

Agenda Item 13 (ii)

Enclosure 16

**Health and Care Professions Council
20 March 2019**

Partner Conflict of Interest Policy

For approval

From Uta Pollman, Partner and HR Manager

Council, 20 March 2019

Partner Conflict of Interest Policy update

Executive summary and recommendations

Introduction

New legal advice has been received, which states that Fitness to Practise (FTP) panel members, chairs or legal assessors may not appear as representatives for HCPC registrants during the period of their appointment by HCPC. This has resulted in proposed changes to the current Conflict of Interest Policy for partners.

Decision

The Council is asked to consider the legal advice and the Tribunal Advisory Committee's recommendation to approve the change.

Background information

During a recent induction training for FTP panel members a newly appointed candidate enquired if they can still act as a representative for HCPC registrants during FTP hearings. Legal advice was initiated to confirm our position on the issue.

Resource implications

No resource implications

Financial implications

No financial implications

Appendices

Appendix A – Updated Conflict of Interest Policy

Appendix B – Legal Advice

Date of paper

6 March 2019

Conflicts of Interest Policy

Purpose

- 1 The aim of this policy is to set out the expectations regarding real or potential conflicts of interest and the process for dealing with a conflict raised in relation to a partner.

Scope

- 2 The policy is aimed at all individuals who have an HCPC partner services agreement – the types of partner include Fitness to Practise Panel members and chairs; Registration assessors; Appeal Panel members; Visitors; Legal Assessors; CPD Assessors. This list is not exhaustive.
- 3 Compliance with this policy is compulsory for all partners and breaches may result in suspension of service or termination of the contract.

What is a conflict of interest?

- 4 A conflict of interest arises where a partner has a private interest which might influence, or be perceived to influence, that person's judgement in carrying out the duties as determined by their contract for service.
- 5 When a reasonable, fair-minded and informed observer would conclude that there is a real possibility that an HCPC decision maker is or could be biased because of a particular interest then there is a conflict of interest.
- 6 This is not a definitive list but examples of relevant interests where a conflict might arise include:
 - Making a decision or leading on a case involving a registrant where the panel member has a strong personal belief about the nature of that registrant's practice.
 - A past or present interest that could reasonably be thought to cast doubt on a partner's independence or impartiality with regard to his or her duties as an HCPC partner.
 - Membership of or any position within a political party, a pressure/interest group, a voluntary organisation or any association connected directly or indirectly with the wider healthcare sector.
 - Where there have been previous interactions with an individual whose case is being considered. These interactions could be personal or

professional. Knowing of the individual would not necessarily be considered a conflict of interest.

- Where a partner's immediate family member, close friend or colleague is attending or has recently graduated from an institute that they have been asked to visit as part of their provision of service.

The aims of the Conflicts of Interest Policy

- 7 Our conflicts of interest policy is designed to ensure that our work is carried out free from improper influence and that it is independent, fair and devoid of bias and must be seen to be so.
- 8 As we are responsible for promoting and setting standards of conduct among registrants, as well as making decisions about registrants whose fitness to practise may be impaired, our own conduct both as an organisation and as individuals must reflect the highest standards.

How does the policy apply in practice?

- 9 This policy sets out how we should manage conflicts of interest and related matters.
- 10 The HCPC does not wish to collect or retain private information about its partners' interests unless it is relevant to their role or an aspect of their role within the HCPC.
- 11 It is the responsibility of all partners not to put themselves or the work of the HCPC in a position where there is a conflict between the duties required as set out in the contract and their own private interests.
- 12 Panel members, chairs or legal assessors may not appear as advocates or lay representatives for HCPC registrants during the period of their appointment by HCPC.
- 132 Partners must avoid making decisions or handling matters where they have interests that might influence, or be perceived as influencing their judgement.

Register of interests

- 143 On appointment to the HCPC all partners will be asked to complete a declaration of interest form. This will be retained in a central Register of Interests and must be completed at the point of engagement of services. It is the responsibility of the

partner to keep the Register of Interests up to date and notify the HCPC of any relevant changes of circumstance. The HCPC also reserves the right to review this information on an annual basis asking all partners to ensure that the information is up-to-date.

- 154** The partner will need to consider whether any past or present interest or association with any person or body or any fact or matter (whether entailing an association with any person or otherwise) of whatsoever nature might reasonably be expected to give rise to a conflict of interest or the suspicion of a conflict. The conflict might arise where an interest might influence or be perceived to influence the partner's judgement in carrying out his or her function – for example as a panellist, whether as to his or her independence, impartiality or in any other way.
- 165** The partner has a responsibility at all times to advise the HCPC of any appointments or changes to their personal circumstances which may in turn cause potential conflicts of interest.
- 176** If at any time in the course of their provision of services a partner recognises a potential conflict they must advise the operational manager and/or the Partner manager.
- 187** Where there is a potential conflict of interest, the operational manager and/or the Partner manager will agree with the partner what if any action should be taken. In many cases this is likely to mean that the partner will be asked to stand down for the particular activity that they have been asked to undertake. Plainly, the sooner the potential conflict is identified and an assessment made the better.
- 198** This information may be made public if there has been improper influence as result of the conflict of interest or there is a legal obligation to disclose it.

Declaration of interest

Name:

.....

Registration of interests

I have read the Conflict of interest policy (and supporting operational guidelines) and I list below the organisations past and present of which I am a member, with which I am associated or in which I have some other interest where a conflict of interest or the appearance of such a conflict of interest could arise (please add rows as required).

Organisation	Position/interest

In line with the conflict of interest policy I also detail other information deemed appropriate.

Signed Date

Name (print).....

HEALTH AND CARE PROFESSIONS COUNCIL

ADVICE ON CONFLICTS OF INTEREST

1 Questions posed

1.1 We are asked to advise on the following questions:

- (A) Is it acceptable for the same person both (i) to sit as an HCPC FTP panel member/chair or legal assessor and (ii) represent HCPC registrants as an advocate in FTP proceedings?
- (B) What, if any, conflict of interest declaration should such a person make, and at what stage of the proceedings in question (e.g. at the hearing, or earlier)?
- (C) What justification could HCPC offer in response to a complaint made by a registrant or other third party about a conflict of interests in the circumstances described above?
- (D) What arguments could HCPC deploy to prevent a person with dual status of the type described above using the knowledge acquired as a panel member/chair or legal assessor unfairly to gain advantage as advocate for an HCPC registrant facing FTP proceedings?

2 Summary of advice

- 2.1 In circumstances where a Panel Member also acts as an advocate for HCPC registrants there is a sufficient risk of a perceived conflict of interests that HCPC should take a policy decision to prohibit this.
- 2.2 A policy to prohibit a Panel Member acting as an advocate for HCPC registrants could be supported by training on this issue during which HCPC's concerns (as addressed in this advice note) could be set out.

3 Background

- 3.1 It is understood that a panel member or chair or a legal assessor (the term Panel Member is used in this note to refer to all three of these roles) would not sit in a case where they had previously represented the registrant concerned and could not, having performed any of those roles in respect of a case against a registrant, accept subsequent instructions to represent that registrant. In those circumstances there would be a direct conflict of interests.
- 3.2 The questions considered by this advice therefore consider cases where there may be a perceived conflict of interests due to a Panel Member accepting instructions to act as advocate for any HCPC registrant in proceedings before the HCPC¹. The need for this advice arose in connection with a query from a barrister but could equally apply to solicitor advocates. Both professions are therefore considered in this advice.

¹ There may be similar considerations in respect of proceedings of other regulators where the registrant in question is also an HCPC registrant, for example a nurse who is registered with both HCPC and NMC.

4 Question A: Acceptability of sitting as a Panel Member and acting as an advocate for HCPC registrants

- 4.1 A conflict of interests may be actual or perceived. On the basis that an actual conflict would certainly be unacceptable for both HCPC and the Panel Member, this advice focuses on whether there would be a perceived conflict in a case where a Panel Member also acts as an advocate for HCPC registrants.
- 4.2 HCPC as a public authority is obliged (by section 6 of the Human Rights Act 1998) to act in a way which is compatible with Convention Rights. Article 6 of the European Convention on Human Rights provides for the right to a fair trial '*by an independent and impartial tribunal*'. Circumstances where there is any bias or perception of bias among members of that tribunal will contravene this provision.
- 4.3 There is no absolute bar on advocates sitting in a judicial capacity, indeed a large number of silks appear as advocates and also sit as judges. There is usually, however, some separation between the area (whether geographical or legal) where they practice and the cases in which they sit. At all times, the court would need to consider its obligations in respect of ensuring a fair trial, and it is incumbent upon HCPC to do likewise.
- 4.4 In circumstances where a Panel Member also acts an advocate for HCPC registrants, there are a number of areas in which a perception of bias may arise:
- 4.4.1 There is a risk of an advocate being perceived to have been pro-HCPC in cases when representing a losing registrant.
 - 4.4.2 Similarly, the Panel Member appearing as an advocate may know the hearing staff or other Panel Members and this could lead to an appearance of bias.
 - 4.4.3 There may be a perception that scores are being (or might be) settled where a Panel Member has previously opposed counsel for HCPC in another case.
 - 4.4.4 There may be a commercial conflict in circumstances where the firm representing the registrant is a competitor to that of the Panel Member.
- 4.5 Both barristers' and solicitors' professional codes of conduct prohibit them from acting where there is an actual conflict of interests. In the case of barristers this extends to a 'risk of a conflict' and solicitors where there is a 'significant risk' of a conflict. This is a somewhat different test to the obligation of HCPC to ensure a fair hearing for the registrant.

5 Practical ways forward

- 5.1 The existing Partners Conflicts of Interest policy makes clear (at paragraph 11) that it is the responsibility of all partners not to put themselves or the work of the HCPC in a position where there is a conflict between the duties required as set out in the contract and their own private interests. As such, the question of whether there may be a conflict of interests is currently left to the individual Panel Member to decide on a case by case basis.

- 5.2 This may lead to recusals or refusal of instructions by Panel Members if they consider that there is a risk of a conflict of interests, but it is not certain that they will adopt the same approach as HCPC.
- 5.3 HCPC should consider whether to take further steps to ensure a consistent approach is adopted by Panel Members and thus avoid a situation arising in which there may be a conflict of interests.
- 5.4 HCPC should therefore consider:
- 5.4.1 Adopting a policy that Panel Members may not appear as advocates for HCPC registrants during the period of their appointment by HCPC. This could perhaps be incorporated into a revised version of the Partners Conflicts of Interest Policy.
- 5.4.2 Including material on conflicts of interest during training for new Panel Members. This would provide an opportunity to clarify the approach adopted by HCPC and ensure that all Panel Members are aware of the prohibition.
- 5.5 The scope of a restriction on acting for registrants will need to be the subject of careful consideration but our view is that limiting this to the period of appointment as a Panel Member would be sufficient. The situation may therefore arise that a former Panel Member returns to representing registrants when their tenure has ended.
- 5.6 As set out above, there may be a perception of bias connected with an advocate knowing other Panel Members or hearing staff through previous interactions but this does not represent a material advantage and where an advocate frequently acts for registrants they too may come to know some HCPC personnel. Where an advocate no longer sits as a Panel Member any such relationships will also become historic as Panel Members change and there is a turnover of hearing staff.

6 Approach of other regulators

- 6.1 We are aware that the MPTS takes the view that there is a perceived conflict of interests where their legally qualified chairs represent registrants in other proceedings and as such do not permit this.
- 6.2 We have not contacted other regulators to ask their approach to this issue as any request of this sort may be best coming from within HCPC. However, the fact that there is a clear issue (as outlined above) and an example of at least one other regulator which takes this approach, it is appropriate that HCPC should be considering its policy in this regard.

7 Question B – Timing of a declaration

- 7.1 Adoption of a policy as suggested in paragraph 5.4 would prevent this particular conflict arising and no need for any declaration would arise.
- 7.2 Were such a policy not to be adopted, if a Panel Member were to consider that there was an actual or perceived conflict of interests in respect of a particular case, they should raise this as early as possible in the proceedings to enable another Panel Member to be appointed. Circumstances where a Panel Member has needed to recuse themselves from proceedings on

the day of the hearing (for example if they sat in the same case at an earlier stage) inevitably cause delay and disruption which can best be avoided by early consideration of these issues.

8 Question C - Complaints from registrants

- 8.1 If a policy which makes clear that Panel Members may not appear as advocates for HCPC registrants were adopted, complaints from registrants would not arise.
- 8.2 If such a policy were not adopted, any complaint made by a registrant is likely to be highly fact sensitive and any response would need to have regard to the particular circumstances which had arisen. An important part of HCPC's response will be its own consideration of the possibility of a conflict of interests arising and policies it had in place to avoid such a situation.

9 Question D – arguments to deploy against a Panel Member acting for HCPC registrants

- 9.1 It would not be possible to prevent a Panel Member utilising any 'inside knowledge' to the advantage of a registrant for whom they appeared in other proceedings.
- 9.2 As HCPC has an obligation to act transparently in reaching decisions and in respect of its compliance with legislation and policy, there should be no such advantage to having sat as a Panel Member. Nevertheless, the situation would not arise if Panel Members were prevented by policy from acting for registrants, save to a limited and diminishing extent where a Panel Member retires and subsequently resumes or commences acting for registrants.

BDB Pitmans

15 February 2019