

Fitness to Practise Committee 26 May 2011

Investigating Committee decision review

Executive summary and recommendations

Introduction

At its meeting on 25 February 2010, the Committee considered and approved the proposed approach to reviewing decisions made as to whether is a case to answer and final and review hearing decisions. The Committee also agreed that the Executive should provide a report on the review of decisions on a six monthly basis. This paper is the second of those reports covering Investigating Committee decision made between 1 September 2010 and 31 March 2011.

In total 310 decisions were made during the course of 49 Investigating Panel meetings. Six of decision were in cases where further information was requested, and two of those cases were considered a second time within the audit period.

Decision

This paper is for discussion

Background information

In 2010-11 532 cases were considered by panels of the Investigating Committee. Panels are scheduled to take place seven times a month.

Resource implications

To the end of August 2010, the audits were undertaken by Lead Case Managers within the Fitness to Practise Department. Since September, the audits have been undertaken by the Policy Department.

Financial implications

Appendices

- Report on the review of Investigating Committee decisions
- Audit form - Decisions as to whether there is “Case to Answer” made by or on behalf of the Investigating Committee (approved by the Fitness to Practise Committee in February 2010)

Date of paper

16 May 2011

Review of Investigating Committee Decisions September 2010 – March 2011

1. Introduction

- 1.1. At its meeting in October 2010, the Committee considered the first report on the review of Investigating Committee decisions between April 2010 and 31 August 2010. This is the second report and covers the period 1 September 2010 and 31 March 2011. Panels of the Investigating Committee met on 49 occasions between 1 September 2010 and 31 March 2011. 310 decisions were made by Investigating Committee Panels relating to 308 cases (2 cases were considered on more than one occasion).
- 1.2. This report divides analysis on the audit into the four sections set out in the audit form (a copy of which is attached), i.e. investigation, decision, other considerations and policy issues. The form itself has been transferred to an Access database for ease of use and reporting on the outcome of the audit.

2. Investigation

- 2.1. The first point the person reviewing the decision is asked to address is whether the case meets the standard of acceptance of allegations. All cases reviewed were assessed as meeting the Council's standard of acceptance for an allegation. The standard of acceptance is detailed in the practice note, The Standard of Acceptance for Allegations, and any case being considered by the Investigating Committee should meet this standard. A case meets the standard of acceptance if it is received in writing and:
 - (1) sufficiently identifies the registrant against whom the allegation is made; and
 - (2) set outs:
 - (a) the nature of the impairment of that registrant's fitness to practise which the complainant alleges to exist; and
 - (b) the events and circumstances giving rise to the allegation;in sufficient detail for that registrant to be able to understand and respond to that allegation.

An allegation is also to be treated as being in the specified form if it constitutes:

- (1) a statement of complaint prepared on behalf of the complainant by a person authorised to do so by the Director of Fitness to Practise which:
 - (a) contains the information set out above; and
 - (b) has been verified and signed by the complainant; or
 - (2) a certificate of conviction, notice of caution or notice of any other determination provided by a court, the police or any other law enforcement or regulatory body.
- 2.2. Of the cases considered, four had previously been considered or an investigation started by another organisation. In two cases the British Psychological Society had begun or had undertaken an investigation. The remaining two cases transferred from the Hearing Aid Council when the HPC took responsibility for the regulation of hearing aid dispensers in April 2010.
- 2.3. There was one case identified where the HPC sought advice from a registrant assessor. The process for appointing assessors was approved by Council in May 2010 and a revised practice note in this area is on the agenda for consideration by the Committee at this meeting. The types of cases where it may be appropriate to appoint a registrant assessor are where:
- the issues raised by the allegations concern profession specific matters which are detailed in nature or relate to a specialised area of practice;
 - the issues are sufficiently specific or specialised that knowledge of them is unlikely to be common to all members of the profession and, consequently, the typical registrant panel member may not have the requisite skills and knowledge;
 - the evidence which forms part of the case includes detailed information that requires interpretation by a registrant with specialised knowledge or requires particular equipment which will not be available to the Panel (e.g. patient notes, diagnostic images or results; NOAH audiological records).

The panel found there was no case to answer in the case where registrant assessor advice had been sought and commented on the usefulness of the report.

