The HPC draft response to the Council for the Regulation of Healthcare Professions (CRHP) consultation document *Protecting the Public: Decisions to Refer Regulatory Cases to Court* is attached.

This has been circulated to all Council members for comment by Friday 5 December 2003.

Council is requested to note the response

HEALTH PROFESSIONS COUNCIL

Response to the Consultation Document

Protecting the Public : Decisions to refer Regulatory Cases to Court

Introduction

The Health Professions Council (HPC) welcomes the publication by the Council for the Regulation of Healthcare Professions (CRHP) of the consultation document *Protecting the Public : Decisions to Refer Regulatory Cases to Court* and, as one of the nine health care regulators potentially affected by CRHP's power to refer cases to the courts under section 29 of the National Health Service Reform and Health Care Professions Act 2002, (the S.29 Power) HPC is grateful for the opportunity to comment on the proposed exercise of that power.

HPC believes that the ability to refer "unduly lenient" decisions by health care regulators to the courts is a power which, if appropriately applied, provides a valuable safeguard against perverse decisions and will help to maintain public confidence in the system of health care regulation.

As the Minister, John Hutton MP noted during the passage of the Bill which became the 2002 Act, the S.29 Power is:

> *"A provision of last resort to deal with exceptionally grave cases in which there has been a perverse decision or the public interest has not been fully or properly served. …the power will need to be used only in exceptionally rare circumstances."*

In HPC's view it is imperative that CRHP recognises that the S.29 Power is one which should only be used in rare or exceptional circumstances and ensures that this remedy of last resort is not used in a way which undermines the role of the health care regulators. In particular, as regulators like the HPC have a range of sanctions available to them, it is vital that those considering fitness to practise cases are not inadvertently led to impose harsher sanctions than would have otherwise been appropriate for fear that their decision will be challenged via the S.29 Power on the grounds that it was unduly lenient. In this regard we welcome the recognition in the consultation document that the regulator hearing a case is in the better position to consider and weigh the evidence and therefore that CRHP will not seek to challenge regulator's findings of fact.

The Questions

In response to the specific questions posed in the consultation document HPC's comments are as follows:

Q1 Do you agree with this account of the policy background to S29?

Yes. In HPC's view the account of the policy background set out in Part 1 of the consultation document properly reflects the intention of the legislature and, in particular, HPC supports the interpretation set out in paragraph 1.14 that "CRHP will consider referral under section 29 only in cases where there appears to be an unusual gulf between the facts as proved and the penalty imposed on the practitioner and where that gulf appears to afford inadequate protection to members of the public".

Q2 Do you have concerns about any aspects of the approach to S29 described in this Part, judged against:

- **The protection of the public**
- **Fairness to practitioners?**

Yes. CRHP has decided not to set out the procedure for making decisions in statutory rules on the grounds that these "can be cumbersome and difficult to amend in the light of experience". We do not regard these as sufficient grounds for not making statutory rules in relation to the S.29 Power given its potential significance.

Q3 Do you think that CRHP should have powers to refer a decision that a practitioner is not guilty of [serious] [professional] misconduct?

No. As stated above, CRHP's function is to deal with cases where there is an unusual gulf between the facts as proved and the penalty imposed on the practitioner and not to substitute its own judgment on the facts for the finding reached by a tribunal which was better placed to reach that decision. A fitness to practice panel has the ability to hear, probe and weigh all of the available evidence and to assess the demeanour and credibility of witnesses. Therefore it is far better placed to make judgments on the facts than CRHP ever could be.

Q4 Do you have any comments at this stage on the appropriateness of the current statutory time limit for decision by CRHP (paragraph 1.11)?

The statutory time limits as they apply to decisions of HPC mean that a total of 56 days are available (a 28 day appeal period and then 28 days from the conclusion of that period) in which CRHP can make a decision. Given that the S.29 Power should only be exercised in rare and extreme circumstances we believe that this is an adequate time period.

Q5 Do you agree with the basic principles in paragraph 1.12?

Broadly yes, although we would wish to see further information or analysis in relation to the final bullet point (providing CRHP with a "discretion" to decide how information should be presented to Council members making decisions on referral).

Q6 Do you have any other comments or concerns about the policy issues governing the implementation of S29?

No.

Q7 Do you agree that CRHP should require regulators to notify it of all relevant decisions (paragraph 2.1)?

No. Requiring regulators to provide CRHP with information about all relevant decisions would impose a huge burden on those regulators who would then need to pass on the cost involved to their registrants. Given that the S.29 Power is only expected to be exercised in a very limited number of cases, such an approach would in HPC's view be disproportionate. HPC believes that regulatory bodies should instead be required to send CRHP details of relevant decisions in accordance with some agreed criteria. In relation to the alternatives set out in Part 2 to the consultation document we do not agree with the comment that the option of referring decisions in accordance with agreed criteria would involve selection by the regulatory body which is not desirable in a Process which may (albeit rarely) result in that body being the respondent in proceedings initiated by CRHP. It is entirely feasible for clear and objective criteria to be drawn up which would not involve this form of subjective selection.

Q8 Do you agree that communications to CRHP about cases may be considered by CRHP, but that CRHP should be advised to exercise caution in giving weight to any comments or observations upon which other parties have not had an opportunity to comment (paragraph 2.9)?

Yes. Whilst CRHP should give consideration to all information which it receives about a case, it clearly must be right that CRHP should be able to give appropriate weight to any comments or observations it receives, providing that such weighting is carried out in a fair, open and transparent manner.

Q9 Do you have any comments on the approach outlined in paragraph 2.14 for assessing whether a referral is desirable for the protection of the public?

Yes. The procedure states, at sub-paragraph (d) that the officer will consider "what other decision the regulatory body could have made which would have protected the public". In relation to regulators such as HPC which have a range of sanctions available to them there is a danger that this form of assessment may lead to "second guessing" of decisions and thus the suggestion that a referral should be made simply because the relevant tribunal selected the lower of two closely related sanctions.

Q10 Do you have any comments on the approach outlined in paragraphs 2.17-2.18 for assessing whether a decision may be unduly lenient or erroneous?

Yes. Whilst HPC broadly supports the approach outlined in paragraphs 2.17-2.18, we are concerned by the suggestion that CRHP would take account of the nature and context of alleged misconduct. This suggests that CRHP would be substituting its own assessment of the facts for those of the tribunal which heard the case. This is not consistent with an approach which recognises that the original fitness to practise panel is the body best placed to reach the finding of fact. We have no difficulty with CRHP considering the nature and context of proven misconduct.

Q11 Do you agree that the transcript should be provided? Should it be the whole transcript or just the transcript after the findings of fact (given that findings of

fact are considered outside the scope of S29)? (for regulatory bodies) would a requirement to provide a transcript in three days require your organisation to make different arrangements?

We believe that only that part of the transcript which relates to the proceedings following the tribunal's finding of fact should normally be provided (although we recognise that there may be cases in which the whole transcript might be required). A requirement to provide transcripts in three days would impose a significant cost burden on HPC which it would need to pass on to registrants; a cost burden which would be disproportionate.

Q12 In the light of the comments at Note 13 (paragraph 2.19), do you agree that the regulatory body should be invited to comment before a case is considered by the Director?

Yes. If a case is referred to the courts the relevant regulatory body will be a respondent in those proceedings and that regulatory body should be invited to comment before a case is considered by the CRHP's director.

Q13 Is there any other information that you think is necessary before the decision by the Director (or person appointed for the purpose), notwithstanding the severe time restrictions in force?

No.

Q14 Do you have any comments on the suggested approach to the assessment by the Director or person appointed for the purpose (paragraph 2.25)?

Yes. All of the information gathered to date should be available at any meeting at which members of CRHP consider whether to refer a decision to the relevant court. That information should be made available to any of those members and not just at the request of the chairman of the meeting (as suggested in paragraph 2.25).

Q15 Do you have any comments on the proposed procedure for a Section 29 meeting (paragraphs 2.26-2.36)?

Yes. Even if, as CRHP suggests, the decision whether to refer to the relevant court is an administrative rather than judicial decision we do not believe that meetings should take place in private. Best practice in modern day regulation is for organisations to be as open and transparent as possible and whilst CRHP will only make decisions on the papers we can see no reason why meetings should not be conducted in public.

Q16 Do you have any comments on the proposals for fast-track decision making, in the event of severe pressures of time (paragraphs 2.39-2.42)?

We recognise the need for CRHP to have an expedited procedure in the event that severe pressures of time mean that normal decision making processes cannot be followed but, given the gravity of the decision to refer a case to the courts, that procedure should only be used in the most exceptional of circumstances. We recommend that, if such a procedure is adopted, CRHP commits to reviewing that procedure on a regular basis and, irrespective of the outcome of any expedited

consideration of a case, of providing the affected regulator with the reasons for doing so.

Q17 Do you have any comments about CRHP's part in the consideration of the case by the relevant court (paragraph 2.45)?

We are concerned by the comment at paragraph 2.44 that "CRHP will consider the issue of costs in each case" which is then followed by a statement to the effect that CRHP will usually apply for an order for costs in any case where an application is successful. If CRHP's policy is that it will always seek an order for costs where it is successful then it should be equally willing to bear the costs where it is not. An approach of "always when we win, and sometimes when we lose" is inappropriate in the exercise of a power of this kind.

Q18 Do you have suggestions for quality assurance of S29 decisions (paragraph 2.48)?

Q19 How can CRHP best ensure that decisions on S29 cases are free from unfair discrimination (paragraph 2.48)?

CRHP should put robust quality assurance processes in place which audit the decisions taken and also provide a statistical analysis which enables bias or discrimination to be identified. That information should be published.

Q20 Do you have any views on how and whether notes of decisions by S29 meetings should be made and retained for future reference by CRHP and the wider public (paragraph 2.49)?

Yes. Although decisions by one CRHP meeting may not be binding precedent for another, decisions reached by CRHP will only be fair, equitable and non-discriminatory if properly reasoned decisions are made and recorded so that a clear and consistent approach to decision making develops. Those decisions should also be published so that they inform good regulatory conduct and the wider public.

Q21 CRHP would welcome comments or corrections on any of the material in Part 3.

No comment.