screeners who can refer cases to committees.
- 2.6 The range of sanctions available to HCPC’s practice committees are different from what had gone before. CPSM rules only allowed the committees to remove an individual from the register if convicted of a criminal offence, or if ‘guilty of infamous conduct in a professional respect’. HCPC’s approach moved to a position whereby individuals can be struck off the register if a finding of impairment was established, but in addition to this, suspensions, condition of practice and cautions can be issued. The legislation and associated procedural rules requires the HCPC to prove an individual had not adhered to the standards and as a consequence, his or her fitness to practise is ‘impaired’.
- 2.7 An important element of HCPC’s legal framework is that it operates on the civil standard of proof and the underlying civil rules of evidence. That is, Panels make findings of fact on the balance of probabilities rather than on the criminal standard (of beyond a reasonable doubt). This is an important

difference and one which was introduced by the HCPC at the outset. Over time, it has become the standard for all professional regulators.

- 2.8 The Order also requires that hearings are held in the UK country of residence of the registrant. Another element is the power for the HCPC to issue interim orders where it considers that registrants may pose a risk to the public or themselves.
- 2.9 The Order provides powers to require employers and other third parties to provide information to the HCPC that may be relevant to the investigation and determination of allegations.

### **3. Meaning of Fitness to Practise**

3.1 In 2010, HCPC commissioned research (through IPSOS Mori) to explore the expectations of complainants, stakeholders and members of the public about the fitness to practise process. The research found that there was a:

- Lack of clarity about the role of the regulator amongst the public
- Confusion about roles between regulator, employer and other agencies
- Desire to see mediation as a stage in the process.

3.2 A range of activity was undertaken in light of this research. The work included:

- Reviewing and updating the information provided on the complaints section of the HCPC website to ensure the information was of relevance, up-to-date and easier to navigate
- Reviewing the information that is provided on the website regarding hearings
- Updating the Standard of Acceptance for Allegations
- Updating all FTP publications
  - The Fitness to Practise Process: Information for Employers
  - What happens if a concern is raised about me
  - How to raise a concern
  - Information for witnesses
- Producing new referral form for those who wish to raise a concern
- How to make a complaint: An Easy Read Brochure
- Reviewing and updating all FTP Standard Letters
- The production of a new audio visual presentation on the purpose of the fitness to practise process which is available on the HCPC website.

The outputs of this work are now well established and are regularly reviewed and updated.

3.3 Informed by this research, in March 2010 the Council considered a paper which explored the concepts of fitness to practise and impairment. It then subsequently approved at its meeting in July 2010 a policy statement on the meaning of fitness to practise. This statement is used in all HCPC publications on the topic and is available on the HCPC website at:

<http://www.hcpc-uk.org/publications/policy/index.asp?id=707>

3.4 The document explains the purpose of HCPC's fitness to practise process and when it is likely that a registrant's fitness to practise will be found to be impaired. It also explains the 'personal' and 'public' components that are taken into account when deciding whether a registrant's fitness to practise is impaired.

#### 4. HCPC's approach to Fitness to Practise

4.1 The approach that the HCPC takes to its fitness to practise process is designed to balance public protection with the rights of the registrant. The approach adopted has been to ensure, so far as possible, that the principles of the fitness to practise process sit within the rehabilitative/restorative phases of the justice continuum.



4.2 Restorative justice is sometimes described as a 'problem solving approach' to justice is about punishing offenders for committing offences, restorative justice is a process which 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. Many of the principles

of the restorative approach have been reflected in the HCPC's approach to fitness to practise.

- 4.3 HCPC 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 cannot encompass all of those principles all of the time. Terminology already in use by the HCPC has endeavoured to ensure this ethos is a core part of the HCPC's approach to fitness to practise. This is reflected by the fact that we do not use the vocabulary of the criminal justice system, such as "prosecution", "charge", "guilty" or "sentence" in our processes and documents.
- 4.4 Independence of the adjudicative process is a key aspect of HCPC's approach to fitness to practise. The HCPC was the first regulator to put Panels at 'arm's length' and end the practice of Council members sitting as panel members. Panel members are appointed through an open recruitment process. Similarly, the HCPC has always respected the concept of 'equality of arms' and ensured that lawyers who regularly appear as presenting officers in fitness to practise cases are not involved in policy development or the training of panellists. The HCPC also does not have any form of review or 'sign off' arrangements for individual Panel decisions; recognising that any such process would undermine their independence and impartiality.
- 4.5 There is a regular programme of panel refresher training in place for all panel members which takes place on a rolling basis throughout the year. All registrant and lay panel members receive refresher training every two years. Panel chairs and legal assessors receive training every year.
- 4.6 Our approach is to ensure there is 'open justice' and for the fitness to practise proceedings to be conducted in a manner which is open, transparent and proportionate. To this end, hearings are usually held in public; allegations are published on our website 28 days before the date on which the hearing is due to take place, and most fitness to practise decisions are published in full.

