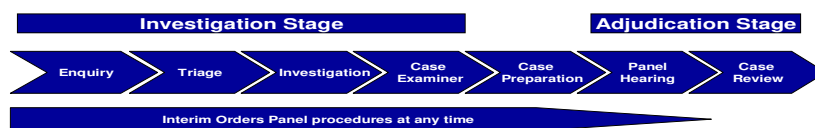


# Possible changes to adjudication procedures and the impact upstream on initial FtP processes

## Introduction

The Fitness to Practise procedure is, in crude terms, a relatively linear exercise (as illustrated below).



However, beneath each of these stages sits a plethora of activities and procedural requirements. In working to establish OHPA, the style and format of other adjudicators was reviewed in order to identify possible models and efficiencies OHPA might introduce. Whether OHPA did indeed seek to introduce new or adapted ways of delivering adjudication rested in part upon the impact of such changes on the preceding investigatory and preparation stages. Of course, there were other and more important considerations for OHPA to make; for example, the fundamental principle of a right to a fair hearing within a reasonable timeframe, and the ease and cost of implementing the proposed changes either individually or collectively.

The following list provides an outline of only those procedural changes proposed by OHPA that were assessed as having an impact on the activities and legislative requirements of the stages preceding adjudication of the referring regulatory body. OHPA also made other proposals and held future ambitions for other changes such as the appointment of a Tribunal President. These matters are not discussed within this paper, and the reader should refer to the OHPA Policy Ambitions discussion paper for further information.

## **Procedural changes proposed by OHPA**

### **Administrative trigger for an adjudication referral**

Cases are referred for adjudication by various routes:

- Following investigation
- As a result of a prior finding
- Non-compliance with a health or performance assessment
- Breach of undertakings.

A referral to an independent body for adjudication would require a duplication of the notice of referral issued by the referring body – to both the practitioner (and/or their legal representative) and to the independent adjudicating body. Notice can be served by a number of means and media, and simple duplication represents a negligible additional activity. More important is the need for the independent adjudicating body to determine a consistent approach with all of the regulatory bodies making referrals to it.

### **Timing of a referral for adjudication**

OHPA had proposed that referrals would only be made to it when a case investigation was complete. A referral would then trigger pre-hearing case management as provided for in OHPA day one rules. The current practice of many regulators is to refer in preparation for case listing and empanelment, while continuing the investigatory process. This can lead to cases being withdrawn as (a) not proven once investigations are completed, (b) requiring more time to complete investigation, or (c) the parties reach an agreement as to an appropriate consensual disposal arrangement.

Requiring referral when investigation is complete does not impact upon the investigation process *per se*, but would affect any existing KPI or service targets determined by the respective referring regulator.

Referral following completion of investigation was supported by both complainants and respondents, and their professional representatives, as the substance and tenor of the case is obviously much better understood than a referral prior to the investigative completion.

### **Case management following referral**

OHPA proposed to hold pre-hearing cases management meetings for every case referred to it, bar in some exceptional circumstances. The model to be adopted closely mirrored the practices of other judicial proceedings we had previously investigated (sister paper on style & format of adjudication refers). In particular, the use of standard directions to provide for the mutual disclosure of evidence, lines of argument and agreement of expert advice. The filing of such information provides the necessary groundwork for effective case management directions to then be given. OHPA was also of the view that this process would enable the adjudication of some cases to take place on the papers, without recourse to its FtP Panel, via consensual disposal.

In common with OHPA's proposal regarding the timing of a referral, this change also required the case investigation to be complete. It also needed the interested parties to meet disclosure requirements. The widespread utilisation of case management afforded other opportunities to ensure proportionality, cost reduction, and improved efficiency and timeliness as described in the following paragraphs.

### **Specimen charging and impact statement**

It was proposed to reduce the number of allegations charged to the most important matters, and to restrict the number to those a prosecutor could get home on to achieve the sanction competed for. This can already be achieved in part under 'Joinder' rules (that is to say, when two or more charges are similar in nature and are proven by common facts they can be joined together as a single allegation). However, the OHPA proposal was for this to be taken further and for only the most important or serious matters to be charged.

This would have been a controversial change, especially to those affected by the behaviours or practice of a practitioner referred for adjudication. It is possible some victims would have felt that they had not 'had their day in court' on the grounds that the practitioner had not been charged with a matter that affected them personally. OHPA therefore decided to introduce a further change and carve impact statements into the hearing procedure. (The analogy was to the victim impact statements now routinely heard in the criminal courts.)

These changes would have affected the case preparation of the referring regulator, in selecting the matters to be charged and ensuring that, where matters were not included, the relevant complainants were afforded the opportunity to make an impact statement. OHPA was not afforded the time to test whether this might best be achieved prior to case referral or at the pre-hearing case management discussions.

### **Consensual disposal & other routes to disposal prior to adjudication**

The proposed changes above hinged upon the timing of referral to OHPA and the preparation of the case in readiness for adjudication. However, this assumes that a formal adjudication is actually necessary. OHPA was firmly of the belief that some cases did not need to be referred; rather, that the regulator should use all options and sanctions available to appropriately dispose of the matters charged. OHPA promoted itself as an adjudicator of last resort that would deal with the most serious cases, or those cases where agreement could not be reached or an argument needed to be heard.

Whereas other changes outlined in this paper were predominantly administrative, the desire to reduce the number of hearings as a whole represented a significant change to existing procedures, and more broadly to the organisational culture of the regulators. It would have been far from straightforward as it would have necessitated the regulator defining

what a serious case might constitute. Due to the lack of harmonisation of sanctions across the regulators, it could also have resulted in practitioners of different regulators receiving different outcomes on matters which were essentially identical.

Given the cultural change this proposal required of the referring regulator, it might be seen as the reform facing the greatest hurdles. However, reducing the number of formal adjudications is now proving to be a popular proposal, with both the GMC and GOC currently consulting upon possible routes to consensual disposal and other means to dealing with cases without recourse to a hearing. However, a problem continues to persist in the lack of harmonisation of sanctions - despite CHRE efforts in this direction.

### **Ethical defence**

In trying to assist with a view on serious cases, OHPA suggested the use of ethical defence in certain case types. This is applied when an individual convicted of a serious crime against another individual, such as sexual or physical abuse, does not offer a defence when the adjudicating panel subsequently hears the matter. Deferring to the moral principles of ethical behaviour, specifically the human duty of respect of others, prevents the need to re-hear evidence previously presented in a higher place (a court), and removes the distress which a material witness might otherwise be re-subjected to. In essence the matter is proven and the sanction is striking off.

### **Costs management**

Costs management is the principle of limiting the amount of money a party is entitled to incur during the course of proceedings. Overall costs escalate with the number of allegations charged, the length of the hearing, and the seniority of the legal representation retained by each party. Civil litigation case management includes cost capping, and OHPA thought an alignment to this might be useful.

Capping does not prevent any party spending more than the capped amount, but this would be the maximum that could be applied for and awarded if costs were to be sought. OHPA suggested the value of the cap would be determined by the legally qualified chair at the case management stage.

The purpose of this change was to ensure proportionality to the seriousness of the matter of impairment charged. The impact on the referring regulator would have been that, in preparing their case, they would need to select their presenting Counsel or legal representative in proportion and relation to the matters of charge.

### **Costs jurisdiction**

The Health & Social Care Act 2008 made provision for OHPA to exercise a costs jurisdiction. Classically, regulators are keen to request costs awards

against those practitioners who fail to engage with or obfuscate the FtP process (often because they fail to, or are unwilling to, recognise that their behaviour or performance renders them unfit to practise).

However, OHPA was also given the power to make wasted costs awards. This refers to the costs of a legal representative of any party, and that their costs may be disallowed by reason of their conduct of the proceedings. The effect of wasted costs orders is that the legal representative is not able to charge their client for the work subject to the order. With respect to the referring regulator, this again would have encouraged a more proportionate approach to the proceedings.

### **Reporting determinations and making changes to the register**

Whilst OHPA would have published the determinations of its panels, it would also have been for the referring regulator to report the findings and to make any annotations to the register entry of the individual(s) adjudicated upon. No significant impact was predicted.

### **Reducing the number of IOP reviews**

Where an Interim Order has been made that affects an individual's ability to carry out their profession, it is right that the Order is reviewed at intervals as defined by rules or procedural practice (normally 3 – 6 monthly). Where the regulator or practitioner believes that circumstances have changed, a review can be requested at any time without need to wait until the next scheduled date. However, no similar opportunity exists for a review to be declined or deemed unnecessary on the grounds that there has been no change since the previous occasion.

GMC published FtP statistics (2009) indicated that in the region of 500 Interim Order reviews took place during the year. This is the single largest case type to be referred for adjudication. OHPA was keen to see the review schedule bypassed where there had been no change in the practitioner's circumstances - both on the grounds of fairness and to reduce unnecessary expenditure on unnecessary hearings.

Wendy Harris