- 2.4. In 70 of the cases considered (23%), legal advice was sought before the case was considered by the Investigating Committee. In the previous review of decisions this figure was 14%. The nature of legal advice requested at the early stage of the case can include:

- Article 22(6) advice which is required where the Council is making the allegation;
 - Advice on whether the case meets the standard of acceptance; and
 - Advice on evidential issues.
- 2.5. The number of requests for information made by the HPC during the course of the investigation across the cases ranged from 0 to 18. The mean and median number of requests was three and two respectively. These requests may have been made to one or a range of individuals and organisations, for example the registrant's employer, the police or the member of the public who made the allegation. In some cases there is enough information to proceed to an Investigating Committee without making any further requests for information. For example, in cases where the registrant made a self referral and the case was first considered by a Registration Panel and therefore all the relevant information is already held by HPC.
- 2.6. In cases where information is requested but is not provided, follow up letters are sent and these are included in the numbers above. Cases are reviewed at least every four weeks in the first two months and then every two weeks for cases that have been in the investigations process for more than two months. This helps to ensure that information is obtained in a timely manner, and where delays are occurring in the information being provided, more frequent contact is made with the individual from whom the information is being sought. Regular reports are provided to the Committee giving detail on the length of time cases take to proceed through the process.
- 2.7. Article 25(1) of the Health Professions Order 2001 enables the HPC to demand information from any party, except the registrant who is the subject of the allegation. This power is used where an individual or organisation refuses to provide information, or where there is no response to the requests that are made. In some instances an organisation may ask the Case Manager to quote the powers the HPC has to require information for their records or audit trail. This power was quoted in 15 of the cases considered by the Investigating Committee in the audit period. In the previous audit period this figure was considerably higher at 67. In the autumn of 2010 a review of the department's standard letters was completed and a number of amendments rolled out to the team. One of these changes was to remove standard paragraphs in some letters making reference to Article 25(1) powers. This was to ensure that this power was only used and referred to when appropriate and that specific information was requested. This may account for the reduction in the use of Article 25(1).
- 2.8. The HPC does not provide the registrant's response to the person who made the allegation. The Committee considered and approved a paper at its meeting in February 2010 which set out the HPC's approach in this area. This was in response to the CHRE report '*Handling complaints: Sharing the registrant's response with the complainant*'. Clarification is

sought on a case by case basis where there are points raised by the registrant that require clarification. From the audit of cases, there was one instance where the Case Manager went back to the complainant for clarification following the registrant's response. Information including patient notes was sought as a result of the response. Case Managers will continue to be reminded of the need to request clarification where appropriate.

3. Decision

3.1. The 310 decisions made by the Investigating Committee are broken down as follows:

- case to answer – 169 (54%)
- no case to answer – 135 (44%)
- further information – 6 (2%)

3.2. Of the six cases where further information was requested, there were three cases highlighted where the need for the further information could have been identified and sought prior to the panel meeting. The information that could have been identified was:

- patient records;
- information about the registrant's job description and training; and
- greater clarity and specificity with respect to dates and names within the allegation.

3.3. In 43 of the cases audited, the Investigating Committee made amendments to the allegation before either making a case to answer decision or referring the case back for further information. This is an important role of the panel as it is responsible for the cases referred to a final hearing and the final drafting of the allegations. The type of amendments the panel made include:

- amending minor inaccuracies, for example an incorrect date, and the names and dosage of a particular drug;
- finding a case to answer in relation to some elements of the allegation and not in others;
- rewording or adding additional clarity to some particulars of the allegation; and
- splitting or combining elements of the allegation.

3.4. If a panel wishes to make substantial changes to the allegation or add additional heads of allegation that the registrant has not had the opportunity to respond to, the case must be sent back for the allegations to be re-drafted and the registrant provided with a further opportunity to respond. This was the case in the three cases referred to in 3.3 above.

3.5. The test applied at the Investigating Committee stage is the 'realistic prospect' test. The practice note, "Case to Answer" Determinations, sets

out how this should be applied. The test applies to the whole of the allegation, that is:

