**Agenda Item 14**

**Enclosure 11**

# Health and Care Professions Council
# 19 September 2018

# Threshold Policy for Fitness to Practise Investigations

**For approval**

**From Brian James, Head of Fitness to Practise and Laura Coffey, Senior Development Manager**

Council, 19 September 2018

# HCPC Threshold Policy for Fitness to Practise Investigations

## Executive summary and recommendations

### Introduction

At the meeting on 5 July 2018, Council endorsed the proposed approach to a revised threshold policy. That paper was the outcome of a wide-ranging review of the Standard of Acceptance and the other policies, processes and guidance that govern the initial stages of the fitness to practise process.

Council also agreed the approach to seek feedback from a number of key stakeholders.

This paper includes the new Threshold Policy for Fitness to Practise Investigations, based on that approach.

The central aim of the Threshold Policy is to improve the consistency, accuracy and efficiency of decisions made during the initial fitness to practise process. To that end, the policy clarifies the hierarchy of decision-making powers between the internal case management teams and the statutory Investigating Committee, and sets out how the more serious and high risk cases will be prioritised and expedited through the decision making 'gateway' stages.

The Threshold Policy is designed to not only improve the quality and timeliness of early fitness to practise decisions, but will also provide benefits in workload planning. For example, it will be possible to identify at an earlier stage the volume of cases requiring consideration by an Investigating Committee panel (ICP) and carry out more focused case management to advance cases to the ICP stage.

The Threshold Policy is likely to result in fewer cases being closed by decision makers in the FTP department and more cases being referred to the Investigating Committee. However, the policy has been designed to ensure that, whilst more cases will reach the Investigating Committee, they will get there more quickly and be prepared to a higher quality standard. In addition, the wider FTP Improvement work on resource planning and capacity will contribute to HCPC's ability to deliver this aim.

Work has already commenced on the operational and systems planning required to implement the policy, including the development of guidance and training for the case management teams, subject to Council's approval of the Threshold Policy. A review of our website and other public facing materials is planned as part of the wider FTP Improvement Project works, in order to align them with the new policy and processes.

At the July Council meeting, we committed to updating Council on the outcome of the work carried out over the summer to inform the drafting of the Threshold Policy; the

stakeholder engagement survey and obtaining formal legal advice. This is set out in detail in the discussion paper at Appendix 1.

**Decision**

The Council is asked to approve HCPC's Threshold Policy for Fitness to Practise Investigations.

**Resource implications**

There are no additional resource implications.

**Financial implications**

None.

**Appendices**

Appendix 1 – Council update paper on the Threshold Policy for Fitness to Practise Investigations
Appendix 2 – HCPC Threshold Policy for Fitness to Practise Investigations
Appendix 3 – Stakeholder Survey background document

**Date of paper**
5 September 2018

## Council Update on the HCPC Threshold Policy for Fitness to Practise Investigations

### Introduction

At the meeting on 5 July 2018, Council endorsed the proposed approach to a revised threshold policy. Following that decision, and further development, a new Threshold Policy for Fitness to Practise Investigations has been produced (Appendix 2).

The policy sets out the HCPC's approach to investigating fitness to practise concerns and the decision making process at the triage and initial investigation stages. It is designed to ensure that we take a proportionate, risk-based approach to carrying out investigations, and make decisions that are correct, consistent, evidence-based and transparent. Summarised below are the key features of the new Threshold Policy.

As explained in the previous paper for Council setting out the proposed approach, a key part of the review of the Standard of Acceptance was a benchmarking exercise against the threshold policies of the other health and social care regulators. This has informed our approach to, and drafting of, the new threshold policy. We believe the policy is consistent with and comparable to those of the other regulators.

Over the summer we undertook engagement activity to seek views from key stakeholders on our proposed approach to a revised threshold policy. We also obtained formal legal advice on the new Threshold Policy for Fitness to Practise Investigations. This paper includes an update on those areas of work.

### The Threshold Policy for Fitness to Practise Investigations

Under the new policy we will operate a two-stage decision-making process. We will first consider at the triage stage whether a concern is something the HCPC can deal with. If a concern is within our remit we will carry out an initial investigation into the potential fitness to practise issues in the concern. At the end of that investigation we will assess the concern and the information we have gathered against our threshold criteria.

All concerns that we receive, regardless of how they came to our attention, will be considered in the same way at the triage and threshold stages. This means we will no longer require concerns received under Article 22(6) of the Order to undergo a separate, additional sign-off process prior to being investigated[1]. This will not only improve the consistency of our decision-making but also enhance the efficiency of our investigations at the initial stages, allowing us to implement a clearer and more streamlined process.

[1] Under Article 22(6) the HCPC has the powers to investigate information about a registrant's fitness to practise that does not come to us in the form of a referral. These cases include self-referrals, anonymous complaints or matters in the press. The Order does not require legal advice to be sought prior to commencing investigation under Article 22(6), but Council has historically asked the Registrar to do so. This process pre-dates the introduction of the Standard of Acceptance policy and means cases received this way are subject to an additional process prior to being referred for a full investigation.

The new policy is more clearly aligned with the Standards of Conduct, Performance and Ethics, Standards of Proficiency and other relevant guidance that we expect registrants to adhere to. It sets out that when we consider a concern, and the information we have obtained during our initial investigation, we will assess whether the matters complained off could amount to a breach of those Standards. In addition, we commit in the policy to ensuring that we will record and communicate the decisions we make against the threshold criteria in relation to the Standards.

*Triage stage*
The Triage decision is a simple assessment as to whether a concern is within our remit to deal with. Only those concerns that fall outside of our remit can be closed at this stage. The intention of the triage decision therefore is not to expand the categories of cases we can close, or to close cases earlier that we otherwise would. Indeed, we expect that only a very small number of cases will be closed at this stage.

