Fitness to Practise Committee – 21 October 2010

OHPA

Executive summary and recommendations

In August 2010, the Department of Health issued a consultation document 'Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery.' This followed a review by the coalition government of the progress towards the implementation of OHPA. The Department of Health is consulting on whether delivery of adjudication can be delivered more proportionately through other means.

As with previous documents that have reviewed the performance of other regulatory bodies or ones which have suggested regulatory change and development where the Council or Committee have been asked to consider and discuss HPC's approach in the light of those documents, the Executive has undertaken a review of the OHPA consultation document and reviewed the HPC position. That review is attached to this paper as an appendix and the Committee are asked to discuss it and whether there is any further work that it wishes the Executive to undertake.

Background information

Any work arising out of this paper would form part of the Fitness to Practise department work plan for 2011-12 and would need to be prioritised accordingly. The Executive has also responded to the consultation and a copy of that response is attached to this paper for the Committee's information.

Also attached as an appendix to this document is the Council for Healthcare Regulatory Excellence (CHRE) proposed response to the consultation which was considered by their Council in late September 2010

Resource implications

To be taken account in 2011-12 departmental work plan.

Financial implications

To be taken into account in 2011-12 departmental work plan.

Appendices

OHPA Consultation document
OHPA Consultation Response
Report reviewing the recommendations set out in the OHPA Consultation document
CHRE response to OHPA Consultation

Date of paper

4 October 2010

‘**Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery: A review of the HPC’s approach**

1.0 Introduction

1.1 In August 2008, the Department of Health issued a consultation document which assessed the argument for the delivery of adjudication of General Medical Council (GMC) fitness to practise cases through the Office of the Health Professions Adjudicator (OHPA). The HPC Executive has undertaken a review of that document and considered HPC’s approach to fitness to practise in the light of that document.

1.2 The Consultation document sets out the

- changes that OHPA would plan to make once it had taken over the adjudicative responsibility for General Medical Council and General Optical Council cases:
- specific ambitions endorsed by the OHPA board; and
- further detail as to how the GMC proposes to deliver more independent adjudication.

1.3 The Executive has reviewed the consultation document and the recommendations and suggestions of OHPA and the GMC and comment on it in the light of HPC’s own approach to adjudication.

Changes that OHPA would plan to make (subject to the outcome of the consultation

2.0 Strong case management of cases, including dealing with matters on the papers where appropriate and where the parties consent (this will lead to efficient and cost effective hearings, delivering swifter outcomes to the benefit of patients, the public and health professionals);

2.1 The HPC has comprehensive arrangements in place to ensure that fitness to practise proceedings are conducted, efficiently, fairly and in a cost effective manner. Since 2004, the HPC has issued a range of Practice Notes for the guidance of Practice Committee Panels and to assist those appearing before them. The practice notes reflect the underlying legislation and provide further and more comprehensive guidance to panels and others. Those practice notes are kept under continual review and new practice notes are produced as required.

2.2 Case Management and Directions

2.2.1 The Practice note 'Case Management and Directions' sets out the default case management directions that apply in fitness to practise cases. It also sets out the principles of case management adopted by the HPC in its running and management of cases. Effective case management is a process which enables:

- the issues in dispute to be identified at an early stage;
- arrangements to be put in place to ensure that evidence, whether disputed or not, is presented clearly and effectively;
- the needs of any witnesses to be taken into account; and
- an effective programme and timetable to be established for the conduct of the proceedings.

2.2.2 In HPC cases, a number of standard directions apply automatically as default directions in every case. Panels can give special directions for the conduct of a case which disapply, vary or supplement the standard directions. Those standard directions relate to:

- Exchange of documentation. HPC provide registrants no later than 42 days before the date fixed for the hearing of the case, a copy of the documents which we will rely upon a the hearing
- Notices to admit facts
- Notices to admit documents
- Notices to admit witness statements
- Withdrawal of admissions

2.2.3 The practice note also provides standard templates for all of the above mentioned notices and can be found at www.hpc-uk.org/assets/documents/10001DD8PRACTICE_NOTE_Case_Management_and_Directions.pdf

2.2.4 We are also reviewing the information that is provided to panels and registrants in HPC "bundles". That review includes consideration as to the provision of a "skeleton argument" in all final hearing cases. The purpose of a skeleton argument is to assist:

- the advocate/presenting officer to deliver a structured, reasoned and persuasive case;
- the tribunal to understand all relevant matters of facts and law; and
- the hearing to be conducted in an effective and timely manner.

The skeleton is intended both to define and confine the areas of controversy and should do so by identifying those matters that are not in issue and the nature of the argument in relation to those matters which are in issue.

2.3 Consent

2.3.1 The Practice note 'Disposal of cases via consent' provides guidance and information on the disposal of cases via consent. The Practice note states that '*Disposing of cases via consent is an effective case management tool which reduces the time taken to deal with allegations and the number of contested hearings which need to be held.*' Neither the HPC nor a Practice Committee Panel will agree to resolve a case via consent unless they are satisfied that:

- the appropriate level of public protection is being secured; and
- doing so would not be detrimental to the wider public interest.

2.3.2 HPC will only consider resolving a case via consent:

- after an Investigating Committee has found that there is a case to answer;
- where the registrant is willing to admit the allegation in full'
- where any remedial action proposed by the registrant and embodied in the Consent Order is consistent with the expected outcome if the case was to proceed to a contested hearing.

2.3.3 The process is also used when existing conditions of practice orders or suspension orders are reviewed. The Practice note can be found at www.hpc-uk.org/assets/documents/10002473PRACTICE_NOTE_ConsentOrders.pdf

2.4 Alternative mechanisms to resolve disputes

2.4.1 As part of the Policy and Fitness to Practise department work plans for 2010-11, we are looking broadly at alternative ways of resolving disputes between registrants and the public, including, but not limited to exploring processes for mediation and alternative dispute resolution. This work will explore whether such arrangements have a place in the Fitness to Practise process or whether there are other steps that the HPC could take in order to help 'resolve' issues and concerns about registrants which fall short of impairment of fitness to practise. The plan for this piece of work can be found here: www.hpc-uk.org/assets/documents/10002C8A20100225FTP-11-alternativemechanismsfordisputes.pdf

2.5 Learning Points

2.5.1 Panels of the Investigating Committee can include learning points in decisions where they decide there is no case to answer. They must decide that there is a realistic prospect of finding the facts and the ground of the allegation proved at a final hearing, but that there is no realistic prospect of finding that fitness to practise is impaired. Learning

points cannot be mandatory but are designed to provide guidance to the registrant on what they may want to consider in future.

2.5.1 One aim of learning points is to ensure that only appropriate cases where there is a realistic prospect of a final hearing panel finding impairment are referred to a final hearing, whilst enabling the Investigating Committee an opportunity to address minor shortfalls in the registrant's practice which do not amount to their fitness to practise being impaired.

3.0 Substituting panel members where a panel becomes inquorate due to ill-health or other significant or enduring problems, thereby preventing adjournment (this will afford patients better protection by registrant's being dealt with in a timely fashion);

3.1 This issue of inquorate panels which can arise as a result of hearings taking a number of days, weeks and months to conclude, runs hand in hand with effective case management. Effective case management helps to ensure that hearings are managed in an expeditious and effective manner.

3.2 Quoarcy

3.2.1 Rule 3(6) of the Health Professions Council (Practice Committees and Miscellaneous Amendments) Rules 2009 provides that 'The quorum for a Practice Committee (that is, for a panel of members invited in accordance with paragraph(2)) is 3 of whom at least one must be –

(a) a registrant from the same part of the register as any registrant who is the subject of the proceedings;
(b) a lay member; and
(c) a panel chair (who may also count as the registrant or lay member mentioned in subparagraphs (a) and (b)).

We are aware that for some other regulators, it is usual practice for a panel to start with five members.

3.2.2 HPC hearings generally conclude within two days. In the last financial year we had no instances of having to cancel hearings due to the unavailability of a panel member part way through the hearing

3.2.3 In practice, if a case was part – way through and a panel became inquorate due to ill-health or other significant problems, we would review the individual circumstances of the case to determine what course of action to take (i.e wait for the panel member's situation to change or to restart proceedings with a new panel). Consideration would be given to what stage the case was at, what evidence had been heard and where the panel were in their determinations, at all time balancing the rights of the registrant with public protection.

3.3 Length of time

3.3.1 When reporting on the length of time of fitness to practise cases, the HPC splits the process out into Investigating Committee stage and final hearing stage and reports on the length of time for each stage separately. Therefore, the cases that are closed at Investigating Committee stage, are not included in the overall statistics on the case concluded. The HPC reports the length of time from receipt of the date the allegation is made to the conclusion of the case, rather than the commencement of the hearing. Further, HPC also report on the mean and median average length of time taken to conclude a case.

3.3.2 HPC allegations considered at Investigating Committee between April and August 2010, have taken a mean and median of 5 months to reach that stage. Final hearings that have taken place in the same period have taken a mean of 16 months and median of 14 months to conclude.