1. the facts set out in the allegation;
 2. whether those facts amount to the “ground” of the allegation (e.g. misconduct or lack of competence); and
 3. in consequence, whether fitness to practise is impaired.
- 3.6. There were 13 cases (4%) where the panel did not refer to the realistic prospect test in relation to all the elements of the allegation as set out above. This doesn't necessarily mean that the panel did not apply the test, but it is not evident from their decision that they did so. In 8 of the 13 cases the panel found there was a case to answer, and in 5 cases they requested further information.
- 3.7. In the first report provided to the committee in October 2010, the number of cases where the Investigating Committee did not apply the realistic prospect test to all elements of the allegation was much greater at 76. There may be a number of reasons for this reduction. Firstly, the template and guidance for panel decisions was amended in September 2010 and now sets out more clearly the information that the panel need to include in their decision. Secondly, Case Managers acting as ICP co-ordinators have been in attendance at all ICP's for the duration of the meeting since September 2010. This should have provided greater consistency in the advice provided to panels. Finally, between September and November 2010 the Head of Case Management or the Investigations Manager attended all Investigating Committee meetings to update panels on the changes that had recently been implemented and to remind the panel of the test to apply and how this should be approached. These measures were outlined in a paper considered by the Committee at its meeting in October 2010. The reduction in cases where the test has not been applied indicates that the measures put in place last autumn have had a positive effect.
- 3.8. In twelve cases, it was felt by the auditor that the decision was not well reasoned. The issues identified with the decisions were that there was a lack of detail or explanation for the decision and that reasons were not linked to the realistic prospect test.
- 3.9. In the previous review 56 cases were identified as not being well reasoned. This improvement may be attributed to the measures outlined in point 3.7 above. The guidance provided to panels was revised and states:

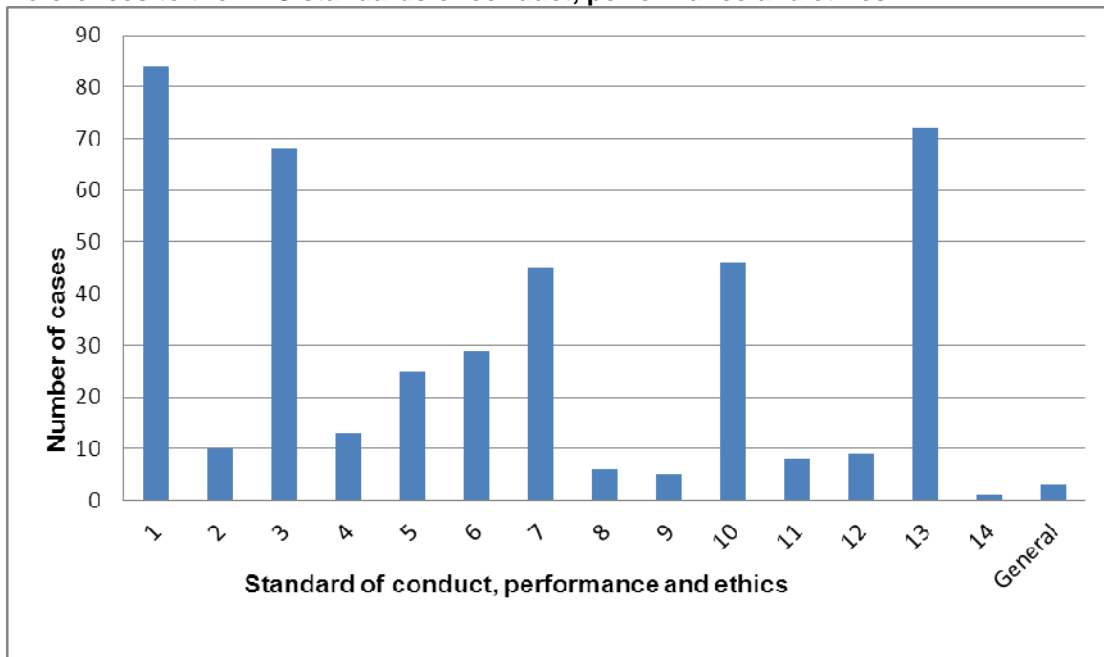
“Reasons

The Panel must give clear and detailed reasons for its findings on each element of the allegation. Those reasons must explain the Panel's rationale for its findings and must not simply be a repetition of the evidence or comments to the effect that the Panel has considered all of

that evidence. Those reasons should be sufficiently detailed for a person to be able to read and understand the decision reached and the reasons for it without the need to refer to any other documents.”

3.10. Panels can make reference to the HPC standards in the course of their decision and did so 139 of the cases audited. The vast majority of the references were made in relation to the standards of conduct, performance and ethics (SCPE). An allegation cannot be made to the effect that a registrant has breached the SCPE, but panels can refer to the standard(s) that are relevant to a particular case in the course of their decision. The graph below shows the number of times each SCPE was referred to. In most cases more than one standard was referred to.

References to the HPC standards of conduct, performance and ethics



3.11. The most commonly referenced standards were:

- 1 - You must act in the best interests of service users (84 cases);
- 3 - You must keep high standards of personal conduct (68 cases); and
- 13 - You must behave with honesty and integrity and make sure that your behaviour does not damage the public’s confidence in you or your profession (72 cases).

This is consistent with the previous report.

3.12. Fifty one cases referenced the standards of proficiency for the particular profession. Some of these cases also had references to the SCPE.

