

Fitness to Practise Committee 21 October 2010

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 first of those reports covering Investigating Committee decision made between 1 April 2010 and 31 August 2010.

In total 223 decisions were made during the course of 34 Investigating Panel meetings. Fourteen of decision were in cases where further information was requested, and six of those cases were considered a second time within the audit period.

Decision

This paper is for discussion

Background information

In 2009-10 499 cases were considered by panels of the Investigating Committee and it is forecast that over 600 cases will be considered in 2010-11. 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. From September, the audits will be 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

4 October 2010

Review of Investigating Committee Decisions April 2010 – August 2010

1. Introduction

- 1.1. Panels of the Investigating Committee met on 34 occasions between 1 April 2010 and 31 August 2010. 223 decisions were made by Investigating Committee Panels relating to 217 cases (6 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, one had previously been considered or an investigation started by another organisation, in this case the British Psychological Society. This particular case was transferred to HPC when practitioner psychologists became registered by HCP in July 2009.
- 2.3. There were no cases identified where it would have been appropriate for HPC to seek the advice of an expert or 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).
- 2.4. In 31 (14%) of the cases considered, legal advice was sought before the case was considered by the Investigating Committee. 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 14. The mean and median number of requests was three. 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 as 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 67 of the cases considered by the Investigating Committee in the audit period.
- 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.
- 2.9. In the course of reviewing the cases, it was noted that there were eight additional cases where it may have been appropriate to seek clarification from the person who made the allegation. This was generally in relation to confirming the registrant's version of events or reasons behind the behaviour with the employer. However, in all these cases a decision was reached by the Investigating Committee and they did not request further information. In four cases a case to answer decision was reached and in four cases it was found there was no case to answer.
- 2.10. Further training will be provided to Case Managers in this area to ensure that clarification on information provided by the registrant is being sought where appropriate. Paragraph 6.1 below sets out the areas of training identified.

3. Decision

- 3.1. The 223 decisions made by the Investigating Committee are broken down as follows:
- case to answer – 127 (57%)
 - no case to answer – 82 (37%)
 - further information – 14 (6%)
- 3.2. Of the 14 cases where further information was requested, there were four cases identified where the need for the further information could have been identified and sought prior to the panel meeting. In three of those cases the panel requested patient notes. This information could have been sought by the Case Manager, however, it was not always obvious on the face of the allegation that the Investigating Committee would require this information in order to make a case to answer decision. In the remaining case, a serious incident was referred to in the documentation which was not specifically set out in the allegations. The case was sent back by the Investigating Committee for the allegations to be redrafted in include additional allegation.
- 3.3. In 23 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 that are referred to a final hearing and the final drafting of the allegations. The type of amendments the panel can make at this stage include:
- amending minor inaccuracies, for example an incorrect date;
 - finding a case to answer in relation to some elements of the allegation and not in others; or
 - rewording or adding additional clarity to some particulars 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 one case referred to in 3.2 above.
- 3.5. The test applied at the Investigating Committee stage 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 76 cases (34%) 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 35 of the 76 cases the panel found there was a case to answer, and in 41 they found there was no case to answer.
- 3.7. In 56 cases, it was felt by the auditor that the decision was not well reasoned. The types of issues identified with the decisions are as follows:
- decisions were too brief and did not point to which evidence supports the outcome;
 - decisions were poorly worded;
 - it was unclear what the findings were in relation to some particulars of allegation; and
 - in one case the panel referred the matter to a Health Committee when misconduct was alleged without a clear explanation why this was the case.

This will be addressed through ongoing training provided to panels and the information from this review of decisions will aid in focusing that training. Paragraph 6.2 below lists the areas of training identified.