4.0 Modernised hearing procedures to avoid spending time in hearings on matters which are not in dispute (e.g. the reading out of charges which are admitted by the practitioner);

4.1 Since its inception, the aim and the ethos of the HPC, has been to avoid creating fear and apprehension which procedures of this kind can often engender. There is no unnecessary reading of "charges" (which are referred to as particulars by the HPC) and unnecessary formality has been removed as this often creates concern, particularly amongst the unrepresented. Panel chairs are asked to explain the procedure throughout the process and a Practice note 'Unrepresented parties' provides more guidance on this topic. That Practice note can be found here: http://www.hpc-uk.org/assets/documents/100028A2UnrepresentedParties.pdf

4.2 Case Management and Directions

4.2.1 As mentioned above at point 2.2, The Practice note 'Case Management and Directions' sets out the principles of case management adopted by the HPC in its running and management of cases. The practice note also provides standard templates for the relevant notices.

4.2.2 The use of notices to admit means that witnesses may not need to be called to give evidence to the panel and the Council can rely on their statement. This can reduce the length of the hearing and the simplify the process of fixing the hearing date.

4.2.3 In cases where admissions have not been made in advance, registrants are asked if they admit any of the allegations at the outset

of the proceedings. If admissions are made then it is possible to “stand down” witnesses.

4.2.4 In cases where witness statements are not in dispute, the witnesses concerned are not called.

5.0 Enhanced pre-hearing case-management procedures to reduce the amount of time spend in hearings on administrative matters such as the number of witnesses to be called;

5.1 HPC makes use of its enhanced case management procedures as appropriate.

5.2 Preliminary Hearings

5.2.1 Panels have the power to hold preliminary hearings in private with the parties for the purpose of case management. In most fitness to practise cases such a hearing will not be required but they are of assistance in the small number of cases where substantial evidential or procedural issues need to be resolved prior to a full hearing take place. he Practice note ‘ Preliminary Hearing’ provides more detail on the topic and can be found at http://www.hpc-uk.org/assets/documents/10001DDEPRACTICE_NOTE_Preliminary_Hearings.pdf

5.2.2 The types of issues and applications considered at a preliminary hearing include:

- witness summons;
- complex legal argument;
- joinder applications;
- vulnerable witness applications;
- disclosure of information; and
- location of a hearing.

5.2.3 It is often the case that dates for the final hearing cannot be listed until after a preliminary meeting has taken place. Decisions made at the meeting often influence the number of days allocated or venue for a hearing. Although a preliminary hearing can mean delay in the listing of a case, the types of issues that are resolved often mean that the final hearing itself runs more smoothly and there is less likelihood of an adjournment at a later stage.

5.3 Fixing the hearing

5.3.1 We have service level standards in place with the law firm which prepares and presents cases to final hearing on our behalf. They provide that we should be notified that a case is ready to fix for hearing

within four and a half months of the Investigating Committee Panel (ICP) case to answer decision in 80 percent of cases. This allows for the more complex cases which may take longer to prepare. Cases are not listed for hearings immediately after an ICP for a number of reasons. It is not known at this stage how many witnesses will be required, whether any witnesses may be considered vulnerable and what additional material may need to be sought. It is also not possible to determine the number of days required for a hearing until the case has been prepared. In waiting until this information is confirmed, the Hearings Team can ensure that cases are listed appropriately and reduce delay in relisting cases.

5.3.2 Once the Hearings Team is notified that a case is ready to fix, the Scheduling Officers will obtain witness availability and that of the Registrant and representative. An average of three witnesses are required for each case, however this can be considerably more in some complex cases. It is often the case that witnesses delay confirming their availability and have to be followed up after two weeks by telephone. In some cases witnesses are assessed as vulnerable and special measures need to be provided for when fixing the hearing. This can include a video link or screens. When witness availability is confirmed, suitable dates are considered in light of the availability of resources. A panel is then organised and the hearing details confirmed to all parties. The availability of the panel (particularly the registrant member), adds further logistical detail to organising the hearing.

5.3.3 The Practice note 'Hearing venues' which can be found at http://www.hpc-uk.org/assets/documents/10001DDAPRACTICE_NOTE_Hearing_Locations.pdf provides more detail on the use of video conferencing facilities.

5.3.4 To ensure witness attendance at proceedings, rather than having to adjourn of they don't attend, the HPC gives each witness three opportunities to provide their dates of availability. The correspondence has been effective in ensuring attendance and on only one occasion since April 2010 has a witness summons had to be issued to ensure attendance.

5.4 Skeleton arguments

5.4.1 As mentioned at above, the information provided to panels and the registrant is under review including the use of future skeleton arguments. The skeleton argument will assist the advocate/presenting officer to deliver a structured, reasoned and persuasive case and also enable the panel to understand all relevant matters of facts and law. The aim of the skeleton arguments if to ensure the hearing is conducted in an effective and timely manner.

5.5 Stakeholder engagement

5.5.1 Regular meetings take place with the unions and professional bodies who provide representation for registrants at final hearings. This helps to ensure understanding of the processes and procedures adopted by the HPC.

6.0 Take steps to reduce the amount of time it takes to schedule and hear interim order cases (so that steps can be taken, more quickly, to protect the public in appropriate cases);

6.1 Interim Orders and Risk Assessment

6.1.1 We identify cases where an interim order would be appropriate through an ongoing process of risk assessment. The seriousness of a case is not always evident on receipt of the initial information and cases are monitored and risk assessed throughout the investigations process. Once a case has been identified as high risk, a manager within the department will confirm and sign off the need for an interim order application.

6.1.2 The Practice note 'Interim Orders' which can be found at http://www.hpc-uk.org/assets/documents/10001DDBPRACTICE_NOTE_Interim_Orders.pdf provides guidance on interim orders, the procedure to be adopted, and when they can be made.

6.1.3 There is no specific requirement for certain period of notice to be given to the registrant that an interim order hearing will take place. The Health Professions Order 2001 provides that no order can be made unless the registrant "has been afforded an opportunity of appearing before the Committee and being heard on the question of whether such an order should be made in his case."

6.1.4 The HPC's interim order practice note states that:

> *"Article 31 does not specify any detailed procedural requirements for such hearings but, normally, the registrant should be given seven day's notice of such a hearing unless there are exceptional circumstances which make it necessary for the Panel to hold a hearing at shorter notice."*

6.1.5 Interim order applications were made in 21 cases between April and August 2010. In these cases it took a mean of 15 days and a median of 13 days from the decision being taken to apply for an interim order, to the panel hearing taken place.

6.1.6 All interim orders must be reviewed after six months and every three months thereafter. A review can take place at any time where new evidence relevant to the order becomes available. The HPC will review an order at the request of the registrant where this is the case, or will instigate an early review where new information s provided by another source.

6.1.7 The GMC aim to commence interim order panel hearings within one month of referral. In 2009 they were successful in this and commenced 100% of their interim order hearings within this time frame (GMC Annual Report 2009).

7.0 Reducing the utilisation of legal assessors/advisors where legally qualified chairs head an adjudication panel (this will save duplication in skills of experience, create greater flexibility for cases to be listed, and reduce costs); and

7.1 Role of Legal Assessor

7.1.1 The assumption seems to have been made that a legally qualified chair is able to undertake the role of a legal assessor as well as that of a panel chair. HPC would argue that the role of a legal assessor is a really important safeguard in its fitness proceedings ensuring that fairness is provided to all parties, particularly in situations where the registrant concerned is unrepresented or not in attendance.

7.1.2 In HPC hearings, the Legal Assessor does not sit with the panel. This step has been taken to signify their independence from the panel and their role in giving advice to all those who are in attendance at the hearing. The Legal Assessor only joins the panel when they are requested to do so to help with drafting decisions and leave the panel room after help has been given. They are also required to announce what advice they have given to the panel whilst they were with them. If legally qualified chairs were to be appointed in the place of legal assessors further consideration would need to be given as to the practicality of that approach.

7.1.3 HPC has taken the view that the benefits of not having a legally qualified chair outweigh any advantages. Chairs should be focused on ensuring hearings progress swiftly. They should not become drawn into legal disagreements, but maintain their focus on resolving disputes as quickly as possible. Legal Assessors are able to talk to both parties in advance of proceedings starting and will often facilitate common points of opinion to be agreed. Because of their position of independence, they are able to intervene when appropriate, e.g. if questioning of witnesses is unnecessary or questions being put to witnesses are unfairly phrased. For a Panel Chair to be involved in these types of issues it could easily lead to impressions being made that their opinions were biased towards one party or another.

8.0 Modernise hearing procedures to ensure that cases take place *in private* only in exceptional circumstances.

8.1 Holding hearings in private

8.1.1 HPC's processes in this area reflect the limited circumstances that hearing should be held in private in accordance with Article 6 of the European Convention on Human Rights. Furthermore, HPC believe that hearings should be conducted in public to the fullest extent possible.

8.1.2 The Practice note 'Conducting hearings in Private' which can be found here http://www.hpc-uk.org/assets/documents/1000289EConductingHearingsinPrivate.pdf sets out under what circumstances a hearings should be held in private. That Practice note provides that:

> "*The decision to conduct all or part of a hearing in private is a matter for the Panel concerned and that decision must be consistent with Article 6(1) of the European Convention on Human Rights (ECHR), which provides limited exceptions to the need for hearings to be held in public."*

8.1.3 The Practice note also sets out the circumstances in which it may be appropriate to hold a hearing in private. There are two broad circumstances in which all or part of a hearing may be held in private:

- where it is in the interests of justice to do so; or
- where it is done in order to protect the private life of:
  - the person who is the subject of the allegation;
  - the complainant;
  - a witness giving evidence; or
  - a service user.