The aim of introducing the triage test is to make sure that we explicitly record a statutory decision that a matter is for the HCPC, before we instigate an initial investigation of the concerns we have received. This allows us to take stock of the concerns we can and should investigate, and be more efficient in identifying and prioritising serious and high-risk matters. It will also enable us to be more effective in our investigation planning from the start, for example by identifying and taking action to overcome potential barriers to obtaining information at the earliest opportunity.

It is important to us that the fitness to practise process is accessible to anyone who wishes to raise a concern with us that is within our remit to deal with. To that end, the triage decision has been designed to ensure that there are no barriers to raising a concern. Where there are factors that may mean we are unable to look into a concern, the policy highlights these at the outset and signposts readers to further information on our website.

*Initial investigation stage and threshold criteria*
Cases that pass the triage test will move forward through the process for an initial investigation. The threshold criteria will be applied at the end of that investigation. The aim of this is to ensure that we have taken steps to understand the full extent of the possible fitness to practise issues before making a decision as to whether a matter should be referred to the Investigating Committee Panel (ICP). This addresses the concern in the 2016/17 PSA Performance Review that cases were closed too early without pursuing appropriate and available lines of enquiry.

The threshold criteria is designed to act as a low and proportionate threshold. It also serves to clarify the different decision-making powers of the internal case management teams and the statutory Investigating Committee, and reaffirm the hierarchy of decision-making set out in our legislative framework.

Where a concern, and the information we have obtained about it, is assessed as meeting the threshold criteria it will be referred to the Investigating Committee panel. Once a case has been referred to the ICP it must proceed to the panel for a decision. A threshold decision once met cannot be reconsidered by the case

management teams; the triage and threshold decision points are ‘one-way gates’ and cases cannot revert to a previous stage once they have passed through. Should we receive new information on a case once the threshold criteria has been met, it will be for the ICP to consider any impact on the allegations of that new information. Once cases have been referred to the ICP they cannot be closed other than by the panel making a ‘no case to answer’ decision.

Cases that do not meet the threshold criteria after initial investigation may be closed at that point and before referral to the Investigating Committee. Cases closed at this stage will be those that have passed through the triage decision stage because they fall within our remit, but after an initial investigation are found to be not capable of amounting to an allegation of impaired fitness to practise. For example, a concern about a professional report written by a registrant where there is no evidence of misconduct or that the registrant acted in bad faith.

The threshold criteria is based on the key factors that need to be considered when deciding whether a case may be closed or should be referred to the ICP. It will be supported by enhanced decision making guidance for the teams on how to apply the criteria, which is currently in development.

An expected outcome of the new threshold criteria is that there will be an increase in the number of cases referred to the Investigating Committee panel for a decision, and a related decrease in the number of cases closed by the case management teams. This is particularly so given the way serious concerns and interim order cases will be managed (see below). We are alive to the operational impact the threshold policy will have on both the case management teams and the HCPTS, and are looking holistically at how cases are managed across the department, including the opportunities the Threshold Policy provides for creating a more streamlined and efficient fitness to practise process. A review of the capacity and capability within the department to manage expected caseloads is also being undertaken as part of the wider FTP Improvement Project.

*Serious fitness to practise concerns*
Some fitness to practise concerns are so serious that we do not consider that regulatory decisions about the outcome of those cases should be taken outside of the Investigating Committee panel.

When applying the triage test, case managers will carry out a risk assessment to determine if a matter gives rise to a serious concern. If it does, the concern will meet the threshold criteria on that basis alone, and will automatically pass into the remit of the Investigating Committee.

In effect, we have removed our discretion to close this type of case so that serious concerns cannot be closed other than by the Investigating Committee panel making a ‘no case to answer’ decision. We have introduced this safeguard to minimise the risk that serious concerns may be inappropriately closed before they reach the Investigating Committee panel, which carries an associated risk to the HCPC’s ability to maintain public protection and to our reputation.

*Interim Order cases*

In those cases where we consider it necessary to make an application for an Interim Order, the case will be treated in the same way as a serious concern above and follow the requirement for regulatory decisions on those cases to be made by the Investigating Committee. This designation will apply for the lifetime of the case, regardless of whether an Interim Order is ultimately imposed by a panel or not, or imposed and later revoked.

This means that the case passes into the jurisdiction of the ICP at the point that a senior decision maker in the department approves an application for an Interim Order. In this way, we can clearly demonstrate that the case is within the remit of the ICP, which needs to happen for us to be able to exercise our statutory power to make an Interim Order referral. The case must then proceed to the Investigating Committee panel for a decision at the conclusion of our initial investigation.

This aspect of the Threshold Policy provides an additional assurance that serious cases, or cases that have at some time been designated as serious, are not later closed inappropriately or prematurely without scrutiny by a panel.

*Diagram of Threshold Policy decision points*
To assist readers' understanding of how a case moves through the two-stage decision-making process, we have produced a high-level process map of the decision points at Appendix A to the Threshold Policy. The flow chart provides an 'at-a-glance' illustration of how cases advance through the key decision points, and how serious and Interim Order cases in particular are expedited through the process.

*Remediation*
At their meeting in July, Council raised that it was not clear how cases where remediation was a factor might be managed outside of the normal process set out above. To clarify, all cases, including where there may be evidence of remediation, will follow the same process and be assessed against the triage and threshold criteria in the same way.

In light of Council's comments, we have developed our explanation of how remediation is taken into account when assessing a case against the threshold criteria, or later after a case has been referred to the Investigating Committee panel. We have also set out that evidence of remediation does not automatically mean that a case will be closed without referral to the ICP.

The new operational guidance on the Threshold Policy will explain the low level and limited circumstances, usually involving competency concerns, in which it may be appropriate to take account of remediation in our decision-making pre-ICP. We will ensure it is clear to the case management teams that remediation forms part of the realistic prospect test, which only the ICP can consider, and make sure the decisions that can be made by case managers are distinguished from those that fall within the jurisdiction of the ICP.