### ***Practice Notes***

- 4.7 An important part of ensuring that the fitness to practise process is open and transparent has been the publication of HCPC Practice Notes. Although primarily guidance to Panels, HCPC's policy since it began operations has been to make these available to everyone. Practice Notes have been produced on a range of subjects including:

- Case to answer determinations
- Case Management and directions
- Drafting Fitness to Practise Decisions
- Finding Fitness to Practise Impaired
- Discontinuance of Proceedings

- Disposal of Cases via Consent

4.8 Practice notes are reviewed on a regular basis to ensure that they reflect current case law and best practice and the feedback from those involved in the process. As and where necessary new Practice Notes are produced to ensure that those who appear at proceedings have the relevant guidance to support them in their roles.

### ***Policies***

4.9 A key fitness to practise document is the Council's Indicative Sanctions Policy. This sets out how sanctions should be applied by Practice Committee and will often be the first document that judges in the High Court refer to when considering an appeal from a Practice Committee Panel.

4.10 To ensure that fitness allegations are considered appropriately, consistent with its public protection objective, the Council established a standard of acceptance policy. This policy sets out a modest proportionate threshold which allegations must normally meet before they will be investigated by the HCPC.

4.11 As well as the Indicative Sanctions and Standard of Acceptance policies, policies on the handling of vexatious, frivolous and abusive complaints and the publication of information relating to fitness to practise proceedings have also been produced. Similar to Practice notes, these policies are reviewed on a regular basis to ensure they reflect case law and any changes to process.

### ***The Standard of Acceptance for Allegations***

4.12 Article 22(5) of the Order requires allegations against registrants to be received 'in the form required by Council'. The 'Standard of Acceptance for Allegations' sets out in more detail what that 'form' is, but also provides more detail about when the HCPC is unlikely to take a matter forward. These include:

- Time limit
- Anonymous complaints
- Matters resolved locally
- Employment issues
- Consumer complaints
- Complaints against registrants acting as expert witnesses
- Social networking

When in receipt of a concern about a registrant, an assessment is made as to whether the matter meets the standard of acceptance and whether any further information is required. If the case does not meet the standard (after receipt of further information or otherwise), the complainant will be advised and in

appropriate circumstances, signposted to alternative sources of guidance or support.

## **5. Alternative mechanisms to resolve disputes**

5.1 A number of initiatives have been implemented to develop and improve upon the way fitness to practise allegations are managed and provide an alternative way of resolving fitness to practise cases without incurring the expense and stress of a fully contested final hearing, whilst ensuring the public continues to be protected. These initiatives include:

- The Standard of Acceptance policy
- Learning points – since 2010 where Investigating Committee Panels can include learning points in their decision where they find there is no case to answer
- Mediation pilot
- Disposal of cases via consent – introduced in 2008 the consent process is a means by which the HCPC and the registrant concerned may seek to conclude a case without the need for a contested hearing. The process requires the registrant to admit the matters alleged and the application to be considered by a Panel. The consent process is also used when existing conditions or suspension orders are reviewed.
- Discontinuance – this a process by which all or part of proceedings can be halted without the need for a substantive fitness to practise hearing. This process is used after the Investigating Committee has determined there is a ‘case to answer’ but where a review of the more detailed evidence which is gathered after that decision has been made indicates that it is insufficient to sustain a realistic prospect of proving the whole or part of the allegation. The decision to grant a discontinuance application rests with a panel of the Conduct and Competence or Health Committee.

## **6. Modern and efficient adjudication**

6.1 In August 2010, the Department of Health issued a consultation document ‘*Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery*’. In October 2010 the former Fitness to Practise Committee considered a paper on the proposed establishment of the Office of the Health Professions Adjudicator (OHPA).

6.2 The government decided not to proceed with establishing OHPA. However, the government asked the Council for Healthcare Regulatory Excellence (CHRE), since renamed as the Professional Standards Authority (PSA), to provide advice on options for modernising and improving the efficiency of fitness to practise adjudication. CHRE’s wider stakeholder community and the



professional regulators were asked to provide their thoughts on how to modernise and improve the efficiency and effectiveness of fitness to practise adjudication.

- 6.3 HCPC responded accordingly and that response was provided to the FTP Committee at its meeting in May 2011. At that same meeting, the FTP Committee discussed a consultation document issued by the General Medical Council (GMC) on its proposals for the establishment of the Medical Practitioners Tribunal Service.
- 6.4 Informed by these broader policy developments, work has been undertaken in relation to new models of adjudication and ensuring modern and efficient fitness to practise adjudication. Examples, in addition to those already described, include:
- Enhanced pre-hearing case management and the use of standard directions, including using notices to admit
  - The use of skeleton arguments/case summaries
  - The introduction of 'loggers' at hearings where proceedings are recorded by audio technology instead of using transcription writers.
- 6.5 As Council will be aware following the publication of the Law Commissions' report and Draft Bill, the Executive have been reviewing the HCPC's current model of adjudication and the scope for introducing greater separation between investigation and adjudication.