8.1.3 The Practice note further provides that a step wise approach should be considered by the panel in determining whether all or part of a case should be heard in private. That includes giving consideration to anonymisation of names within the decision.

The OHPA board also endorsed a number of specific ambitions on which comment is provided for below.

9.0 A President or Senior Chair appointed to give visible leadership to the chairs and panellists, to participate in their appointment and performance assessment, to set training, mentor and challenge, and to work with the Chief Executive to ensure the judicial and administrative arms of OHPA work together;

9.1 OHPA is solely an adjudicative body. The appointment of a person to lead the adjudicative function, who is, and is seen to be, separate from the head of OHPA's administrative arm follows the well established pattern for courts and tribunals.

The value of such an arrangement for regulators – who perform a much wider range of functions than OHPA would - is doubtful. The HPC has taken steps to separate the decision making in individual cases from the setting of strategy and policy. Panels are kept at arm's length from the regulator, with no Council or Committee members sitting on Panels. The Panels are led by a relatively small group of experienced Panel Chairs, who meet as a group at regular intervals to provide feedback to HPC on such matters as case management, mentoring and training needs The Panels are also responsible for their own, peer-review based, performance assessments.

The collegiate approach adopted by the Panel Chairs provides clear and effective leadership for the Panels and the appointment of a Senior Chair from among them would be unlikely to enhance the quality of that leadership significantly.

10.0 More effective training and appraisal systems for panellists;

10.1 Training

10.1.1 A comprehensive programme of training is provided to panel members and panel chairs. Refresher training is provided to panellists on a two yearly cycle and to panel chairs on a yearly cycle.

10.2 Appraisal and Reappointments

10.2.1 At its meeting in February 2010, the Council approved the policy in the reappointment of fitness to practise panel members. That paper can be found here http://www.hpc-uk.org/assets/documents/10002C50enclosure08-partnerreappointmentandagreementrenewal.pdf. The Council agreed to keep that policy under review.

10.2.2 HPC has an appraisal system and as with all HPC processes, this process is kept under review to ensure that it remains fit for purpose

10.3 Practice notes and Partner Newsletter

10.3.1 The Fitness to Practise department issues a partner newsletter every quarter providing FTP partners with relevant updates. The Council has also produced a range of practice notes The HPC is unique in the approach that it takes in relation to practice notes in that no other regulator produces anything similar. The purpose of practice notes is to provide further and more comprehensive guidance and information than that provided in the Order and rules made under it, to panels and to those who appear before them.

11.0 The employment of full or part-time legally qualified chairs to handle case management matters, the issue of directions and orders for costs and to chair the hearings;

11.1 Case Management

10.1.1 Comment is provided above on HPC's approach to case management. The approach in this area is kept under review, however it is difficult to understand what benefit full or part time legally qualified chairs would bring to a process that is already working well. Case Management procedures are embedded throughout HPC's fitness to practise processes and are integral to how cases are handled. We have never encountered any issues in this area and cannot see what advantages full or part-time legally qualified chairs would bring.

11.2 Costs Provisions

11.2.1 There is no provision for cost awards in the Health Professions Order.2001 and therefore any change to the approach taken in this area would require amendment to the governing legislation,

12.0 Active pre-hearing case management with clear directions to the parties as to time limits for the disclosure of evidence, lines of argument/skeleton arguments, hearing time estimates and how expert evidence is to be handled;

12.1 HPC's approach

12.1.1 Comment has been provided above on HPC's approach to skeleton argument, directions and hearing time estimates.

12.2 Directions

11.2.1 Panels can give special directions for the conduct of cases where the standard directions are not suitable. This is often in more complex cases where directions are required which are more tailored to the particular needs of the case. In these circumstances a preliminary

hearing is usually held at which the panel chair can consider a number of procedural issues and determine the best way to proceed. They will issue directions to HPC and the registrant in order to ensure that the case proceeds to a hearing in a timely manner.

12.3 Disclosure

12.3.1 The Practice note 'Disclosure' sets out the HPC's policy in disclosing to the registrant all any evidence which the HPC holds but which it will not rely on as a part of its case and which weakens its case or strengthens that of the registrant. HPC has an obligation to disclose unused material. Furthermore, HPC does not adopt the one-sided approach of only seeking evidence to prove that an allegation is well founded. The HPC seeks to act as an objective fact finder, gathering all relevant evidence in a fair and balanced manner and presenting it in a format which will assist a Panel to determine whether there is a 'case to answer' or that the allegation is well founded. The issue of disclosure is very rarely an issue in HPC proceedings as our process is not to have unused material of the kind that arises in criminal proceedings.

12.4 Assessors and Experts

12.4.1 Articles 35 and 36 of the Health Professions Order 2001, enables the HPC to appoint medical assessors to give advice on matters within their professional competence and registrant assessors to give advice on matters of professional practice arising in connection with cases being considered by Panels. Panels also have the discretion to admit opinion evidence which is given by expert witnesses.

12.4.2 The Practice note 'Assessors and Expert Witnesses' provides detail on the way in which the use of assessors and experts should be managed. It gives details of the expert's role, the expert report and putting questions to the expert. The practice note can be found at www.hpc-uk.org/publications/practicenotes/index.asp?id=161

13.0 Oral hearings only where necessary to resolve and determine disputed evidence or argument;

13.1 The HPC would argue that a publically open and oral hearing is the mainstay of fitness to practise proceedings. It helps to contribute to ensuring public faith in an open and transparent regulatory process. Further, the fact that a course of action has been agreed between the regulator and an individual registrant, does not automatically mean that the proceedings should be conducted in private as a public hearing provides wider benefits such as the deterrent effect and maintaining confidence in the profession concerned and the regulatory process. Regulators have previously been criticised for protecting "their own", conducting proceedings behind closed doors could arguably reignite public concern,

13.2 Consent

13.2.1 The HPC has a consent process in place This is a means by which the HPC and the registrant concerned can seek to conclude a case without the need for a contested hearing. The final decision on whether a case should be disposed of by consent is made by a panel who considers the proposed order and decides whether it is an appropriate course of action. This hearing is held in public as openness and transparency is an important part of regulatory proceedings. The Practice note 'Disposal of cases via consent' provides more detail on this and can be found at http://www.hpc-uk.org/assets/documents/10002473PRACTICE_NOTE_ConsentOrders.pdf

13.2.2 The benefit of this process is that cases can be considered more quickly. There is no need to call witnesses and the hearings are therefore shorter and usually listed for 2-3 hours. The majority of these cases are presented by HPC Case Managers which reduces overall costs. Between April 2010 and August 2010, 7 cases were concluded by consent.

14.0 A two stage, rather than three stage decision process;

14.1 Finding fitness to practise impaired

14.1.1 The Practice note 'Finding that Fitness to Practise is "Impaired" reflects the current regulatory case law on this area and provides that '*Panels should adopt a sequential approach to determining whether fitness to practise is impaired. In doing so Panels should act in a manner which makes it clear that they are applying the sequential approach by:*

- *first determining whether the facts as alleged are proved;*
- *if so, then determining whether the proven facts amount to the statutory 'ground' of the allegation;*
- *if so, hearing further argument on the issue of impairment and determining whether the registrant's fitness to practise is impaired; and*
- *if so hearing submissions on the question of sanction and then determining what, if any ,sanction to impose.*

The Practice note which can be found at: http://www.hpc-uk.org/assets/documents/1000289FFindingthatFitnesstoPractiseisImpaired.pdfgoes on to state that '*It is important that these four steps should be and be seen to be separate but that does not mean that Panels must retire four times in every case. Whether the Panel needs to retire at each and every step in the process will depend upon the nature and complexity of the case.'* HPC consider that at the very least however, Panels must deliberate separately on the issue of sanction.

15.0 The regulator bringing the proceedings to limit its case to allegations necessary for a determination, and to specify the sanction it asserts would be appropriate

15.1 Case to answer

15.1.1 The HPC has a Practice note which sets out the Council's standard of acceptance for allegations. That practice note can be found at www.hpc-uk.org/publications/practicenotes/index.asp?id=185. Only cases reaching that threshold proceed through the fitness to practise process.

15.1.2 For those cases that meet the standard of acceptance, once the investigation has been undertaken by the Case Manager, the allegation is drafted and sent to the registrant concerned. The Investigating Committee then considers the case and determines whether there is a case to answer. In reaching this decision they apply the realistic prospect test and consider whether there is a realistic prospect that the allegation will be well founded at a final hearing.

15.1.3 As the allegation is already drafted at this stage, it is clear what the final hearing panel will be considering if the case is referred. The Investigating Committee may only find a case to answer on some elements of the allegation and in these circumstances will only refer part of the original allegation. Final hearing panels only consider cases where a case to answer is found and therefore only hearings are only held where a determination needs to be made.