**Stakeholder engagement**

We carried out stakeholder engagement activity to seek views on our proposed approach to a revised threshold policy. The stakeholder engagement activity took the form of an electronic survey, which was sent to 75 individual stakeholders

representing organisations including other healthcare regulators, professional bodies, unions, patient groups and charities.

The survey was open between 25 July and 13 August. A copy of the background document sent to stakeholders is included at Appendix 3. The click to open rate of the survey was 56%, and 27 recipients opened the email fully. We received full survey responses from five different stakeholders; two unions and three professional bodies.

We acknowledge that the short timeframe for responses, which coincided with the summer holidays, may have affected the response rate. However, whilst the response rate was low in numerical terms, the responses we received were from stakeholders who are part of a network of fitness to practise representative groups, and therefore have a wider reach. In addition, the responses we received were uniformly supportive with only minor points of clarification required.

The Threshold Policy must necessarily provide a high-level overview of our approach to fitness to practise investigations, and the criteria applied at the two key decision points, and cannot deal with every case scenario in detail. How the threshold criteria is applied to different types of cases will be addressed in operational guidance for the case teams, and the stakeholder feedback we received has been valuable in informing our thinking about the development of that guidance.

The respondents were in agreement with the triage and threshold decision points as set out in the paper, and indicated that our approach to making decisions at these points was clear. The respondents also agreed with our approach to serious concerns and minor offences.

Across all respondents, the comments we received related to our proposed approach to remediation, and how we manage cases where there are ongoing employer investigations and/or performance management. Whilst the respondents welcomed that we had considered a registrant's remediation, they asked us to also consider:

- The role of the regulator where an employer is managing risk, and whether the regulator should be involved where an employer is effectively managing risk;
- That evidence of remediation should take into account ongoing or planned activities;
- Whether HCPC can stay a case for a period of time (e.g. a year) to allow for retraining to take place, rather than proceed to a final hearing;
- Providing further clarification as to how local investigations feed into the process

These issues relate to the application of the policy and how we take account of local investigations when assessing a case against the threshold criteria. As such, further support for the case management teams on how to approach cases where an employer is taking local action will be provided in the threshold operational guidance.

Nevertheless, we would emphasise that the regulator must maintain oversight of any fitness to practise concerns that have been brought to our attention, regardless of whether the employer is taking local action. Each case must be considered on its own merits and the risks presented by that case fully assessed by the HCPC before we decide how to proceed. In some instances, the seriousness of the issues raised by a case will be such that it is appropriate to proceed to an Investigating Committee or final hearing where there is ongoing local supervision or performance management. It would not be appropriate for us to take account of planned remediation activities where there is no evidence that activities have been completed and consequently that any improvements are embedded in a registrant's practise.

We are already engaged in dialogue with the unions and professional bodies, through the FTP Stakeholder Forum, regarding how we approach cases where there is ongoing employer action or oversight. We will feed back on the comments made in the survey about this area at our next Forum meeting in autumn 2018.

One respondent asked us to clarify the skills, knowledge and training of the case management teams to enable them to make decisions, particularly in relation to technical areas, as well as the impact on length of time for case progression of the new two-stage decision process. These issues are outside the scope of the policy document and we will follow this up with the respondent directly.

**Professional Standards Authority regulatory agenda**

In developing the Threshold Policy we have been mindful of key themes in the PSA's current regulatory agenda that are relevant to the policy. We spoke to PSA as part of the feedback process, to test our assumptions. Whilst we did not expect any endorsement or formal response to the draft policy, it was helpful to receive some signposting to the key elements of their regulatory reform agenda, as well as the comments they have made on other regulators' consultations on their equivalent thresholds, or aspects of performance reviews. In summary these are:

- The need for full transparency of threshold policies and a clear demonstration of how threshold criteria enables the regulator to fulfil its overarching statutory objective;
- Clear hierarchy and accountability of decision making, with clearly documented reasoning and decisions, and quality assurance and challenge of decisions;
- The importance of ensuring threshold criteria are linked to the professional code or standards that set out what is expected of registrants;
- Caution around defining the public interest in terms of the public's assessment of whether they would continue to use the services of registrants;
- The importance of differentiating between whether conduct is remediable and whether remediation has in fact taken place;
- Concerns that consideration of remediation is part of the realistic prospect test and caution that this test is not applied at too early a stage.

Our response to those areas is as follows:

- The policy will be published on our website and we have undertaken stakeholder engagement activity with a range of stakeholders to seek views on the new threshold. The threshold clearly sets out our statutory objectives and how we meet these through our approach to fitness to practise investigations.
- Following receipt of the 2016 /17 PSA performance review, we took steps to improve the accountability, consistency and clarity of our decisions at the early stages. This will be further developed through the other initiatives in the FTP Improvement Plan that relate to the implementation of the new Threshold Policy.
- We have included further reference in the Threshold Policy to the role of the Standards of Conduct, Performance and Ethics, Standards of Proficiency and other guidance in our investigations. We will amend our template forms and letters to ensure we explicitly communicate our decisions with reference to the Standards.
- We have reviewed the wording used to describe the public interest test in the Threshold Policy to ensure the onus is not placed on the public's assessment of whether they would be likely to use the services of a registrant.
- As set out above, we will make clear in the threshold policy operational guidance the low-level and limited circumstances involving competency in which remediation may be taken into account in pre-ICP decisions, and how it should be considered. We will make sure the decisions that can be made by case managers are distinguished from those that fall within the jurisdiction of the ICP.

**Legal advice**

Prior to July's Council meeting, we obtained indicative legal advice on the approach we wanted to take to a revised threshold policy. That advice suggested there were no legal barriers to the new threshold and that we could proceed to develop this area of work.

We have now obtained formal legal advice on whether there are any points of law that would prevent us from implementing the triage decision or threshold criteria tests as set out in the new threshold policy, or that would need to be considered in relation to the policy's implementation.

The legal advice we have received is that there are no legal impediments to the implementation of the Threshold Policy and the two-stage decision-making process. The advice did highlight some revisions to the drafting of the policy that were required to clarify the scope of the triage and threshold decisions, and the investigations that take place at each stage of the process. These points have been incorporated into the policy.

**Recommendation**

We are asking Council to endorse the HCPC's Threshold Policy for Fitness to Practise Investigations.

Following Council's endorsement, we will proceed to develop and put in place the operational and systems changes that will be required to support the implementation of the policy. The working date for the implementation of the policy is 3 December 2018.

# HCPC's Threshold Policy for Fitness to Practise Investigations

## Introduction

The Health and Care Professions Council is the regulator of 16 professions that provide health and care services. It is our job to protect, promote and maintain the health and safety of the public; promote and maintain public confidence in the professions we regulate; and promote and maintain proper professional standards and conduct for members of those professions[1].

We do this by:

- Maintaining a register of properly qualified members of the professions;
- Approving and upholding high standards for the education and training of the professions, and their continued good practise;
- Setting the standards that professionals have to meet throughout their careers; and
- Investigating concerns that registered professionals may not meet those standards, and taking action where necessary to protect the public.

This document explains our approach to investigating concerns about the professionals on our register, our decision making process and how we apply our threshold criteria.

We have a threshold policy to help us to identify those cases that raise a fitness to practise concern and require investigation. It supports our core purpose of maintaining public protection by enabling us to make decisions that are fair, transparent and consistent, while at the same time allowing us to manage our resources effectively.

We investigate all concerns independently and objectively and do not take the side of either the registrant or the person who has raised the concern. During our initial investigations it is likely we will need to contact the complainant or other third parties to ask them for more information about the concerns that have been raised. Providing information we have requested in full and within the timeframes we have set will help us to investigate concerns effectively and efficiently.

Our legislation gives us the powers to require a person to provide us with information or documentation where relevant to the exercise of our statutory functions. We may use these powers to obtain information where it is necessary to do so during a fitness to practise investigation[2].

Our website has more information about how to raise a concern, our investigation and fitness to practise process and what to expect from us during an investigation.

## Fitness to practise

To remain on our register, the health and care professionals we regulate must be fit to practise. By fitness to practise we mean where a registrant has the skills, knowledge, character and health to practise safely and effectively. It is about more than being a competent health and care professional. As well as the need for registrants to keep their skills and knowledge up to date, and to work within their field of competence, fitness to practise requires registrants to treat service users with dignity and respect and to act with honesty and integrity.

[1] Article 3(4) and (4A) of the Health and Social Work Professions Order (2001) states that the HCPC's over-arching objective is to protect the public, and sets out how this objective should be pursued.

[2] Article 25(1) sets out our powers to require the disclosure of information.

Fitness to practise may also involve issues outside of professional or clinical performance. The conduct of a professional outside of their working environment may involve fitness to practise where it could affect the protection of the public or undermine public confidence in the profession.

One of the ways we make sure that professionals are fit to practise is by investigating concerns we receive about them.

## Impaired fitness to practise

The Health and Social Work Professions Order 2001 (the Order), sets out that a registrant's fitness to practise may be impaired for one or more of the following five reasons[3].

- Misconduct;
- Lack of competence;
- Conviction or caution for a criminal offence;
- Physical or mental health;
- A determination by another health or social care regulatory or licensing body.

Impaired fitness to practise means more than a suggestion that a professional has done something wrong. It means a concern about their conduct, competence, health or character, which is serious enough to suggest that the registrant is unfit or unsafe to practise without restriction, or at all.

Our focus as set out in the Order is on current impairment; that is whether a registrant may continue to present a risk. Our fitness to practise process is not designed to punish past mistakes or provide redress for past incidents, although we can take into account past failings in assessing current fitness to practise. In some cases, a past event will be so serious that a finding of current impairment is required to protect the public interest, even where the registrant no longer presents a risk of harm to service users.

## Our approach to fitness to practise investigations

The HCPC is committed to carrying out efficient, effective and appropriate investigations, to ensure that the right regulatory action is taken to manage any risk to public protection.

We recognise that parties to an investigation may have differing views about the services provided by a registrant and the incident(s) that gave rise to a fitness to practise concern. We are mindful of balancing the full range of views in undertaking our enquiries.

Our Standards of Conduct, Performance and Ethics, Standards of Proficiency and other relevant guidance explain the professional standards that we expect all of our registrants to adhere to. When we consider a concern and the information obtained during an investigation we will assess whether the matters complained of could amount to a breach of those Standards.

We take a proportionate, risk-based approach to investigating fitness to practise concerns that are raised with us. Our aim is to enable our decision makers to make decisions that are correct, consistent, evidence-based and fair at the earliest opportunity.

We will first consider whether a concern is something that we can deal with. This assessment takes place during our triage stage. If a concern is for us, we will go on to carry

[3] Article 22(1)(a) of the Order sets out the statutory grounds of impairment as listed above.

out an initial investigation of the potential fitness to practise issues in the concern. We have set out in more detail below our approach to making decisions at these two stages.

## Triage stage

We receive concerns from many different sources. These include members of the public, service users, employers, notifications from the police, other organisations involved in health or social care, self-referrals from registrants and media reports. We can act on information we receive from any source that may call into question a registrant's fitness to practise[4]. We consider all concerns in the same way, regardless of how they originated.

When we receive a concern we will consider whether it:

- Relates to an HCPC registered professional;
- Has been made in writing;
- Relates to any of the five statutory grounds of impairment set out in our legislation;

We will also undertake a risk assessment on receipt of the concern. This enables us to identify any serious concerns or potential Interim Order matters that need to be prioritised through the fitness to practise process (see sections on Serious Concerns and Interim Orders below).

The HCPC can only look into concerns about individual professionals on our register. We cannot deal with complaints about organisations, even if a registered professional may have worked there[5].

We must be able to identify the registrant who the concern is about. There may be some situations where the name of the registered professional is not known. In these cases we will make reasonable efforts to trace them.

In the interests of transparency and fairness a concern must be made in writing, even if it was originally received over the phone. This is because the registrant needs to know the source of the complaint in order to provide a full response to the concerns. We also require the concern to be in writing so that we can be clear and confident about the precise nature of the concerns. Where necessary we will make reasonable adjustments to ensure this can be done. For example, we may be able to take down a concern over the phone where someone is unable to write, or we can provide a copy of our concerns form on coloured paper to assist someone who has a visual impairment.

For those reasons, we are usually not able to take forward a concern that is made anonymously, or where the complainant wishes to remain anonymous. However, where the concerns raised are serious we may decide that it is in the public interest for us to investigate even where the complainant is, or wishes to remain, anonymous.

We can only look into concerns that raise questions about a registrant's fitness to practise. We cannot look at concerns that are solely about customer service or employment issues or

[4] Under Article 22(6) of the Order we have the powers to investigate information about a registrant's fitness to practise that does not come to us in the form of a referral.

[5] The HCPC has Memoranda of Understanding and information sharing agreements with other systems and professionals regulators and healthcare organisations. We may share information with other relevant bodies or organisations to assist them in their investigations or other regulatory activities. When sharing information we will comply with our requirements under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018.

the level of fees charged by a registrant. We are not a complaints resolution service and do not have the powers to make a registrant apologise, or provide a refund or compensation.

Further examples of the types of concerns we are and are not able to look into are available on our website.

We may need to seek further clarification on receipt of a concern to enable us to make a full and informed decision about whether it is something we can deal with.

The triage decision is a simple assessment as to whether a concern is within our remit to deal with. It is necessarily a low bar and only those concerns that do not meet this test may be closed at this stage.

If the concern is one that the HCPC can deal with it will move forward through our process for an initial investigation.

### Initial investigation stage and threshold criteria

Where we have made a decision at the triage stage that a matter is within our remit, we will carry out an initial investigation to obtain the relevant information about that concern. Our investigation aims to understand the full extent of the possible fitness to practise issues raised in the concern.

This may involve gathering information from a number of sources. Types of information we may obtain include, for example, service user records, documents relating to an employer investigation or complaints process, copies of a police caution or Memorandum of Conviction, a copy of a professional report written by a registrant for court proceedings or another purpose.

The threshold test we apply at this stage is whether the concern we have received, and any associated information that we have gathered about it, amounts to an allegation that the registrant's fitness to practise may be impaired on one or more of the statutory grounds set out in the Order. In applying this test, we will consider whether the information we have obtained substantiates the original concerns we received.

The main criteria we take into account when assessing whether the information we have received meets that test include:

- The actual or potential risk to public safety;
- Whether the matter may undermine public confidence in the profession;
- Whether the matters complained of could amount to a breach of the HCPC's Standards of Conduct, Performance and Ethics, Standards of Proficiency and other relevant guidance for registrants.
- Whether the matter is a serious concern of the type listed below;
- Whether the information calls into doubt the registrant's honesty or integrity;
- If the registrant has a physical or mental health condition that may present a risk to their ability to practise safely or effectively;
- Whether the matter relates to an isolated incident or indicates a wider pattern of behaviour;
- If the registrant has taken action to remediate their practise;
- Whether there have been previous, similar concerns about the registrant.
- Any other public interest considerations.

The length of time that has passed since the incidents that gave rise to a concern can affect the quality and availability of relevant information, which in turn may affect whether that

information meets the threshold. Concerns that relate to incidents over five years old may therefore not be capable of meeting the threshold test. We consider each case on its own merits and will assess the means open to us to obtain relevant information, as well as whether there are any public interest concerns that would warrant investigation despite the length of time since the events.

If we consider that the threshold has been met we will draft allegations based on the relevant information we have obtained. We may need to carry out further investigation to obtain information pertinent to those allegations. These allegations will then be referred to a panel of our Investigating Committee, who will consider if there is a case to answer.

When an allegation is referred to the Investigating Committee the case passes into their jurisdiction. Once a matter is within the jurisdiction of the Investigating Committee it cannot return to the previous stage, be re-assessed against the threshold or otherwise pass out of the Investigating Committee's jurisdiction. As such, once the allegations are in the jurisdiction of the Investigating Committee panel the case cannot be closed other than by the panel making a no case to answer decision. The only exception to this is in the rare circumstance where the HCPC loses jurisdiction to investigate a case, following the death or striking off from the Register of the relevant registrant.

Further information about how the Investigating Committee Panel consider cases can be found in our Indicative Sanctions Policy and Case To Answer Practice Note

If we consider that the threshold test is not met then the case may be closed. The reasons for our decision to close the case will be provided to the relevant parties.

We provide guidance for our decision makers to assist them in applying the threshold criteria consistently and fairly.

The flow-chart at Appendix A illustrates how a case moves through the triage and threshold criteria decision points.

### The public interest

Our legal framework makes clear that our overarching objective is to protect the public. This applies to everything we do. All HCPC decision makers in the fitness to practise process must consider whether their decision helps us to protect the public.

When we say a particular decision may be required in the public interest, we mean more than needing to protect the health and safety of the public. It is also about needing to maintain public confidence in the professions we regulate, as well as the regulatory process, and the need to uphold and declare to our registrants the importance of the professional standards we expect from them.

### Serious fitness to practise concerns

Some concerns we receive are so serious that they will meet the threshold criteria at the point of triage and will be referred automatically to the Investigating Committee. This is because, if proven, they are likely to result in us taking action on a registrant's registration. Due to the higher risk to public protection presented by these cases, we consider that it would not be appropriate for regulatory decisions about their outcome to be taken outside of the Investigating Committee panel.

Such cases would include[6].

- Serious violence;
- Sexual assault or indecency;
- Any criminal offence relating to a child;
- Improper sexual, emotional or financial relationship with a service user;
- Any criminal offence where the registrant has been given a custodial sentence;
- Dishonesty;
- Serious or reckless errors in a registrant's practise which have caused, or have the potential to cause, serious harm to service users.

