Agenda Item 10

Enclosure 7

Health and Care Professions Council
04 July 2018

Proposed Approach to a revised threshold policy for the acceptance of Fitness to Practise concerns

For discussion

From John Barwick, Executive Director of Regulation and Brian James, Head of Fitness to Practice

Council, 4 July 2018

Proposed Approach to a revised threshold policy for the acceptance of Fitness to Practise concerns

Executive summary and recommendations

Introduction

In their 2016/17 Performance Review, the Professional Standards Authority (PSA) raised a number of concerns about our Standard of Acceptance (SOA) policy and its application. These concerns informed the PSA's decision that we had not met Standards 1, 3, 5, and 8 of the Standards of Good Regulation (see Background below for details of each Standard). In light of the PSA's findings we committed to carrying out a review of the SOA policy; this forms a central workstream in the FTP Improvement Plan.

The review provides an opportunity for us to look beyond the PSA's comments on the SOA policy itself, and to take a more wide-ranging look at the policies, processes and guidance that govern decision-making in the initial stages of our fitness to practise process. Since March 2018, a programme of work has been undertaken to inform the review, and time has been invested to evaluate the current way of working in light of the findings. Further details of the review activities undertaken and proposals for future developments are contained in the attached paper.

In summary, it is proposed that we maintain a threshold policy. The threshold should be one that allows HCPC to appropriately identify those fitness to practise concerns that require investigation, and to manage resources effectively in carrying out our public protection objective.

To achieve this, a new approach to a threshold policy is required to ensure that the decisions made in the initial stages of the fitness to practise process are proportionate, risk-based and consistent. The approach outlined in the attached paper not only addresses the concerns identified by the PSA, but also takes account of the findings of the internal HCPC assurance and evaluation activities as well as reflecting the broader regulatory reform agenda.

Initial legal advice on our proposed approach has been sought, which indicates that it is appropriate to move ahead to explore these areas further. Further and additional legal advice on the detail of the revised threshold policy will be sought as we develop this over the coming months.

Working in collaboration with the Policy and Communications teams, a programme of stakeholder engagement activity is proposed in order to seek views on the proposed revised threshold approach.

An outline timetable for the next stages of developing a new threshold policy is included at the end of the attached paper. The intention is to an update on the outcome of the additional work undertaken and a draft of the threshold policy to the Council meeting in September.

Decision

The Council is asked to endorse:

- the approach to a revised threshold policy;
- the approach to stakeholder engagement activity on the revised policy;
- the proposed timescales for returning to Council in September with a draft threshold policy and update paper.

Background information

The review of the Standard of Acceptance policy and our approach to cases received under Article 22(6) forms part of the scheme of work, set out in the FTP Improvement Plan, to regain the following particular Standards of Good Regulation:

- Standard 1 – Anybody can raise a concern, including the regulator, about the fitness to practise of a registrant.

- Standard 3 – where necessary, the regulator will determine if there is a case to answer and if so, whether the registrant's fitness to practise is impaired or, where appropriate, direct the person to another relevant organisation.

- Standard 5 – the fitness to practise process is transparent, fair, proportionate and focused on public protection.

- Standard 8 – all fitness to practise decisions made at the initial and final stages of the process are well reasoned, consistent, protect the public and maintain confidence in the profession.

Resource implications

There are no additional resource implications.

Financial implications

None.

Appendices

Appendix 1 – Proposed Approach to a Revised Threshold Policy

Date of paper
22 June 2018

Proposed Approach to a revised threshold policy for the acceptance of Fitness to Practise concerns

Review of the Standard of Acceptance policy

1. Following the case file audit conducted as part of the 2016/17 Performance Review, the Professional Standards Authority (PSA) raised concerns about our Standard of Acceptance (SOA) policy and its application. These concerns were identified in their assessment of our performance against Standards of Good Regulation 1, 3, 5 and 8, and informed the PSA's decision that those standards had not been met.

2. The key issues identified by the PSA in relation to the SOA and its application were:

    - a too high a high threshold - which was not a moderate of proportionate test - was being applied in some instances;
    - the application of the policy was inconsistent;
    - Some cases were being closed prematurely, including cases that should have proceeded to the Investigating Committee Panel for consideration;
    - the policy could potentially act as a barrier to complainants;
    - the policy does not reference the Standards of Conduct, Performance and Ethics and as such there is no relationship between the two;
    - it can lead those who are applying the policy to apply the 'realistic prospect test' which is the responsibility of the Investigating Committee Panel;
    - the reasons provided for the SOA case closure decisions, and our communication of those decisions, were not always as clear as they could be;
    - decisions about whether the SOA is met or not sometimes changed with little evidence to understand why the decision had changed.