4. Other Considerations

- 4.1. Since 1 September 2010, panels have had the option of including learning points in their decisions. This is applicable where it is decided that there is a realistic prospect that HPC will be able to prove the facts and the ground of allegation, but not that fitness to practise is impaired. The auditors were asked to consider, in cases where a no case to answer decision had been made, if it might have been appropriate for the panel to provide the registrant with any learning points, and in addition whether then panel did include learning points.
- 4.2. There were six cases where it was felt that the panel could have provided learning points but didn't do so. The areas in which panels could have provided further guidance to registrants were:
 - communication;
 - record keeping; and
 - use of language.
- 4.3. There were 16 cases in which the panel did include learning points in its decision. This amounts to 12% of the 135 cases where a no case to answer decision was made. However the number of cases where learning points could have been applied is less than 135. Learning points are only applicable in cases where there is a realistic prospect that HPC will be able to prove the facts and the ground of allegation, but not that fitness to practise is impaired.
- 4.4. The areas referred to in the learning points included in those 16 decisions were:
 - the importance of maintaining professional relationships with colleagues;
 - the need to reiterate verbal advice given to patients in writing;
 - the importance of keeping records and the crucial role that such records play in effective practice;
 - consideration of undertaking appropriate retraining in a particular area;
 - the need to adequately identify and assess the health and social care needs of service users;
 - the need to communicate clearly with patients;
 - the responsibility on registrants to declare convictions; and
 - the use of peer review and case discussion with colleagues.
- 4.5. In 13 cases, it was felt by the auditors that consideration could have been given to resolving this case in another way had the option been available. Comment was made that the cases could possibly have been resolved by the employer at a local level. These cases were referred to the HPC by members of the public, employers and other registrants. An on-going piece of work being undertaken jointly by the Policy Team and the Fitness to Practise Team is currently looking into alternative mechanisms to resolve disputes which may have been applicable in these cases.

5. Policy issues

- 5.1 Some policy issues were identified from the cases including:
- record keeping;
 - scope of practise;
 - patient confidentiality;
 - scope of practise; and
 - CPD.

These cases will be reviewed in more detail to determine whether there is anything further that HPC needs to consider and whether any additional guidance can be offered to registrants in these areas.

6. Areas of on-going work arising from the audit

- 6.1. Further training will be provided to Case Managers in areas including:
- The need to request clarification from the complainant on receipt of the registrant's response where appropriate.
 - Ensuring all relevant information, including patient notes and relevant dates are requested in advance of the Investigating Committee where necessary.
 - The use of registrant assessors in cases where this may assist the Investigating Committee.
- 6.2. Training will be provided on an on-going basis to panels to ensure continued improvement in areas including:
- The need to provide reasons for their decision that can be easily understood by all.
 - The application of the realistic prospect test.
 - The use of learning points where in appropriate in no case to answer decisions.
- 6.3. Information will be fed into the on-going work on alternative mechanisms to resolve disputes.
- 6.4. The policy areas identified will be reviewed in individual cases where identified.

Audit Form
**Decisions as to whether there is “Case to Answer” made by
or on behalf of the Investigating Committee**

Case details

Case name	
Case reference	
Date of Decision	
Complainant Type	
Decision by	

1. Investigation

Allegation meets the Standard of Acceptance?	Yes/No [Identify the registrant/Identify complainant/provide allegation in sufficient detail/is it about fitness to practice]
Has the case previously been considered by another organisation (e.g. BPS/HAC)?	Yes/No
Expert or Clinical Advice sought?	Yes/No/Reasons
Legal Advice sought?	Yes/No/Reasons
Number of requests for information made	
Article 25 powers used?	Yes/No
Further clarification requested on receipt of registrants observation from complainant or another third party?	Yes/No
Should further clarification have been sought?	Yes/No/Reasons

2. Decision

What was the decision?	Case to Answer/No Case to Answer/Further Information
If further information was sought, was this a decision that could have been reached before the Investigating Committee met?	Yes/No/Reasons
Was the allegation amended?	Yes/No/Reasons
Has the realistic prospect test been applied to the whole of the allegation?	Yes/No

Facts	Yes/No
Ground	Yes/No
Impairment	Yes/No
Is this the decision clearly reasoned?	Yes/No/Comments

3. Other Considerations

If the decision was “no case to answer” is it appropriate to provide the registrant with any learning points?	Yes/No
If Yes, what is that learning	Comments
If it were possible, should consideration have been given to resolving this case in another way?	Yes/No/Comments

4. Policy issues

Are there any emerging policy issues?

Audited by:

Date: