

## **Health Professions Final Fitness to Practise (FtP) Adjudication**

An OHPA Board discussion paper

### **Background**

1. Now subject to repeal under the Health & Social Care Bill 2010 - 11, the Health & Social Care Act 2008 set out the requirement for OHPA to make procedural Rules for the constitution of its panels and the hearing of allegations of fitness to practise cases (including Interim Orders), any subsequent reviews, and restoration applications.
2. The OHPA Board took an early policy decision to commence on day one with procedural Rules adapted from existing GMC FtP Rules. When coupled with the necessary Transitional Rules (as set out by the Secretary of State), we intended that this approach would facilitate ease of transfer of existing cases, processes and resources. This approach also afforded early indication that OHPA would review the current procedures and resources and articulate its thoughts as widely as possible so as to harvest ideas and intelligence on how FtP adjudication for health professions might best be modernised in line with legal and judicial developments.
3. Adaptations to the GMC Rules would be sufficient to signal the direction of travel intended by the establishment of OHPA, but would avoid the threat to business continuity that the immediate introduction of more radical changes might bring.
4. During 2011-12, OHPA intended to then draft and consult upon a second set of Rules that would include changes that were more significant. This set of Rules would be reflective of modern adjudicatory practice, and be equitable and applicable to adjudication for any health and social care profession and not only to the GMC and GOC.
5. In preparing for this second, longer-term intention, the OHPA Board sought to articulate policy ambitions for the future and to seek views through this discussion paper. The DH consultation and subsequent decision not to pursue the establishment of OHPA obviously means the consideration of the emerging policy ambitions will not proceed.
6. Adjudication is an increasingly expensive resource, with a significant proportion of the fees paid to regulators being utilised for this purpose. Since the ambitions also consider the cost and speed of hearings, we believe the information will still be of interest to others working in the regulatory field.

## Introduction

7. OHPA's objective was to organise and manage adjudication cases of registrants of the General Medical Council (GMC), and subsequently those of the General Optical Council (GOC). These cases involve determining issues between a regulatory authority and those subject to its jurisdiction. In time, adjudication of the cases of registrants of other health and social care regulators might also have moved to OHPA. (It was our hope that they would.)
8. The Health & Social Care Act 2008 (the Act) conferred powers on OHPA that health profession regulators either do not currently enjoy or do not utilise in full. The Act provided for OHPA to hold preliminary hearings, make directions to the parties as to the conduct of the proceedings (and provide for the consequences of breach of those directions), and make orders for the award of costs and expenses. The regular and effective use of these powers has the potential to bring about very significant changes to the way adjudications are conducted.
9. OHPA intended to utilise these powers, and effective processes and procedures, to deal with cases fairly and justly. We saw this being delivered through:
  - Dealing with the case in ways that are proportionate to the complexity of the issues and to the resources of the parties;
  - Seeking informality and flexibility in the proceedings;
  - Avoiding delay, so far as is compatible with the proper consideration of the issues;
  - Ensuring (so far as is practicable) that all parties are able to participate fully in the proceedings;
  - Using specialist advice and expertise effectively.
10. This is against the background of Article 6 of the European Convention on Human Rights, embodied in the Human Rights Act, which entitles anyone whose civil rights and obligations are being determined to a fair and public hearing within reasonable time by an independent and impartial tribunal established in law.
11. The report, *Tackling Concerns Nationally*,<sup>1</sup> recognised that the functions of OHPA were similar to those of other bodies publicly recognised as tribunals. As such, it noted that OHPA might be listed as a body under the remit of the Administrative Justice and Tribunals Council (AJTC). Several benefits were described in the report, including the ability of AJTC to review, consider and report on OHPA's constitution and activities.
12. In considering its policy ambitions and style of working, OHPA conducted a detailed consideration of the Rules and procedures of the Health, Education & Social Care Chamber as a First Tier Tribunal (there is some synergy with the

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<sup>1</sup> *Tackling Concerns Nationally*. Establishing the Office of the Health Professions Adjudicator. March 2009. Department of Health.

Care Standards Tribunal and the Primary Care Trust Discipline Committees located here), and of the Solicitors Disciplinary Tribunal, as well regulators across a wide range of disciplines.

13. This is not to say that there is a single model or a uniform code of procedural Rules to copy. However, OHPA's policy ambitions continue to remain reflective of modern legal and judicial practice across a number of existing bodies.

### **Policy Ambitions**

14. The OHPA model for adjudication retained the essential elements of fairness and transparency, balancing the rights of the registrant against the need to ensure public protection. Subject to these essential elements, the OHPA model was intended to exhibit the following features:

- An overriding objective of dealing with cases in ways that are proportionate to their importance, the complexity of the issues, the anticipated costs and the resources of the parties; avoiding unnecessary delay and formality; seeking flexibility; and an obligation on the parties to cooperate to further these objectives.

15. To deliver this overriding objective OHPA considered the following:

- A President or Senior Chair appointed to give visible leadership to the chairs and to the panellists, to participate in their appointment and performance assessment, to set training, mentor and challenge, and to work with the Chief Executive to ensure the judicial and administrative arms of OHPA work together. In turn, the President might be supported by Deputies.
- More effective training and appraisal systems for panellists.
- The employment of full or part-time legally qualified chairs to handle case management matters, the issue of directions and orders for costs and to chair the hearings.
- Active pre-hearing case management with clear directions to the parties as to time limits for the disclosure of evidence, lines of argument / skeleton arguments, hearing time estimates and how expert evidence is to be handled.
- Oral hearings only where necessary to resolve and determine disputed evidence or argument.
- A two stage, rather than three stage decision process.
- The regulator bringing the proceedings to limit its case to allegations necessary for a determination, and to specify the sanction it asserts would be appropriate.
- "Impact statements" carved into the proceedings, so that the panel recognises the impact the alleged conduct has had on patients.
- A broad use of the cost powers provided to OHPA.

- Disclosure of parties' case budgets and limits on the amount of recoverable costs that parties will be entitled to incur, irrespective of their actual financial commitment.
- More efficient use of hearing rooms, and improved opportunities for professionals and lay members to act as panellists by organising hearings in the evenings and at weekends.
- Locally focused panellist recruitment and empanelment.

16. The following paragraphs set out our early views in more detail:

### **Appointment of a Tribunal President or Senior Chair**

17. The adjudications were required to be delivered from April 2011 and carried out by panellists appointed in accordance with the requirements defined within the Health & Social Care Act 2008, functioning as 'fitness to practise panels'. These panels would more commonly be called tribunals, and in time, we expected that to be the word to describe them.
18. One of the problems faced by the current regulators is that, while they each appoint panellists, they expect them to perform their function independently. As one of the parties to the proceedings, the regulator can only have limited communication with their panellists lest their independence be seen as compromised. Consequently, the panellists perform their functions with guidance only from legal assessors or advisers. Many commentators have pointed to a lack of leadership as a deficiency in this system.
19. To overcome this problem, our first ambition was to appoint a Tribunal President or Senior Chair to take an active role in ensuring jurisprudential and practical consistency both in decision-making and in the setting and interpretation of practice and procedure. By implication, this post therefore required the holder to be a senior lawyer or judge. We also believed the President should preside over a small number of cases, typically those that raise the most difficult, novel and complex issues, and those that raise issues of practice and procedure, for which binding guidance is desirable. These functions mirror those described for Tribunal Presidents.<sup>2</sup>

### **Training for Panellists**

20. The Act required OHPA to provide, or arrange for the provision of, training for panellists. Currently, the health profession regulators tend to devise their own training programmes and professional support for panellists. We believed we needed to address fears that decision-making is influenced by professional preconceptions or preference for a particular party<sup>3</sup>. We also needed to ensure consistency between panels to address the belief that decision-making varies depending upon which individuals are sitting together as a panel on a given day. We considered this might best be remedied by mirroring the

<sup>2</sup> [http://www.judiciary.gov.uk/about\\_judiciary/roles\\_types\\_jurisdiction/tribunals/index.htm#a1](http://www.judiciary.gov.uk/about_judiciary/roles_types_jurisdiction/tribunals/index.htm#a1)

<sup>3</sup> Report on the evaluation of Tribunal training in Scotland: Scottish Courts, Government & Constitution Analytical Team, Justice Analytical Services, November 2008

integrated training system operated within the tribunal system, and by maintaining a record of training of the panellists as one element of their performance assessment.

21. We also recognised that many chairs and panellists hold positions on more than one regulator's panel or tribunal. Most are part-time in this role, and balance it with other commitments, whether domestic or professional. We therefore think scope exists for support mechanisms such as mentoring to help panellists grow in confidence and competence in their OHPA role.
22. OHPA wished to explore integrated training systems such as that provided by the Judicial Studies Board, and to develop a framework of competencies setting out the skills, knowledge and behavioural attributes needed to perform the adjudicatory role for OHPA.
23. We acknowledge that on day one OHPA would have inherited a legacy of the cases awaiting adjudication under the transitional provisions from GMC. We also expected that a majority of the current GMC panellists would move to OHPA since cases continued to be scheduled by GMC for hearing in readiness for OHPA day one, and the panellists' time was therefore committed. It would not be fair for OHPA to introduce a competency framework on day one. Rather, we intended to assess the panellists during the transitional period and provide opportunity for individual development. However, a competency framework would be embodied within the annual appraisal and performance assessment of OHPA panellists in the future.

### **Legally qualified chairs**

24. Provision was made in the legislation for OHPA to employ legally qualified chairs for our tribunals. This followed a strong recommendation made by Lady Justice Smith in concluding the Shipman Inquiry that the new independent adjudicator should adopt legally qualified chairs. Although lawyers now chair most tribunals, the opinion in the healthcare regulatory community remains divided. Under the procedures of some tribunals, the function of giving legal advice does not sit with a legal adviser, but with a legally qualified chair.
25. A legally qualified chair should have experience in analysing evidence, determining facts and reaching conclusions, although it is likely this will have been gained in an adversarial rather than an inquisitorial setting. We acknowledge that research within healthcare adjudication does not suggest that legally qualified chairs necessarily guarantee better decision-making. However, we believed that legally qualified chairs should be more effective in managing hearings more quickly when compared to those chairs without legal qualification advised by a legal assessor.
26. The Act empowered OHPA to conduct pilot exercises with legally qualified chairs. However, devising the terms of a pilot would not be easy. Which cases should qualify for the pilot, what criteria should be set for success, how long should it last? Rather than run a pilot we believed that we should review

the associated costs, efficiency and effectiveness of all of our chairs (legally and non-legally qualified), seeking the views of the Tribunal President, and then determine how many legally qualified chairs we should appoint to contribute to the more efficient disposal of cases.

27. One notion was for us to appoint a number of legally qualified chairs who, together with the Tribunal President, would act as the core leadership team. It is open to question whether a mix of full and part-time legally qualified chairs would be beneficial.

### **Legally qualified chairs and the role of the legal assessors**

28. Whilst these proposals focused on the legally qualified chairs, we also determined to reflect further upon the role of legal assessors. For example, what is the relationship between the legally qualified case manager and the legal assessor?
29. The current model, common to the health professions regulators, of a professional / lay panel advised by a legal assessor emerged when reforms were introduced across the health profession regulators. The changes prevented council members of the regulator from participating in health profession final adjudication hearings of those subject to its jurisdiction. The addition of the legal assessor was to provide advice, but not to participate in any decision-making role.
30. The Act provided for OHPA to make Rules for a panel not to be advised by a legal assessor if the chair of the panel is legally qualified. Legal assessors currently intervene or provide advice on procedural issues such as gaining agreement to narrow areas of dispute. They also provide advice, for example, about the admissibility of evidence or the impartial reading of statements of absent witnesses. OHPA would exercise powers to make directions at case management to the parties as to the conduct of the proceedings, which mirror many of the procedural roles currently fulfilled by the legal assessors. We believe this could result in more effective case management at each stage of the process, with consequent cost savings, and a more proportionate, ordered and effective system as a whole.