3. In their assessment against Standard 3, the PSA also raised concerns about HCPC's approach to obtaining legal advice in relation to cases that arise under Article 22(6) of the Order. The PSA identified that we took an inconsistent approach to obtaining legal advice in these cases, that the status of that legal advice was unclear and that it appeared to take the place of a case management decision on the SOA rather than help inform it.

4. As part of our response to the Performance Review, HCPC committed to carrying out a review of the SOA policy. It was recognised that a fundamental review of all aspects of the SOA, including its purpose, drafting and application, as well as of the other policies and process that govern the first stage of the fitness to practise process, provided an opportunity to comprehensively address the concerns raised by the PSA, and to look beyond these to identify other areas for improvement. The holistic approach to the review has provided an opportunity to reflect on how the various policies that have developed alongside the SOA can be consolidated, but not necessarily in alignment with, each other to ensure there is a clear, accessible, streamlined and easily understood fitness to practise threshold.

5. In undertaking this review, a range of information from a variety of sources has been drawn upon, in order to understand whether the SOA is pitched at an appropriate level, how it operates as a case progression and management tool and how it is applied as a decision making threshold test.

6. In addition to the findings of the PSA Performance Review, the review is based on:

- a benchmarking exercise against the other health and social care professionals regulators' threshold policies and approach to invoking their equivalent Article 22(6) powers, where relevant;
- outcome of internal and external audits (using our external legal supplier) of recent SOA decisions;
- an evaluation of the SOA against our other initial stage policies and processes, including the HCPC's Approach to Fitness to Practise policy and the new Approach to Investigating Health Matters policy approved by Council in May 2018;
- learning identified from the interim assurance measures put in place in September 2017 to manage the risks in relation to the SOA policy, including from the senior management sign-off of decisions;
- feedback gathered during the review of the realignment;
- new PSA dataset questions introduced in April 2018.

Background to the current process

7. A number of policies and processes are currently in place that govern the first stage of the fitness to practise process and help determine which matters require full investigation and referral to the Investigating Committee panel. Below is a brief summary of the background of each of these policies:

8. The Standard of Acceptance policy is the key document that sets out the threshold concerns must normally meet before they will be investigated by the HCPC. The policy has operated since 2009 and has developed as the volume and nature of our fitness to practise work has changed. In May 2015, substantial changes to the policy were made with the introduction of the 'credible evidence' test, which was introduced to help manage a continued increasing trend in the volume of referrals. The test extended the powers of Case Managers to close cases at the early stages by including an assessment of the evidential basis for allegations of fitness to practise.

9. The SOA sits alongside our Article 22(6) process. Under Article 22(6) of the Order the HCPC has the powers to investigate information about a registrant's fitness to practise that does not come to us in the form of a referral. These cases may include registrant self-referrals, anonymous complaints, matters in the media or concerns about a registrant arising from a public inquiry or official review. The powers allow the HCPC to act in the public interest where these concerns arise and take a proactive approach to maintaining public protection.

10. The Order does not require HCPC to seek legal advice prior to commencing an investigation under Article 22(6). However, Council has historically asked the Registrar to do so in order to ensure that our powers are used proportionately. This approach pre-dates the introduction of the Standard of Acceptance policy. As such, cases received this way are subject to an additional process and test prior to being referred for a full investigation.

11. In December 2016, Council approved the HCPC's Approach to Fitness to Practise policy. This is an important document that explains how HCPC will deliver our public

protection mandate through our fitness to practise processes. It includes the assessment of what is fitness to practise, and as such it provides a context through which the threshold policy should be understood. However, it is not set out in the documentation how this policy should inform the interpretation or application of the SOA.

Outcome of the review

12. It is HCPC's position, and one that the PSA accepts, that it is necessary to have a threshold policy that allows identification of those cases that raise a fitness to practise concern and require investigation. It is important that the threshold is set at the right level that allows effective management of resources, and ensure these are deployed only to those cases that warrant investigation in pursuit of public protection. The threshold should also enable and support the case management teams to make informed and appropriate decisions in line with HCPC's public protection mandate.

13. The Standard of Acceptance was introduced with the aim of ensuring that available resources were used effectively to protect the public and were not diverted into investigating matters that do not raise fitness to practise concerns. Our response to the PSA Performance Report recognised that consistent application of the threshold was an area we would be focusing on.

14. The ongoing FTP Improvement Project provides an opportunity to re-examine the threshold, by comparing our approach to other regulators, and also in the way Fitness to Practise teams are structured and supported. It also allows reflection on the wider regulatory positions being advanced in PSA's *Rethinking Regulation*, and what may constitute a barrier to raising a concern.

15. The conclusion of the review is that a different, more agile approach to a threshold test is needed, one that emphasises and supports our core purpose of maintaining public protection through proportionate, risk-based and robust regulatory decisions. This approach will be one more clearly aligned with the principles of right-touch regulation to ensure that our decisions are transparent, fair and consistent, and that the right regulatory action is taken to manage any risk to public protection. This paper aims to set out the high-level statement of how we intend to achieve this, and what further work is planned, following Council discussion in July.

Proposed revised threshold policy

16. The central tenet of the proposal is that the revised threshold policy will be orientated around a two-stage decision-making process. This is to ensure that appropriate decisions are made on cases early in the process, and provide a greater focus to the investigation of cases that proceed beyond the first stage.

17. It will set out how we decide that a concern received is something appropriate for the HCPC to deal with. It will then go on to explain the approach to those concerns identified as raising potential fitness to practise issues.

18. The decision making process at both stages of the revised threshold will have safeguards built in to ensure that HCPC acts proportionately, appropriately and in the public interest when exercising our regulatory powers. All concerns, no matter how they are received, are assessed in the same way against the threshold. As the seeking of legal advice for Article 22(6) cases pre-dated the introduction of the SOA,

the review of the threshold over the summer will encompass the approach to these cases. This will be set out in the policy paper for Council in September.

19. The proposed threshold test is aligned with the Approach to Fitness to Practise policy and the two will be consolidated into one document. The threshold will sit alongside the new Approach to Investigating Health Matters and relevant connections will be drawn between the two.

Triage decision

20. When Fitness to Practise receives a concern, we will consider whether the information provided is within our jurisdiction to investigate. This decision will take place during the triage stage and will be applied to any and all concerns raised with us, regardless of the route by which the concern is brought to our attention.

21. The triage decision will be a simple assessment as to whether the concern is within our remit. We will consider whether the concern:
    - relates to an HCPC registered professional;
    - has been made in writing (reasonable adjustments will be made where a concern cannot be made in writing);
    - relates to any of the statutory grounds set out in our legislation (i.e. is it capable of amounting to an allegation of impaired fitness to practise?)

22. This triage decision will be a low bar and will only allow those concerns that we do not have the statutory powers to investigate to be closed at this stage. For example, those concerns relating to the level of service provided by an organisation, or where the registrant's professional role is incidental to the matter, such as a boundary dispute between a registrant and their neighbour.

23. The intention of this decision at the triage stage is not to expand the categories of cases we can close, or to close cases earlier than we otherwise would. Rather, this has been introduced to ensure we explicitly record our consideration of whether a matter is something we can deal with. This will enable us to take stock at an earlier stage of the concerns we can and should investigate, and to plan more effectively how we will go about doing so. It will also enable us to meet the new PSA dataset reporting requirements, which monitor length of time from receipt to a jurisdiction decision.

24. We may need to seek further information or clarification on receipt of a concern to enable us to make a full and informed decision about whether we have jurisdiction to investigate the matter.

25. If the concern is one that is within the jurisdiction of the HCPC to deal with it will move forward through our process for further investigation.

Threshold test

26. Where a concern is within our jurisdiction, we will carry out an investigation to obtain the relevant available information about that concern. This may involve gathering information from a number of sources.

27. Once we have received that information we will consider whether it amounts to an allegation that the registrant's fitness to practise may be impaired on one or more of the five statutory grounds set out in the Order.

28. This threshold will be aligned with the standards expected of our registrants, as described in the Standards of Conduct, Performance and Ethics, and the Standards of Proficiency for each profession. It will also clearly set out that the HCPC has a statutory duty to act in the public interest to ensure that the public is protected and that public confidence in the sixteen professions it regulates is maintained.

29. The threshold is not designed to encroach upon the remit of the Investigating Committee panel. It is the role of the panel, not HCPC Case Management teams, to consider whether there is a realistic prospect of the facts or grounds of an allegation, or the registrant's impairment, being found proved at a final hearing. The threshold also does not pre-empt whether the Investigating Committee panel are likely to make a no case to answer decision. Rather, the threshold is a deliberately low test that asks only whether this is an *allegation* of impaired fitness to practise.

30. If the threshold test is not met then the case may be closed.

31. If the threshold is met then the case must be referred to the Investigating Committee panel for their consideration. The case will pass into the jurisdiction of the Investigating Committee and cannot be closed other than by the panel making a no case to answer decision. The only exception to this may be where the HCPC loses jurisdiction to investigate a matter prior to consideration by a panel. For example, where a registrant has died, or where a registrant has been struck off the register in relation to another case.

32. Following receipt of the 2016 /17 PSA Performance Review, we put in place new operational guidance for case managers to assist them in their decision-making. We will develop this guidance in line with the new threshold policy to ensure our decision makers are supported to make appropriate, robust and consistent decisions.

Serious allegations of impaired fitness to practise

33. This approach to the two-stage threshold consideration does not mean that decision making in serious cases would be slowed down. The stages of the test can be applied simultaneously, and would therefore not impact negatively on the time taken to take swift action. It allows for the fact that some cases are so serious that there will be a presumption that they amount to an allegation of impairment. That is because, if proven, they are likely to result in us taking action on a registrant's registration.

34. These cases will therefore be investigated on the basis that they will be referred to the Investigating Committee panel. Due to the higher risk to public protection and the public interest presented by these types of cases, we consider that it would not be appropriate for regulatory decisions about their outcome to be taken outside of the Investigating Committee panel. This approach also clarifies the remit of the panel of the Investigating Committee to impose an interim order. Such cases would include:

    - serious violence;
    - sexual assault or indecency;
    - any criminal offence relating to a child;
    - improper sexual, emotional or financial relationship with a service user;
    - any criminal offence where the registrant has been given a custodial sentence;
    - dishonesty;

- serious or reckless errors in a registrant's practise which have caused, or have the potential to cause, serious harm to service users.

Low-level offences

35. The Standard of Acceptance currently sets out certain low-level offences that are considered not to meet our threshold because they do not amount to an allegation of impairment. We are not seeking to change this. These offences are:

    - minor motoring offences;
    - fixed penalty motoring or parking notices, or penalty notices issued under a public transport fare scheme;
    - drink driving offences where the penalty does not exceed the minimum mandatory disqualification and there are no aggravating circumstances;
    - protected cautions or convictions.

36. In exceptional circumstances, such as where service users or the public have been placed at risk, we may consider that the threshold for an allegation of impairment has been reached despite the seemingly low-level nature of the offence.

Remediation

37. A particular theme that arose from our review was lack of certainty about the extent to which we should take account of a registrant's remediation, particularly where the issues raised were not recent. The revised threshold policy will therefore also explain how we approach information we receive that indicates that steps have been taken by the registrant to remediate fitness to practise concerns since the incidents which led to the referral. If there is evidence that a registrant has undergone retraining, learning or a period of performance supervision, and has demonstrated that any remediation and improvements are effective and embedded in their practise, we may decide that they no longer present a risk to members of the public.

38. We would need to assess whether the nature of the incidents are so serious that the Investigating Committee is still required to consider the case. If we decide they are not then we may consider that the case does not need to proceed through the fitness to practise process.

Next stages of the review

39. Over the summer, we intend to carry out additional activities to inform our review and the drafting of our revised threshold policy.

40. We will seek further legal advice on the detail of our policy in order to ensure that it is compliant with, and does not extend beyond, our statutory powers and legislative requirements.

41. In collaboration with our Policy and Communication teams we will engage with key stakeholder groups on our proposed approach to the revised threshold policy. This will be an expedited engagement exercise targeting stakeholders mostly through existing relationships, and using electronic questionnaires and feedback mechanisms. This approach will balance the desire for input with the need to implement and test the new approach. The engagement activities will mirror those undertaken as part of the recent review into our Indicative Sanctions Policy. The

groups we will invite to comment will include:

- Patient groups
- Professional bodies
- Unions
- Other healthcare regulators
- Equality and Human Rights Commission

42. We are currently developing an electronic survey as the means of seeking comments. This will be promoted through our existing channels, such as the FTP Partnership Forum Newsletter, HCPC social media, website and scheduled external events.

43. The outcome of the above activities will inform our thinking on the new threshold policy, which will be presented to Council in September for approval. We will also update Council on these planned activities.

44. In summary, the proposed timescales for the next stage of review are:

    Mid July to Mid-August:

    - Seek more comprehensive legal advice on first draft of the threshold policy;
    - Stakeholder survey is open for comments for four weeks.

    Mid-August to early September:

    - Draft policy is reviewed in light of legal advice and external stakeholder comments;
    - Further legal advice is sought as necessary;
    - Final draft is finalised for approval by Council.