**HEALTH PROFESSIONS COUNCIL**

# Referral of Relevant Decisions to the Courts by the Council for the Regulation of Healthcare Professionals

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## Introduction

At the meeting of Council on 17th September 2003 it was agreed that I should consider the process for the referral of health regulators' decisions to the courts by CRHP under s.29 of the National Health Service Reform and Health Care Professions Act 2002 and the resource implications this might have for HPC in relation to the transcription of hearings.

## Background

Section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 provides that CRHP may refer a relevant decision by one of the regulators to the courts if it considers that:

> (a) a relevant decision ... 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 ... 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.

The "relevant court" means the Court of Session in Scotland, the High Court of Justice in Northern Ireland or the High Court of Justice in England and Wales.

It should be noted that CRHP are currently consulting on the exercise of these powers but that the relevant legislation is already in force. That consultation closes on 15th December 2003.

## Timing and impact

The decision to refer a case to the court must be taken by CRHP before "the end of the period of four weeks beginning with the last date on which the practitioner concerned has the right to appeal against the relevant decision". The Health Professions Order 2001 prescribes a 28 day period in which appeals must be made and therefore CRHP has 56 days from the date a decision is made by HPC to make a referral.

Referrals should be rare. The power provided by s.29 is one of last resort and it is clear that the Government do not expect it to be used often. During the debates on the Bill which became the 2002 Act the Minister, John Hutton, said:

*"...we envisage that the clause will work... as 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 and properly served. There have been very few such cases—probably only half a dozen in the past four or five years. The power will need to be used only in exceptionally rare circumstances.*

*[the Clause] gives three separate thresholds that the council must satisfy before it can refer a case to the High Court. First, it must satisfy itself that the decision has been unduly lenient; secondly, that it should not have been made; and, thirdly, that it would be desirable for the protection of members of the public. I am convinced that the clause does not constitute a right to roam or to interfere with every disciplinary decision taken by the regulatory bodies, and I would not propose it if it would have that effect."*

Hansard, 13th December 2001 at Col 424

CRHP will need to have a mechanism in place which enables it to identify potential s.29 referral cases, to examine the case in sufficient detail to decide whether it needs to receive further details of that case and to formulate a referral to the courts within a 56 day period.

Given the nature of CRHP's task it should be looking for decisions which involve a sanction being imposed which is significantly at odds with the allegation that HPC has determined is well founded. It is not the task of CRHP to re-consider findings of fact (i.e. whether or not the allegation was well founded). Consequently, to the extent that CRHP needs to see transcripts, there is a strong argument to suggest that those transcripts should be limited to the events which follow the finding of fact stage of the hearings, that is the determination that a particular allegation is well founded, any argument as to mitigating or aggravating factors and the sanction imposed.

Under the HPC fitness to practise procedures Panels will adopt a two stage determination process, retiring to consider their verdict (findings of fact), then returning to announce their decision and, if they have determined that an allegation is well founded, to hear argument on mitigating or aggravating factors before retiring again and then announcing what, if any, sanction is to be imposed.

**Conclusion**

Given the separation of the finding of fact and sanctioning phase of HPC fitness to practise proceedings from the main hearing, it should be possible for the transcripts of the finding of fact and sanctioning phase to be produced ahead of the main transcript and within a timescale that adequately meets CRHP's needs. On that basis HPC could continue to use a single stenographer at hearings. To produce full transcripts at short notice for CRHP's purposes would involve substantial additional costs to HPC, including the use of additional stenographers; costs which are not justified given the nature of the s.29 process and the fact that it is intended to be used only in rare and exceptional circumstances.