### **The unrepresented respondent**

31. If legal assessors were not appointed to advise a tribunal panel, the legally qualified chair would as a consequence need to ensure unrepresented practitioners were provided with any necessary assistance during a hearing (currently this is provided by a legal assessor at the request of a panel chair). Such assistance might be provided through a duty solicitor or McKenzie Friend (a layperson who provides reasonable assistance to a respondent who is not legally represented)<sup>4</sup>. However, a debate is necessary to determine who

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<sup>4</sup> Where proceedings are held in open court, principles set out in Court of Appeal decisions ensure that a litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend. This is allowed unless the judge is satisfied that fairness and the interests of justice do not so require. This may be withdrawn if the judge forms the view that the assistance the MF has given, or may give, impedes the efficient administration of justice; reasons for refusal or withdrawal must be given.

should bear the cost of such provision, as OHPA was to be non-profit making and would have no budget. Rather it was required through legislative regulations to charge its costs to the regulator bodies utilising its adjudicating services. Alternatively, it could fall to the legally qualified chair to assist the unrepresented respondent. If this were to be the case then we considered that the chair might adopt greater flexibility in the proceedings. This could allow the unrepresented respondent opportunity to 'state their case' before observing the more standard hearing procedures of the presentation of facts and examination of witnesses.

### **Pre-hearing case management**

32. We recognise that it is difficult for the regulators to implement sufficient discipline into the process whilst they remain both a party to the proceedings and responsible for determining the outcome. The absence of any sanctions for breach of pre-hearing directions has also been an obstacle.
33. In reviewing other jurisdictions, we were aware of standard directions for the mutual disclosure of evidence, lines of argument, hearing time estimates, and agreement on expert advice. (At the preliminary conference, the parties can request any particular departure from the standard directions.)
34. We also believed that each party should be obliged to identify factual witnesses whom it intended to call and which of the alleged facts the various witnesses would prove.
35. The filing of such documentation was necessary for any case management conference at which effective case management directions are to be given. The current lack of obligation on a respondent to disclose evidence at an early stage means it is impossible to discern the extent to which matters will be fully contested, or whether in reality the parties are not that far apart. We included all of these matters within a non-exhaustive list of directions that could be made by a legally qualified case manager in our day one Rules.
36. The person conducting the preliminary and substantive hearings must be able to manage proceedings to complete them fairly within the allotted time. This requires the confidence to intervene appropriately to remind representatives of the preliminary directions. This ambition therefore also directly linked to a previous one for the growth of skills and competences of the chairs and panellists.

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What may a MF do? Provide moral support, take notes, help with case papers, quietly give advice on points of law or procedure, issues the respondent may wish to raise in the hearing, questions the respondent may wish to ask witnesses. The MF may not act on behalf of the respondent, is not entitled to address the panel, may not attend sessions *in camera*, nor act as an agent to the respondent outside of the hearing (for example by signing papers).

### **Oral hearings only when necessary, with two-stage decision process**

37. One of the advantages of preliminary hearings and directions is to identify the extent to which allegations are in fact uncontested or the parties are not far apart. If matters are not contested, OHPA believed it could save much time and expense to dispense with the oral hearing if this was with the consent of the practitioner. We do not believe that Article 6 requires a public hearing if matters are not in dispute. But neither is this an exercise to bury the matters or deal with the practitioner behind closed doors and away from public scrutiny. We also concluded that this change in procedure should particularly be applied to review hearings for the monitoring of undertakings or practise conditions, and for health cases, where it is common ground that there has been no change since the previous review.
38. It is common for a regulator's procedural Rules to require that an adjudicatory outcome can only be reached after a panel hearing, even when there is little or no dispute. The panel might not have been provided with written evidence in advance, and, contrary to the practice in many courts and tribunals, witnesses are required to give all of their evidence "in chief" orally. ["In chief" is the evidence given by a witness for the party who called the witness.] Even accepting the need for cross-examination, the written statements could be accepted as evidence. Our ambition was that, subject to a modest supplementary examination in chief, a written witness statement should be accepted.
39. OHPA intended to commence with the GMC's current three-stage decision process on day one (finding of facts, whether these amount to impairment, and sanctions). At each stage at present, the panel retires *in camera* to reach its decision. We were conscious that the current system results in up to half the hearing being conducted *in camera*, with consequent delay and expense. However, OHPA contended that in fitness to practise cases there are essentially two stages: the facts alleged and their implications for impairment of fitness, and the possible sanctions for the respondent's representative to present arguments in mitigation.
40. Alternatively, it was suggested by OHPA's Challenge & Confirm group<sup>5</sup> that a two-stage process that required the facts to be proven, and impairment considered with proportionate sanction, may also be worthy of consideration.
41. With either of these options the panel would retire and reach its decision. On return, the chair could indicate the outcome and summary of reasons, with an indication that a full written decision will follow, thereby releasing all parties and not necessitating a significant and costly wait whilst a written determination is produced. It remains important to ensure that the reasoned decision does in fact follow swiftly; the time for appeal will only run from the time it is received.

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<sup>5</sup> A group made up of lawyers and others with an interest in medical regulation.

## **Specimen charging**

42. It is an increasingly common feature of fitness to practise proceedings that a pattern of conduct consisting of a number of instances is alleged which results in all of them included as formal allegations. Findings in cases that have gone to appeal (for example, *Toth v GMC* [2000] 1 WLR 2209) have directed this development. OHPA does not believe this best serves the public interest; nor does it safeguard the public any better than if specimen allegations were brought.
43. We believe the concerns of the courts were that not to refer all of the allegations resulted in an over-favourable treatment of the practitioner. For cases referred for adjudication there must be a realistic prospect that the facts, if established, demonstrate a practitioner's fitness to practise is impaired to a degree to justify action on registration. Nevertheless, if the sanction imposed on the practitioner would not be greater if the un-referred facts were proven in addition to the referred facts, then only those facts referred should suffice. The need for reassurance of the complainant and the public that complaints are fully and properly investigated and that there is no cover up remains fully satisfied if a proper investigation is conducted prior to determining the allegations to refer.
44. Careful guidance would undoubtedly need to be given on when to decide not to refer an alleged fact. Where there are several complainants in relation to one practitioner, for example, but the complaints all go to one allegation of impairment, it is unlikely to be appropriate to refer one complaint over that of another if each retains a legitimate expectation that their complaint will be publicly ventilated. In seeking to address this need, OHPA considered introducing impact statements.
45. Specimen charges are frequently used by prosecutors in the criminal courts. The Crown Prosecution Service Code<sup>6</sup> provides that prosecutors may select charges so long as they reflect the seriousness and extent of the misconduct, allow the court to impose appropriate penalties, and enable the case to be presented in a clear and simple way.
46. Despite the existence of indicative sanctions guidance, the regulator, when launching proceedings, does not currently indicate what sanction it asserts would be appropriate to protect the public given the facts and circumstances it is alleging. Consequently, this may make some respondents more likely to challenge all of the allegations, and make them less likely to make admissions that could lead to a shortening of the proceedings.
47. In many circumstances, NHS-employed health professionals will remain in employment (or under contract) while fitness to practise proceedings are progressing. It is therefore very important that hearings reach their natural end as quickly as the conduct of fair and thorough proceedings will allow. This is to minimise the continuing costs to the taxpayer of reimbursing any health professional who is, in effect, deemed not fit to practise whilst awaiting

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<sup>6</sup> The Code for Crown Prosecutors. Crown Prosecution Service. February 2010

an adjudication decision. The financial burden of any delay falls to the taxpayer, and it was OHPA's ambition to reduce this wherever it was able to do so.

48. OHPA believed it is not appropriate to cite every possible allegation if the effect is to make it difficult for a case to be presented or defended concisely. However, we acknowledge this is a sensitive issue – particularly for complainants and those representing the interests of patients.

### **Impact statements**

49. In proposing specimen charging, OHPA was aware that this might disappoint or frustrate patients or their families if the complaints they make are not contained within the selected charges brought. Conversely, in criminal cases the victims do not determine the charges brought, so this should not be a contentious issue.

50. Our proposal aimed to bring the whole matter in to proportion with the seriousness and extent of the misconduct, and to shorten the length of the hearing (and through this action shorten the length of waiting-time to bring to a hearing). Whilst some complainants might not have the satisfaction of seeing the allegation made and the chance to give evidence about it, if the hearing is able to find fact and impose an appropriate sanction, their personal participation becomes unnecessary.

51. To address what might be seen as an imbalance, or an over-favourable treatment of the practitioner, OHPA proposed to carve in 'impact statements' to the evidential aspects of the hearings. This takes the lead from the process recently introduced in the criminal jurisdiction, and should ensure the hearing panel is aware of the impact that the alleged conduct has had on the patient or their family.

### **Costs jurisdiction**

52. The cost of disciplinary procedures is an increasing burden on registrants. In effect, those whose conduct or behaviour is not brought in to question (the vast majority) are paying for those whose fitness is in question who do not engage with the process, or who engage but ignore offers on agreement (the small minority). Unlike insurance premiums, professional regulation fees are not charged on a sliding scale on the basis of 'polluter pays'. The good are therefore subsidising the bad.

53. There was no reason why OHPA should not expect its panels routinely to make costs awards in favour of the regulators against registrants who had been unwilling to recognise that their behaviour or performance rendered them unfit to practise.

54. We were also specifically given the power to make Rules to allow panels to order that the costs of a representative be disallowed by reason of their

conduct of the proceedings – that is to say a wasted costs order. The effect of this is that the representative would not be able to charge his or her client for the work subject to the order. This applied to the representatives of either party so applied equally to the presenting officer and to the defending counsel.

55. We recognise that regulators bring proceedings in the public interest and should not be deterred from doing so through fear of costs orders against them, but shambolic conduct should be penalised.

56. The Act had intended that our Rules require that account be taken of the ability of a party to pay before making a costs award. We did not wish the panels to be overly burdened with financial status enquiries. If the regulator sought a costs award, the respondent should be given the opportunity to seek to demonstrate to the panel that he did not have the means to pay. A costs award may amount to a substantial sum, and whether the regulator would actually be able to recover the money from the registrant is unknown.

57. All of these scenarios and potential use of OHPA's costs jurisdiction were highly relevant to our interest in legally qualified chairs. The handling of a wasted costs jurisdiction calls for judicial skills in order to be fair to the representative who may be at risk.

### **Cost capping**

58. Whilst costs awards might have been a useful deterrent to lack of engagement, there are also those parties who, given the opportunity to reach consensual agreements, prefer to pursue a hearing in full. In doing so, there appears a tendency to then inflate legal expense through disproportionate representation, and increase the number of expert witnesses relied upon.

59. A feature of modern casework and costs management in civil litigation is known as "cost capping". By this is meant that at a preliminary hearing the court or tribunal imposes limits on the amount of future costs that a successful party can recover from the losing party. It does not mean that the party is prevented from spending more than is specified in the cap, simply that no more can be recovered from the party against whom the order is made. The parties prepare and exchange costs budgets and submit these to the tribunal for approval, and the tribunal states the extent to which they are approved. So far as possible the tribunal then manages the case so that it proceeds within the approved budgets. At the end, costs are assessed in accordance with the approved budget.

60. This aspect of case management has been recommended by Lord Justice Jackson in his recent review of the costs of civil litigation. He notes that cost management is in its infancy in England, being subject to a pilot scheme (albeit one that seems to be proceeding successfully). He does, however, point to the need for adoption of supporting materials and for training judges and lawyers in costs management.

61. The legally qualified chairs and case managers would certainly require training to develop an expertise in a costs jurisdiction sufficient to impose costs capping.

### **Improving use of hearing rooms and opportunities for panellists**

62. The costs of adjudication continue to escalate as the number of cases increases, and the average length of each hearing grows. There is a consequential strain upon availability of panellists and hearing rooms.

63. The location of hearings involves balancing competing principles. It may well be more convenient for an organisation to run from one location, inviting all the parties and witnesses to come to it. In contrast, a system designed to be maximally accessible may not be efficient if it runs at great expense from numerous easily reached but under-used locations. OHPA took an early decision to locate its hearings in Manchester and London. But if other regulators had come on board, it may well have been cost-effective in the future to have run adjudications in a number of regional centres. Very significant sums are currently paid in travel and subsistence where panellists and others cannot be expected to travel home at night.

64. Moreover, technologies continue to improve. Telephone and video-conferencing are already technological features within the case management and pre-hearing stages, and may be utilised for the protection of a vulnerable witness during a hearing. It is not unreasonable to consider how hearings might, in the future, take place in a virtual environment. Whilst not an immediate ambition it is one nevertheless that OHPA determined to review at intervals to best reflect its overriding objective of flexibility.

65. Hearing rooms themselves are a significant investment and, as the regulators will bear the burden of its costs, it is only right that OHPA looked to achieve maximum benefit from these assets. Related to the successful use of hearing rooms is the availability of the panellists, and indeed the availability of all parties to attend on the notified days.

68. We were aware of the growing difficulties of recruiting a sufficient number of professionally qualified panellists, often due to pressure of work commitments. One possibility OHPA wished to test was whether it could enter into contracts with employers (such as NHS Trusts) and purchase portions of time from consultants and other specialist staff. Also, OHPA planned to investigate any equivalent arrangement that might be possible with independent practitioners such as General Practitioners, given that many are self-employed.

69. We further speculated whether the difficulties of attracting professionally qualified panellists might be addressed in part by holding hearings outside of 'normal' working hours. OHPA would then derive maximum use of the rooms and, it could be hoped, be able to appoint sufficient professional panellists. Indeed, these additional hours may also suit others who are in employment that dissuades or prevents them for applying as lay panel members.

70. If flexibility were designed into the system, it might be possible for cases that run long, that is to say the hearing lasts longer than the time pre-allocated to it, to continue rather than being adjourned, part-heard. The delay caused by such adjournments is costly, and might be avoided if panels were able to sit until later, or continue at weekends.

71. Conversely, the costs of hearings can be inflated when panellists require overnight accommodation and subsistence. OHPA believed that empanelment on a local basis for longer cases (so the panellists may return home at the end of each day) offered significant financial benefits. However, we remained uncertain as to the degree to which local empanelment was feasible.

### **In conclusion**

72. Our starting points were the modernisation of the legal and judicial procedures in the courts and tribunal system, and opportunities for a more efficient adjudication procedure by better utilising powers provided to us in the Act. This ambitious agenda does not disappear with OHPA's demise. The DH consultation confirmed that the GMC would move forward with the establishment of an independent tribunal and described many of the initiatives described in this paper. We hope that by publishing this paper now it will serve as a legacy of OHPA, and inform future debates.