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Consultation on Remote Hearings
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Dear Sir or Madam

Re: CSP response to 'Consultation on permanent changes to our Rules to hold remote hearings'

The Chartered Society of Physiotherapy ('CSP') is the professional, educational and trade union body for the UK's 60,000 chartered physiotherapists, physiotherapy students and support workers.

Physiotherapists are autonomous practitioners, able to independently assess, diagnose and prescribe medicines. The contribution of physiotherapy can be seen at many points of a care pathway as physiotherapists work as clinical leaders, first contact practitioners and multi-professional team members, to support patients in hospital, home, community and leisure environments.

We are responding in our role as the voice of physiotherapy and as the professional body that represents physiotherapists, physiotherapy support workers and physiotherapy students.

We represent the majority of physiotherapists that attend hearings at the HCPTS.

Q1: We would like to amend our Rules so that we can continue to hold hearings remotely once the emergency period ends, where it is fair and practical to do so.

Do you think there are any reasons why we should not be able to hold remote hearings once the emergency period ends?

Yes / No / Don't know

Please explain your answer.

There are advantages to remote hearings, most obviously that of cost. A Registrant does not have to incur the sometimes significant costs of travelling and accommodation to attend a hearing. For Interim Order applications and review hearings, where it is unusual for a Registrant to be called to give evidence, a remote hearing is likely to be

beneficial. However, this still depends on a Registrant being able to attend remotely, undisturbed, with an excellent connection to the Internet and appropriate technology (and without potentially limiting protected characteristics that are set out below).

For many Registrants this will not be possible. In addition, Registrants often prefer to be in physical proximity to their representatives (if they are represented at all) which is not possible in a remote hearing.

However, for hearings where potentially career ending, or career limiting decisions, can be made such as a final hearing or a substantive review hearing a virtual hearing is unlikely to be appropriate, and should certainly not be the default position.

For final hearings this is particularly going to be the case where the evidence is highly contested or where there are disputed allegations of a very serious nature such as sexual touching or dishonesty. It is important for the Panel deciding the case, and the representatives, to be able to make a full observation of the demeanour of all of the witness to reach a conclusion on their credibility. This is not possible in a remote hearing where witnesses are often the size of a postage stamp.

Sir Andrew McFarlane President of the Family Division when adjourning a very serious family case listed for remote hearing (*P (A Child: Remote Hearing), Re (Rev 3)* [2020] EWFC 32 (16 April 2020)) noted: “Establishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way” (para 8). The same principle applies to HCPTS hearings.

In the context of that case Sir McFarlane noted (para 12) “it is a crucial element in the judge’s analysis for the judge to be able to experience the behaviour of the parent who is the focus of the allegations throughout the oral court process; not only when they are in the witness box being examined in-chief and cross-examined, but equally when they are sitting in the well of the court and reacting, as they may or may not do, to the factual and expert evidence as it unfolds during the course of the hearing”.

He added (at para 25): “although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge’s screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person’s link with the court hearing is maintained at all times and that they choose to have their video camera on”.

The HCPC should not have the right to impose remote hearings in such cases as it deems fit. Remote hearings should only take place where a Registrant consents to this mode of hearing.

For completeness a hybrid hearing does not get over any of the difficulties outlined above or below, and might even exacerbate them.

A Registrant’s Article 6 entitlement to a fair trial includes the “practical and effective” right of access to a court. Denying a Registrant access to an in-person hearing cannot be Article 6 compliant. There is also a strong argument to be made that denying a Registrant the opportunity to cross-examine his or her accuser in person would also not be Article 6 compliant. See, for example, *R (Bonhoeffer) v General Medical Council* [2011].

The recent appeal decision of *Byrne v General Medical Council* [2021] EWHC 2237 (Admin) set out principles for assessing witnesses in fitness to practise cases and particularly noted that demeanour, which can only be fully assessed in person, is relevant to assessing the reliability and credibility of witnesses. Mr Justice Morris noted “whilst there are different schools of thought, I consider that, if relevant, demeanour might in an appropriate case be a significant factor and the lower court is best placed to assess demeanour: Despite the doubts expressed in *Dutta and Khan*, the balance of authority supports this view”.

The August 2021 study 'Living Life in Limbo: Experiences of Healthcare Professionals during the HCPC Fitness to Practise Investigation Process in the UK' made key recommendations including allowing Registrants a voice, holding face to face meetings and providing opportunity for Registrants to be heard and increasing opportunities for Registrants to be heard using face to face contact. Defaulting to remote hearings will not do this.

Part V of the Health Professions Order 2001 currently provides:

(7) Hearings and preliminary meetings of Practice Committees at which the person concerned is entitled to be present or to be represented are to be held in —

(a) the United Kingdom country in which the registered address of the person concerned is situated; or

(b) if he is not registered and resides in the United Kingdom, in the country in which he resides; and

(c) in any other case, in England.

An appropriate amended wording would be:

(7) Hearings and preliminary meetings of Practice Committees at which the person concerned is entitled to be present or to be represented are to be held —

(a) in the United Kingdom country in which the registered address of the person concerned is situated; or

(b) if he is not registered and resides in the United Kingdom, in the country in which he resides; or

(c) in any other case, in England; or

(d) where the registrant consents, by way of remote hearing technology.

In our submission, therefore, it would not be down to a Panel chair to say that a hearing should proceed as a remote hearing where the Registrant has not consented.

Q2: Do you consider there are any equality and diversity implications for groups or individuals as a result of the proposed change to our Rules?

If yes, please explain what could be done to change this.

If the HCPC has a right to impose remote hearings without a Registrant's consent this will have a potentially disproportionate impact on those with protected characteristics.

For example, we represented a member whose autism meant that they could not communicate by phone. Had their case progressed to a final hearing it is extremely unlikely that they would have been able to participate in a virtual hearing.

We have another member with hearing difficulties who would be very unlikely to be able to participate fully in a virtual hearing.

Those with dyslexia (particularly if they do not possess two screens) are likely to find it extremely difficult to follow remote proceedings and refer to written evidence at the same time.

Registrants with mental health difficulties are likely to find it very difficult to participate in a remote hearing without support from their representative or friends and family being in close physical proximity.

In conclusion, the HCPC's unofficial policy throughout the pandemic of imposing remote hearings in all cases/objecting to all requests for in-person hearings is not appropriate and must not become a permanent arrangement.

– Ends –

Yours faithfully

Godric Jolliffe
National Legal Officer (Solicitor)