Where the risk assessment carried out at the triage stage identifies a concern as being a serious matter, it will always meet the threshold criteria on that basis. Serious concerns will therefore pass automatically into the jurisdiction of the Investigating Committee panel from the point we decide that the case is within our remit.

The case will remain in the Investigating Committee panel's jurisdiction until they consider the case. It cannot return to the previous stage, be reassessed against the threshold decision or otherwise pass out of the Investigating Committee's jurisdiction. As a result, these cases cannot be closed other than by the Investigating Committee panel.

This process also ensures that serious concerns can be prioritised and expedited through our fitness to practise process. See the flow-chart at Appendix A for an illustration of how serious cases move through the decision points.

We provide guidance for our decision makers to assist them in undertaking accurate risk assessments and identifying serious concerns.

## Interim Orders

The HCPC has the power to apply for an Interim Order during an investigation[7]. These are measures to protect the public by temporarily restricting or suspending a registrant from practising while their case is being investigated. An Interim Order will be required in cases where concerns about a registrant's fitness to practise are so serious that public safety would be put at risk, or there would be a risk to the public interest or to the registrant themselves, were the registrant allowed to continue to practise.

Interim Orders are likely to be required in the types of serious concerns listed above, though may be required in relation to other matters too. When we take the decision to apply for an Interim Order, following a risk assessment of information we have received on a case, the threshold criteria will automatically be met and the case passes into the jurisdiction of the Investigating Committee. As explained in relation to serious concerns above, the case cannot be reconsidered against the threshold criteria or otherwise pass out of their jurisdiction.

In summary, where a case is deemed to warrant an Interim Order application it must proceed to the Investigating Committee panel for a decision on that application. Once a case has been referred to the Investigating Committee panel in this way, it cannot be closed other

[6] The serious concern process excludes protected cautions and convictions. Under the Rehabilitation of Offenders Act 1974, certain criminal offences become protected after a relevant period of time has passed. The HCPC is not able to look into a concern that a registrant's fitness to practise may be impaired on the basis of a protected caution or conviction, and these offences will therefore not meet the triage test or threshold criteria.

[7] Article 31 of the Health and Social Care Professions Order (2001).

than by the panel making a no case to answer decision. This process applies whether an Interim Order is ultimately granted or not, or whether an Order that has been granted is later revoked before the case reaches the Investigating Committee panel. This is illustrated in the flow-chart at Appendix A.

## Health concerns

The HCPC's Approach to Investigating Health Matters explains in more detail how we investigate concerns that suggest a registrant may have a health condition that affects their fitness to practise, and the relevant factors we take into account. The same threshold test applies to these cases as to all other cases.

## Remediation

We sometimes receive information when a concern is referred to us, or during our initial investigations, that indicates that steps have been taken by the registrant to remediate fitness to practise concerns, since the incidents that gave rise to the referral. This may be documentation that shows that a registrant has undergone retraining, learning or a period of performance supervision, for example.

This information will be assessed against our threshold criteria in the usual way. If we consider that the information demonstrates that any retraining, learning or improvements are embedded in the registrant's practise, we may decide that the registrant no longer presents a risk to members of the public or the wider public interest and that the threshold criteria is not met. However, we will also need to assess whether the nature of the concerns are such that the Investigating Committee panel is still required to consider the case in the public interest, for example where the original concerns posed a potentially serious risk to patient safety. A case may therefore still meet the threshold criteria and proceed to the Investigating Committee panel, even where a registrant may have taken steps to change their practise.

Where we receive information relating to a registrant's remediation after a case has been referred to the Investigating Committee panel, it will be treated as a registrant's formal observations to the panel. This is because the case has passed into the jurisdiction of the Committee, and so cannot be re-considered against the threshold criteria. The panel will take account of any evidence of remediation in their consideration of whether there is a case to answer.

## Registrants' engagement with fitness to practise investigations

The Standards of Conduct, Performance and Ethics sets out that registrants 'must co-operate with any investigation into your conduct or competence, the conduct or competence of others, or the care, treatment or other services provided to service users' (Standard 9.6).

The HCPC expects registrants to cooperate with a fitness to practise investigation, whether they are the subject of the investigation, a complainant or involved in some other way. Whilst we cannot compel a registrant who is the subject of an investigation to engage with us, doing so will help us reach an outcome more efficiently and effectively.

Where a registrant is involved in an investigation as a third party, for example as a complainant or witness, and does not cooperate with our investigation, we may consider whether that lack of engagement itself gives rise to a fitness to practise concern.

## After an investigation

Once we have made a decision against our threshold criteria we will notify the parties of the outcome. We will explain why we decided that the case should be closed or referred to the Investigating Committee Panel, and set out how we assessed the matter in relation to the Standards of Conduct, Performance and Ethics, Standards of Proficiency and other relevant guidance.

Where a case has been closed, either at the threshold stage or by the Investigating Committee panel, the HCPC may take that matter into account in assessing any future concerns we receive about a registered professional.

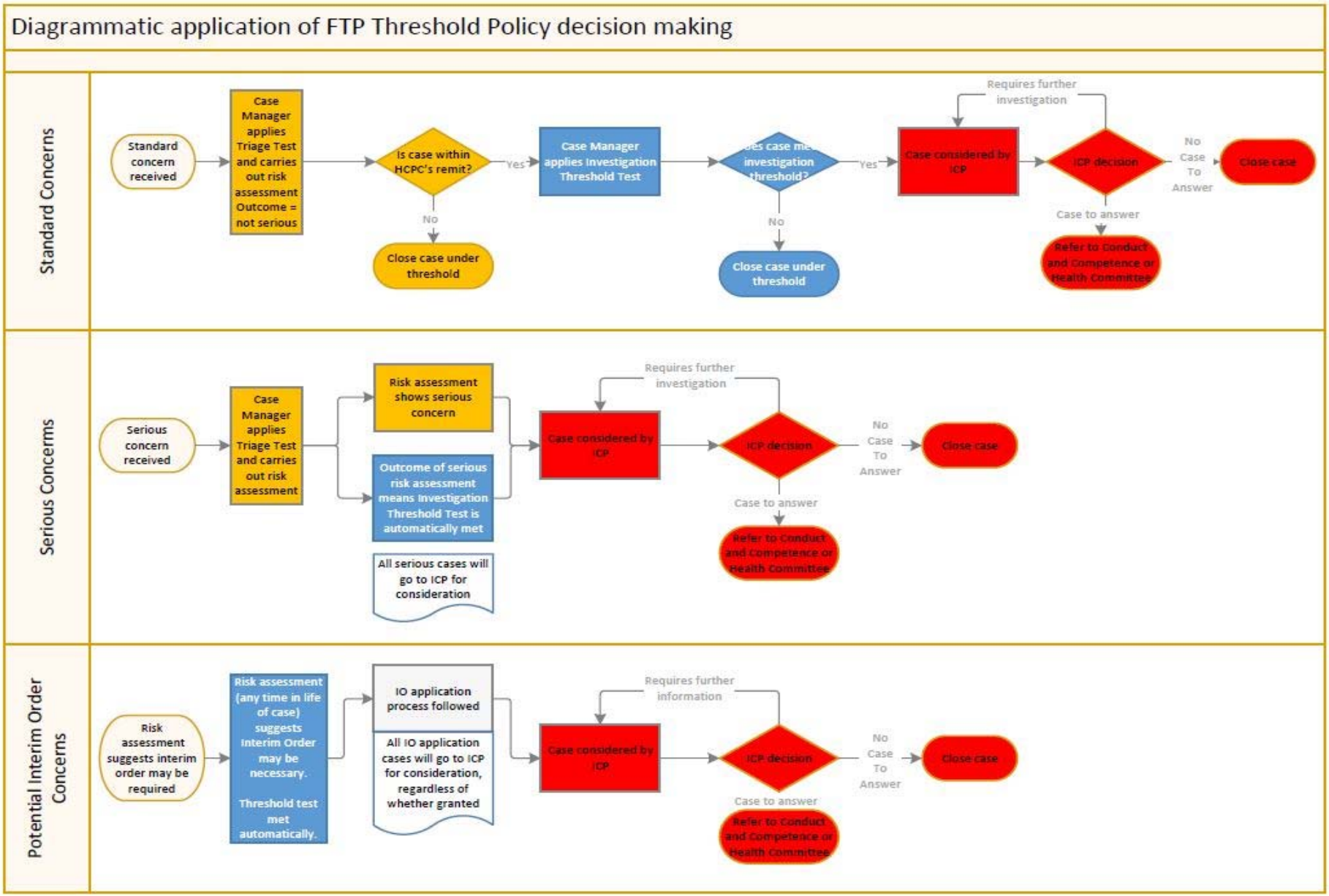
The Investigating Committee panel may also take into consideration any other complaint made against a registrant in the previous three years, when deciding whether there is a case to answer in relation to an allegation[8].

**Related documents**

- HCPC's Approach to Investigating Health Matters
- Guidance for HCPC decision makers on applying the threshold policy.
- Standards of Conduct, Performance and Ethics, Standards of Proficiency and other guidance.

[8] Rule 4 of the Health and Care Professions Council (Investigating Committee) (Procedure) Rules 2003 provides that in determining whether there is a case to answer the Committee may take account of any other allegation made against the registrant in the previous three years.

Appendix A


Diagrammatic application of FTP Threshold Policy decision making
Standard Concerns
Standard concern received
Case Manager applies Triage Test and carries out risk assessment Outcome = not serious
Is case within HCPC's remit?
Yes
No
Close case under threshold
Case Manager applies Investigation Threshold Test
investigation threshold?
Yes
No
Close case under threshold
Case considered by ICP
Requires further investigation
ICP decision
No Case To Answer
Close case
Case to answer
Refer to Conduct and Competence or Health Committee
Serious Concerns
Serious concern received
Case Manager applies Triage Test and carries out risk assessment
Risk assessment shows serious concern
Outcome of serious risk assessment means Investigation Threshold Test is automatically met
All serious cases will go to ICP for consideration
Case considered by ICP
Requires further investigation
ICP decision
No Case To Answer
Close case
Case to answer
Refer to Conduct and Competence or Health Committee
Potential Interim Order Concerns
Risk assessment suggests interim order may be required
Risk assessment (any time in life of case) suggests Interim Order may be necessary.
Threshold test met automatically.
IO application process followed
All IO application cases will go to ICP for consideration, regardless of whether granted
Case considered by ICP
Requires further information
ICP decision
No Case To Answer
Close case
Case to answer
Refer to Conduct and Competence or Health Committee

## The background to our survey

Our proposed approach to a revised threshold policy for Fitness to Practise investigations

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## Introduction

### About this engagement exercise

1.1. We are now seeking the views of stakeholders on our proposed approach to a revised threshold policy.

1.2. This document explains the background to this approach and the changes we are proposing so that you can respond fully to our survey.

1.3. We have identified patient groups, professional bodies, unions, other healthcare regulators, and the Equality and Human Rights Commission as parties who may have a particular interest in our survey.

1.4. Our survey will be open for completion from **25 July 2018** to **13 August 2018**. We appreciate that the deadline for responses is short, but welcome any comments you are able to provide in this timeframe.

1.5. We hope to use the feedback we receive to inform our review of our revised threshold policy.

### About this document

1.6. This document is divided into five sections.

- **Section 1** introduces the HCPC and our survey.
- **Section 2** provides a summary of how to respond to our survey.
- **Section 3** explains the background to our proposed approach.
- **Section 4** sets out the next steps following our survey.

### About us

1.7. We are a regulator of health and care professionals. Our main objective is to protect, promote and maintain the health and safety of the public, and to maintain public confidence in the professions we regulate. To do this, we keep a Register of professionals who meet our Standards for their professional skills, knowledge and character. Individuals on our Register are called ‘registrants’. We also investigate concerns about registered professionals who may not meet those Standards, and therefore may not be fit to practise, and take action where necessary to protect the public.

1.8. We currently regulate 16 professions:

- Arts therapists
- Biomedical scientists
- Chiropodists / podiatrists
- Clinical scientists
- Dietitians
- Hearing aid dispensers
- Occupational therapists
- Operating department practitioners
- Orthoptists
- Paramedics
- Physiotherapists
- Practitioner Psychologists
- Prosthetists / orthotists
- Radiographers
- Social workers in England
- Speech and language therapists

## Survey questions

1.9. We would welcome your response to our survey. We have listed our survey questions below to help you. These questions are not exhaustive and we would also welcome your comments on any related issue. Please provide your answers where possible.

### About you

Q1. What is your name / the name of your organisation? (Optional)

Q2. What is your email address? (Optional)

Q3. Are you responding to this survey on behalf of an organisation?

Q4. Please tick the category below that best describes you / your organisation?

Q5. Are you happy for your response to be identifiable in the public domain?

### Our proposed approach – The triage decision

Q6. As part of our proposed approach, the HCPC's Council has agreed that when we receive a concern, a triage decision needs to be made. The triage decision is there to ensure that any case considered is within our remit to investigate, as set out in paragraph 21 of the council paper. Do you think our proposed approach to making a triage decision, as outlined in the council paper, is clear?

Q7. We have a responsibility to ensure that anyone can raise a concern with us about a registrant. Are there any aspects of our proposed approach which may prevent or deter anyone from raising a concern with us?

### Our Proposed approach – The threshold test

Q8. As part of our proposed approach, the HCPC's Council has agreed that a threshold test should be applied after we have carried out an initial fitness to practise investigation. Under the threshold test, we determine whether a concern we have investigated amounts to an allegation that the registrant's fitness to practise may be impaired. Do you think the threshold test, as set out in the council paper, is clear?

### Serious allegations, low level offences and remediation

Q9. As part of our proposed approach, any concern that falls under the category of a serious allegation of impaired fitness to practise will be presumed to meet the threshold test and will be referred to an Investigating Committee Panel. This is because a serious allegation of impaired fitness to practise, if proven, is likely to result in us taking action on registrant's registration. Do you think this is an appropriate approach for the types of serious cases we have identified?

Q10. As part of our proposed approach, we have designated some offences as low level, as set out in paragraph 35 of our council paper. Any one of these low level offences will be considered to not meet the threshold test, and will not be referred to an Investigating Committee Panel. Do you agree that this approach to low level offences is appropriate?

Q11. As part of our proposed approach, the HCPC's Council has agreed that the threshold policy should set out how remediation will be considered during our initial investigation of concerns. Our revised threshold policy will include information about the extent to which we take remediation into account. Do you think it is helpful to set out our approach to remediation in this new policy?

**Other**

Q12. Do you think there is anything that should be included in our proposed approach to revised threshold policy which is not included at the moment?

Q13. Do you have any other comments on the proposed approach to a revised threshold policy?

**Equality Analysis**

Q14. Do you consider that there are any aspects of our proposed approach that could result in equality and diversity implications for groups or individuals based on one or more of the following protected characteristics, as defined by the Equality Act 2010 and equivalent Northern Irish legislation? If yes, please explain what could be done to change this.

- Age
- Gender
- Reassignment
- Disability
- Pregnancy and maternity
- Race, religion, or belief
- Sexual orientation

## How to respond to our survey

2.1 Our survey will close on **13 August 2018**. We look forward to receiving your comments.

2.2 You can respond to our survey by completing our easy-to-use online survey.

2.3 Please note that we do not normally accept responses by telephone or in person. We ask that responses are made via the survey to ensure that we can accurately record what the respondent would like to say. However, if you are

unable to respond in this way please contact us on +44 (0)20 7840 9153 to discuss any reasonable adjustments which would help you to respond.

2.4 **Please contact us to request a copy of this document in an alternative format or in Welsh.**

2.5 If you would prefer we do not make your response public, please indicate this when you respond.

## Background

3.1. The HCPC is committed to continuous improvement and to observing the principles for an effective regulatory system, as set out by the Professional Standards Authority. As part of this commitment, the HCPC has recently initiated a Fitness to Practise Improvement Project that aims to ensure the continued efficient and effective management of fitness to practise cases going forward.

3.2 A key workstream of the FTP Improvement Project is the review of our Standard of Acceptance policy and the other policies and processes that govern the first stage of our fitness to practise process.

3.3. The starting point of this review was the development of a new approach to a revised threshold policy for fitness to practise investigations.

3.4 We have always had a threshold policy and we believe it is necessary to maintain one. A threshold policy allows us to appropriately identify those fitness to practise concerns that require investigation, and to manage resources effectively in carrying out our public protection remit.

3.5 As part of our review we have undertaken a benchmarking exercise against the threshold policies of the other healthcare professionals' regulators.

3.4. Our revised approach seeks to ensure that we have an agile threshold policy moving forward, which supports our core purpose of maintaining public protection through proportionate, risk-based and robust regulatory decisions. It will be aligned with the principles of right-touch regulation to ensure that our decisions are transparent, fair and consistent. We aim to have set out clearly for all parties how we make decisions at each stage.

3.5. Our approach to a revised threshold policy was considered and endorsed by the HCPC's Council on 5 July 2018.

3.6. We are now seeking the views of our stakeholders on this approach in accordance with the stakeholder engagement strategy that was approved by HCPC Council at that council meeting.

## Next steps

4.1. Once our survey has closed, we will analyse the responses we have received.

4.2. We will provide a report to the HCPC's Council on the outcome of this stakeholder engagement activity in September 2018.