- 3.8. As part of the review that has been undertaken of the Investigating Committee stage (a paper further explaining this is on the Fitness to Practise Committee agenda), the guidance provided to panels has been revised and now states:

“Reasons

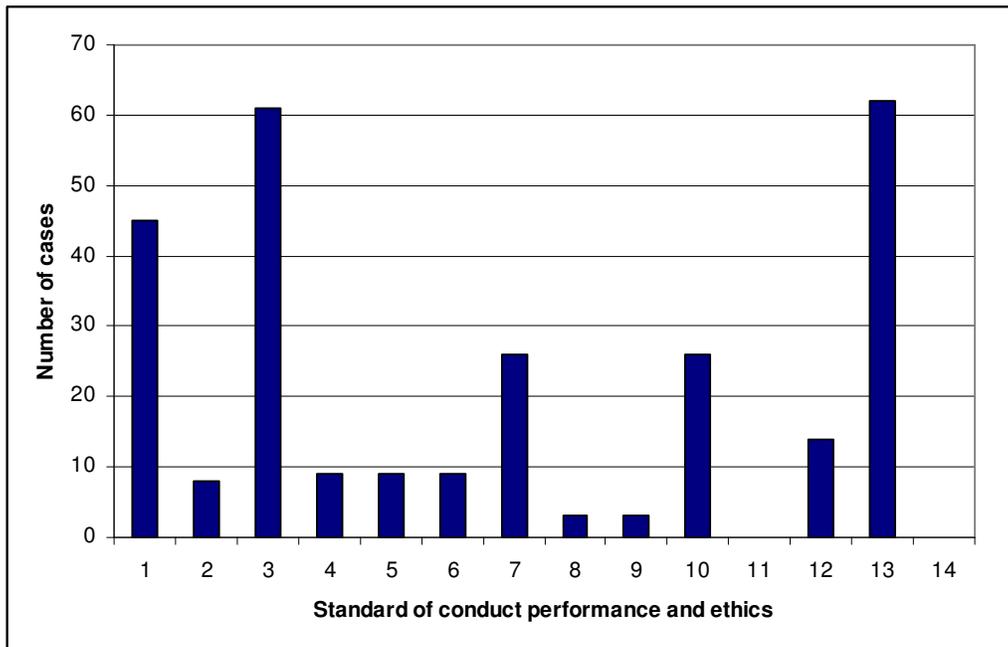
The Panel must give clear and detailed reasons for its findings on each element of the allegation. Those reasons must explain the Panel's rationale for its findings and must not simply be a repetition of the evidence or comments to the effect that the Panel has considered all of that evidence. Those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

This guidance was provided to panels from 1 September 2010 onwards and so doesn't cover decisions made in this audit period. The importance of providing adequate reasons is an ongoing theme of panel refresher training.

- 3.9. Panels can make reference to the HPC standards in the course of their decision and did so 103 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



3.10. The most commonly referenced standards were:

- 1 - You must act in the best interests of service users (45 cases);
- 3 - You must keep high standards of personal conduct (61 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 (62 cases).

3.11. Eleven cases referenced the standards of proficiency for the particular profession. Some of these cases also had references to the SCPE. Very few cases allege solely a lack of competence.

4. Other Considerations

4.1. 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. There were 16 cases identified where this could have been appropriate. The areas in which panels could have provided further guidance to registrants were:

- communication;
- record keeping;
- personal conduct;
- making referrals; and
- complaint handling.

- 4.2. 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. Further details about this are contained in the Investigating Committee process and documents update committee paper. The result from this audit would indicate that there are cases where this can be utilised by panels.
- 4.3. In nine 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. Mediation was most commonly cited as a possible alternative method to resolving cases. In all but one of these cases, however, the panel found there was no case to answer. Under the Health Professions Order 2001, a case to answer decision needs to have been made in order for mediation to be an option available to the panel. Therefore under the current legislation it would not have been a course of action open to the panel in these cases. An ongoing 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.

5. Policy issues

- 5.1 There were no particular policy issues arising from the cases audited in this period.

6. Areas of ongoing 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 patient notes are request in advance of the Investigating Committee where necessary.
- 6.2. Training will be provided on an ongoing basis to panels 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 ongoing work on alternative mechanisms to resolve disputes.

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: