

Tribunal Advisory Committee, 16 November 2017

Head of Tribunal Services report, November 2017

Introduction

This update paper summarises a number of key areas of work relating to the planned hearing activity, which is being delivered through the Health and Care Professions Tribunal Service (HCPTS).

It is intended this summary provides a useful context to the Tribunal Advisory Committee (TAC), and follows the format of the previous reports, presented in May and September 2017.

Decision

The TAC is asked to:

- i) consider the attached paper.

Progress of HCPTS

The Tribunal Service was established in April 2017. We have now concluded around 260 final hearings, and a further 150 review hearings. The transfer of systems to operate an independent tribunal listing system continues to be smooth, with no significant operational issues, or adverse operational feedback from stakeholders.

As previously advised, a review of systems and outputs is planned for completion by December 2017. A paper will come to TAC in early 2018 with a summary of the findings of the review.

Summary of Tribunal Services activity

We are currently contributing to the HCPC consultation on the indicative sanctions policy, which is taking place over the summer months. Following the TAC discussion in September, we are exploring how we can assist Policy and Standards colleagues to target and access sub sets of Panels, to ensure as wider input to the consultation as possible.

We have now conducted a series of skype enabled video conference trials for complex hearings, including one which had adjourned part heard several times due to getting evidence from witnesses that were based in Nigeria. Technical and health difficulties

had meant that this was the only mechanism for having suitable live evidence from a witness.

Initial tests of the technology confirms ease of setup, and quality of sound and vision. The benefits are lower cost access to the technology, and no requirement to book or attend a specialist video conference location. This is especially useful for witnesses that have specific vulnerabilities, or those who are located geographically far from this specialist technology.

We will continue these trials until Christmas 2017, and aim to roll out to hearings in the early part of 2018 if satisfactory. Resources will need to be allocated as part of the budget planning process, and we have been working with colleagues in support services to test the technology and make an appropriate business case. Panels will not require additional training, as the equipment will be managed by the Hearing Officers, though we will publicise any changes and remind the Panels of the acceptability of video evidence, and how this approach balances fairness and timely and appropriate use of resource to conclude cases.

We have continued to work on enhancing our existing approach to sensitive data handling and transmission processes. Specifically, we have been working with a range of stakeholders in Tribunals who share and receive sensitive materials and evidence before the hearing (including large bundles, those containing health matters, or recipients who live in remote locations and therefore have logistical issues with receiving safely hard copies of bundles via the post).

This approach requires early identification of parties who would prefer electronic materials, extracting them from our case management system, and forwarding them – securely – via an appropriate portal of email mechanism. Our experience to date is that a recognized transfer portal is preferable to email, as there are bandwidth issues with sending (and receiving) large files, and a bespoke portal allows tracking and monitoring of receipt and reading of the materials.

We will be revising our advice to panels on the use of these approaches after Christmas, if required.

A summary of the usual statistics relating to fitness to practice activity can be found in the public papers going to Council (see link below). We are broadly on activity for scheduled and completed hearings, and continue to focus on older cases. The number of open hearing cases is now at the level last seen in October 2015. The adjourned and part heard rate of hearings has fluctuated, with a peak of adjournments in October, most likely due to older cases with more complex matters being considered, but we continue to apply pre-hearing quality checks.

<http://www.hcpc-uk.org/aboutus/council/councilmeetings/>

Reviewable sanctions update

As reported at the initial TAC meeting in May 2017, an emerging trend of more numerically more, and more frequent reviewable sanctions imposed at both final hearings and ongoing review stages continues.

Since April 2017, at final hearings, 31 conditions of practice and 65 suspensions have been imposed. Of the 65 suspensions imposed, 16 were for less than 6 months, 3 for 7 to 11 months, and 46 for 12 months.

Of the 157 reviews of existing conditions or suspension orders that have concluded since April 2017, 25 cases had continued conditions, and 53 had continued suspensions.

The trend of short suspensions continues, with 28 of the 53 cases being imposed for less than six months.

Our analysis indicates that these short duration reviewable orders continues to relate to panel intentions to allow registrants one final opportunity to engage with the regulatory process, despite the fact that in more than sixty percent of the cases, there is no previous or recent engagement since the order was imposed or last reviewed.

We have included this analysis as part of the refresher training for Panel Members, and have used short suspensions and ongoing conditions as two specific case studies. As part of our move to enhance and vary the training, we are asking panel Members to review the scenarios, and then present their thoughts back to the rest of the group, detailing the considerations they would make and balance. The materials are also available for self-study, and will form part of the materials for the forthcoming online modules.

Stakeholder engagement

The latest meeting with the registrant representative and professional bodies took place on 2 November. The meeting was positive, and we agreed a number of areas that we could work on collaboratively. We also discussed the initial research findings of the review of paramedic and social worker referrals, conducted by the University of Surrey.

The next meeting (scheduled every six months) is May 2018.

PSA Learning points

There have been only two cases where learning points received since last TAC meeting.

There continues to be a number of common themes: Panel decisions being inappropriately brief, specifically the public component of decision-making.

All will be incorporated in revised training programme, and we continue to write to those specific panels to share the learning point, including our response to PSA.

Training programme

There is a busy training programme planned, with dates set for refresher and induction training between now and March 2017. There will be a verbal update on the content in the TAC meeting.

We have developed a short video explaining the role of the TAC, for use in the training. We intend to develop a range of these videos that can be made available online, and therefore can be used to send short messages to Panel Members quickly and without the need to wait for the next training session or newsletter.

We would welcome thoughts from TAC on any items that could be added to the programme, and would welcome volunteers to present material to the camera.

A link to the video is below. The password will be sent with the agenda for this meeting.

<https://vimeo.com/240989291>

Partner complaints, recruitment and feedback

We continue to work with Partners' Unit to respond to any complaints or concerns raised about individual Panel Members. Now the new Partner Manager is in place, it is possible to take this work forward, and to review the processes by which we gather information and investigate matter. There are two ongoing matters.

We continue to work with Partners' Unit to reassess the needs for recruiting and training Panel Members, factoring in the outcome of the self-assessment process, expiry of terms of office, and planned Tribunal Service activity. We have recently concluded a recruitment process for registrant Panel members. Disappointingly, despite attempting recruitment for the third time, and having contacted all Practitioner Psychologists on our register, we still have a shortage of certain modalities. A verbal update will be given in the TAC meeting, along with options that we have been considering, linked to the 3-5 year strategy plan (which is on the agenda for discussion and advice from TAC).

HCPC developments

As previously reported, part of the ongoing independence of the Tribunal Service, we have been working on examining the role of the Case Manager in presenting material at the Investigating Committee Panel. Cases being considered by ICP in November are now entirely on papers.

It is too early to evaluate the impact this has on the process, but we have reduced the number of cases per Panel to six (from nine), and have provided information on the change via the Newsletter. We are reiterating the change at the start of each Panel. There have been no concerns raised thus far.

We will review in the coming months, and report back in early 2018.

Reviews based on papers

We have been conducting a pilot to formalize this approach, with more than sixty cases now in the review on papers cycle. We have had active encouragement from registrant representatives in a number of bodies. We will continue to review progress, and target cases where there have been no, or minor, changes since the last review.

After Christmas, we will be looking to see whether this approach is suitable to extend to cases with substantive orders.

Allegations of dishonesty and the Ghosh test

In October, there has been a significant change in caselaw relating to dishonesty. The Supreme Court have essentially overturned the longstanding criminal 'Ghosh' test for dishonesty. They have confirmed that the test for dishonesty should be the same in both criminal and civil matters, and should be the test laid down in the case of *Barlow-Clowes*;

'When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards'[74]

TAC may wish to read more at the following link:

<https://www.kingsleynapley.co.uk/insights/blogs/regulatory-blog/supreme-court-overrules-the-ghosh-test-the-implications-for-professional-disciplinary-proceedings>

We have already incorporated this into the Panel training, with supporting guidance in the Partner newsletter. All Panel Members need to be aware of the issue, but we will be focusing on Legal Assessors and Panel Chairs.

Other significant legal rulings

In October 2017, the Supreme Court made a ruling (*Mickaluk v GMC*) that permits registrants to bring a case before the Employment Tribunal against a Regulator if they believe there has been a breach of the Disability Discrimination Act.

We are preparing ourselves for any impact this may have on our cases. We will be issuing guidance to Panels in the coming weeks on this matter.

TAC members may wish to read more about the ruling at the link below:

<https://www.supremecourt.uk/cases/docs/uksc-2016-0084-press-summary.pdf>

Pre-instruction work for Case to Answer decisions

We previously updated TAC on our work to perform pre-instruction works after a Case to Answer decision was made, but ensuring we had reviewed the availability of documentary evidence, and use of all of HCPC's powers, before the external legal investigation began.

We are now taking, on a case-by-case basis, a maximum of four weeks from the case to answer decision in order to review cases and ensure all materials are gathered, or at least requested on behalf of our external investigators.

A verbal update will be given in the TAC meeting on progress.

Resource implications

There are no resource implications arising from this update paper.

Financial implications

There are no financial implications arising from this update paper.

Appendices

There are no appendices associated with this update.

Date of paper

5 November 2017