

Council, 9 December 2010

## Practice Notes

### Executive summary and recommendations

#### **Introduction**

At its meeting in October 2010, the Fitness to Practise Committee considered two new and one updated practice notes and recommended that the Council approve those practice notes.

Those practice notes are as follows:

#### **Discontinuance**

This is a new practice note which provides guidance to panels and those appearing before them as to how panels should address their obligations as set out in *Ruscillo v CHRE and GMC*. Ruscillo provides that in conducting fitness to practise proceedings, panels:

*‘Should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.’*

#### **Misuse of the HPC’s Collective Mark**

HPC has a “HPC Registered” collective mark which registrants may use subject to the approval of the HPC. The attached practice note provides guidance to panels on how to deal with fitness to practise cases relating to the misuse of the mark and when it is appropriate to limit its use.

#### **Assessors and Expert Witnesses**

This practice note has been updated following a change to the rules which came into force in April 2009 which changed the way panels must be constituted.

#### **Decision**

The Council is asked to approve the practice notes:

- Discontinuance
- Misuse of the HPC’s Collective Mark
- Assessors and Expert Witnesses.

#### **Background information**

A number of practice notes have been produced to aid panels that make decisions relating to fitness to practise cases. Their purpose is also to assist those who appear before them on matters of law and procedure. They do not override the provisions sets out with HPC's legislation. However, the Executive do keep the practice notes under regular review and ensure that they are updated to take into account relevant case law, legislation and good practice.

### **Resource implications**

None

### **Financial implications**

None

### **Appendices**

Practice Note - Discontinuance  
Practice Note – Misuse of the HPC's Collective Mark  
Practice Note – Assessors and Expert Witnesses

### **Date of paper**

23 November 2010

# PRACTICE NOTE

## Misuse of the HPC Collective Mark

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

### Introduction

The HPC has a “HPC Registered” collective mark (the **Logo**) which registrants may use subject to the approval of the HPC. A copy of the Logo appears in the Annex to this Practice Note.

The Logo is protected under the Trade Marks Act 1994 and the regulations made under that Act controlling the use of the Logo (the **Regulations**) include powers to enable Practice Committee Panels, in certain circumstances, to revoke or restrict a registrant’s use of the Logo.

### Use of the Logo

Registrants may only use the Logo after they have received HPC’s approval to do so. Applications are made online, via the HPC website and, as part of the application process, registrants must agree to abide by the terms of use for the Logo set out in the Regulations before they are given permission to download and use it.

### Misuse of the Logo

Panels are likely to encounter fitness to practise cases which relate to the misuse of the Logo in two ways:

- use of the Logo by a registrant without HPC’s approval; and
- use of the Logo by a registrant in a manner that contravenes the Regulations.

Primary responsibility for enforcing the Regulations rests with the HPC. Consequently, except where misuse or unauthorised use of the Logo first comes to light in the course of the Panel’s proceedings, cases relating to use of the Logo are only likely to be referred to a Panel where the registrant has been given an opportunity to take remedial action to end any breach of the Regulations, has failed to do so and, thus, where there is *prima facie* evidence of misconduct.

In cases involving misuse of the Logo, any allegation will specify what is alleged to have taken place and how this constitutes a breach of the Regulations. For example, Regulation 4.3.1 only permits the Logo to be used in connection with the name of the individual registrant and not in respect of a company, firm or other business;

### **Limiting use the HPC Mark**

Regulations 5.3.2 of the Regulations enables a Practice Committee Panel, where it finds that an allegation is well founded to:

- revoke a registrant's use of the Logo:
  - for a set period of time;
  - for the period of time during which any conditions of practice are in place;
  - for the life of the registrant; or
- place restrictions on a registrant's use of the Logo.

Any action taken by the Panel in relation to use of the Logo is separate from (and may be in addition to) any Order the Panel may impose of the registrant by way of sanction. However, in cases where a Conditions of Practise Order is imposed on the registrant, any limitation on the registrant's use of the Logo may be included in that order.

The need for panels to take action in relation to use of the Logo is likely to be rare. It is expected that Panels will only need to do so where the matter is specifically brought to the attention of the Panel, although Panels retain the discretion to act irrespective of any submissions made.

For example, if a Panel make a Striking Off Order, the registrant will cease to have any right to use the Logo in any event and similar considerations apply for the duration of any Suspension Order. In other cases, where a lesser sanction has been imposed, the Panel will have determined that the registrant should be permitted to remain in practice, albeit potentially subject to restrictions, and thus there is a presumption that the registrant should be permitted to use the Logo. Consequently, action to limit the use of the logo is only likely to be appropriate in cases:

- which relate specifically to proven misuse of the Logo; or
- where a Conditions of Practice Order has been imposed and the nature and extent of those conditions mean that it would be misleading to the public for the registrant to be permitted to use the Logo whilst those conditions are in place.

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THE HPC COLLECTIVE MARK



# PRACTICE NOTE

## Assessors and Expert Witnesses

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

### Introduction

The rules on the admissibility of evidence before Practice Committee Panels are those which apply in civil proceedings in the part of the United Kingdom in which the Panel is conducting a hearing. Consequently, as in any other civil proceedings, Panels have the discretion to admit opinion evidence which is given by expert witnesses.

In addition, Articles 35 and 36 of the Health Professions Order 2001<sup>1</sup> (the Order) enable the HPC to appoint **medical assessors**<sup>2</sup> to give advice on matters within their professional competence and **registrant assessors**<sup>3</sup> to give advice on matters of professional practice arising in connection with cases being considered by Panels.

The role of those assessors is set out in the Health Professions Council (Functions of Assessors) Rules 2003<sup>4</sup>. Those rules also refer to the appointment of **legal assessors**. However, the appointment of legal assessors is not discretionary. A legal assessor must be present at all Panel hearings.

### Assessors

A Panel may request the appointment of a medical assessor or registrant assessor in respect of any case which *has been referred to it for hearing following a decision that there is a 'case to answer'*<sup>5</sup> ~~it is considering~~. The decision as to whether an assessor is required in a particular case is a matter for the Panel alone. However, it is open to the parties to request that an assessor be appointed. Such a request must be made in writing to the Panel setting out the

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<sup>1</sup> SI 2002/254

<sup>2</sup> medical assessors are appointed from among suitably qualified registered medical practitioners

<sup>3</sup> registrant assessors are appointed from among suitably qualified members of the professions which the HPC regulates

<sup>4</sup> SI 2003/1577

<sup>5</sup> Assessors are sometimes asked to give advice to the Investigating Committee at the 'case to answer' stage. In that event the registrant concerned is provided with, and given an opportunity to comment upon, the advice before it is considered by the Investigating Committee.

issues on which the party concerned believes the Panel will need the assistance of an assessor.

Where a Panel proposes that an assessor be appointed it will, ~~not less than 28 days before an appointment is made,~~ notify the parties in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

A party that wishes to object to the appointment of an assessor or in respect of the assessor's qualification must do so in writing ~~and the objection must be received by the Panel not more than 14 days after the Panel's notice was issued.~~ Any objections should be taken into account by the Panel in deciding whether the appointment is to be confirmed.

Assessors' reports should be prepared in a similar format to an Experts' report (see below)<sup>6</sup> and must contain a copy of the instructions given to the assessor by the Panel in preparing that report. Any report prepared by an assessor must be sent to each of the parties not less than 14 days before the hearing.

Assessors should normally be present at the hearing and may participate in the proceedings as directed by the Panel, in accordance with the Health Professions Council (Functions of Assessors) Rules 2003. However, an assessor should not appear as a witness to give oral evidence or be open to cross-examination.

### **Expert witnesses**

Whether expert evidence of any kind is required is a matter within the discretion of the Panel. Consequently, the consent of the Panel is always required either to call an expert or to put an expert's report in evidence.

Panels should only give consent where they are satisfied that expert evidence will assist them to deal with the case and should limit the use of oral expert evidence to that which is reasonably required. Wherever possible, Panels should direct that matters requiring expert evidence are to be dealt with in a single or joint expert report.

Where a Panel has directed that evidence is to be given by one expert but a number of disciplines involved, a leading expert in the dominant discipline should be identified as the single expert. That expert should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.

### **The expert's role**

The paramount duty of any expert is to assist the Panel on matters within the expert's own expertise. This duty overrides any obligation to the party that instructs or pays the expert. Expert evidence should be the independent product of the expert. Experts should consider all material facts, including those which

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<sup>6</sup> and should also include the statement of truth

might detract from their opinion and should provide objective, unbiased opinion on matters within their expertise.

An expert should make it clear:

- when a question or issue falls outside the expert's expertise; and
- when the expert is not able to reach a definite opinion, for example because of a lack of information.

### **Experts' reports**

Experts' reports should be addressed to the Panel, not to the party who instructed the expert. An expert's report must:

- set out details of the expert's qualifications;
- provide details of any literature or other material which the expert has relied on in preparing the report;
- contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- make clear which of the facts stated in the report are within the expert's own knowledge;
- identify any person who carried out any examination, measurement, test or experiment used by the expert for the report, the qualifications of that person, and whether the task was carried out under the expert's supervision; and
- where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion.

An expert's report must be supported by a Declaration and Statement of Truth in the form set out in the Annex to this Practice Note.

### **Instructions**

The instructions given to an expert are not protected by privilege, but an expert may not be cross-examined on those instructions without the consent of the Panel. Consent should usually only be given if there are reasonable grounds for considering that the statement in the report of the substance of those instructions is inaccurate or incomplete.

### **Questions To experts**

Questions asked for the purpose of clarifying the expert's report should be put to the expert in writing no later than 28 days after the expert's report is provided to the parties.

Where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other parties and the



Panel. The party instructing the expert must pay any fees charged by that expert for answering those questions.

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## ANNEX

### Declaration and Statement of Truth

I [insert full name of expert ] DECLARE THAT:

1. I understand that my duty in providing written reports and giving evidence is to help the Panel, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the hearing, there is any change in circumstances which affect my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including those instructing me.
10. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
11. I understand that:
  - (1) my report will form the evidence to be given under oath or affirmation;
  - (2) questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;

- (3) the Panel may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the case, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
- (4) the Panel may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
- (5) I may be required to attend the hearing to be cross-examined on my report by a cross-examiner assisted by an expert;
- (6) I am likely to be the subject of public adverse criticism by the Panel if it concludes that I have not taken reasonable care in trying to meet the standards set out above.

#### STATEMENT OF TRUTH

I confirm that, insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

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# PRACTICE NOTE

## Discontinuance of Proceedings

This Practice Note has been issued by the Council for the guidance of Practice Committee Panels and to assist those appearing before them.

### Introduction

Occasionally, after the Investigating Committee has determined that there is a 'case to answer' in respect of an allegation, objective appraisal of the detailed evidence which has been gathered since that decision was made may reveal that it is insufficient to sustain a realistic prospect of proving the whole or part of the allegation.

As a public authority, HPC should not act in a partisan manner and seek to pursue an allegation which has no realistic prospect of success. Where such a situation arises, the HPC should discontinue the proceedings.

### Discontinuance

Once a case has been referred to a Panel of the Conduct and Competence Committee or Health Committee, if it is intended to discontinue those proceedings in whole or part, then the appropriate method of doing so is to seek the leave of the Panel to that discontinuance.

A Panel cannot simply agree to discontinuance without due inquiry, as it needs to be satisfied that the decision does not represent 'under-prosecution' on the part of the HPC. As the Court of Appeal made clear in *Ruscillo v CHRE and GMC*<sup>1</sup>, Panels conducting fitness to practise proceedings:

*"should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it."*

In order to be satisfied that discontinuance is appropriate, a Panel does not need to undertake a detailed inquiry and must take care not to stray too far in considering the evidence, particularly if only part of the allegation is being discontinued. The Panel's task is to ensure that the HPC has proper grounds for discounting proceedings and has provided an objectively justified explanation for doing so.

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<sup>1</sup> [2004] EWCA Civ 1356

To a large extent, the nature and scope of the Panel's inquiry will depend upon the explanation which has been provided by the HPC for the discontinuance. In this regard, HPC Presenting Officers are expected to assist Panels by providing a clear and evidentially robust explanation of why the decision not to proceed has been taken and why it is justified.

Presenting Officers are reminded that, in considering the prospects of proving an allegation, the HPC is not required to establish that the allegation is capable of proof to the standard required by the Panel (the balance of probabilities) but must act fairly and justly. Consequently, the Panel will need to be satisfied that the decision not to proceed has been reached either because the HPC has no realistic prospect of proving the allegation or because there is some other overriding public interest (for example, that a crucial witness or the registrant is seriously ill) which justifies discontinuance.

### **Further proceedings**

In determining an application for discontinuance, Panels should consider whether the more appropriate decision, as a matter of fairness to the registrant concerned, is to record a formal finding that the allegation is not well founded.

Similarly, as a public authority the HPC should not make repeated attempts to pursue the same allegation against a registrant. Although fitness to practise proceedings are not subject to a strict 'double jeopardy' rule prohibiting an allegation from being pursued more than once, a decision to discontinue fitness to practise proceedings is one which a registrant should be entitled to regard as final unless the contrary has been made clear to the registrant.

If the the decision has been taken on the basis of insufficient evidence and there is the prospect that further proceedings may take place if new and significant evidence comes to light or circumstances arise that require action to be taken in order to protect the public, this should be specifically addressed in the Notice of Discontinuance. A template for such a notice appears in the Annex to this Practice Note.

**[PRACTICE] COMMITTEE**

**NOTICE OF DISCONTINUANCE**

**TAKE NOTICE** that:

On [date] the Investigating Committee, being satisfied that there was a realistic prospect of the Health Professions Council (**HPC**) proving its case, referred the following allegation(s) (the **Allegation(s)**) against [name] (the **Registrant**) for hearing by the [Practice] Committee:

[set out allegation(s)]

On [date] the HPC agreed:

1. to discontinue all proceedings in relation to [paragraph(s) XXX of] the Allegation(s); and
2. that no further proceedings would be commenced in relation to [those paragraphs of] the Allegation(s) or the events giving rise to [it][them] [unless ....]

**AND FURTHER TAKE NOTICE** that the [Practice] Committee, being satisfied upon due inquiry that it is appropriate to do so, consents to the HPC discontinuing these proceedings.

Signed: \_\_\_\_\_ Panel Chair

Date: \_\_\_\_\_