Health Professions Council
Council – 2nd March 2005
Report on the 5th Report of the Shipman Inquiry

Introduction

Safeguarding Patients: Lessons from the Past - Proposals for the Future (Cm 6394), the 5th report of the Shipman Inquiry ('the Inquiry') was published on 9th December 2004. Dame Janet Smith made various recommendations for change based upon her findings regarding the handling of complaints by the General Medical Council (GMC), its procedures and its proposals for the revalidation of doctors. Most of the recommendations are specific to the GMC, but many are relevant to the HPC.

The Inquiry examined the operation of the GMC's fitness to practise (FTP) procedures over a period of 23 years. The Inquiry's Terms of Reference required Dame Janet to make recommendations for the better protection of patients in the future. She states in the summary to the 5th report that the inquiry therefore had to examine the systems for monitoring GP's in place at the present time and those that are envisaged for the future.

The report is very critical of the GMC. In particular, it suggests that significant changes should be made to its FTP processes, including the establishment of free-standing tribunal arrangements, and that the GMC should no longer have a majority of members drawn from the medical profession. If implemented, Dame Janet's recommendations would have a profound effect on regulation of the medical profession and, potentially, significant consequences for HPC and the other UK regulators of health professionals. Some of the proposals would, in effect, bring profession-led self regulation to an end.

Many of the report's recommendations are helpful, not least the timely reminder to NHS bodies of the need to work with the regulators. The report suggests that 'triage' of complaints should be undertaken by Primary Care Trusts (PCTs) to help to decide whether a complaint is to be investigated by or on behalf of the PCT or whether it should instead be referred to some other body, such as the police or a regulator.

A number of the recommendations are specific to the GMC, simply because of the distinctive way it has handled FTP issues when compared to other regulators. For example, Dame Janet notes that, in 2003, GMC administrative staff were responsible for closing 65% of the complaints which were received by the GMC. It is that kind of fact that has prompted the Inquiry to look so deeply into the GMC processes, but the reason for the in-depth examination - and the significantly different approach adopted by HPC and the other UK regulators of health professionals - may well be overlooked by the time the recommendations come to be implemented by the Government.

However, while the composition of HPC and the process it uses for dealing with fitness to practise cases are significantly different from those of the GMC, there are many parallels that can be drawn from the Inquiry's recommendations.

Areas where current HPC procedure accords with the report's recommendations

The Report recommends that the GMC's constitution should be reconsidered, with a view to changing its balance, so that elected medical members do not have an overall majority and the medical and lay members who are to be appointed (by the Privy Council) should be selected for nomination to the Privy Council by the Public Appointments Commission following open competition. HPC's Council effectively has a 50:50 registrant to lay balance but the registrants are permitted to have a majority of one.

Many of the recommendations in the areas of investigation and fitness to practise also accord with current HPC processes. Recommendation 80 suggests that, as part of their training, FTP panellists should be advised about their discretion to admit hearsay evidence and other forms of evidence not admissible in a criminal trial and that it is entirely appropriate for them to intervene during FTP panel to ask questions if they feel that any issue is not adequately explored. Dame Janet goes on to recommend that the GMC should reopen its debate about the standard of proof to be applied by FTP panels as says the civil standard of proof is appropriate in a protective jurisdiction although it is arguable that the criminal standard of proof is appropriate in a case where the allegations of misconduct amount to a serious criminal offence**.** In the text to the report she points out that the GMC has always maintained that, out of fairness to the doctor, the criminal standard of proof must be applied to findings of fact in conduct cases. However, she does point out that in despite of this, the GMC allows finding of fact to be made on a bare majority decision.

The recommendation Dame Janet makes here, accords with a number of the procedures adopted by the HPC. HPC uses the civil rules of evidence and standard of proof. This can be found, for example, in Rule 10(1)(b) of The Health Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 which provides that 'at any hearing...the rules on the admissibility of evidence that apply in civil proceedings in the appropriate court in that part of the United Kingdom in which the hearing takes place shall apply'.

Rule 10(1)(c) of those Rules goes on to provide that 'the Committee may hear or receive evidence which would not be admissible in [civil] proceedings if it is satisfied that admission of that evidence is necessary in order to protect members of the public.' Thus, the discretion to admit hearsay evidence already exists. Furthermore, panel members are taught, as part of their overall training in the law of evidence, that they can admit hearsay, are given specific training on their right to intervene and taught appropriate questioning skills.

A further area where HPC procedure accords with the recommendations made by Dame Janet is her recommendation that the GMC should abandon its practice of notifying doctors, at the same time as sending notice of referral of their case to a FTP panel, of the outcome it will be seeking at the FTP panel hearing. This is a procedure that the HPC does not and has never sought to use as it could be seen as the executive seeking to exert undue influence on the panel process.

HPC has, so far as practicable, put its panels at arm's length from the executive and, in any event, the range of sanctions available to Panels should not influence the decision as to whether or not an allegation is well founded. The finding of fact and sanctioning phases of a hearing should be (and be seen to be) separate elements of the process. To reinforce this point, Panel members are trained that they should first retire to determine whether or not an allegation is well founded and then return to announce their decision and the reasons for that

decision. Where the Panel has decided that an allegation is well founded it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring for a second time to determine what, if any, sanction to impose and then return to announce that sanction and reasons for that sanction. Notifying registrants of the proposed outcome HPC is seeking would be a dramatic shift away from the way HPC operates. Dame Janet also points out that FTP panels should be required to give brief reasons for their main findings of fact. HPC panellists are trained to do this as part of their structured decision making and a decision making checklist is provided for panellists in their retiring room.

The report recommends that the GMC rules should enable Investigating Committee Panels to direct that an assessment of a doctor's performance or health should be carried out and that the GMC should develop an abridged performance assessment to be used as a screening tool in any case where an allegation is made which potentially calls into question the quality of doctor's clinical practise.

The HPC Rules provide for medical examinations and tests of competence to be administered at the adjudication stage, but only with the consent of the registrant. There is a broad power to seek 'advice and assistance' at the investigation stage, but any interaction with the registrant requires their consent. Powers of this kind would require changes to the HPC Rules.

The final recommendation in the report which accords with our current procedures is Dame Janet's call for an independent audit of investigating stage decisions. Whilst decisions are not currently reviewed by an independent external commissioner, all allegations that are received by HPC (apart from those which are patently frivolous or vexatious), are considered by a panel of lay and professional partners thereby demonstrating an arms length and independent approach to all the decisions at the investigating stage.

Areas that would require legislative change for HPC to implement

While HPC benefits from operating under modern legislation there are a number of recommendations made by Dame Janet that, in order to be implemented, would require a change in our legislation. The report recommends that the GMC Rules should be amended to provide for the revival of closed allegations, with a 'cut-off' period of five years but with the power, in exceptional circumstances and in the interests of patient protection, to reopen a case at any time. HPC Rules provide that an allegation which has been dismissed at the case to answer stage may nonetheless be taken into account if a further allegation is received within three years. Rule 4(6) of The Health Professions Council (Investigating Committee) (Procedure) Rules 2003 provides that 'in determining whether there is a case to answer the Committee may take account of any other allegation made against the health professional within a period of three years ending on the date upon which the present allegation was received by the Council'. This is not quite as strong as the report recommends and legislative change would be required to implement this recommendation

Further legislative change would also be required if the full recommendations for seeking performance and health assessments from health professionals during a fitness to practise investigation were to be introduced. HPC legislation provides that these assessments can be requested but can only be carried out with the consent of the health professional concerned.

Areas for further discussion

There are a number of specific points raised that, at first glance, could potentially cause HPC some difficulties should they be implemented. Dame Janet recommends that in the event that the GMC retains control of the adjudication stage, it should appoint a number of legally qualified chairmen to preside over the more complex FTP hearings.

The appointment of legally qualified chairmen could potentially have significant cost implications for HPC which in turn would have to be passed on to registrants by raising their fees. We can see the need for panels to be properly chaired and to act impartially and effectively but feel our current system of independent panel members making decisions based on sound training and experience works well. Furthermore, HPC does not often deal with cases that are as complex as those heard by GMC Panels and HPC Panels have a legal assessor present to advise on law and procedure. .

The Report recommends that there should be complete separation of the GMC's casework and governance functions at the investigation stage of the FTP procedures and that the adjudication stage of the FTP procedures should be undertaken by a body independent of the GMC. That body would appoint and train lay and medically qualified panellists and take on the task of appointing case managers, legal assessors (if they are still necessary) and any necessary specialist advisers. It should also provide administrative support for hearings.

The Report also recommends that consideration should be given to appointing a body of full-time, or nearly full-time, panellists who could sit on the FTP panels of all the healthcare regulatory bodies. Dame Janet is concerned that under current arrangements, the GMC will select the FTP panellists (both for inclusion on the list of panellists) and for inclusion on a panel in an individual case), train them, provide them with guidance, audit their decisions, appraise their work and call them in for discussions about their decisions with which it disagrees; it will also have the power to dismiss them if dissatisfied. Dame Janet believes that panellists will have very little independence.

HPC has, so far as possible, put its FTP Panels at arm's length. On 7th December 2004 Council agreed to phase out the use of Council Members as panel chairmen and recommended that appropriately experienced partners should be identified to act in this role. If the Inquiry's recommendations are implemented it is likely that a new tribunal will be established to perform adjudication functions for all the regulators, leaving them to perform only registration and "prosecution" functions. This would have a profound effect on HPC, not least because some of the smaller professions which HPC regulates generate very few Fitness to Practise cases and it may lead to cases involving, say orthoptists or clinical scientists, being heard by Panels which do not include a member of the relevant profession. Nevertheless, HPC recognises the concerns about the independence of panel members and to this end is developing a case management strategy which will include the recruitment of a hearing officer who will be responsible for scheduling and managing hearings, including contacting the partners who are to serve on that Panel. This will mean that the current practice of case managers also acting as hearing officers will end. The HPC's scheme of delegation provides that Panel members must be selected by a random process and an IT system is being developed which incorporates this functionality.

The Report criticised the GMC for not having clear and objective tests to be applied by Panels at the investigation and adjudication stages of the FTP procedures and Dame Janet drafted her own which may assist HPC in understanding its own FTP tests.

Investigation stage test

1. Is there one or more than one allegation of misconduct, deficient professional performance or adverse health and/or one or more than one report of a conviction, caution or determination which, if proved or admitted, might show that the doctor:

(a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

(b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

(c) has in the past committed a breach (other than one which is trivial) of one of the fundamental tenets of the medical profession and/or is liable to do so in the future; and/or

(d) has in the past acted dishonestly and/or is liable to act dishonestly in the future.

The report outlines when a case can be closed on the basis of a health assessment by a GMC case examiner. If this recommendation were to be implemented by HPC, a fundamental shift in the way HPC operates would be required. If the registrant consents to a health assessment, a panel will determine the relevance of the assessment when deciding whether the case is well founded. There is no provision for cases being closed the basis of a health or competence assessment. Furthermore, assessments are not currently undertaken at the Investigating Panel stage.

Recommendation 76 relates specifically to Adjudication Stage Investigation. The report recommends that there should be an explicit power in the GMC rules to allow the GMC to undertake any further investigation it considers necessary after a cases has been referred to a Fitness to Practise panel and before the panel hearing. The HPC Rules specifically provide for further investigation to be carried out but for investigations which go beyond case preparation, the consent of the panel is required. To assist the investigating panels in making case to answer decisions, the fitness to practise team is currently developing a strategy for case management which will be presented at the three Fitness to Practise Committees in April.

The report further states that *Rule 17(2)(j) of the November (GMC Fitness to Practise) 2004 Rules should be amended to make clear what type of further evidence should be received before a FTP panel decides whether a doctor's fitness to practise is impaired.* Dame Janet believes that that evidence should include the doctor's previous FTP history and that evidence should be received after a finding of impairment of fitness to practise but before determination of sanction. The HPC rules allow the panels to hear any types of evidence before determining impairment to fitness to practise but further guidance may be required for panellists. This could be incorporated in partner training, manuals and communicated to partners. However, any previous FTP history is declared at the sanction stage as presenting the information before the panel has decided whether the case is well founded may prejudice the panel in their decision making.

In her report, Dame Janet Smith also discusses the need for supervision. She says at recommendation 88 that throughout the period that a doctor's registration is subject to

conditions imposed by a FTP panel or to voluntary undertakings, someone within the GMC should take responsibility for monitoring the doctor's progress and for ensuring, so far as possible, that s/he is complying with the conditions imposed or undertakings given. It also recommends that a professional supervisor should be appointed to oversee and report on the doctor's progress and compliance with the conditions. She recommends that in cases where a doctor's health is an issue, a medical supervisor should be appointed.

The report also recommends that any breach of a condition imposed by a FTP panel (save for the most minor breach) should result in the doctor being referred back to a FTP panel so that consideration can be given to imposing a sanction which affords a greater degree of protection to the public. The ability to impose conditions of practice has been a welcome change in the regulatory regime for the professions regulated by HPC and they have been used effectively by panels on numerous occasions since their introduction. However, the degree of oversight and policing suggested by Dame Janet would have significant financial and resource implications for HPC.

In their training panellists are advised that the conditions imposed should be realistic, verifiable and adequately protect the public. Nevertheless, if a registrant breaches a condition imposed by a FTP panel, a further panel will be convened to review the breach. At such a review hearing, the panel have a power to impose any sanction that could have been imposed at the original hearing.

The report recommends that the GMC Rules should be amended to ensure that there is at least one review hearing in all cases where a period of suspension or conditions on registration have been imposed, unless there are exceptional reasons why no such hearing should take place and that, in all but exceptional cases, a doctor whose registration has been suspended, subject to conditions or who applies for restoration should be required to undergo objective assessment of his/her fitness to practices before being permitted to return to unrestrained practice.

This accords with current HPC procedure. In all such cases a hearing is required before a decision is made on whether or not a registrant can return to unrestrained practice. the report also recommends that a doctor must go through an assessment of their competence to practise. A procedure of that kind would require a change to HPC legislation. However, a panel can, on review of a suspension order, substitute for that order a conditions of practice order, therefore preventing the registrant from returning to unrestrained practice. Furthermore, on review of conditions, panels can impose a suspension order if the conditions that the panel have imposed have not resulted in any improvement to the registrant's practice.

The report recommends that a doctor whose application for restoration to the register has reached the second stage of the procedure should be required to undergo an objective assessment of every aspect of his/her fitness to practise. It also recommends that Doctors who are restored to the register should be required to have a mentor whose task it will be to monitor and report to the GMC on their progress in practice.

The rules relating to restoration state that the applicant must prove that they are a fit and proper person to restore to the HPC register. This is a fairly wide ranging provision. However, if the full provisions of Dame Janet's recommendation were to be implemented, there would be significant resource implications for HPC.

Dame Janet further recommends that Rule 28 of the (GMC) November 2004 Rules, which provides for the cancellation of hearings before a FTP panel, should be amended so as to provide that a decision to cancel must be taken by an Investigating Committee Panel and that the reasons for the cancellation must be formally recorded. All referrals from HPC's Investigating Panels and the Conduct and Competence and Health Committee panels will make the decision on whether the allegation of impairment to fitness to practise is well founded. However, processes will need to put into place to audit/review cases where no evidence is presented to the panel (this may be because HPC has been unable to gather the relevant evidence to prove its case).

What the HPC needs to do

One of the key recommendations made by the 5th report is that the GMC should ensure that its publications contain accurate and readily understandable guidance as to the types of cases that do and do not fall within the remit of its FTP procedures. The Fitness to Practise team have identified and started work on a number of brochures which will further develop HPC's existing work in this area. The brochures are as follows:

- How to make an complaint
- What happens if a complaint is made against you
- Witness Support Packs.

The HPC has also approved a number of practice notes relating to the Fitness to Practise procedures and the Executive provides all HPC partners with a manual containing this information. Work will need to be done to incorporate this material into an accessible format.

A great deal of work has been done to ensure that the information HPC provides is clear and accessible. Although obviously work remains to be done, HPC's commitment to providing public information can be seen in its corporate membership of the Plain English Campaign, the Plain English crystal marks gained for many publications and the crystal mark gained for the HPC website.

Furthermore, the new HPC website is due to be launched shortly and this will be a further step to providing accessible information for registrants and members of the public.

HPC is also obliged to publish 'at least once in each calendar year a statistical report which indicates the efficiency and effectiveness of the arrangements it has put in place to protect the public from persons whose fitness to practise is impaired, together with Council's observations on the report.' Such a report demonstrates the open and transparent nature of the processes that HPC has put in place to protect the public. This can also be demonstrated by the information that is presented on HPC's website.

The report recommends that that the GMC rules should be amended to make formal provision for the GMC to communicate with employers and with primary care organisations before deciding what action should be taken in response to an allegation and giving the GMC power to require from the doctor the necessary details to enable it to make such communication. The Health Professions Order 2001 (the HPO 2001) provides that the Council will cooperate wherever reasonably practicable with employers and prospective employers of registrants. Furthermore Article 25 (2) requires the registrant to provide the Council with details of 'any person by whom he is employed to provide services in, or in relation to, the profession in

respect of which he is registered or with whom he has an arrangement to provide such services'. There are some areas where HPC does need to improve its relationship regarding FTP with employers. Employers will need to be made aware of when the HPC needs to be informed of concerns and when it should be provided with information. In some instances, the FTP team has needed to use its Article 25 powers (to compel the provision of information) perhaps more than should be necessary. The team is also in the process of writing to employers advising them of the processes the FTP team has in place and encouraging them to provide contact details for the most appropriate contact.

The primary objective of HPC is protection of the public so when a matter which may be dealt with under Article 22 of the HPO 2001 comes to the attention of HPC, the matter will be investigated thoroughly. However, the HPC will shortly be going out to consultation on a document entitled '*Managing fitness to practise',* this document details how registrants can maintain and manage their own fitness to practise and also contains information for employers on when they may need to let us know their concerns about an employees fitness to practise. This document will assist the work that is already being done in this area.

What will be of benefit to the HPC?

The report recommends that the Council for Healthcare Regulatory Excellence (CHRE) should be invited to set up a panel of professional and lay people which should assist in the process of developing standards, criteria and thresholds for the GMC and that in three to four years time, CHRE or someone instructed by them should carry out a thorough review of the operation of the new FTP procedures. It also, at recommendation 109 recommends that there should in the future *be a review of the powers of the CRHP/CHRE with a view to ascertaining whether any extension of its powers and functions is necessary to enable it to act effectively to ensure that patients are adequately protected by the GMC.* A review of this kind will not only be of benefit to the GMC but may also be of benefit to HPC and other regulators.

Revalidation

The Report also has direct relevance with regards to the HPC's proposals for Continuing Professional Development (CPD)**.** Dame Janet's report provides extremely strong support for a revalidation/re-licensing process for doctors and makes several proposals for how this process might work. Subsequent to this, ministers have asked the Chief Medical Officer to review the GMC's revalidation proposals, postponing their implementation beyond the intended date of April 2005. In the light of the Dame Janet's finding and the postponement of the GMC's revalidation proposals, HPC will need to make clear the link, if any between , renewal of registration, fitness to practice and continuing professional development. It may well be that the revalidation process that is eventually adopted by the GMC will have implications for the HPC

Over the past few years, the GMC has raised various proposals for how revalidation may operate. At one point it favoured evaluation of an individual doctor's FTP by means of examination of evidence by a revalidation group. However, by November 2004 its position had changed and revalidation would depend upon participation in appraisal and a clinical governance certificate (which is essentially negative); it had agreed this with the DoH and was due to implement the system in April 2005.

Dame Janet does not believe that these arrangements will provide an evaluation of FTP because the appraisal process is not sufficiently linked to clinical governance and was not set up to test FTP. Doctors would only be refused revalidation if their professional performance was "remarkably poor". She notes the low standards that are applied in performance cases and that, under the GMC's plans, these low standards would form the baseline for revalidation.

Dame Janet's revalidation recommendations

Dame Janet believes that the public is being led to expect more from revalidation than it could reasonably be expected to provide, in terms of reassurance of the competence of an individual doctor. She proposes that:

- The main platform for revalidation should be a folder of evidence, prepared by each doctor, demonstrating what the doctor has been doing in the last five years. This would include data drawn from clinical governance, a record of the CPD activities the doctor has undertaken, an appraisal form, a patient satisfaction questionnaire, and a certificate for successful completion of a knowledge test. A doctor's NHS contract of employment of contract for services would have to require the production of these compulsory items

- Preparation of the folder would take place over a five-year period. Its development would be discussed during the appraisal process and advice given as to what more needed to be done. Appraisers might encourage doctors to produce one or more of the specific compulsory elements each year so that appraisal could focus on a discussion of that topic

- At revalidation, the folder would be scrutinised by a local group based within the PCT and chaired by the clinical governance lead

- Knowledge tests should contribute to revalidation, with doctors able to retake the test within a five-year period until they reach a satisfactory standard

Implications for the HPC

Dame Janet has made a link between doctors' CPD, competence, FTP and revalidation. She appears to view being 'up to date and fit to practise' (e.g. via CPD) as a key determinant of revalidation, thereby extending the scope of FTP. She considers the term 'impairment of FTP' as non-specific and notes that the GMC does not define the term or set any standard by which doctors are to be judged: the GMC should formulate standards, criteria and thresholds by which impairment of FTP is to be judged. Dame Janet also notes that the GMC's statute requires an *individual* evaluation of every doctor's FTP but that its current proposals for revalidation do not fulfil that promise.

Some respondents to HPC's consultation on CPD called for a link to be made connecting CPD, competence, FTP and re-registration.

HPC does not have revalidation powers and, whilst registrants who fail to undertake CPD may not have their registration renewed, registrants cannot be *struck off* the Register for failing to meet the CPD Standards as there is no direct link in the HPO 2001 between fitness to practice and CPD.

Conclusion

As the only multi-professional health regulator in the UK we support many of the recommendations made in the report. We believe that through its legislation and processes HPC is already working to many of Dame Janet's recommendations. There are other areas that would require legislative change before we could implement them, but which we support in principle. Equally there are recommendations which we believe may not need to be implemented, as firstly the current modern systems are working well at regulators such as HPC, and secondly the cost of implementing them could be prohibitive.

Decision

The Council is asked to note the above report and the implications for the Health Professions Council

Background Information

The Health Professions Order 2001 and Rules made under it.
Sanctions Practice Note
Managing your fitness to practise

Resource Implications

The recommendations from the 5th report of the Shipman Enquiry will have significant resource and financial implications for the HPC if all the recommendations were to be implemented.

Appendices

Recommendations to the 5th Report of the Shipman Enquiry
(www.the-shipman-inquiry.org.uk)

Date of paper

Kelly Johnson 13th February 2005

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