15.2 Presenting cases

15.2.1 A number of core principles form how HPC's approaches the investigation and presentation of cases. The guidance that is provided to HPC Investigators (both in the capacity of those who are case managers and those who are instructed to appear on HPC's behalf at final heaings) is that HPC investigators should investigate and manage allegations in an effective and professional manner, in accordance with the following guiding principles:

:

- acting proportionately and courteously, recognising that both complainants and registrants are entitled to expect that allegations with be dealt with expeditiously and in accordance with the law;
- upholding HPC's commitment to promoting equality and valuing diversity by acting in a fair, impartial and non-discriminatory manner;

- being objective 'finders of fact', not simply seeking evidence to prove an allegation, but gathering all relevant evidence in a fair and balanced manner; and supporting HPC in its obligations as a public authority under the Human Rights Act 1998 to act in accordance with the European Convention on Human Rights

15.2.2 Article 29(4) of the National Health Service Reform and Health Care Professions Act 2002 provides that if the CHRE considered that:

> *(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or*
>
> *(b) a relevant decision falling within subsection (2) should not have been made,*
>
> *and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court.*

15.2.3 This allows for CHRE to refer decisions to the relevant court if that body believes an allegation to have been "under prosecuted".

16.1 Sanctions

16.1.2 HPC's Indicative Sanctions Policy which can be found at http://www.hpc-uk.org/assets/documents/10000A9CPractice_Note_Sanctions.pdf, sets out the Council's policy on how sanctions should be applied by Practice Committee Panels in fitness to practise cases. It states that

> *'the decision as to what sanction, if any, should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the Panel which heard the case'* and that '*It would be inappropriate for the Council to set a fixed "tariff" of sanctions, as a Panel must decide each case on its merits.*

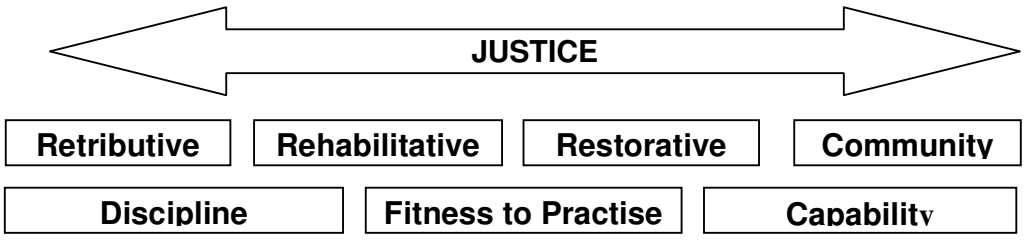
16.1.3 When presenting cases on behalf of the HPC, presenting officers will direct panels to the Indicative Sanctions Policy but will not direct the panel as to what sanction they consider to be appropriate as this is properly a decision for the panel that heard the case.

17.0 "Impact statements" carved into the proceedings, so that the panel recognises the impact the alleged conduct has had on patients;

17.1 Purpose of Fitness to Practise

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

Figure 1



17.2 Impact statements are inappropriate in regulatory proceedings. They are designed for criminal proceeding and to the extent that the impact on service users is a relevant factor in the case, should come out in the evidence presented. HPC's fitness to practise processes are not designed to publish registrants for past mistakes. They are designed to protect the public from those who are not fit to practise.

18.0 A broad use of the costs powers provided to OHPA;

18.1 There are no costs provisions within the Health Professions Order 2001

19.0 Disclosure of parties' case budgets and limits on the amounts of recoverable costs that parties will be entitled to incur, irrespective of their actual financial commitment;

19.1 There are no cost provisions within the Health Professions Order 2001

20.0 More efficient use of hearing rooms, and improved opportunities for professionals and lay members to act as panellists by organising hearings at the evenings and at weekends; and Locally focussed panellist recruitment and empanelment

20.1 Hearing venues

20.1.1 Article 22(7) of the Health Professions Order 2001 provides that:

> "*Hearings and preliminary meetings of the Practice Committees at which the person concerned is entitled to be present or be represented are to be held in*
>
> *(a) the United Kingdom country in which the registered address of the person concerned in situated; or*
> *(b) if he is not registered and resides in the United Kingdom, in the country in which he resides; and*
> *(c) in any other case in England.*

20.1.2 The Practice note 'Hearing venues' provides more guidance on this topic and particularly provides that '*Panels have a discretion as to exactly where a hearing is held within the home country of the registrant concerned and hearings do not need to be confined to Belfast, Cardiff, Edinburgh and London.*

20.1.3 As mentioned previously, HPC has made use of its video conference facilities to allow evidence to be given,

20.2 Locally focused empanelment

20.2.1 As the HPC is a UK wide regulator, we have a responsibility to ensure that those that sit on panels are representative of the wider registrant population. Furthermore, it is often the case that locally sourced registrant panel members and those from smaller professions may have some conflict of interest with the case if they know or are aware of those involved in the case. HPC tries to ensure as far as is possible that its processes and procedures are not only free from bias but free from the appearance of bias.

20.3 Hearings in the evening and at the weekend

20.3.1 In all that it does, HPC endeavours to ensure that it balances the rights of the registrant with public protection. In holding hearings in the evening or on the weekend it could be argued that this balance is no longer struck. It is arguable unfair to expect a registrant to attend a hearing after they have worked a full day or on their days off.

20.3.2 There would be a number of issues such as resource requirements (both human and facilities) and health and safety implications that would need to be taken if the Council were minded to undertake such a step.

The Consultation document provides further details as to how the GMC proposes to deliver more independent adjudication. Comment on those proposals is provided in the section below,

21.0 A move towards greater levels of independence and the establishment of a "Tribunal" style model of hearings through the creation of an independent Doctors' Disciplinary Tribunal, which would be headed by an independently appointed President who will have overall responsibility for appointing and training lay and medical panellists, case managers, legal assessors and specialist advisers, and would be responsible for the quality of work undertaken by panels;

21.1 Since its inception, HPC has been clear on the need for adjudication to be independent and impartial and apart from a brief period when Council Members chaired fitness to practise panels, moved very quickly to the appointment of independent panels.

21.2 HPC would be concerned about any move away from the model it has put in place in relation to its fitness to practise proceedings towards a disciplinary approach to professional regulation.

22.0 The requirement that the Tribunal President will present an Independent report to Parliament on an annual basis;

22.1 Annual Report

22.1.1 As outlined previously, in order to separate HPC's policy and adjudicative functions, Council members do not sit on fitness to practise panels.

22.1.2 Article 44(1)(b) of the Health Professions Order 2001 provides that:

> *"the Council shall publish, by such date in each year as the Privy Council shall specify a statistical report which indicates the efficiency and effectiveness of, and which includes a description of, the arrangements which the Council has put in place under article 21(1)(b) to protect members of the public from registrants whose fitness to practise is impaired, together with the Council's observations on the report."*

23.0 A requirement that a right of appeal is retained by the GMC in relation to decisions that are made by the Tribunal (this is intended to re-enforce the independence of the GMC's governance structure);

23.1 It seems appropriate to the HPC that CHRE should still be capable of challenging GMC decisions and that if the GMC has this right, it should only be exercised with the agreement of the CHRE.

23.2 Reviewing decisions

23.2.1 HPC decisions remain capable of being challenged by either the registrant, CHRE or through judicial review proceedings.

24.0 Shorter and more streamlined hearings, through the introduction of radically enhanced case management and pre-hearing arrangements (including consideration of the introduction of costs sanctions for both sides where appropriate);

24.1 Case Management and pre-hearing arrangements

24.1.1 Comment is provided above on HPC's approach to case management. There are currently no provisions for costs within the Health Professions Order 2001

25.0 Consider the introduction of legally qualified chairs to support enhanced case management arrangements;

25.1 Legally qualified chairs

25.1.1 Comment is provided at above on HPC's approach in this area.

26.0 Consider the introduction of specimen charges in order to ensure the most relevant issues are taken into account at hearings and unnecessary delays in proceedings are avoided. This will involve limiting the number of allegations charged to the most important matters in hand;

26.1 Comment is provided on specimen charges above.

26.2 The cases dealt with by HPC rarely concern cases concerning a large number of allegations of a similar nature.

26.2.1 The type of case where this can occur is in cases concerning record keeping where there may be a large number of instances of inadequate patient records. In this instance HPC will generally seek a sample of records that highlight the concerns raised, rather than what may amount to hundreds of records illustrating the same issues.

27.0 Consider improved resource utilisation through a reduction in the number of panellists required to sit on a panel;

27.1 Comment is provided above as to the requirements of the number of panellists to sit on panels.

28.0 Consider the replacement of written transcriptions of proceedings with audio recording facilities where appropriate; and

28.1 Transcription writer services

28.1.1 HPC currently have a transcription writer attend all hearings where a registrant or applicant is entitled to appear. The writer then produces a transcript which is then stored on the relevant case file. Transcripts are provided to the CHRE on request and are used to if an appeal is made against a HPC decision. Transcripts are also referred to when there is an issue with a case. A number of transcripts are typed up and never read or used in any way.

28.1.2 The Executive are currently reviewing the approach that HPC takes in this area and are currently planning a trial of having hearings recorded by audio technology with a 'logger' attending each hearing. The Logger supplements the audio recording with timing details, and details such as spelling of names. We would then only request the audio record to be typed up into a transcript if an appeal or judicial review was made or the hearing went part heard and was required to refresh the memories of the parties at a future hearing. There may also be occasion to request a transcript to resolve particular issues that may arise during the course of a case. A copy of the audio file would be kept on the Case management record and held by the transcription company.

28.1.3 For lengthy and often complex proceedings it is very difficult to transcribe an audio recording which holds no details about who is speaking when or who takes part in conversations. For this reason, loggers are being considered over audio recordings alone. .

28.1.4 It should be noted that the quality of transcripts provided by loggers is reliant on the quality if the audio recording. Loggers are unlikely to have the same awareness that a transcriber might have and a transcriber working on an audio log may need to make queries after the hearing to ensure they are transcribing correctly. Audio logs alone are bound to involve manner further complications for any that need to be transcribed at a future date.

29.0 Consider the use of technology to deliver effective communication between parties to FTP proceedings (e.g. issuing adjudication documentation by electronic means where appropriate).

29.1 The effective use of technology to ensure the effective and efficient

management of cases, is integral to HPC's approach to fitness to practise proceedings.

29.2 Service of documents

29.2.1 The Practice note 'Service of Documents' which can be found at http://www.hpc-uk.org/complaints/representing/index.asp?id=154 provides guidance to panels on

- Method of service;
- Service by electronic means;
- Address for service;
- Deemed service; and
- Proof of service.

30.0 Conclusions and Recommendations

31.0 The Committee is asked to discuss this review of the OHPA consultation documentation and whether there is any further work that it would like the Executive to undertake to enhance and develop the approach HPC takes to its fitness to practise process.

11 October 2010

Health Professions Council response to Department of Health consultation: Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery

The Health Professions Council welcomes the opportunity to respond to this consultation.

The Health Professions Council is a statutory UK wide regulator of healthcare professionals governed by the Health Professions Order 2001. We regulate the members of 15 professions. We maintain a register of professionals, set standards for entry to our register, approve education and training programmes for registration and deal with concerns where a professional may not be fit to practise. Our main role is to protect the health and wellbeing of those who use or need to use our registrants' services.

Our comments

Our comments relate to the question 'Should the Government proceed with its preferred Option – Option 2 (Repeal legislative provision relating to OHPA and, in separate legislation, take forward steps to enhance independence of adjudication and modernise existing processes at the GMC (and subsequently review whether to also do so for the GOC and other health regulators.)) Yes or No?'

As part of our consideration of this question, we have prepared a detailed paper for our Fitness to Practise Committee reviewing HPC's approach in the light of the consultation document, in particular focusing on:

- Changes that OHPA would plan to make;
- The specific ambitions endorsed by the OHPA board
- GMC Proposals for delivery of more independent adjudication

We have attached a copy of that paper to this document as an appendix.

We do believe the OHPA legislation should be repealed. Having conducted a review of the proposals put forward by OHPA and the GMC, HPC has concluded that its legislation affords the appropriate degree of independence in its adjudication processes and that it is operating a modern, effective and efficient adjudicative process, ensuring fairness to the registrant and a high degree of public protection. We already have in place many of the proposed developments recommended and suggested by the GMC and OHPA to the extent that they are appropriate and therefore do not think any further review of HPC's processes is necessary.

We hope that you find these comments useful. Should you wish to discuss any of our comments then please do not hesitate to contact us.

Yours sincerely,

Kelly Johnson
Director of Fitness to Practise

Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery

A paper for consultation

DH INFORMATION READER BOX

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HR / Workforce	Commissioning
Management	IM & T
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Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery

A paper for consultation

Professional Standards Division, Workforce Directorate, Department of Health

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Executive summary

Professional health regulation is designed to protect the public by ensuring good standards of practice among those who are registered with one of the statutory health regulators. Currently each regulator has powers, and follows set procedures, to investigate any concerns about the fitness to practise of any of the professionals it regulates.

Each health regulator[1]investigates complaints, decides which cases should go to a hearing, prepares cases for the hearing, prosecutes, and arranges for the adjudication of those cases. Adjudication involves assessing the evidence, making findings of fact and, if appropriate, imposing sanctions.

The previous Administration took forward legislation to create a new body, the Office of the Health Professions Adjudicator, which would be separate from the health regulators and adjudicate separately on fitness to practise matters. Initially these changes would affect doctors as registrants of the General Medical Council before then being applied to those professions regulated by the General Optical Council, and with a view to applying the same approach for other health professionals if appropriate.

The Government has reviewed the progress towards implementation of OHPA and is consulting on whether delivery of adjudication can be delivered more proportionately through other means.

[1] The health regulatory bodies: General Chiropractic Council (GCC), General Dental Council (GDC), General Medical Council (GMC), General Optical Council (GOC), General Osteopathic Council (GOsC), Health Professions Council (HPC), Nursing and Midwifery Council (NMC), Pharmaceutical Society of Northern Ireland (PSNI), Pharmaceutical Society of Great Britain (RPSGB) – RPSGB is to be replaced in September 2010 by the General Pharmacy Council (GPhC).

1. Background

Health regulation

1.1 During the 1990s, public and professional confidence in the system of regulation of health professionals was called into question after a number of high profile cases in which patients were harmed, most notably murders carried out by Harold Shipman, which led to a major public inquiry chaired by Dame Janet, now Lady Justice Smith.

1.2 The processes and systems of the General Medical Council (GMC) were subject to criticism, particularly in the fifth Report of the Shipman Inquiry. It raised concerns about the GMC's arrangements for adjudication and questioned the GMC's ability to handle adjudication independently (given that it also investigated and prosecuted fitness to practise (FTP) cases). Lady Justice Smith recommended that adjudication should be handled independently from the GMC.

1.3 Following the publication of The Shipman Inquiry fifth report, Lord Warner commissioned a review of medical regulation. The review was conducted by Sir Liam Donaldson, then Chief Medical Officer (CMO) for England. His report, *Good doctors, safer patients* focused upon the protection of the interests and safety of patients. The report aimed to create a new approach to promoting and assuring good medical practice and protecting patients from bad practice. The report and regulatory impact assessment can be found at:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4137232

1.4 Shortly thereafter, the Department of Health conducted a parallel review of the arrangements in place for the regulation of the other health professions in order to provide consistency of approach.
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4137239

Adjudication

1.5 The previous Administration's White Paper *Trust, assurance and safety: The regulation of health professionals* set out a programme of reform to the United Kingdom's system for the regulation of health professionals, including the signalling of a move towards independent adjudication on FTP matters: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_065946

1.6 The legal framework for an independent body – the Office of the Health Professions Adjudicator (OHPA) - to adjudicate (i.e. to judge and make final decisions) on FTP cases is set out in the Health and Social Care Act 2008 (the 2008 Act). This legislation provides the legal basis for OHPA to adjudicate on FTP matters for GMC registrants initially and subsequently for GOC registrants.

1.7 Following *Trust, assurance and safety* a working group was established to make recommendations to Government on how independent adjudication could be delivered though OHPA. In March 2009 published a report of its findings called *Tackling Concerns Nationally* (TCN), The report be accessed at:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_096502

Establishment of OHPA

1.8 The previous administration accepted the proposals made in TCN, and progressed with the establishment of OHPA. The experience how OHPA performed in handling adjudication of FTP cases emanating from the GMC and the GOC would inform a decision as to whether OHPA's remit would be extended to the other health professional regulators. Further legislation would be required to provide for this. The previous Administration believed that this would enhance public and professional confidence in the system of adjudication.

1.9 OHPA became a legal entity on 25 January 2010 and planned to have in place by April 2011 the Rules and Regulations it required to become operational in terms of performing its adjudication function.

OHPA and implementation of the TCN Recommendations

1.10 In establishing OHPA, the following TCN recommendations have been progressed:

Establishment and Governance of OHPA

- *OHPA should have a status commensurate with the principle of independence from Government and sectional interests in terms of its operational and financial freedom* - The Office of National Statistics classified OHPA as a Public Body.
- *Consideration is given to listing OHPA under the Tribunals, Courts and Enforcement Act to bring it within the remit of the AJTC* - OHPA was listed under the Tribunals, Courts and Enforcement Act 2007 on 25 January 2010.
- *In line with established practice OHPA's chair ought to be appointed first and should sit on the selection panel for other members of the board* - Walter Merricks CBE was appointed by the Privy Council as the first chair of OHPA and took up his post in November 2009. Along with the Appointments Commission (on behalf of the Privy Council) he has appointed three non-executive board members as well as the chief executive.
- *One of the first tasks of the initial board of OHPA should be to produce a statement on governance. The statement should include consideration of the likely effectiveness of a board of three to provide proper governance and accountability and to be able effectively to hold the Chief Executive to account with a view to having any additional members of the board appointed by the time OHPA becomes operational* - Following public consultation, OHPA's board consists of five people: the chair and chief executive and three non-executives.
- *The role of OHPA's board should be to set the direction of the organisation in line with its statutory duties and purpose. It should ensure that systems are in place to enable it to monitor performance, manage risks, and hold the executive to account. It should also provide that systems be in place to ensure it acts with probity* - A

programme plan was developed alongside governance and funding and accountability frameworks.

- *The proposed statement on governance to be produced by the initial board should include a schedule of delegated authority for the executive* - A schedule of delegated authority has been developed as part of the structure necessary for OHPA to become a corporate body on 25 January 2010.

Information

- *OHPA's initial board should develop as soon as possible a 'Publication Scheme' governing the publication and disclosure of information which should include policies in respect of the publication of minutes of meetings of the board, OHPA's fee, factual details about the status of individual cases and panel's determinations. The scheme should be developed in consultation with interested parties* - An interim publication scheme was drawn up and promulgated as part of the process leading to the establishment of OHPA as a corporate body in January 2010. The current publication scheme follows the Information Commissioner's guidance on best practice.

Transition

- *OHPA's board should be appointed at an early stage, before the body becomes operational, in order to oversee the detailed work necessary to establish policies and procedures* - Three non-executives and the chair were appointed to the board prior to OHPA becoming a legal entity and were integral in approving all of the necessary policies and procedures.

1.11 Once operational OHPA would be responsible for:

- Deciding whether a health professional's FTP is impaired;
- Ensuring the safety of patients and the public by imposing sanctions following a finding of impairment that may restrict or remove a health professional's registration where appropriate;
- Considering the need for temporary sanctions (interim orders) restricting or suspending a health professional's registration prior to a full hearing on FTP;
- Reviewing any sanctions; and

- Deciding whether health professionals ought to be allowed to practise again after being removed from the register for FTP reasons.

1.12 Each of the functions listed above are currently carried out by the GMC, GOC, and the other health profession regulatory bodies.

2. The current context

2.1 The Government has been reviewing the progress of OHPA towards implementation, and reassessing the case for creation of a new body to regulate in this area as part of its wider spending review.

2.2 The fifth Report of the Shipman Inquiry highlighted Lady Justice Smith's concerns about whether the GMC could operate adjudication independently from their other duties of investigating and presenting FTP cases. It noted that, at that time, the GMC had already taken steps to enhance the independence of its adjudication function, but Lady Justice Smith was not persuaded that the steps then being taken would lead to the scale of change necessary.

Further changes at the GMC

2.3 There has been fundamental change at the GMC since the events that led to the publication of the fifth Report of the Shipman Inquiry.

2.4 Until 2004 the GMC's FTP procedures were governed by three separate pieces of legislation and supported by three committees covering different aspects of a doctor's FTP: health, conduct and performance. Following a review of FTP procedures in 2002 the Council approved the measures that later became the basis of the GMC's Fitness to Practise Rules 2004. The key elements of the new Rules were:

- A holistic approach to concerns about doctors based on the concept of impaired FTP, with a single set of Rules and a single FTP Panel being able to consider the whole range of allegations;
- The introduction of professional decision makers (Case Examiners) to refer a case to a FTP Panel and a single test for referral, the "realistic prospect" test;
- A staged decision making process based on formal criteria and supported by extensive guidance allowing for thorough audit of case progression; and,
- The separation of governance from adjudication decision making by excluding Council members from being eligible to sit on FTP Panels.

2.5 The GMC has kept the operation of the Fitness to Practise Rules 2004 under review and further changes have been implemented since Lady Justice Smith's Fifth Report on the Shipman Inquiry. Perhaps most significantly the GMC has moved to the civil standard of proof in line with the policy direction set out in *Trust, Assurance and Safety*. This moved the standard of proof for evidence from 'beyond reasonable doubt' to 'on the balance of probabilities' reflecting most other civil tribunals.

2.6 In 2007 the power to agree undertakings with doctors was extended to misconduct cases under the consensual disposal arrangements to increase the opportunity for remediation and rehabilitation of doctors whose FTP is impaired without the need for a FTP Panel hearing in appropriate cases.

2.7 A further package of changes was made to the FTP Rules in 2009. These changes arose from operational experience and developments in case law.

2.8 Additionally the infrastructure supporting the FTP procedures has been significantly enhanced. Following the introduction of the new Rules in 2004, a more robust process for monitoring and supporting those doctors who are subject to undertakings and conditions was introduced.

2.9 Recognising the benefits that can be realised from information systems technology, in April 2006 an electronic case management system was introduced across the GMC. All case documents are now stored electronically, allowing for the rapid retrieval of the information pertaining to a doctor's FTP held by the GMC including any previous and current concerns, hearings or sanctions.

2.10 A series of service targets are in place against which the performance of the organisation is assessed and reviewed by the Council. Additionally the GMC commissions periodic reviews of its processes, for example the audit of investigation stage decisions conducted by King's College London, in 2007, to provide external assurance that the FTP decisions are consistent with relevant guidance.

2.11 The GMC has also pursued an active training and development programme both for its panellists and for its staff. Regular training events are held for panellists to update them

on the latest developments resulting from changes to legislation, case law or policy changes to ensure more professional, consistent and robust decision-making by panels. Additionally panellists are now subject to 360-degree assessment following every hearing. Staff are supported with thorough induction training and by manuals setting out in detail the process for handling complaints.

2.12 The GMC's governance arrangements have been transformed — its governing body is smaller and it is now independently appointed. The Council has 24 members, half of whom are lay and half doctors. All of the members are independently appointed by the Appointments Commission, acting on behalf of the Privy Council. The Council provides strategic leadership to the GMC and holds the executive to account. Members do not have a role in either the investigation of cases nor in their adjudication.

2.13 More recently, in view of concerns about the increasing length of cases (and to try to minimise the number of last minute adjournments or cancellations of FTP hearings), the GMC established a Case Management Working Group that reported in December 2008. The recommendations of the Group were consulted upon in 2009 and led to a number of proposals which the GMC indicated it intended to pursue both in the short term within the current adjudication arrangements and by discussion with OHPA in the longer term.

2.14 Current data[2] suggests that the decisions made by FTP Panels are robust – only a small proportion of cases are challenged before the higher courts, and a smaller proportion are successful in such a challenge.

2.15 A recent independent report on the performance of the health regulatory bodies, prepared by the Council for Healthcare Regulatory Excellence (CHRE), is positive about the GMC and its performance. It is clear that the organisation, and its culture, is now in a very different place than it was at the time of the fifth Shipman Report. The 2009/10 CHRE report[3] notes that:

[2] See Table 1 of the Impact Assessment accompanying this consultation

[3] "Performance review report 2009/10. Enhancing public protection through improved regulation." CHRE. July 2010.

"*The GMC has continued to perform well, demonstrating excellence in several areas across its functions in a year of significant change. It is impressive that the GMC has maintained its commitment to continuous improvement, even in areas where it was already performing to a good standard, and to addressing challenges in medical regulation.*"

Changes that OHPA would plan to make

2.16 Subject to the outcome of this consultation, it is the present intention of OHPA to deliver a smooth transition at the point of proposed take over of responsibility for adjudication, by "adopting and adapting" existing GMC processes. These proposed adaptations prepared in readiness for public consultation are summarised below:

- Strong case management of cases, including dealing with matters on the papers where appropriate and where the parties consent (this will lead to efficient and cost effective hearings, delivering swifter outcomes to the benefit of patients, the public, and health professionals);
- Substituting panel members where a panel becomes inquorate due to ill-health or other significant or enduring problems, thereby preventing adjournment (this will afford patients better protection by registrants being dealt with in a timely fashion);
- Modernised hearing procedures to avoid spending time in hearings on matters which are not in dispute (e.g. the reading out of charges which are admitted by the practioner);
- Enhanced pre-hearing case-management procedures to reduce the amount of time spent in hearings on administrative matters such as the number of witnesses to be called;
- Take steps to reduce the amount of time it takes to schedule and hear interim order cases (so that steps can be taken, more quickly, to protect the public in appropriate cases);
- Reducing the utilisation of legal assessors/advisors where legally qualified chairs head an adjudication panel (this will save duplication in skills of experience, create greater flexibility for cases to be listed, and reduce costs); and
- Modernise hearing procedures to ensure that cases take place *in private* only in exceptional circumstances.

2.17 At the same time as consulting on their proposals to “adopt and adapt” existing GMC procedures, OHPA have ambitions to make more wide ranging, significant changes to adjudication processes.

2.18 The proposed OHPA model of adjudication sought to balance the rights of the registrant against the need to ensure public protection. The overriding objective was to deal with cases in ways that were proportionate to their importance, the complexity of the issues, the anticipated costs and the resources of the parties; avoiding unnecessary delay and formality; seeking flexibility; and with an obligation on the parties to cooperate to further these objectives.

2.19 The specific ambitions endorsed by the OHPA Board were as follows:

- A President or Senior Chair appointed to give visible leadership to the chairs and to the panellists, to participate in their appointment and performance assessment, to set training, mentor and challenge, and to work with the Chief Executive to ensure the judicial and administrative arms of OHPA work together. In turn, the President might be supported by Deputies;
- More effective training and appraisal systems for panellists;
- The employment of full or part-time legally qualified chairs to handle case management matters, the issue of directions and orders for costs and to chair the hearings;
- Active pre-hearing case management with clear directions to the parties as to time limits for the disclosure of evidence, lines of argument / skeleton arguments, hearing time estimates and how expert evidence is to be handled;
- Oral hearings only where necessary to resolve and determine disputed evidence or argument;
- A two stage, rather than three stage decision process;
- The regulator bringing the proceedings to limit its case to allegations necessary for a determination, and to specify the sanction it asserts would be appropriate;
- “Impact statements” carved into the proceedings, so that the panel recognises the impact the alleged conduct has had on patients;
- A broad use of the cost powers provided to OHPA;

- Disclosure of parties' case budgets and limits on the amount of recoverable costs that parties will be entitled to incur, irrespective of their actual financial commitment;
- More efficient use of hearing rooms, and improved opportunities for professionals and lay members to act as panellists by organising hearings in the evenings and at weekends; and
- Locally focused panellist recruitment and empanelment.

2.20 OHPA believe their ambitions have multiple benefits to:

- Move health professional adjudication in line with modern legal and judicial practice;
- Provide a single adjudication Rule set applicable to all health professionals; and
- Introduce greater independence of the adjudication function whilst ensuring a consistency of approach across the individual panellists.

2.21 The Office of Government and Commerce (OGC) recently carried out an independent review of OHPA's work, in the context of the likelihood of the organisations capability to be operationally ready to handle FTP cases from 01 April 2011. This Gate 0[4] review investigated the direction and planned outcome of the programme of work OHPA have been undertaking and the likelihood of delivery. Following a series of interviews with OHPA's stakeholders and document reviews, the OGC's conclusion was:

> *"The OHPA programme has been well managed and is being delivered to plan by a highly experienced, competent and enthusiastic team and would meet the requirements of the policy."*
>
> It added,
>
> *"The Review found several instances of good practice within a programme that is clearly being run extremely well."*

<u>GMC Proposals for delivery of more independent adjudication</u>

2.22 The Government has asked the GMC whether, and if so how, independent adjudication could be strengthened without the need to proceed to implement OHPA, but instead through modernisation of existing legislation. The GMC has made it clear that it fully supports the principle of independent adjudication and it is willing to develop such a

[4] See OGC website for scope of a Gate 0 review: http://www.ogc.gov.uk/introduction_to_procurement_gateway_0.asp

model within the GMC if asked. It has indicated that it would consider a wide range of proposals and believes that the vast majority of proposals outlined by OHPA could be implemented by the GMC (albeit, some proposals would require changes to existing legislative powers / procedural rules). They include the following :

- A move towards greater levels of independence and the establishment of a "Tribunal" style model of hearings through the creation of an independent Doctors' Disciplinary Tribunal, which would be headed by an independently appointed President who will have overall responsibility for appointing and training lay and medical panellists, case managers, legal assessors and specialist advisers, and would be responsible for the quality of work undertaken by panels;
- The requirement that the Tribunal President will present an independent report to Parliament on an annual basis;
- A requirement that a right of appeal is retained by the GMC in relation to decisions that are made by the Tribunal (this is intended to re-enforce the independence of the GMC's governance structure);
- Shorter and more streamlined hearings, through the introduction of radically enhanced case management and pre-hearing arrangements (including consideration of the introduction of costs sanctions for both sides where appropriate);
- Consider the introduction of legally qualified chairs to support enhanced case management arrangements;
- Consider the introduction of specimen charges in order to ensure the most relevant issues are taken into account at hearings and unnecessary delays in proceedings are avoided. This will involve limiting the number of allegations charged to the most important matters in hand;
- Consider improved resource utilisation through a reduction in the number of panellists required to sit on a panel;
- Consider the replacement of written transcriptions of proceedings with audio recording facilities where appropriate; and
- Consider the use of technology to deliver effective communication between parties to FTP proceedings (e.g. issuing adjudication documentation by electronic means where appropriate).

2.23 The genesis of many of these developments has arisen from the work that OHPA has done in developing the manner in which it would operate adjudication in the future and influenced by discussions between OHPA, the GMC, and wider external partners.

2.24 The Government's initial assessment of these proposals (subject to this consultation) is that they present an opportunity for the GMC to modernise and improve existing processes and provide for independence of adjudication on a much clearer basis than is the case now. This may also provide the opportunity to realise substantially the same benefits as regards adjudication for doctors as would be the case should OHPA become operational, without the additional cost to the public purse in 2010-11 that would be required to set up OHPA. Subject to the outcome of this consultation the GMC would seek to consult on proposals to modernise their processes prior to implementation.

3. Options for the future

3.1 Before moving forwards towards full implementation of OHPA it is appropriate for Government to assess the situation as it is now, and the impact of the change that OHPA will lead to.

3.2 The OHPA project has generated valuable ideas about how the process of adjudication could be delivered differently. However, it is considered that these innovations could also be replicated and delivered through refinements to the GMC's processes. The types of changes and the benefits derivable are discussed in detail in the impact assessment that accompanies this consultation paper.

3.3 It is also clear that the GMC has changed significantly since 2004 and is willing to implement further changes in order to deliver enhanced levels of independence between its adjudication and investigatory functions. Again, the scale and nature of these changes are discussed in full in the impact assessment accompanying this consultation paper.

3.4 In light of the GMC's response to the Government's question as to how it could enhance independence of adjudication and modernise its current process of adjudication, the Government considers that rationale for moving to adjudication on FTP matters through OHPA is less clear cut than was previously the case.

3.5 In addition, the expectation (as expressed to Parliament during the passage of 2008 Act) was that the cost of transition to establish OHPA would be in the region of c. £3-4m over two years. This estimate was developed by the Department with assistance of an external consultancy organisation. OHPA's Transition team now estimate that the range of expected cost to Government for the establishment of OHPA is to be between £10 and £16m. The basis behind incurrence of these costs is discussed in full in the impact assessment accompanying this consultation. The scale of this increase is significant. The lower end of this estimate also presents risks in relation to availability of contingency funds for a start-up operation.

3.6 It should be noted that a decision not to proceed with OHPA will potentially have a wider impact on other health regulators, as potential economies of scale in the sector will not be realised, in the longer term. This has been acknowledged by the Department, who will aim, as part of the preferred option, to review learning from the GMC change programme, and apply it to other regulators as and when appropriate.

3.7 It is considered that there are three main options on how to proceed:

OPTION 1: Proceed with OHPA implementation as previously planned - do nothing option*.

(*This option has been labelled as "do nothing" as it is essentially continuing with pre-existing policy, though it is recognised that all three of these options would require some further work in the form of legislation to fully implement);

OPTION 2: Repeal legislative provision relating to OHPA and, in separate legislation, take forward steps to enhance independence of adjudication and modernise existing processes at the GMC (and subsequently review whether to also do so for the GOC and other health regulators).

Subject to this consultation, this is the preferred option. The Government considers that it offers a way to achieve more independent adjudication that is more proportionate than the other proposals;

OPTION 3: Repeal legislative provision relating to OHPA and take no further action.

3.8 A full assessment of the likely economic and other impacts of these options accompanies this consultation. For the reasons given therein, Option 2 is the Government's preferred option as it delivers the benefits expected from the implementation of OHPA to adjudicate on GMC FTP cases, but at a lower cost, giving the greatest net benefit overall. The cost savings are generated through the avoidance of creation of a new body to fulfil the adjudication function that could otherwise be performed by the GMC.

3.9 As such, your views are invited on the following questions:

Q1. Should the Government proceed with its preferred Option – Option 2
Yes or No?
Please give your reasons.

Q2. Do you have any comments on the identified benefits, costs and risks of the Options that are detailed in this document and its accompanying impact assessments and are there any other considerations that the Government should consider?

4. Consultation next steps

Individuals and organisations are invited to submit comments on any issues raised by this paper.

Response to the Consultation

Replies to this consultation should be received no later than **11 October 2010**.

Please respond by downloading the question template provided on the DH website. If you cannot access the question template, please e-mail the address below or write to us and we will send the consultation document and/or template to you. If you e-mail your response please do not send a duplicate hard copy.

The document is available on the Department of Health website at:
http://www.dh.gov.uk/consultations/liveconsultations,

You can respond by e-mail to HRDListening@dh.gsi.gov.uk, or in writing to:

Consultation on Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery
Department of Health
Room 2N10
Quarry House
Quarry Hill
Leeds
LS2 7UE

Attachments to e-mails should be in Microsoft word or rich text format only please.

Please indicate whether you are replying as an individual or on behalf of an organisation or group of people.
Your response may be made public, but if you would prefer it to remain private please make this clear in your reply.

Annex A

The Consultation Process - Criteria for consultation

This consultation aims to follow good practice on consultations and in particular we aim to:

- Formally consult at a stage where there is scope to influence the policy outcome;
- Consult for a sufficient period;
- Be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- Ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- Keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees' 'buy-in' to the process;
- Analyse responses carefully and give clear feedback to participants following the consultation;
- Ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please:

contact Consultations Coordinator
Department of Health
3E48, Quarry House
Leeds
LS2 7UE

e-mail consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's **Information Charter.**

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the Consultations website at http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm

Annex B - Response Template

Summary of Consultation Questions

Q1.	Should the Government proceed with its preferred option – Option 2 Yes or No? Please give your reasons.

Q2.	Do you have any comments on the identified benefits, costs and risks of the Options that are detailed in this document and its accompanying impact assessments and are there any other considerations that the Government should consider?

Your Reply

Please send replies to this consultation electronically wherever possible.

The closing date for responses is **11 October 2010**.

Council Meeting

29 September 2010

Paper 6

council for healthcare regulatory excellence

Purpose: For approval

Fitness to Practise Adjudication for Health Professionals: Assessing different mechanisms for delivery

1. Purpose

1.1 To discuss and agree the nature of our response to the consultation.

2. Background

2.1 The previous Administration took forward legislation to create a new body, the Office of the Health Professions Adjudicator (OHPA), which would take on the adjudication function of the GMC's Fitness to Practise (FtP) process. It was intended that OHPA would then adjudicate on GOC cases, with a view to eventually applying to the other regulators.[1] OHPA became a legal entity on 15 January 2010, with the aim of becoming operational by April 2011.

2.2 The move to create OHPA followed concerns about public and professional confidence in health professional regulation following a number of high profile scandals, particularly the Harold Shipman murders. The Fifth Report of the Shipman Inquiry[2] (December 2004) raised concerns about the GMC's arrangements for adjudication, and recommended that this function should be independent of the investigation of FtP cases[3]

2.3 The GMC has made a series of structural and process changes since the Fifth Report was published. This includes the introduction of a civil standard of proof, and having a smaller governing body which comprises half lay members and half doctor members, all of whom are independently appointed.

[1] In 2008 we stated in our Special Report on the NMC that the adjudication function for the NMC should move across to OHPA at an early stage. Source: http://www.chre.org.uk/_img/pics/library/080611_NMC_Final_Report.pdf
[2] Available at http://www.the-shipman-inquiry.org.uk/fifthreport.asp
[3] Our review of the Medical Council of New Zealand, and our experience of professional regulation in Australia, has highlighted the benefit of, and value placed in, the formal separation of investigation and adjudication functions.

3. Summary of GMC's proposals

3.1 The Government asked the GMC whether it could deliver strengthened, independent adjudication as an alternative to proceeding with OHPA. The GMC believes it can implement the majority of proposals outlined by OHPA. The GMC has suggested a number of changes to its structure and processes, including:

- Creation of a tribunal style model of hearings – the Doctors' Disciplinary Tribunal – headed by an independently appointed President
- The Tribunal President would present an independent report to Parliament
- The GMC would acquire a right of appeal for decisions made by the Tribunal
- Introduction of legally qualified chairs
- Introduction of 'specimen charges' to deal with the most important maters at hand.

3.2 The Government's view is that implementing these proposals would enable the GMC to modernise and provide a greater degree of independence, realising the same benefits that OHPA would. It is also of the view that these measures could in time be extended to the other regulators. Legislating for these changes at the GMC is the Government's preferred option, rather than proceeding with OHPA or repealing the legislation provision for OHPA and taking no further action.

4. Key points from the OHPA draft response to the consultation

4.1 In its draft response, OHPA has supported its continuance by stating that it would provide consistency, independence and value for money. OPHA argues that:

- OHPA would ensure that those engaged in judicial decision-making would be 'conspicuously independent', a key legal principle
- A unique selling point of OHPA would be its ability to operate across all the health professions, providing a 'single source of reassurance to the public'
- The consultation focuses almost exclusively on doctors and the GMC. Not only would it be 'overly optimistic' to suggest that the proposals for a Doctors' Disciplinary Tribunal could be simply applied to the non-medical regulators, but they could have a 'disproportionate impact' if adopted by them.
- The introduction of the Doctors' Disciplinary Tribunal (DDT) would add a period of further delay. Having separately appointed and administered panels for all the regulators would add to the overall cost and burden of regulation.

- The impact assessment estimates the cost of establishing OHPA to be as much as £16m, but the final funding estimate submitted in June 2010 was for £8.6m.[4]

5. Proposed nature of our response

5.1 Since the publication of the Fifth Report of the Shipman Inquiry in 2004[5], the GMC and the other regulators have demonstrated improvements in their processes and outcomes, benefitting the public, professionals and employers. This is evidenced in our annual performance reviews, the decline in high court referrals and findings from our policy projects. We continue to highlight areas for improvement at the GMC, like all of the regulators, but it would be inaccurate to suggest that the extent of the problem being tackled in 2004 remains the same in 2010.

5.2 There does remain evidence however, from market research[6] and concerns expressed to us through advocacy organisations such as AvMA, that confidence in regulation could still be further enhanced.

5.3 Overall, we think the GMC's model could work effectively, but consider that it should be set up in a way that will contribute to the wider improvement of regulation in the long term, not solely as a response to the problem originally identified by Dame Janet or simply as an alternative to OHPA. In future, we think it would be beneficial for such tribunals to be offered by and on behalf of a number of the regulators. There are opportunities for sharing expertise and services and achieving greater cost efficiency in this and possibly other areas of operation.

5.4 The introduction of an independent Tribunal as proposed by the GMC would strengthen considerably the degree of independence of adjudication and should therefore improve confidence in regulation. Many of the other proposals identified[7] appear sensible, and if implemented would help to strengthen the efficiency of the process.

5.5 We believe that should this model be adopted, the GMC should set up its Tribunal model in a way that it could offer its services to some of the other regulators. This 'shared services' model would enable the benefits of economies of scale, independence and consistency to be realised in a more proportionate way than introducing a new Tribunal service at each of the nine regulators. We consider that having a service which serves more than one regulator might increase confidence in its independence. This could be further enhanced by aligning fitness to process processes and outcomes across regulators increasing consistency. This proposal would be in line with the recommendation in *Trust, Assurance and Safety* to establish 'a central list of vetted and approved panellists for all adjudication panels'.[8]

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[4] We noted some inaccuracies in the Impact Assessment, particularly on page 11 point 17, which inaccurately states that there were 3,334 FtP hearings at the GMC in 2008/09. We believe this figures relates to the number of preliminary investigations undertaken.
[5] Available at http://www.the-shipman-inquiry.org.uk/fifthreport.asp
[6] Opinion Leader Research, 2006. Joint UK Health and Social Care Regulators PPI Group: Making registers more usable. London: OLR
[7] Section 2.22 of the consultation paper
[8] Trust, Assurance and Safety. P.67

5.6 With regard to the GMC's proposal that it be given a power of appeal against the decisions of the DDT, we believe that the most effective way to improve regulators' decision making and to enhance public confidence in regulation is for CHRE to retain its Section 29 function across all the regulated professions.

5.7 We should not assume that the decline in high court challenges would continue in the absence of independent scrutiny; and the public may begin to question the reasons behind any future decline. It would reduce the contribution of CHRE's unique 'whole market' view of regulation if our scrutiny of final decisions did not include the medical profession, and it could increase the inconsistency in decision-making across the regulators. One of our purposes is to promote harmonisation, therefore removing CHRE's right of appeal would increase inconsistency.

5.8 It would of course be open to the GMC to draw CHRE's attention to any case if it considers that the Tribunal has been too lenient, which would serve to emphasise the independence of its governance.

5.9 We are of the view that giving the GMC the power to appeal the decisions of the DDT would undermine public confidence in regulation, despite the best efforts to ensure its independence. Given that the GMC would be funding the DDT, the view that medical regulation operated 'behind closed doors' might persist.[9] There could also appear to be a financial and reputational disincentive for the GMC to appeal Tribunal decisions, as the cost would be funded by registrants and any appeal could reflect negatively upon the DDT.

5.10 On the specific point of legally qualified chairs, we stated in the 2007/08 Performance Review that there is no evidence of any benefit to the quality of decision-making of having legal chairs and consider it important to ensure hearings are not overly legalistic in style, for the benefit of complainants.[10] We understand there may be other benefits in terms of effective management of hearings. However we believe that the same effect can be achieved through appropriate training and competence checking of lay chairs, rather than necessarily requiring legal chairs.

5.11 This consultation has raised some wider questions about whether the outputs of the current FtP process are the desired ones; we should start to think about these questions before making changes to process. For instance, it would benefit patients, professionals and service providers if the dramatic rise in final FtP hearings was better understood. There may be opportunities for greater focus on earlier resolution, remediation and greater use of mechanisms such as consensual disposal. Similarly, we believe that there would be benefit in exploring ways in which complainants' could be a more active participant in, rather than merely a witness to, the FtP process.

[9] Opinion Leader Research, 2006. Joint UK Health and Social Care Regulators PPI Group: Making registers more usable. London: OLR

[10] CHRE. Performance Review of the health professions regulators 2007/08: Helping regulation to improve. Available at: http://www.chre.org.uk/_img/pics/library/080827_Peformance_Review_Report_2007-08.pdf

5.12 In conclusion, we believe that the GMC's proposal is broadly sound but consider it should be amended to improve regulation generally. CHRE should retain its Section 29 power over the GMC in line with all of the regulators. If the decision is taken to repeal the legislation provision for OHPA, we believe an alternative way to realise the benefits of increased independence, consistency and economies of scale would be for the GMC to develop its independent 'Health Professional Tribunal' service in a way that it could in future offer its services to other regulators, some of whom may wish to do likewise. The development of such a system should be done in full consultation with CHRE, the regulators and all relevant stakeholders.