

Education and Training Committee 26 March 2008

Governance of Education Panels

Executive summary and recommendations

Introduction

HPC's solicitor, Jonathan Bracken of Bircham Dyson Bell, observed the Education and Training Panel on 14 November 2007 at the request of the Executive, to review how the panels were operating after their first year of work. The Executive has subsequently met Mr Bracken to discuss whether any changes are needed to the arrangements for Panel meetings. His advice is set out in the letter attached to this paper.

Mr Bracken has advised on the following points:

- it is not appropriate for Panels to follow a committee model of operation and that they should instead follow a tribunal model, with a limited, itemised list of matters to be considered;
- in addition, there should be a record of decisions, rather than minutes of the Panels. Decisions should be recorded separately and each should set out the decision reached and the reasons for it. This would be especially important where a Panel varied or disagreed with any recommendations or conditions proposed by Visitors;
- to ensure that Panels operate smoothly, the Chair of each Panel should be appointed in advance, so that he or she can liaise with the Executive and ensure that proceedings are conducted effectively. For this purpose and to ensure continuity, the Committee should give consideration to appointing and training a small group of members as designated Panel Chairs.

Decision

The Committee is asked to:

- (1) agree to adopt the tribunal model of governance for Education and Training Panels (with effect from the Panel meeting on 29 May 2008);

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- (2) agree that records of decisions made, rather than minutes, should be used;
- (3) agree that Panels should not debate broader issues which are properly within the remit of the Education and Training Committee, including themes or issues arising from the specific business before the Panel. If such themes or issues do arise, members should bring them to the attention of the Secretariat as items for potential inclusion on a future agenda of the Education and Training Committee;
- (4) agree that, in order to ensure that Panels operate smoothly, the Chair of each Panel should be appointed in advance;
- (5) decide whether a small group of members should be appointed and trained as Panel chairmen. (If the Committee agrees to the recommendation, the Executive would like to suggest that a maximum of six members would be a reasonable number, given that there are currently nine Panel meetings a year.)

Background information

The Education and Training Committee agreed on 28 September 2006 to establish panels with effect from 1 January 2007 to consider Visitors' reports, annual monitoring reports, major and minor changes to programmes and education providers' representations on Visitors' reports (all these matters were previously considered by the Approvals Panel). The committee paper (enclosure 6, paper ETC 46/06 from the meeting of 28 September 2006) is available on the HPC website:

www.hpc-uk.org/aboutus/committees/educationandtraining_archive/index.asp?id=256

The panels currently meet nine times a year (every month except January, April and November). As far as possible, panels are held on the same day as another meeting, either an Education and Training Committee or a Council meeting. This helps to make the best use of resources, including members' time. The panels in February, August and October are currently held on a stand-alone basis.

Panel meetings are held in public, with the agendas, papers and minutes being published on the website. In accordance with the principles of good governance and HPC's guiding principles, panel meetings would continue to be held in public and the decisions would be published.

Membership of panels varies between meetings, depending on the availability of Education and Training Committee members. To date, the Executive has tried to ensure that there is some continuity of membership between meetings although this has not always proved to be possible. Each panel has selected a chairman as the first item of business at the meeting.

Resource implications

None.

Financial implications

Fee for legal advice.

Cost of training panel chairmen (if agreed by the committee).

Appendices

Letter from Jonathan Bracken, Bircham Dyson Bell, dated 5 February 2008.

Date of paper

12 March 2008.

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Dear Niamh

Education and Training Committee Panels

As I had not observed a meeting of an Education and Training Committee (ETC) Panel since the concept of Panels was introduced, I took the opportunity to attend such a meeting late last year. From my observation of the proceedings it is clear that the Panels are fulfilling a valuable role and have delivered the caseload management improvements which were expected of them. However, I do have some concerns about the governance model which has been adopted for the Panels and the risks this may create, most notably the prospect of Panels acting beyond their delegated authority (*ultra vires*).

The Panels are currently using a "committee model" of governance and receiving minutes of previous Panels, discussing matters arising from those minutes and so on. In fact the Panels should be conducting business using a "tribunal model", in a manner which more akin to a tribunal such as an Investigating Committee Panel, and limiting the business to taking and recording specific decisions (and the reasons for them) in respect of programme approvals.

Among the problems created by Panels using the committee model are:

- the decisions taken in respect of specific programmes are not being recorded as clearly and consistently and they should be and sometimes lack cogent reasoning which would withstand legal challenge (bearing in mind that a Panel's decisions are susceptible to judicial review). The use of the committee model encourages en bloc decision-making which is supported by limited reasoning;
- the basis of the Panel system is that each Panel is a separate body, put together to deal with a specific business agenda. They do not have continuous standing or consistent membership like a committee and, therefore, it is not appropriate for the minutes of Panel X to be reviewed by Panel Y and that is so even if the two Panels have the same membership. Such a practice unwittingly encourages "mission creep", taking Panels beyond the powers delegated to them by the ETC under its Standing Orders;

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- the same considerations apply in relation to "matters arising". There should be no such business before Panels. In the event that one Panel cannot reach a decision on a particular matter, the business should be adjourned with sufficient reasons being recorded so that a future Panel will be able to deal with the matter. The matter should then be put before another Panel in due course, once the outstanding issues have been resolved (e.g. where further information is required from the education provider, once this has been received).

The issue of "mission creep" is very important as the delegation of functions by public bodies is often a careful balancing act. In addition to the need to meet all legal formalities (in the sense of whether delegation is permitted by law and, if so, how it is to be achieved), proper consideration needs to be given to whether it is appropriate, in all the circumstances, for the function in question to be delegated.

Where a statutory body such as the ETC is entrusted with making certain decisions, it is usually because the body in question has the requisite skills or expertise to do so and will be able to reach informed decisions after full consideration and debate. Consequently, there is an expectation that such a body will not exercise its powers of delegation in a manner which abrogates that responsibility and results in less robust or less accountable decision-making.

Clearly, most public bodies cannot take every decision which is made in their name and some degree of delegation is inevitable. However, that delegation must be appropriate. The functions delegated by the ETC to Panels are entirely appropriate as they are largely uncontroversial decisions involving formal approval of recommendations made by HPC Visitors. That work is an important part of the ETC's overall functions and it is therefore important that Panels adopt a governance model which enables them to fulfil that role effectively but without inadvertently widening their remit and calling the whole process into question.

These comments should not be construed as criticism of the ETC or any of its Panels. I am seeking to encourage best practice in order to address the risk of what might happen rather than suggesting that it is to rectify any particular mistake. Nonetheless I do recommend that changes are made to the manner in which Panel proceedings are conducted and, in particular:

- the use of the committee model of governance for Panels should cease and be replaced by use of a tribunal model under which the Panel's agenda is limited to an itemised list of the matters that it is being asked to consider. Before a Panel is convened the Secretariat should verify that all matters included in the agenda are within the vires of the Panel;
- in line with the tribunal model, the practice of recording minutes of Panels should cease and be replaced by records of the decisions made. These should be recorded separately and each should set out the decision reached and, just as importantly, the reasons for it. This is especially so where a Panel varies or disagrees with any recommendations or conditions proposed by Visitors. A decision template should be created for this purpose;

- Panels should not debate broader issues which are properly within the remit of the ETC, including themes or issues arising from the specific business before the Panel. If such themes or issues do arise, members should bring them to the attention of the Secretariat as items for potential inclusion in the ETC agenda in the usual way;
- in order to ensure that Panels operate smoothly, the Chair of each Panel should be appointed in advance so that he or she can liaise with the Executive and ensure that proceedings are conducted effectively. For this purpose and to ensure continuity, the ETC should give consideration to appointing and training a small group of members as designated Panel Chairs.

I trust this is helpful.

Yours sincerely

Jonathan Bracken
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For and on behalf of Bircham Dyson Bell LLP

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