Council, 22 March 2017

Review of Fitness to Practise Practice Notes

Executive summary and recommendations

Introduction

1. In preparation for establishing the Health and Care Professions Tribunal Service (HCPTS) - including the Tribunal Advisory Committee (TAC) - a review of existing Practice Notes has been undertaken. The primary purpose of this review is to ensure that Practice Notes are properly directed at Panels (rather than secondary audiences) and to remove statements of HCPC policy or practice which belong elsewhere.

2. To date, both policies and Practice Notes have been approved by Council. As previously agreed by Council, once the Tribunal Advisory Committee (TAC) has been established, it will be responsible for providing guidance to the Tribunal on matters of practice and procedure, in order to assist the Tribunal to conduct proceedings fairly, proportionately, efficiently and effectively. Principally, the TAC will discharge that function by assuming responsibility for the approval of Practice Notes.

3. All of the current Practice Notes have been reviewed in order to provide the TAC with a useful starting point from which to develop their programme for future reviews and development.

4. One new PN has been developed, *Conduct of Representatives*, to clarify the conduct expected of lay and other representatives appearing before panels of the HCPTS.

5. To assist Council, these revisions have been listed in the table at appendix 1. Copies of the revised Practice Notes and policies are also included in the appendices.

6. In the course of the review a number of amendments to the Indicative Sanctions policy and the HCPC's approach to fitness to practice policy have been identified.

7. The Indicative Sanctions Policy has been amended to:

    a. incorporate language taken from the Convictions and Caution Practice Note
    b. emphasise the need for real engagement by registrants and to clarify that Conditions of Practice Orders are unlikely to be appropriate in circumstances when the registrant has failed to engage in the FTP process

c. clarify that in those circumstances when a registrant is not working, Panels need to consider whether conditions of practice can be formulated which do not depend on the registrant finding work.

8. A comprehensive review of the Indicative Sanctions Policy is planned in 2017/18.

9. HCPC's approach to fitness to practice policy has been amended to include a footnote regarding the disclosure of unused material which was previously included in the Disclosures Practice Note.

Decision

The Council is asked to discuss and approve the proposed changes to the individual Practice Notes and policy documents as outlined.

Resource implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Financial implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Appendices

Appendix One – Summary of amendments to Practice Notes 2017
Appendix Two – Revised Practice Notes
Appendix Three – Indicative Sanctions Policy
Appendix Four – HCPC's approach to Fitness to Practise

Date of paper

9 March 2017

Appendix 1

Review of HCPC Practice Notes

The Council has agreed that, once the Tribunal Advisory Committee (TAC) has been established, it will be responsible for providing guidance to the Tribunal on matters of practice and procedure, in order to assist the Tribunal to conduct proceedings fairly, proportionately, efficiently and effectively. Principally, the TAC will discharge that function by assuming responsibility for the approval of Practice Notes. In order to provide the TAC with a helpful starting point, all of the current Practice Notes have been revised.

An explanation of the revisions made is set out below. In most case the amendments made are relatively minor; to improve readability, ensure that the Practice Notes are properly directed at Panels (rather than secondary audiences) and to remove statements of HCPC policy or practice which belong elsewhere.

Title	Revised	Comments
Article 30(2) Reviews	August 2014	Minor amendments to improve general clarity. The language relating to review applications made by the HCPC has been re-focused so that it refers to what Panels should expect rather than what the HCPC may do.
Case Management, Directions and Preliminary Hearings	January 2015 (Preliminary Hearings September 2015)	Title changed from "Case Management and Directions" and the formerly separate Preliminary Hearings Practice Note incorporated here. Minor amendments made to improve general clarity. Amended to reflect the recent rule change which permits Panel Chairs to issue directions without the need to hold a preliminary hearing. Addition of a reminder that parties and their representatives attending a 'prelim' need to be prepared to make an informed contribution to the management of the case. Standard Directions moved to an Annex.
Case to Answer Determinations	April 2013	Minor amendments to improve general clarity.

Child Witnesses	June 2015	Minor amendments to improve general clarity.
Competence and Compellability of Witnesses	August 2012	Minor amendments to improve general clarity. Clarification of the link between competence and capacity and, in particular, the relevance of the Mental Capacity Act 2005.
Concurrent Proceedings	August 2012	Minor amendments to improve general clarity. Specific reference made to the differing purposes of criminal and regulatory proceedings (*Ashraf v GDC*).
Conduct of Representatives	NEW	New Practice Note setting out the conduct expected of lay and other representatives appearing before Panels.
Conducting Hearings in Private	July 2015	Minor amendments to improve general clarity, to reflect the HCPC's revised overarching statutory objective (protection of the public) and to refer to the decision in *L v Law Society*.
Conviction and Caution Allegations	September 2015	Minor amendments to improve general clarity. Statements about sanctions removed (which will be recast and be included in the Council's Indicative Sanctions Policy)
Cross-Examination in Cases of a Sexual Nature	January 2015	Minor amendments to improve general clarity.
Disclosure of Unused Material	January 2015	Discontinued on the basis that HCPC practice is to disclose all material in every case. (An appropriate reference will be included in the Council's Fitness to Practise Policy).
Discontinuance of Proceedings	March 2013	Minor amendments to improve general clarity and to focus on what Panels rather than the HCPC should do. Clarification that in all 'discontinuance in whole' cases, the Panel should make a formal finding that the allegation is not well founded.

Disposal of Cases by Consent	August 2012	Minor amendments to improve general clarity and to focus on what Panels rather than the HCPC should do. HCPC policy on consensual disposal has been moved to a separate Annex.
Drafting Fitness to Practise Decisions	August 2012	Minor amendments to improve general clarity. New heading and text added on "What a 'reasoned' decision should include".
Finding that Fitness to Practise is Impaired	July 2013	Minor amendments to improve general clarity and to clarify that the 'steps' in the fitness to practise process do not always need to be treated as formal and separate stages.
Half time submissions	March 2013	Minor amendments to improve general clarity.
Health Allegations	January 2015	Minor amendments to improve general clarity, to clarify the relative rarity of health allegations and their focus on unmanaged ill-health, and to address cross-referrals from the Conduct and Competence Committee.
Hearing Venues	August 2012	Minor amendments to improve general clarity and to reflect the opening of HCPC's dedicated hearing centre in London and the selection of venues in Belfast, Cardiff and Edinburgh.
Interim Orders	September 2015	Minor amendments to improve general clarity. Under the heading "Orders in the public interest", specific reference has been made to the *Christou v NMC* and *NH v GMC* decisions.
Joinder	August 2012	Minor amendments to improve general clarity. Under the heading "Joinder and fitness to practise", addition of guidance on the need to avoid over-reliance upon criminal case law on joinder, having regard to the decision in *Wisson v HPC*.

Mediation	August 2012	Minor amendments to improve general clarity, to reflect the HCPC's overarching revised statutory objective (protection of the public), to make clear that the objective must also be pursued by Panels, and to refer to the public interest components identified in *Cohen v GMC*.
Opinion Evidence, Experts and Assessors	September 2015	Title amended from "Assessors and Expert Witnesses". Minor amendments to improve general clarity. New information added on the admissibility of and weight to be attached to opinion evidence provided by witnesses of fact, based upon the decision in *Hoyle v Rogers*.
Postponement and Adjournment of Proceedings	September 2015	Minor amendments to improve general clarity. Time limit in which administrative postponements may be sought has been amended from 14 days to 28 days before the scheduled hearing.
Proceeding in the Absence of the Registrant	September 2016	Minor amendments to improve general clarity. This Practice Note was substantially amended in September 2016 to reflect the decision in *GMC v Adeogba*.
Restoration to the Register	December 2015	Minor amendments to improve general clarity.
Service of Documents	August 2012	Minor amendments to improve general clarity.
Special Measures	March 2014	Minor amendments to improve general clarity. Under the heading "Explaining the use of special measures" a reminder of the need for Panels to allay unfounded concerns that the Panel will draw adverse inferences from the use of certain special measures, such as the sue of witness screens.
Striking Off Reviews: New Evidence and Article 30(7)	September 2015	Minor amendments to improve general clarity.
Unrepresented Parties	July 2015	Minor amendments to improve general clarity.

Use of Welsh in Fitness to Practise Proceedings	August 2012	Minor amendments to improve general clarity. Specific changes to address the need to appoint interpreters with relevant experience.
Witness and Production Orders	January 2015	Title amended from "Production of Information and Documents and Summonsing Witnesses". Minor amendments to improve general clarity and, in particular, to clarity when orders may be sought and the scope of such orders. Removal of all material relating to the exercise by HCPC case managers of the Article 25(1) power to require information in the course of an investigation. (That material will be reproduced elsewhere).

Health and Care Professions Council

PRACTICE NOTE

Case Management, Directions and Preliminary Hearings

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

Introduction

In fitness to practise proceedings, the interests of justice are best served by a process which is simple, accessible and fair and where the issues in dispute are identified at the earliest opportunity. Those objectives can be secured by case management procedures which require:

- the HCPC, which has the burden of persuasion[1], to set out its case;
- the registrant to identify in advance those parts of the HCPC's case which he or she disputes; and
- the parties to provide information to assist the Panel in the conduct of the case.

Expecting registrants to participate in this process is not contrary to their rights, as they retain the right to deny every element of an allegation if they wish to do so.

Case management

Article 32(3) of the Health and Social Work Professions Order 2001 imposes a statutory obligation on Panels to conduct proceedings expeditiously. Panels should meet that obligation by making full use of their case management powers, to ensure that cases are heard without undue delay, fairly, justly and in a manner which:

- is proportionate to their importance and complexity;
- encourages engagement and co-operation by the parties;
- avoids inflexibility or unnecessary formality in the proceedings;
- makes effective use of the Panel's time and expertise; and
- enables the parties to participate fully in the proceedings.

[1] That burden only applies to the facts alleged. Whether those facts amount to the 'statutory ground' of the allegation (e.g. misconduct) and, in turn, constitute impairment are matters of judgement for the Panel conducting the final hearing: *CRHP v. GMC and Biswas [2006] EWHC 464 (Admin)*.

Effective case management eliminates unnecessary complexity. Some cases are simpler than others and Panels should ensure that straightforward cases are dealt with straightforwardly. Panels should use their case management powers in appropriate cases to:

- identify the issues in dispute and seek to ensure that they are subject to no greater factual inquiry than justice requires;
- put arrangements in place to ensure that evidence, whether disputed or not, is prepared and presented clearly, effectively and by the most appropriate means;
- ensure that the needs of any witnesses are taken into account;
- encourage the use of collaborative tools, such as agreed chronologies or statements of agreed facts;
- set an appropriately early hearing date and establish a realistic timetable and programme for the conduct of the proceedings.

Directions

Panels and Panel Chairs have the power to give directions for the conduct of cases[2], including directions as to the consequences of failure to comply.

Directions are intended to ensure that the Panel and parties have a full understanding of the case before a hearing takes place. Directions should be used, in particular, to ensure that the issues in dispute are identified and to help the parties focus their preparation on those issues.

Directions should be used, at an early stage, to require the parties to:

- exchange documents;
- identify the written evidence they intend to introduce and the other exhibits or material they wish to present;
- identify witnesses that are expected to give oral evidence, the order in which they will do so and any special arrangements which need to be made for a witness;
- request any witness or production orders which are required to compel the attendance of a witness or the production of evidence;
- draw attention to any points of law that they intend to raise which could affect the conduct of the hearing; and
- indicate the timetable they expect to follow.

[2] Art. 32(3), Health and Social Work Professions Order 2001; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r. 7(1); HCPC (Health Committee) (Procedure) Rules 2003, r.7(1).

Standard Directions

To improve the management of cases, the Standard Directions set out in Annex A apply as 'default' directions in every case. At a minimum, Panels should actively manage cases to ensure compliance with the Standard Directions.

Where it considers that it is appropriate to do so, either of its own motion or at the request of a party, a Panel may give directions (Special Directions) which disapply, vary or supplement the Standard Directions.

Preliminary hearings

Panels have the power to hold a preliminary hearing[3] "*in private with the parties, their representatives and any other person it considers appropriate where it considers it would assist the [Panel] to perform its functions*"[4].

Most case management issues can be satisfactorily resolved 'on the papers' by issuing directions In the small number of cases where that is not possible, the Panel may need to hold a preliminary meeting

Preliminary hearings may be held by the Panel Chair sitting alone who, with the parties' consent, may take any action which the Panel could take at such a hearing. Wherever possible, Panels should adopt that practice.

The purpose of a preliminary hearing is to assist the Panel in preparing for and regulating the proceedings at a substantive hearing, for example, by resolving procedural, evidential, timetabling and other case management issues before the substantive hearing takes place.

A preliminary hearing should not be used to deal with which are properly a matter for the full Panel at a substantive hearing, such as making findings of fact in respect of disputed evidence.

In particular, Panel Chairs conducting preliminary hearings alone must take care not to make determinations in respect of substantive matters with which the other Panel members may disagree, such as the relevance of, or need for, particular evidence.

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[3] the legislation refers to "preliminary meetings" but that term has been found to mislead some parties as to the nature of the proceedings and the term "preliminary hearing" has therefore been adopted

[4] HCPC (Investigating Committee) (Procedure) Rules 2003, r.7(1),(2); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r. 7(2),(3); HCPC (Health Committee) (Procedure) Rules 2003, r.7(2),(3).

Procedure

A Panel may decide to hold a preliminary hearing of its own motion or at the request of one of the parties.

As many preliminary issues can be resolved by issuing Directions, a Panel should only agree to hold a preliminary hearing where it is satisfied that there are substantial procedural or evidential issues to be resolved and which cannot be resolved by other means.

Where a party asks for a preliminary hearing is held, before agreeing to do so, the Panel should require that party to outline the reasons for the request, including the issues which will be raised if the hearing is held and the steps which that party has already taken in order to resolve those issues.

Normally, the parties should be given at least 14 days' notice of a preliminary hearing. In setting the time and place for a hearing, Panels must take account of Article 22(7) of the Order, which requires preliminary hearings to be held in the UK country in which the registrant concerned is registered.

Regardless of the reasons for holding a preliminary hearing, the Panel (or Panel Chair, if sitting alone) should take the opportunity to verify the parties' compliance to date with all requirements relating to the proceedings, including the standard directions which apply to (or any special directions which have already been made in respect of) those proceedings. The Panel (or Panel Chair) may:

- consider issues relating to the hearing of the case including:
  - the extent to which any evidence is agreed including, where facts are not in dispute, requiring the parties to produce a statement of agreed facts;
  - where agreed between the parties, directing that witness statements are to stand as evidence in chief;
  - ordering the joinder of allegations;
  - issuing Witness Orders or Production Orders;
  - determining whether expert evidence is required;
  - determining applications for all or part of the hearing to be held heard in private;
  - ordering special measures or providing for any other needs of vulnerable witnesses;
  - determining whether any facilities are required for particular evidence, such interpreters or equipment for recordings or other exhibits;
- make arrangements for any further investigation which the Panel has agreed to have conducted and which the registrant has requested or consented to (such as a medical examination or test of competence);

- set a date for (or the arrangements for setting the date for) the hearing or a further preliminary hearing, including requiring the parties to provide dates to avoid and time estimates;
- giving any special directions for the exchange of documents prior to the hearing, including:
  - o requiring the mutual disclosure of documents and setting time limits or other requirements for disclosure or service;
  - o requiring agreed bundles or skeleton arguments to be submitted (this requirement should only be imposed if the parties are legally represented).

Parties and their representatives

Panels are entitled to expect that parties or their representatives attending a preliminary hearing will be familiar with the case and its history and be in a position to assist the Panel in managing the case, including:

- resolving any outstanding issues which are impeding the setting of a hearing date;
- agreeing dates for the hearing; and
- setting an informed and realistic timetable for that hearing.

[Date]

Annex A

Standard Directions

Standard Direction 1. Exchange of Documents

(1) The HCPC shall, no later than 42 days before the date fixed for the hearing of the case, serve on the registrant a copy of the documents which the HCPC intends to rely upon at that hearing.

(2) The registrant shall, no later than 28 days before the date fixed for the hearing of the case, serve on the HCPC a copy of the documents which he or she intends to rely upon at the hearing.

(3) The parties shall, at the same time as they serve documents in accordance with this Direction, provide the Panel with five copies of those documents.

Standard Direction 2. Notice to admit facts

(1) A party may serve notice on another party requiring that party to admit the facts, or part of the case of the serving party, specified in the notice.

(2) A notice to admit facts must be served no later than 21 days before the date fixed for the hearing of the case.

(3) If the other party does not, within 14 days, serve a notice on the first party disputing the fact or part of the case, the other party is taken to admit the specified fact or part of the case.

Standard Direction 3. Notice to admit documents

(1) A party may serve notice on another party requiring that party to admit the authenticity of a document or exhibit disclosed to that party and specified in the notice.

(2) A notice to admit documents (together with those documents unless they have already been provided to the other party) must be served no later than 21 days before the date fixed for the hearing of the case.

(3) If the other party does not, within 14 days, serve a notice on the first party disputing the authenticity of the documents or exhibits, the other party is taken to accept their authenticity and the serving party shall not be required to call witnesses to prove those documents or exhibits at the hearing.

Standard Direction 4. Notice to admit witness statements

(1) A party may serve notice on another party requiring that party to admit a witness statement disclosed to that party and specified in the notice.

(2) A notice to admit a witness statement (together with that statement unless it has already been provided to the other party) must be served no later than 21 days before the date fixed for the hearing of the case.

(3) If the other party does not, within 14 days, serve a notice on the first party requiring the witness to attend the hearing and give oral evidence (and thus be available for cross examination), the other party is taken to accept the veracity of the statement and the serving party shall not be required to call the witness to give evidence at the hearing.

Standard Direction 5. Withdrawal of admissions

The Panel may allow a party, on such terms as it thinks just, to amend or withdraw any admission which that party is taken to have made in relation to any notice served on that party under Standard Directions 2 to 4.

Annex B

[PRACTICE] COMMITTEE

NOTICE TO ADMIT [FACTS] [WITNESS STATEMENTS] [AUTHENTICITY OF DOCUMENTS]

To: [name and address of party]

TAKE NOTICE that in the proceedings relating to [identify proceedings] [the HCPC or name of other party], for the purpose of those proceedings only, requires you to admit:

[the following fact(s):

	RESPONSE*
1.	Admit/Dispute
2.	Admit/Dispute
3.	Admit/Dispute]

[the authenticity of the following document(s):

	RESPONSE*
1.	Admit/Dispute
2.	Admit/Dispute
3.	Admit/Dispute]

[the statement(s) made by the following witness(es), [a copy][copies] of which [is][are] are enclosed with this notice:

	RESPONSE*
1.	Admit/Dispute
2.	Admit/Dispute
3.	Admit/Dispute]

* delete as appropriate

AND FURTHER TAKE NOTICE that, if you do not within 14 days of the date of this notice serve a notice on [the HCPC or name of other party] disputing [any of those facts] [the authenticity of any of those documents] [any of those witness statements], they shall be admitted by you for the purpose of those proceedings.

Signed: _____ Date: _____

For [the HCPC or name of other party]
[Address]

DO NOT IGNORE THIS NOTICE

If you dispute [any of the facts][the authenticity of any of the documents][any of the witness statements] set out above, you should respond to this Notice (by striking out "Admit" or "Dispute" as appropriate) and returning a copy of it to the address shown above by no later than [date].

If you fail to respond to this Notice in the time allowed, you will only be able to [dispute those facts][dispute the authenticity of those documents][ask for the witnesses who made those statements to attend and give oral evidence] with the leave of the Panel.

RESPONSE

The [facts] [authenticity of the documents][witness statements] set out above are admitted or disputed by [the HCPC or name of other party] as I have indicated above.

Signed: _____ Date: _____

For [the HCPC or name of other party]
[Address]

Health and Care Professions Council

PRACTICE NOTE

"Case to Answer" Determinations

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

Introduction

Article 26(3) of the Health and Social Work Professions Order 2001 provides that, where an allegation is referred to an Investigating Panel, it must consider, in the light of the information which it has been able to obtain and any representations or other observations made to it, whether in its opinion, there is a "case to answer".

The "realistic prospect" test

In deciding whether there is a case to answer, the test to be applied by a Panel, based upon the evidence before it, is whether there is a "*realistic prospect*" that the HCPC will be able to establish at a hearing that the registrant's fitness to practise is impaired.
That test (which in some proceedings is known as the "real prospect" test) is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman*[1]:

> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success… or, as [Counsel] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."*

Applying the test

In determining whether there is a case to answer, the Panel must decide whether, in its opinion, there is a "realistic prospect" that the HCPC (which has the burden of persuasion)[2] will be able to prove the facts alleged and, in consequence, that a determination will be made that the registrant's fitness to practise is impaired.

The test <u>does not</u> call for substantial inquiry or require the Panel to be satisfied on the balance of probabilities. The Panel only needs to be satisfied that there is a realistic or genuine possibility (as opposed to remote or fanciful one) that the HCPC will be able to establish its case.

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[1] [2001] 1 All ER 91

[2] The HCPC only has the burden of proving the facts. Whether those facts amount to the statutory ground and, in consequence, whether fitness to practise is impaired do not require separate proof, but are matters of judgement for the Panel conducting the final hearing. *CRHP v. GMC and Biswas [2006] EWHC 464 (Admin).*

In reaching its decision, a Panel:

- should recognise that it is conducting a limited, paper-based, exercise and not seek to make findings of fact on the substantive issues;
- may assess the overall weight of the evidence but should not seek to resolve substantial and material conflicts in that evidence.

It is for the HCPC to prove the facts alleged, not for the registrant to disprove them. Although registrants are not obliged to provide any evidence, many will choose to do so and any such evidence should be properly taken into account by the Panel.

Resolving substantial conflicts in the available evidence, such as assessing the relative strengths of competing arguments is not a task which can be undertaken by an Investigating Panel. However, the mere existence of such a conflict does not mean that there is a case to answer. Panels need to consider whether the evidence in dispute has a material bearing on the issue of impaired fitness to practise. It may be that each of the conflicting versions of events, when taken at their highest,

In deciding whether there is a case to answer, Panels also need to take account of the wider public interest, including the overarching regulatory objective of protecting the public and public confidence in both the profession concerned and the regulatory process.

It is important for Panels to remember that the realistic prospect test applies to the whole of an allegation, that is:

- the facts set out in the allegation;
- whether those facts amount to the 'statutory ground' of the allegation (e.g. misconduct or lack of competence); and
- in consequence, whether fitness to practise is impaired.

In the majority of cases, the evidence will relate solely to the facts and, typically, this will be evidence that certain events involving the registrant occurred on the dates, and at the places and times alleged.

It will be rare for separate evidence to be provided on the 'statutory ground' or the issue of impairment, as these are matters of judgement for the Panel. For example, does, the factual evidence suggests that the service provided by the registrant fell below the standard expected of a reasonably competent practitioner or that the registrant's actions constitute misconduct when judged against the established norms of the profession? In reaching that decision the Panel may wish to have regard to the relevant HCPC Standards.

Review and amendment of allegations

In considering whether there is a case to answer, Panels should consider each element of the allegation, to see whether there is evidence to support the facts alleged and whether those facts would amount to the statutory ground and establish that fitness to practise is impaired.

Panels should also consider allegations 'in the round' to ensure that they strike the right balance in terms of the case which the registrant must answer.

In doing so, the Panel may need to amend or omit elements of an allegation. As allegations are drafted at an early stage in a dynamic investigative process, it is important that Panels give critical scrutiny to the drafting of allegations put before them, to ensure that they are fit for purpose and constitute a fair and proper representation of the HCPC's case.[3]

If a Panel varies or extends an allegation to a material degree, the registrant concerned should be given a further opportunity to make observations on the revised allegation before a final case to answer decision is made.

Impaired fitness to practise

In deciding whether there is a realistic prospect that fitness to practise is impaired, Panels should consider the nature and severity of the allegation.

People do make mistakes or have lapses in behaviour and public protection would not be enhanced by the HCPC creating a 'climate of fear' which leads registrants to believe that any and every minor error or isolated lapse will result in an allegation being pursued against them.

Determining, on the basis of a limited, paper-based exercise, whether there is a realistic prospect of establishing impairment can sometimes be difficult. A useful starting point for Panels is to consider whether the HCPC's case includes evidence which, if proven, would show that the registrant does not meet a key requirement of being fit to practise, in the sense that the registrant:

- is not competent to perform his or her professional role safely and effectively;
- fails to establish and maintain appropriate relationships with service users, colleagues and others; or
- does not act responsibly, with probity or in manner which justifies the public's trust and confidence in the registrant's profession.

A presumption of impairment should be made by Panels in cases where the factual evidence, if proven, would establish:

- serious or persistent lapses in the standard of professional services;
- incidents involving:
  - harm or the risk of harm;
  - reckless or deliberate acts;

[3] Further guidance on the drafting of allegations is set out in the Annex to the HCPC policy document *Standard of Acceptance for Allegations*

  - concealment of acts or omissions, the obstruction of their investigation, or attempts to do either;
- sexual misconduct or indecency (including any involvement in child pornography);
- improper relationships with, or failure to respect the autonomy of, service users;
- violence or threatening behaviour;
- dishonesty, fraud or an abuse of trust;
- exploitation of a vulnerable person;
- substance abuse or misuse;
- personal health problems which the registrant has not addressed, and which may compromise the safety of service users;
- other, equally serious, activities which undermine public confidence in the relevant profession.

No case to answer

A decision that there is "no case to answer" should only be made if there is no realistic prospect of a finding of impairment being made at a final hearing. This may arise where there is insufficient evidence to substantiate the allegation, the available evidence is unreliable or discredited, or where the evidence, even if found proved, would be insufficient for another Panel to make a finding of impairment. In cases where there is any element of doubt, Panels should adopt a cautious approach at this stage in the process and resolve that conflict by deciding that there is a case to answer.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Children as Witnesses

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

Introduction

Panels should take steps to ensure that, when children appear as witnesses in fitness to practise proceedings, they are able to participate without distress or intimidation and thus to give their evidence effectively.

Background

The legal definition of the age of a child varies according to context but, for the purpose of civil proceedings throughout the UK, may be regarded as a person under the age of 18.[1] This is consistent with definition in the UN Convention on the Rights of the Child, to which the UK is a signatory, Article 3.1 of which requires that:

> "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

The Panel rules[2] provide that a witness under the age of 17[3] (at the time of the hearing), if the quality of their evidence is likely to be adversely affected as a result of their age, may be treated as a vulnerable witness and subject to the 'special measures' set out in those rules. Those special measures include <u>but are not limited to</u>:

- use of video links;
- use of pre-recorded evidence as the child's evidence-in-chief;
- use of interpreters or intermediaries;
- use of screens or other measures to prevent the identity of the witness being revealed or access to the witness by the registrant; and
- the hearing of evidence in private.

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1 s.105 Children Act 1989, s.15 Children (Scotland) Act 1995, Art. 2 Children (Northern Ireland) Order 1995.

2 HCPC (Investigating Committee) (Procedure) Rules 2003, r.8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10A; HCPC (Health Committee) (Procedure) Rules 2003, r.10A.

3 it is anticipated that this will be increased to 18 when a suitable legislative opportunity arises

Childhood spans a broad age range and, in determining how to support and protect a child witness, Panels should take account of the child's wishes and their level of cognitive, social and emotional development. The child's age and circumstances will often dictate what special measures are appropriate.

Competence of child witnesses

There is no specific age below which children are regarded as incompetent to give evidence. In Panel proceedings, the basic test of competence is whether the witness is capable of giving rational testimony (in essence, being able to understand the questions put to them and to give answers capable of being be understood) and understands the nature of an oath. The relevant test was articulated by Bridge LJ in the following terms in *R v Hayes*:[4]

> *"The important consideration, we think, when a [tribunal] has to decide whether a [witness] should properly be sworn, is whether the [witness] has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".*

However, by virtue of section 96 of the Children Act 1989, even if a child does not meet the *Hayes* test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

- understands that it is his or her duty to speak the truth; and
- has sufficient understanding to justify his or her evidence being heard.

Whether a child is competent to give evidence is a matter for the Panel, but it is not an issue which a Panel must investigate merely because of the age of a witness.

Case management

Panels should always consider holding a preliminary hearing for the purpose of active case management in any case that involves a child witness. In doing so, the Panel should have regard to the full range of special measures which are available, taking account of the child's wishes and needs.

In any case where a child is to be called as a witness by the HCPC,[5] an early meeting will have taken place between the child (supported as necessary by a parent, guardian or other appropriate adult), a HCPC case manager who has been trained in assessing vulnerable witnesses and the solicitor who will conduct the case on the HCPC's behalf. This enables the case manager and solicitor to build a rapport with the witness and to provide support and reassurance at an early stage in the process.

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4 [1977] 1 WLR 238

5 Special measures may apply to a child called by any party. If the HCPC becomes aware that a registrant proposes to call a child as a witness, the registrant will be advised to submit relevant information to the Panel

Normally, in the course of that meeting the case manager will conduct a vulnerable witness assessment and identify any special measures that would assist the child witness in giving their evidence. That information will form part of the submissions put to the Panel by the HCPC at any preliminary meeting.

Although the adoption of special measures is subject to any representations made by the parties (and any advice provided by the Legal Assessor), there should be a presumption that all child witnesses will give their evidence-in-chief by video-recorded interview and any further evidence by live video link unless the Panel considers that this will not improve the quality of the child's evidence.

Older children may prefer to give live evidence and, if that is the case, there should be a presumption that they will do so from behind a screen. A child witness who does not wish to use a screen should be permitted that choice if the Panel is satisfied that the quality of the child's evidence will not be diminished.

At any preliminary hearing the Panel should seek to fix an early date for the hearing of the case and agree a timetable that avoids adjournments. The timetable needs to take account of the child's intellectual capacity, ability to communicate and concentration span and the length of any recorded evidence-in-chief. Generally, if a child's evidence is taken early in the day it reduces the time that the child must spend at the hearing and also minimises the risk of delay caused by procedural or other matters that may arise as the day progresses.

Panels should also seek to limit the issues on which evidence needs to be given by a child witness, by having as much of the child's evidence as possible accepted in advance as admitted fact. For example, where abuse is alleged, the fact that some form of encounter with the child in question took place at a particular time and location may not be disputed.

Panels should permit a child witness to see their statement ahead of the hearing for the purpose of refreshing their memory. This is particularly important where evidence is video-recorded. A child may be uncomfortable seeing themselves on video and it is better if this does not occur for the first time at the hearing.

Panels should also direct that any familiarisation visit to the hearing venue take place before the day of the hearing. This provides time for the child to consider and provide an informed view about any special measures and, if necessary, for an application to be made to the Panel to vary those special measures.

At the hearing

Although HCPC's adjudication team are responsible for the logistical arrangements for hearings, Panels must satisfy themselves that the relevant equipment is functioning properly before a child witness is called to give evidence. Malfunctions, delays or the need to run equipment checks whilst a child witness is in the room will not help that child to achieve best evidence.

As a minimum it is necessary to ensure that:

- the child's pre-recorded evidence-in-chief can be played;
- the child will be able to see the face of any person asking questions;
- if relevant, that the child cannot see the registrant.[6]

Before the proceedings begin the Panel should check (via the Hearings Officer) whether the child would like to meet the Panel. This helps the Panel to establish rapport with the witness and allows them to encourage the witness to let the Panel know if they have a problem, such as not understanding a question or needing to take a break.

The Panel (or Hearings Officer) should also explain that the Panel will be able to see the witness over the live link even if the witness cannot see them and that everyone else at the hearing (including the registrant, if relevant) will also be able to see them.

Questioning

Child witnesses of all ages may experience difficulties in giving evidence when they are asked questions at too fast a pace or which are too complex or developmentally inappropriate.

To ensure that they achieve best evidence, Panels need to recognise that children need more time to process questions than adults, particularly as children who are distressed may function at a lower level than normal. Paradoxically, it is adolescents who are at greater risk here, as unrealistic assumptions may be made about their ability to cope with what is taking place.

Although it is good practice for Panels to begin by asking children to say when they do not understand a question, they may be reluctant to do so and will often try to answer questions they do not fully understand. Panels need to be vigilant in this regard. Asking a child whether they understood the question is not always a reliable indicator of comprehension and probing question along the lines of "what do you mean when you say…" may be helpful.

Advocates should not be permitted to behave in an aggressive or intimidating manner towards any child witness and Panels should always challenge and prevent such conduct.

Complex questions may confuse children. Panels should encourage advocates to use language that is appropriate to the age and abilities of the witness and to allow adequate time for the witness to process and answer questions.

[6] For example, where the witness is the victim of alleged abuse by the registrant

Advocates also need to be encouraged to:

- speak slowly and pause after each question, to give children enough time to process and answer it;
- ask short and simple questions which address one point at a time;
- use simple, common language and avoid idiomatic phrases;
- avoid questions which are complex or 'front-loaded' and require the child to remember too much detail in order to answer them;
- avoid questions which assert facts or contain other suggestive forms of speech, which children struggle to answer when asked by an adult in a position of authority;
- adopt a structured approach which 'signposts' the subject and warns when the subject is about to change.

Panels should not permit a child witness to be asked questions concerning intimate touching by being asked to point to parts of their own body. If such questions need to be asked, the Panel should direct that the witness be asked to point to a body diagram.

Further information about good practice when questioning children in legal proceedings can be found in the NSPCC publication *Measuring up? Good practice guidance in managing young witness cases and questioning children*.[7]

[Date]

[7] http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf

Health and Care Professions Council

PRACTICE NOTE

Competence and Compellability of Witnesses

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

Introduction

A person who can lawfully be called to give evidence is a "competent" witness. A competent witness is "compellable" if he or she can be required by a Panel to give evidence when otherwise unwilling to do so.

Fitness to practise proceedings are civil in nature and the Panel rules[1] enable Panels to compel witnesses to attend and give evidence.

As a general principle, in civil proceedings all persons are competent to give evidence and all competent persons are also compellable. A witness may claim privilege[2] not to answer certain questions but otherwise, once called, must co-operate fully in the proceedings.

In Panel proceedings that general principle is subject to one important exception. Article 32(2)(m) of the Health and Social Work Professions Order 2001 provides that a Panel's power to compel a person to attend a hearing and give evidence or to produce documents does not extend to "the person concerned" (the registrant who is the subject of those proceedings).

Competence

Competence is about whether a witness may legally give evidence and most witnesses will give their evidence without any challenge to their competence. In this context, "competent" does not mean reliable or credible, as they are about the weight to be attached to a witness's evidence rather than their competence to give it.

Questions of competence are a matter for the Panel. If the issue is raised, either by a party to the proceedings or the Panel of its own motion, the burden of proving that a witness is competent falls upon the party seeking to call the witness.

Ideally, competence issues should be resolved long before a witness is called to give evidence, but may only become apparent after the witness has begun to do so.

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1 HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; HCPC (Health Committee) (Procedure) Rules 2003.

2 for example, refusing to disclose lawyer - client communications..

Any necessary questioning of a witness by the Panel should take place in the presence of the parties. A Panel may also hear expert evidence on the competence of a witness and any competence assessment should take account of measures which could be used to assist the witness to give evidence. As the court said in *R v B*[3]:

> *"...the competency test is not failed because the forensic techniques of the advocate... or the processes of the court... have to be adapted to enable the witness to give the best evidence of which he or she is capable."*

In Panel proceedings, the basic test of competence is whether the witness is capable of understanding the nature of an oath and of giving rational testimony. That test was articulated in *R v Hayes*[4] in the following terms:

> *"It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a [tribunal] has to decide whether a [witness] should properly be sworn, is whether the [witness] has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".*

Children

There is no fixed age below which children are regarded as incompetent to give evidence and a child is clearly competent if the Panel is of the opinion that he or she meets the *Hayes* test. However, by virtue of section 96 of the Children Act 1989, even if a child[5] does not meet that test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

1. understands that it is his or her duty to speak the truth; and
2. has sufficient understanding to justify his or her evidence being heard.

Whether a child or young person is competent to give evidence is a matter for the Panel but it is not an issue which a Panel is obliged to investigate merely because of the age of a witness.

Intellectual capacity

The competence of a witness whose intellectual capacity is impaired will also be governed by the *Hayes* test.

Competence and capacity are distinct issues. For example, the Mental Capacity Act 2005 is concerned with a person's capacity to make decisions rather than to give evidence. Capacity is only relevant to competence in terms of assessing the witness's ability to understand questions and to provide replies that can be understood.

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3 [2010] EWCA Crim 4

4 [1977] 1 WLR 238

5 for the purposes of section 96 a child is a person under the age of 18

A witness may be prevented by incapacity, such as mental disorder or the effect of alcohol or medication, from being competent but that lack of competence is only co-extensive with the incapacity. Thus, a person who is drunk will be competent once sober. Where incapacity is only temporary, Panels have the discretion to postpone the proceedings until that incapacity has ended.

A person who has a mental illness may still be a competent witness if that illness only affects an aspect of the person's character which does not diminish his or her capacity to recall information on matters relevant to the proceedings or to appreciate the nature of the oath. Equally, the clarity of their evidence may be affected by factors such as distress, anxiety or panic which are not relevant to the question of capacity.

Compellability

Compellability is about whether, as a matter of law, a witness can be required to give evidence when they do not wish to do so.

Generally, in civil proceedings all witnesses that are competent to give evidence may also be compelled to do so. In particular, section 1 of the Evidence Amendment Act 1853 makes the spouse of a party to the proceedings both competent and compellable.

As noted above, a Panel's power to compel witnesses to attend and give evidence or to produce documents does not extend to the registrant who is the subject of the proceedings.

It is a criminal offence for a person, without reasonable excuse, to refuse to attend, or to answer admissible questions put to them in, Panel proceedings. The penalty, on summary conviction, is a fine of up to level 5 on the standard scale (£5,000).

[Date]

Health and Care Professions Council

PRACTICE NOTE

Concurrent Proceedings

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

Introduction

Article 32(3) of the Health and Social Work Professions Order 2001 requires Panels to conduct fitness to practise proceedings "expeditiously" and it is in the interest of all parties that allegations are heard and resolved as quickly as possible.

Whilst there may be limited circumstances in which it is appropriate for fitness to practise proceedings to be postponed when a registrant is being tried concurrently[1] for related criminal charges, postponement should not be regarded as automatic and will rarely be appropriate where the registrant or the subject matter of an allegation is the subject of other civil proceedings.

Concurrent criminal proceedings

It is often suggested that a potential injustice may arise if regulatory or other civil proceedings are conducted at the same time as a related criminal trial, usually on the basis that, as more restrictive rules of evidence will apply in criminal proceedings, there is a risk that evidence which may not be admitted at that trial may enter the public domain in the course of the regulatory proceedings.

However, as the Court of Appeal held in *Mote v Secretary of State for Works and Pensions*[2], civil proceedings can often proceed concurrently without risk to the defendant's rights in a related criminal trial, and there is a 'real discretion' as to whether or not to adjourn those civil proceedings. In particular, the Court pointed out that, as criminal defendants are now required to disclose their defence at an early stage, no prejudice arises from the fact that a defendant may disclose his or her defence to the criminal charges in civil proceedings.

The decision in *Mote* also clarifies that neither the privilege against self-incrimination nor the risk of 'double jeopardy' are grounds for delaying civil proceedings, as both are only relevant to criminal proceedings.[3]

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[1] Concurrent proceedings are also referred to as parallel proceedings

[2] [2007] EWCA Civ 1324

[3] the privilege against self-incrimination only applies to incriminating oneself of a criminal offence. Similarly, double jeopardy only arises where a person is tried more than once by the criminal courts for essentially the same offence.

Consequently, whilst Panel proceedings may be postponed until any related criminal trial has concluded[4], there is no automatic obligation to do so and the decision is one within the discretion of the Panel.

An important consideration here is that acquittal in the criminal courts does not always preclude subsequent regulatory action. In some cases, the grounds for acquittal may be irrelevant for the purpose of fitness to practise proceedings. For example, a registrant who is charged with a sexual offence against a service user may be acquitted on the basis of doubts about the service user's consent or lack of it, but may still face an allegation of misconduct based upon the inappropriate nature of the relationship with the service user.

As the Divisional Court made clear in *Ashraf v GDC*[5], pursuing fitness to practise proceeding following acquittal in the criminal courts is not inherently unfair or abusive, as criminal and regulatory proceedings serve differing purposes.

Concurrent civil proceedings

The courts have shown a marked reluctance to stay regulatory proceedings when asked to do so by parties who are the subject of concurrent civil proceedings. As Stanley Burnton J. stated in *R v Executive Counsel of the Joint Disciplinary Scheme*[6]:

> *"Regulatory investigations and disciplinary proceedings perform important functions in our society. Furthermore, the days have gone when the High Court could fairly regard the proceedings of disciplinary tribunals as necessarily providing second class justice".*

The need for the discretion to stay one set of concurrent civil and regulatory proceedings to be exercised sparingly and with great care was highlighted by the Court of Appeal in *R v Panel on Takeovers and Mergers ex parte Fayed*[7]:

> *"It is clear that the court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of other proceedings. But it is a power to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice."*

Whether there is "a real risk of serious prejudice which may lead to injustice" may be a difficult question to answer and will depend upon the facts of the case.

It is open to the parties in fitness to practise proceedings to ask the courts to stay those proceedings but, in the first instance, it is more likely that an application to stay the proceedings will be made to the Panel which is due to hear the case.

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[4] it is open to HCPC to seek an interim order where FTP proceedings are postponed

[5] [2014] EWHC 2618 (Admin)

[6] [2002] EWHC 2086

[7] [1992] BCC 524

Staying proceedings

If Panels are asked to stay proceedings on the basis that a party is subject to concurrent civil or criminal proceedings, the approach which should be adopted, derived from the decisions of the courts[8], is as follows:

- Panels must exercise the discretion to stay concurrent proceedings sparingly and with great care;
- a stay must be refused unless the party seeking the stay can show that, if it is refused, there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings;
- if the Panel is satisfied that there is a real risk of such prejudice arising then it must balance that risk against the countervailing considerations, including the strong public interest in seeing that the regulatory process is not impeded;
- each case turns on its own facts and Panels can only derive limited assistance from comparing the facts of a particular case with those of other cases.

[Date]

[8] For example, R v Executive Counsel of the Joint Disciplinary Scheme [2002] EWHC 2086, which follows R v Chance, ex p Smith [1995] BCC 1095 and ex p Fayed

Health and Care Professions Council

PRACTICE NOTE

Conduct of Representatives

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

Introduction

The Panel rules[1] allow registrants to be represented by any person[2], who may but does need not to be a legally qualified.

Registrants are often represented by someone who is not a qualified lawyer (a "lay representative"). Some lay representatives may be friends or colleagues who have never undertaken the task before, others will be union or professional body representatives with far greater experience.

All representatives, whether legally qualified or not, share the same responsibilities; to ensure that the rights of the registrant concerned are respected and to represent the interests of that registrant in the best manner possible by all proper and lawful means.

Panels are entitled to expect that anyone representing a party in proceedings before the Panel will conduct themselves appropriately and, in particular, that qualified lawyers[3] will act in accordance with the professional conduct rules which apply to them.

Lay representatives are not subject to those professional conduct rules, but Panels are entitled to expect lay representatives to conform to the minimum standards of conduct set out below. Misconduct by representatives is rare but, where it does occurs, Panels must take appropriate steps to address it. Behaviour of that kind is neither in the interests of justice or the interests of the party concerned.

Registrants have the right to be represented by a person of their choosing, but that right does not require Panels to tolerate unlawful, disruptive or other improper behaviour by any representative. Panels should deal promptly and firmly with such behaviour.[4]

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1 HCPC (Investigating Committee) (Procedure) Rules 2003, r.6(5); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.6(3); HCPC (Health Committee) (Procedure) Rules 2003, r.6(3).

2 other than a member of the Council or one of its committees, or a Council employee.

3 solicitors, barristers, advocates, chartered legal executives and other lawyers qualified to practise as such in a UK jurisdiction.

4 serious misconduct by qualified lawyers should be reported to the relevant regulatory body.

If a representative disregards the Panel's rulings and persists in their inappropriate behaviour then, as a last resort, the Panel may need to consider excluding that person from the proceedings. The Panel rules[5] enable a Panel to "*exclude from the hearing any person whose conduct, in its opinion, is likely to disrupt the orderly conduct of the proceedings.*".

Standards of conduct

Panels are entitled to expect any representative appearing before the Panel to comply with the following minimum standards of conduct:

- to be punctual and adequately prepared for the proceedings;
- to be courteous and fair to everyone involved in the proceedings;
- to avoid undignified, disorderly or disruptive behaviour and to discourage similar behaviour by others;
- not to knowingly assist in any unlawful conduct or to condone the giving of perjured evidence;
- to test or challenge evidence by proper means and not to be abusive, offensive or unnecessarily confrontational when cross-examining witnesses;
- not to engage in unfounded personal attacks or in acrimonious, sarcastic, or intimidatory exchanges with anyone involved in the proceedings;
- not to waste time on irrelevant matters or make frivolous or vexatious objections;
- to comply with the Panel's ruling, and not attempt to re-open a matter which has been ruled upon or circumvent the ruling by other means;
- to comply with reasonable requests concerning hearing dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the registrant;
- not to seek to influence the proceedings by improper means, such as advising a witness not to attend or dissuading a witness from giving evidence;
- not to send abusive or offensive correspondence to, or otherwise communicate in a similar manner with, any person in connection with the proceedings.

[Date]

[5] HCPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(g); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10(1)(g); HCPC (Health Committee) (Procedure) Rules 2003, r.10(10(g).

Health and Care Professions Council

PRACTICE NOTE

Conducting Hearings in Private

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

Introduction

Most fitness to practise hearings are held in public, but Panels have the discretion to exclude the press or public from all or part of a hearing in appropriate cases.

Whether all or part of a hearing is held in private is a decision for the Panel concerned and must be consistent with Article 6(1) of the European Convention on Human Rights (ECHR), which provides limited exceptions to the requirement for hearings to be held in public.

Hearings in private

The "open justice principle" adopted in the United Kingdom means that, in general, justice should be administered in public and that:

- hearings should be held in public;
- evidence should be communicated publicly; and
- fair, accurate and contemporaneous media reporting of proceedings should not be prevented unless strictly necessary.

Historically, concerns about the conduct of hearings have been about the failure to sit in public and, for that reason, the common law has long required that quasi-judicial proceedings should be held openly and in public on the basis that:

> "…*publicity is the very sole of justice…and the surest of all guards against improbity. It keeps the judge…, while trying, under trial*"[1].

Similarly, Article 6(1) ECHR is directed at preventing the administration of justice in secret. It guarantees the general right to a public hearing, for the purpose of protecting the parties from secret justice without public scrutiny and to maintain confidence in the courts.[2] However, there is no corresponding general right for a person to insist upon a private hearing.

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1 *Scott v Scott* 1913 AC 417

2 *Diennet v France* (1995) 21 EHRR 554

The right to a public hearing is subject to the specific exceptions set out in Article 6(1). Consequently, there are circumstances in which proceedings can be heard in private but, unless one of those express exceptions applies, a decision to sit in private will be a violation of the ECHR.

The Panel rules[3] reflect Article 6(1) ECHR and provide that:

> *"At any hearing... the proceedings shall be held in public unless the [Panel] is satisfied that, in the interests of justice or for the protection of the private life of the registrant, the complainant, any person giving evidence or of any patient or client, the public should be excluded from all or part of the hearing;..."*

Thus, there are two broad circumstances in which all or part of a hearing may be held in private:

- where it is in the interests of justice to do so; or
- where it is done in order to protect the private life of:
  - the registrant who is the subject of the allegation;
  - the complainant;
  - a witness giving evidence; or
  - a service user.

Deciding to sit in private

The decision to sit in private may relate to all or part of a hearing. As conducting proceedings in private is regarded as the exception, Panels should always consider whether it would be feasible to conduct only part of a hearing in private before deciding to conduct the whole of a hearing in private.

In determining whether to hear a case in private, a Panel should also consider whether other, more proportionate, steps could be taken to achieve their aim, for example:

- anonymising information;
- redacting exhibited documents;
- concealing the identity of complainants, witnesses or service users (e.g. by referring to them as "Person A", or "Service User B", etc.).

Panels should also be aware that they do not have the 'intermediate' option which is available to the courts, of excluding the media from or imposing reporting restrictions on a hearing which is otherwise conducted conducted in public.

[3] Rule 10(1) of the HCPC (Conduct and Competence) (Procedure) Rules 2003 and HCPC (Health Committee) (Procedure) Rules 2003; Rule 8(1) of the HCPC (Investigating Committee) (Procedure) Rules 2003

A decision on whether to sit in private may be taken by the Panel on its own motion or following a request by one of the parties. Regardless of how the issue arises and no matter how briefly it can be dealt with, the Panel should provide the parties with an opportunity to address the Panel on the issue before a decision is made and provide reasons for its decision.

For example, most health allegations[4] will require Panels to consider intimate details of a registrant's physical or mental condition. A Panel is justified in hearing such a case in private in order to protect the registrant's privacy, unless there are compelling public interest grounds for not doing so; a situation which is highly unlikely to arise. The decision to hear such a case in private is unlikely to be contentious but, nonetheless, is one which the Panel should make formally and after giving the parties the opportunity to make representations.

The interests of justice

In construing its statutory powers, a Panel must take account of its obligation under the Human Rights Act 1998, to read and give effect to legislation in a manner which is, so far as possible, compatible with the ECHR.

On that basis, the provision in the Panel rules which permits a Panel to conduct proceedings in private where doing so "is in the interests of justice" must be construed in line with the narrower test set out in Article 6 ECHR, which provides that proceedings may be held in private:

> "*to the extent strictly necessary in the opinion of the [Panel] in special circumstances where publicity would prejudice the interests of justice.*"

The narrow scope of that Article means that the exercise of the "interests of justice" exception should be confined to situations where it is strictly necessary to exclude the press and public and where doing otherwise would genuinely frustrate the administration of justice, such as cases involving:

- public interest immunity applications;
- national security issues;
- witnesses whose identity needs to be protected; or
- a risk of public disorder.

In deciding whether to conduct proceedings in private in "the interests of justice" Panels need to have regard to broad considerations of proportionality, but a fairly pragmatic approach can be adopted. For example, it has been held that prison disciplinary proceedings may be conducted in private in the interests of justice because requiring such proceedings to be held in public would impose a disproportionate burden on the State.[5]

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[4] an allegation made under Article 22(1)(a)(iv) of the Health and Social Work Professions Order 2001 that fitness to practise is impaired by reason of the registrant's physical or mental health

[5] *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165

To protect private life

A decision to hear all or part of a case in private may be taken in order to protect the private life of:

- the registrant concerned;
- the complainant;
- a witness giving evidence; or
- a service user.

The protection of a person's private life is not subject to the 'strict necessity' test under Article 6(1), but nonetheless Panels do need to establish a compelling reason for deciding that a hearing should be held in private.

Doing so is not justified merely to save the registrant or others from embarrassment or to conceal facts which, on general grounds, it might be desirable to keep secret. The risk that a person's reputation may be damaged because of a public hearing is not, of itself, sufficient reason to hear all or part of a case in private unless the Panel is satisfied that the person would suffer disproportionate damage.

For example, in *L v. Law Society*[6] refusing to hear proceedings in private to prevent the appellant's 'spent' criminal convictions from being made public was held not to be a breach of Article 6. The court found that the convictions were relevant to being a member of the regulated profession and that conducting the proceedings in public was part of ensuring that public confidence is maintained.

Children

Although not expressly mentioned in the Panel rules, Article 6(1) ECHR provides a broad protection for children, enabling all or part of a hearing to be held in private "where the interests of juveniles… so require". The protection of 'juveniles' is not limited to protecting their "private life" and it will rarely be appropriate for Panels to require a child to be identified or participate in public proceedings.

There is no single law in the United Kingdom which defines the age of a child. Different ages are set for different purposes and varying provision is made by the laws of England & Wales, Scotland and Northern Ireland.

The UN Convention on the Rights of the Child, which has been ratified by the United Kingdom, defines a child as a person under the age of 18. Child protection agencies across the UK all work on the basis that a child is anyone who has not yet reached their 18th birthday. Panels should regard anyone under the age of 18 as being subject to the protection for 'juveniles' afforded by Article 6(1) ECHR unless they are advised that doing so would conflict with a specific legal provision which applies in the UK jurisdiction in which they are sitting and to the proceedings before them.

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6 [2008] EWCA Civ 811

Public pronouncement of decisions

Article 6(1) ECHR provides for all judgments "to be pronounced publicly", but the relevant case law, notably *B v United Kingdom*[7] makes clear that, in this regard, Article 6(1) should not be interpreted literally. The Strasbourg Court has held, in the following terms, that doing so in cases where evidence has been heard in private may frustrate the primary aim of that Article:

> *"Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6(1) concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6(1), which is to secure a fair hearing."*

At the conclusion of any case which has been heard wholly or partly in private, the Panel will need to consider what, if any, 'public pronouncement' it will make. In doing so Panels should adopt the following approach:

1. Where a Panel has proper grounds under Article 6(1) ECHR for hearing all or part of a case in private, it is not obliged to deliver its full decision in public if doing so would frustrate a purpose of hearing that case in private.

2. In such cases a Panel must consider the extent to which the evidence heard, its decision and the reasons for it can and should be made public. In doing so the Panel should take account of:

   (1) the nature of the case and reasons why it was heard in private;

   (2) the 'fair administration of justice' objective of Article 6(1) ECHR; and

   (3) the HCPC's overarching objective under Article 3(4) the Health and Social Work Professions Order 2001 to protect the public.

3. Where a reason for hearing proceedings in private was to protect the identity of, or sensitive information relating to, particular individuals and that protection can be maintained by doing so, the Panel should deliver its decision in the normal manner but in an appropriately anonymised or redacted form.

4. Where delivery or publication of an anonymised or redacted decision may frustrate a purpose of hearing the proceedings in private, as a minimum the Panel should deliver a brief decision:

   (1) stating whether or not any allegation was well founded and the sanction (if any) it has imposed; and

   (2) recording that the Panel's decision will be provided in writing to the Registrar who may make it available (in an appropriately anonymised or redacted form) to any person who has good grounds for seeking the information.

[Date]

[7] (2002) 34 EHRR 19

Health and Care Professions Council

PRACTICE NOTE

Conviction and Caution Allegations

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

Introduction

Article 22(1)(a)(iii) of the Health and Social Work Professions Order 2001 (the Order) provides that one of the grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of:

> *"a conviction or caution in the United Kingdom for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence,".*

Thus, what are often termed "conviction allegations" include allegations that a registrant's fitness to practice is impaired as a consequence of:

- being convicted for an offence by a criminal court in any part of the UK;
- accepting a caution for an offence from a UK police force or other law enforcement agency;
- being convicted by a court outside of the UK, but for an offence which is recognised as a crime in English law ; or
- being convicted by a Court Martial.

Convictions allegations are not about punishing a registrant twice for the same offence. A conviction or caution should only lead to further action being taken against a registrant if, as a consequence of that conviction or caution, the registrant's fitness to practise is found to be impaired. The Panel's role is "to protect the public and maintain the high standards and reputation of the profession concerned"

Cautions

The practice for administering cautions varies in England and Wales, Scotland and Northern Ireland but certain common principles apply throughout the UK.

Cautions are generally a discretionary, non-statutory, means of disposing of offences without the need for the offender to appear before a court. Typically, they are used for first time, low level offences by adults, where diversion from the courts is appropriate for both the offence and the offender.

Although most cautions are non-statutory disposals, they are nonetheless treated as an 'offence brought to justice' and will appear on Disclosure and Barring Service and equivalent criminal record checks. For that reason, there are safeguards in place to protect the offender in all three UK jurisdictions, the principles of which are that cautions should only administered where:

- the evidence is sufficient to provide a realistic prospect of conviction;
- the offender unequivocally admits having committed the offence; and
- the offender agrees to accept the caution and understands the significance of, doing so

Cautions should not be administered where there is insufficient evidence to bring a prosecution, or where a person does not admit of the offence or there are doubts about the offender's capacity to do so.

Binding Over and Discharge

The powers available to certain criminal courts include the power to 'bind over' offenders or to discharge them either absolutely or subject to conditions. These methods of disposal do not constitute a conviction for the purposes of Article 22(1) of the Order.

Binding over is a preventative measure which, even though it may be imposed as a penalty, is not regarded as a criminal conviction. Similarly, the Powers of Criminal Courts (Sentencing) Act 2000 provides that "absolute discharge" and "conditional discharge" orders are not to be treated as a conviction for the purposes of any enactment (such as the Order) which authorises the imposition of any disqualification or disability upon convicted persons.

Consequently, in cases where a registrant is bound over or receives an absolute or conditional discharge, a conviction allegation cannot be made against the registrant. If the HCPC investigates the circumstances which led to that action being taken and wishes to pursue the matter further, it must make an allegation of misconduct against the registrant.

Dealing with conviction allegations

The Panel rules provide that:

> *"where the registrant has been convicted of a criminal offence, a certified copy of the certificate of conviction (or, in Scotland, an extract conviction) shall be admissible as proof of that conviction and of the findings of fact upon which it was based;"*

Those rules also provide that, evidence is admissible before a Panel if it would be admissible in civil proceedings before the appropriate court in that part of the UK where the Panel is sitting.

In all three UK jurisdictions, evidence that a person has been convicted of an offence is generally admissible in civil proceedings as proof that the person concerned committed that offence, regardless of whether or not the person pleaded guilty to that offence.

Consequently, in considering conviction allegations, Panels must be careful not to 'go behind' a conviction and seek to re-try the criminal case.

The Panel's task is to determine whether fitness to practise is impaired, based upon the nature, circumstances and gravity of the offence concerned, and, if so, whether any sanction needs to be imposed. A similar approach should be adopted when considering cautions, as a caution should not have been administered unless the offender has made a clear admission of guilt.

In considering the nature, circumstances and gravity of the offence, Panels need to take account of public protection in its broadest sense, including whether the registrant's actions bring the profession concerned into disrepute or may undermine public confidence in that profession. In doing so, Panels are entitled to adopt a 'retrospective' approach and consider the conviction as if the registrant was applying for registration with the HCPC.

Although Panels cannot re-try criminal cases, they may have regard to whether the registrant pleaded guilty to the offence and, if so, at what stage in the proceedings. A guilty plea entered at the first reasonable opportunity is indicative of a greater insight on the part of the registrant than one entered at the last moment. A registrant who is convicted of an offence but maintains that the conviction was wrong may lack insight into their offending behaviour and this may have a significant bearing upon the sanction which a Panel should impose in order to protect the public.

In reaching its decision, a Panel should also have regard to any punishment or other order imposed by the courts, but must bear in mind that the sentence imposed is not a definitive guide to the seriousness of an offence. Panels should not assume that a non-custodial sentence implies that an offence is not serious. One factor which may have led the court to be lenient is the expectation that the registrant would be subject to regulatory proceedings.

As Dame Janet Smith noted in the Fifth Shipman Inquiry Report:

> "*The fact that the court has imposed a very low penalty or even none at all should not lead the [regulator] to the conclusion that the case is not serious in the context of [its own] proceedings…The role of the [regulator] in protecting [service users] involves different considerations from those taken into account by the criminal courts when passing sentence…What may well appear relatively trivial in the context of general criminal law may be quite serious in the context of [professional] practice.*"

[Date]

Health and Care Professions Council

PRACTICE NOTE

Cross-Examination in Cases of a Sexual Nature

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

Introduction

The Panel rules[1] provide that:

"(4) Where—

(a) the allegation against a registrant is based on facts which are sexual in nature;

(b) a witness is an alleged victim; and

(c) the registrant is acting in person;

the registrant shall only be allowed to cross-examine the witness in person with the written consent of the witness.

(5) If, in the circumstances set out in paragraph (4) a witness does not provide written consent, the registrant shall, not less than seven days before the hearing, appoint a legally qualified person to cross-examine the witness on his [or her] behalf and, in default, the Council shall appoint such a person on behalf of the registrant."

The appointment of legal representatives

In cases involving allegations of a sexual nature, a registrant who is conducting his or her own defence is only permitted to cross-examine a complainant with the complainant's written consent. Where the complainant does not consent, the registrant may appoint a legally qualified person to conduct the cross-examination. If the registrant fails to do so, then the HCPC, at its own expense, must appoint a legally qualified person to conduct the cross-examination on the registrant's behalf.

Background

The decision to appoint a legal representative will be dictated by the nature of the allegation and willingness or otherwise of complainants to be questioned by the registrant concerned. The Panel rules provide that, in cases involving allegations of a sexual nature, it is for the witness to decide whether he or she is willing to be cross examined by the registrant. Consequently, Panels should not draw prejudicial inferences from the fact that a registrant is not cross-examining witnesses or that the HCPC has appointed someone to do so on his or her behalf.

[1] HCPC (Investigating Committee) (Procedure) Rules 2003, r. 8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r. 10A; HCPC (Health Committee) (Procedure) Rules 2003), r. 10A.

In practice, cases involving allegations of a sexual nature should be identified by HCPC case managers at an early stage and, where it is apparent that a registrant proposes to conduct his or her own defence, appropriate inquiries should be made of witnesses. If they indicate that they do not wish to be cross-examined by the registrant, the HCPC must make arrangements for a legal representative to be appointed.

The role of the legal representative

The appointment of a legal representative in one which is made in the interests of justice, to ensure that the registrant is able to 'test the evidence' as part of his or her right to a fair hearing.

The legal representative's function is to act on behalf of the registrant and, for that purpose, legal representatives should be provided with case bundles, must familiarise themselves with the case and should take instructions from the registrant in the normal way. It is for the legal representative to exercise normal professional judgement about the handling of the case and the questions to be asked by way of cross-examination.

The role of the legal representative is intended to be limited to cross-examining those witnesses whom the registrant is prohibited from cross-examining. Panels should assume that the legal representative's appointment will normally terminate at the conclusion of the cross-examination of those witnesses.[2]

Procedure

Panels have the power to hold preliminary hearings for the purpose of case management and are encouraged to do so in cases of this nature, in order to resolve as many evidential or procedural issues as possible before the hearing takes place.

[Date]

[2] It is, of course, open to the registrant at his or her own expense to 'adopt' the appointed representative at this stage for the remainder of the proceedings.

Health and Care Professions Council

PRACTICE NOTE

Discontinuance of proceedings

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

Introduction

After the Investigating Committee has determined that there is a 'case to answer' in respect of an allegation, objective appraisal by the HCPC of the evidence which has been gathered since that decision was made may reveal that there is no longer a realistic prospect of being able to establish all or part of the allegation.

This may occur when new evidence becomes available or because of emerging concerns about the quality or viability of the evidence that was considered by the Investigating Committee.[1]

As a public authority, the HCPC should not act in a partisan manner and seek to pursue an allegation which has no realistic prospect of success. In that event, the HCPC should apply to discontinue the proceedings.[2]

Discontinuance

The appropriate method of discontinuing a case (in whole or part) which has been referred to the Conduct and Competence Committee or Health Committee but has not yet begun to be heard[3] is to apply to a Panel of that Committee for discontinuance.[4]

A Panel cannot simply agree to discontinuance without due inquiry, as it needs to be satisfied that the decision does not represent 'under-prosecution' by the HCPC. As the Court of Appeal made clear in *Ruscillo v CHRE and GMC*[5], 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."*

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1 for example, the case to answer decision is a paper-based exercise and doubts about the credibility or reliability of a witness may only arise when the witness in interviewed after that decision has been made.

2 discontinuance may also be appropriate where an overriding public interest consideration arises, such as a crucial witness being too ill to participate in the proceedings.

3 if the HCPC no longer intends to pursue all or part of an allegation at a substantive hearing, as the matter is already before a Panel, the appropriate course of action is for the HCPC to 'offer no evidence' at that hearing rather than make a separate discontinuance application.

4 a different process applies when an allegation is withdrawn to enable a registrant and the HCPC to enter into a voluntary removal agreement. This is set out in the Practice Note on disposal of cases by consent.

5 [2004] EWCA Civ 1356

In order to be satisfied that discontinuance is appropriate, a Panel does not need to undertake a detailed examination of or 'go behind' the Investigating Committee's decision. The Panel's task is not to re-consider the decision reached by the Investigating Committee, but to ensure that the HCPC has proper grounds for discontinuing the proceedings and has provided an objectively justified explanation for why there is no longer a realistic prospect of the HCPC establishing that the allegation is well founded.

The nature and scope of the Panel's inquiry will depend upon the explanation which the HCPC provides and Panels are entitled to expect HCPC Presenting Officers to assist them in this regard, by setting out a clear, appropriately detailed and evidentially robust explanation of:

- what has changed since the case to answer decision was made; and
- why that change means there is no longer a realistic prospect of the allegation being established.

In particular, any such explanation should take proper account of the 'public components' of impairment[6] - the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. Those components reflect the HCPC's over-arching statutory objective of protection of the public.

Panels should also avoid straying too far in considering the evidence, particularly if only partial discontinuance is being sought. If evidence needs to be tested or material evidential conflicts need to be resolved, then discontinuance is unlikely to be appropriate. Those are matters which should take place at a substantive hearing.

Partial discontinuance

If a Panel is asked to discontinue only part of an allegation, it must consider whether those elements of the allegation which it is being asked to leave in place amount to a viable allegation.

This is particularly important where, for example, the original allegation is based upon a pattern or sequence of events. If partial discontinuance removes some of those events from the fact pattern, the Panel should consider whether what remains would be sufficient to establish the statutory ground of the allegation or that fitness to practise is impaired.

If an allegation is partially discontinued, the Panel must also ensure that the revised allegation is coherently drafted and, in particular, that no essential background detail has been removed, as the Panel which hears the revised allegation will not be made aware of that partial discontinuance.[7]

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[6] derived from *Cohen v GMC* [2008] EWHC 581 (Admin) and more fully considered in the Practice Note on finding that fitness to practise is 'impaired'

[7] unless it is brought to the Panel's attention by the registrant. The discontinued elements of an allegation would be part of the record that is shared with the Professional Standards Authority for audit purposes

The effect of discontinuance

Although fitness to practise proceedings are not subject to a strict 'double jeopardy' rule, as a public authority the HCPC should not make repeated attempts to pursue the same allegation against a registrant. In granting discontinuance applications in respect of the whole of an allegation, Panels should make a formal finding that the allegation is not well founded.

A template Notice of Discontinuance is set out in the Annex to this Practice Note.

[Date]

Annex

[Practice] Committee

NOTICE OF DISCONTINUANCE

TAKE NOTICE that:

1. On [date] the Investigating Committee, referred the [following] [annexed] allegation(s) (the **Allegation(s)**) against [name] (the **Registrant**) for hearing by the [Practice] Committee:

[set out allegation(s) or, if lengthy, add as Annex]

2. On [date] the Health and Care Professions Council (**HCPC**) determined that:

A. all proceedings in relation to [paragraph(s) XXX of] the Allegation(s) should be discontinued; and

B. no further proceedings would be commenced in relation to [those paragraphs of] the Allegation(s) or the events giving rise to [it][them].

3. The HCPC made that determination on the basis that:

[set out explanation]

AND FURTHER TAKE NOTICE that the Panel, being satisfied upon due inquiry that it is appropriate to do so, consents to the HCPC discontinuing the Allegations, [on the basis that they are not well founded.]

Signed:_____Panel Chair

Date: _____

Health and Care Professions Council

PRACTICE NOTE

Disposal of Cases by Consent

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

Introduction

Disposing of cases by consent is an effective case management tool. It reduces the time taken to deal with allegations and the number of contested hearings that need to be held. However, as the HCPC's overarching statutory objective is the protection of the public[1], a Panel should not agree to a case being resolved by consent unless it is satisfied that:

- the appropriate level of public protection is being secured; and
- doing so would not be detrimental to the wider public interest.

Disposal by consent

If the HCPC and the registrant concerned wish to conclude a case without the need for a contested hearing, the may seek to do so by putting before a Panel an order of the kind which they consider the Panel would make if the case had proceeded to a contested hearing. The process may also be used where a Panel is due to review an existing conditions of practice orders or suspension orders, to enable orders to be varied, replaced or revoked without the need for a contested hearing.[2]

Disposal by consent does not affect a Panel's powers or the range of sanctions available. It is merely a process by which the HCPC and the registrant concerned may propose what they regard as an appropriate outcome to the case. If a Panel is content to do so, it may conclude the case on an expedited basis, upon the terms of the draft Consent Order[3] put before it. Equally, it may reject that proposal and set the case down for a full, contested hearing.

Panels must retain the option of rejecting a proposal for disposal by consent. Consequently, before considering a draft Consent Order, a Panel should satisfy itself that the HCPC has made clear to the registrant concerned that co-operation and participation in the consent process will not automatically lead to a Consent Order being approved.

If a Panel rejects a proposed consensual disposal, it should direct the HCPC to treat any admissions made by the registrant as part of that process as a "without prejudice" settlement offer.

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1 Article 3(4), Health and Social Work Profession Order 2001.

2 HCPC policy in respect of the use of disposal by consent is reproduced in Annex A.

3 the HCPC is expected to present a draft Consent Order to the Panel in any consent case.

Doing so will mean that, when a substantive hearing takes place before a different Panel, it will not be made aware of those admissions or the attempt to resolve the matter by consent unless the registrant chooses to bring it to the Panel's attention.

Voluntary Removal

The HCPC's governing legislation[4] prevents a registrant from resigning from the HCPC register whilst the subject of an allegation or a conditions of practice order or suspension order.

In cases where the HCPC is satisfied that it would be adequately protecting the public if the registrant was permitted to resign from the Register, it may enter into a Voluntary Removal Agreement allowing the registrant to do so, but on similar terms to those which would apply if the registrant had been struck off.

In cases where an allegation is already before a Panel or a conditions of practice or suspension order is in place, such an agreement cannot take effect unless those proceedings are withdrawn or a Panel revokes the order. In such cases the HCPC will give formal notice of withdrawal to the Panel and, if necessary, ask it to revoke any existing order.

As with consensual disposal, a Panel should only agree to revoke an existing order where it is satisfied that voluntary removal would secure an appropriate level of public protection and would not be detrimental to the wider public interest.

Templates for Consent Orders and Withdrawal Notices are set out in Annex B and Annex C respectively.

[Date]

[4] Article 11(3) of the Order and Rule 12(3) of the Health and Care Professions Council (Registration and Fees) Rules 2003

Annex A

HCPC Policy on Consensual Disposal

The Health and Care Professions Council (HCPC) will consider resolving a case by consent:

- after an Investigating Committee Panel has found that there is a 'case to answer', so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit both the substance of the allegation and that his or her fitness to practise is impaired. A registrant should not be prevented from resolving a case by consent simply because he or she disputes a minor aspect of the allegation. However, a registrant's insight into, and willingness to address, failings are key elements in the fitness to practise process and it would be inappropriate to dispose of a case by consent where the registrant denied those failings; and
- where any remedial action proposed by the registrant and to be embodied in the Consent Order is consistent with the expected outcome if the case was to proceed to a contested hearing.

As the Panel which considers any proposal for consensual disposal must retain the option of rejecting the proposal, the HCPC should make it clear to registrants that co-operation and participation in the consent process will not automatically lead to a Consent Order being approved.

Equally, as a registrant is required to admit the substance of the allegation in order for the process to proceed, if a proposal is rejected by the Panel, that admission will be treated as a "without prejudice" settlement offer. A full hearing will take place before a different Panel which will not be made aware of the proposal unless the registrant chooses to bring it to their attention.

Annex B

[Practice] Committee

CONSENT ORDER

TAKE NOTICE that, in respect of the [allegation made] [review of the order made by the Committee] on [date] against [name] (the **Registrant**):

1. the Registrant consents to the Panel [making][revoking][varying] [a][the] [type] Order against [him][her] in respect of that matter on the terms set out below; and

2. the Council consents to the making of an Order on those terms, being satisfied that doing so would in all the circumstances be appropriate for the following reasons:

   [*for example:*

   (a) the Registrant has admitted the allegation in full and did so at an early stage in the fitness to practise process;

   (b) the Registrant has demonstrated insight by recognising the serious nature of the allegation;

   (c) given the low risk of repetition, the public will be adequately protected by such an Order which is proportionate in the circumstances.]

AND FURTHER TAKE NOTICE that the Panel, with the consent of the parties and, upon due inquiry being satisfied that it is appropriate to do so, now makes the following Order:

[for example:

That the Registrar is directed to annotate the register entry of [name of registrant] to show that, with effect from [date of hearing], [set out Order]]

Signed: _____ Panel Chair

Date: _____

Annex C

[Practice] Committee

NOTICE OF WITHDRAWAL

TAKE NOTICE that:

On [date] an Investigating Committee Panel referred the [following] [annexed] allegation (the **Allegation**) against [name] (the **Registrant**) for hearing by a Panel of the [Practice] Committee:

[set out allegation or, if lengthy, include as an Annex]

On [date] the HCPC and the Registrant entered into a Voluntary Removal Agreement, under the terms of which:

1. the HCPC agreed to withdraw all proceedings in relation to the Allegation; and

2. the Registrant, in consideration of that withdrawal, agreed:

    a. to resign from the HCPC register;

    b. to cease to practise as a [profession] or use any title associated with that profession; and

    c. that, if the Registrant at any time seeks to be readmitted to the HCPC Register, in considering any such application the HCPC shall act as if the Registrant had been stuck off of the register as a result of the Allegation.

AND FURTHER TAKE NOTICE that the Panel, being satisfied upon due inquiry that it is appropriate to do so, consents to the HCPC withdrawing those proceedings.

Signed: _____ Panel Chair

Date: _____

Health and Care Professions Council

PRACTICE NOTE

Drafting Fitness to Practise Decisions

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

Introduction

Panels have a legal duty to explain their decisions and to provide adequate the reasons for them.[1] That duty arises:

- at common law, on the basis that a Panel must give adequate reasons for its decision in order to enable the registrant concerned to exercise the right of appeal. Without knowing the basis for the decision, that right of appeal may be rendered illusory and both the parties and the appellate court must be able to understand why the decision was reached;
- as part of the obligation to provide a fair hearing under Article 6 of the European Convention on Human Rights. In deciding whether the requirements of Article 6 are met, the whole of the proceedings, including the availability of an appeal to the courts, must be considered. Inevitably, the effectiveness of the right of appeal may depend on the Panel providing adequate reasons;
- as a practical consideration, in that Panels should give adequate reasons for their decisions to enable the Professional Standards Authority to consider whether to exercise its statutory powers[2] to challenge the decision.

What a 'reasoned' decision should include

A decision must be recorded in a manner which explains what the Panel decided and, just as importantly, why it did so. The decision should enable readers, without the need to refer to any other materials, to understand the nature and seriousness of the issues before the Panel, its findings and decision and the reasons for them.

The reasons for a decision are not simply the conclusions reached, but the reasons for those conclusions. Every decision should be capable of a logical explanation. Reasons must provide readers with a logical explanation of how and why the Panel decision was reached.

The detail required will depend upon the nature and complexity of the case, but. decisions should include:

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[1] *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin)

[2] under section 29 of the NHS Reform and Healthcare Professions Act 2002

- **the allegations or a description of them**

  Where the allegations are lengthy, complex or concern technical matters with which readers may be unfamiliar, an overview may be helpful ("this case concerns the registrant's conduct towards service users A and B who were receiving [service C] at [facility D] between [dates E and F]");

- **the Panel's findings on material questions of fact**

  Allegations are based upon facts. The Panel should set out the undisputed facts, the facts in dispute and, in relation to latter, the findings of fact which it made and why. Where the credibility of witnesses is in issue, any factors which led to the evidence of one witness being preferred (consistency, opportunity for knowledge, etc.) should be included;

- **whether the facts found proved amount to the s tatutory ground(s) of the allegation and why**

  The Panel's judgement on this issue must be recorded in sufficient detail for readers to understand why the facts do or do not amount to the ground(s) alleged. This is particularly important where, for example, the decision is based upon accepted practice within a profession that others may not be familiar with or where the seriousness (or otherwise) of an allegation may not be apparent;

- **whether or not fitness to practise is impaired and why**

  Readers may struggle to understand why, if facts were found proved that amounted to the statutory ground, a finding of impairment did not follow. This accept of a decision should address the forward-looking nature of the impairment test, any consideration of the wider public interest, any mitigating or aggravating evidence and the findings that the Panel made on basis of that evidence including the issues of insight, remediation and the risk of repetition.

- **any sanction that was imposed and why it was appropriate**

  The Panel must explain what sanction was imposed and why, and how the sanction will protect the public. This should include an explanation of any sanction which was regarded as inappropriate and, if the sanction imposed deviates from the HCPC's Indicative Sanctions Policy[3], why that deviation is appropriate.

- **any relevant procedural issues**

  A decision should record all significant procedural steps and how they were dealt with, including adjournment requests, Human Rights Act and other legal challenges and any advice given by the Legal Assessor. Any decision by a Panel to disregard the advice given by a Legal Assessor must be recorded in detail.

[3] failure to do so may lead to the Panel being accused of ignoring the policy

Drafting Style

The length and detail of decisions will vary according to nature and complexity of the case before the Panel and the decision it has reached. However, Panels should seek to establish a consistent approach to drafting decisions. So far as possible, decisions should be concise yet comprehensive, written in plain English and:

- be written in clear and unambiguous terms, using short sentences and short paragraphs;
- be written in plain English, avoiding jargon, technical or esoteric language (or explaining any that must be used);
- avoid complicated or unfamiliar words and use precise but everyday language (e.g. “start” instead of “commence);
- be written for the target audience, so that the registrant concerned, any complainant and other interested parties can understand the decision reached and the reasons for it;
- be self-contained, so that without any other materials the reasonably intelligent and literate reader is able to understand the case before the Panel, the decision it reached and why it did so.

Drafting Orders

Where a Panel finds a registrant’s fitness to practise is impaired and imposes a sanction upon the registrant, its decision must clearly set out the order which it has made.

Caution Orders, Suspension Orders and Striking Off Orders should all be expressed in a form which is addressed to the Registrar who, in accordance with the Panel’s decision, must annotate or amend the Register from the date that the order takes effect (i.e. once any period for making an appeal has expired, or any appeal has concluded or been withdrawn). For example:

Caution Order

ORDER: That the Registrar is directed to annotate the register entry of [name] with a caution which is to remain on the register for a period of [three] year(s) from the date this order comes into effect.

Suspension Order

ORDER: That the Registrar is directed to suspend the registration of [name] for a period of [x] year(s) from the date this order comes into effect.

Striking Off Order

ORDER: That the Registrar is directed to strike the name of [Registrant] from the Register on the date this order comes into effect.

The opening paragraph of any Conditions of Practice Orders should similarly be addressed to the Registrar, but making appropriate reference to the registrant. The detailed conditions should be written in the second person ("you", "your") so that they are clearly addressed to the registrant concerned. For example:

Conditions of Practice

ORDER: The Registrar is directed to annotate the Register to show that, [for a period of [time]] from the date that this Order comes into effect ("the Operative Date"), you, [name of registrant], must comply with the following conditions of practice:

1. Within [time period] of the Operative Date you must etc.....

Drafting Conditions of Practice

From the above examples it is clear that the drafting of Conditions of Practice Orders is the more difficult task. This is especially so given that Orders do not take effect on a fixed date, but only when the relevant appeal period has expired or any appeal has been disposed of or withdrawn.

For the other Orders, which simply run for a fixed period of years, this does not cause much difficulty. However, conditions of practice inevitably involve periodic compliance arrangements. If conditions of practice are to work, then the dates on which evidence of compliance is to be sent to the HCPC must be clear and certain, so that prompt follow up action can be taken in respect of those who fail to comply. The simplest means of overcoming this difficulty is to define the date on which the Order finally takes effect as its "Operative Date" and then to relate all other dates and time limits to that Operative Date.

In drafting Conditions Of Practice Orders, Panels also needs to consider the following three issues:

- **are the conditions realistic?**

  Will the registrant be able to comply with these conditions; are they proportionate; do they provide the necessary level of public protection; and will they work if the registrant changes jobs?

  For example, if the conditions require the registrant to improve treatment premises, facilities or equipment, they should only be set at the standard reasonably required of a typical practitioner from the profession or specialism concerned. In setting conditions of this kind, Panels should take account of any relevant guidance issued by professional bodies or similar organisations.

  Equally, if conditions have been prepared with the support of the registrant's employer and are thus job-related, it may be necessary to include a condition requiring the registrant to inform the HCPC if the registrant changes jobs.

- **are the conditions verifiable?**

  Do they impose obligations that require straightforward 'yes' or 'no' compliance decisions; do they simply require the registrant to do something or must they also prove it has been done; can the due dates be clearly determined?

  For example, conditions requiring a registrant not to deal with certain types of case or service user may not need ongoing proof of compliance but many other conditions will need to be supported by evidence, such as periodic written confirmation that the registrant is continuing to undergo alcohol dependency treatment. Where evidence is required it should be in a form which allows 'yes' or 'no' decisions to be made. Conditions requiring registrants to submit documents or records to the HCPC for assessment or audit will not meet this requirement.

  In cases where compliance with conditions may need to be verified by the HCPC by means of inspection - for example, conditions to improve premises or facilities, record keeping systems or chaperoning arrangements - the Panel's order should include a specific requirement that the registrant must allow and co-operate with inspection by HCPC upon reasonable notice.

- **are the conditions directed at the right person?**

  Do the conditions clearly impose obligations on the registrant; are any conditions mistakenly directed at someone else?

  It is for the registrant to comply with the conditions which have been imposed and, in drafting orders, care must be taken not to inadvertently impose a condition on a third party, such as an employer or GP. There is a significant difference between "you must submit to the Committee evidence from the doctor treating you that..." and "your GP must submit to the Committee evidence that..."

Conditions Bank

Example conditions of practice are provided in the 'Conditions Bank' set out in the Annex to this Practice Note. Those conditions are not intended to be either prescriptive or definitive but are intended to assist Panels in the drafting of Conditions of Practice Orders.

Advice from the Legal Assessor

Panels are reminded that Legal Assessors may assist a Panel in the drafting of its decision. Panels should take advantage of the expertise Legal Assessors can offer, especially in relation to decisions which include conditions of practice orders.

The Legal Assessor's role is to assist in the drafting of the decision, not in the making of that decision.

It is important for Panels to ensure that no confusion arises on the part of the registrant or any other party about the role the Legal Assessor. Before retiring to make its decision, a Panel should invite the Legal Assessor to explain this aspect of their role to the parties. Alternatively, the Panel should retire alone to make its decision, return from its deliberations and explain to the parties that it has reached a decision and that the Legal Assessor is now being asked to assist the Panel in the drafting of that decision.

[Date]

Annex

CONDITIONS BANK

A. Introductory paragraph

ORDER: The Registrar is directed to annotate the HCPC Register to show that, [*for a period of* [*time*]] from the date that this Order takes effect ("the Operative Date"), you, [*name of registrant*], must comply with the following conditions of practice:

1. [*set out conditions as numbered paragraphs*]

B. Education and training requirements

1. Within [*time period*] of the Operative Date you must:
   A. satisfactorily complete [*name of course, etc.*]; and
   B. forward a copy of your results to the HCPC.

2. Within [*time period*] of the Operative Date you must:
   A. take and pass [*name of examination, etc.*]; and
   B. forward a copy of your results to the HCPC.

3. Before undertaking [*type of practice, work or procedure*] you must:
   A. satisfactorily complete [*a period of supervised practice/refresher training/ examination, etc.*]; and
   B. forward a copy of your results to the HCPC.

C. Practice restrictions

1. You must confine your professional practice to [*set out restriction*].

2. You must not carry out [*type of work or procedure*][*unless directly supervised by a* [*type of person*]].

2. You must maintain a record of every case where you have undertaken [*type of work or procedure*] [*which must be signed by* [*supervisor*]] and you must:
   A. provide a copy of these records to the HCPC on a [*monthly etc.*] basis, the first report to be provided within [*time*] of the Operative Date, or confirm that there have been no such cases during that period; and
   B. make those records available for inspection at all reasonable times by any person authorised to act on behalf of the HCPC.

4. You must not undertake [*work/consultations*] with [*type(s) of service user*].

5. You must not undertake intimate examinations of service users.

6. You must not undertake any out-of-hours work or on-call duties [*other than at* [*location*]]

7. You must not [*prescribe*][*administer*][*supply*][*possess*][*any* [*type of*] *prescription medicines*]

8. You must not prescribe [*any or type of prescription medicines*] for [*yourself/a member of your family/etc.*].

9. You must not act as a supplementary prescriber.

D Chaperones

1. Except in life threatening emergencies, you must not be involved in the direct provision of services to [*female service users/male services users/service users under the age of X etc.*] without a chaperone being present.

2. You must maintain a record of:
   A. every case where you have be involved in the direct provision of services to [*female service users etc.*], in each case signed by the chaperone; and
   B. every case where you have be involved in the direct provision of services to such service users in a life-threatening emergency and without a chaperone being present.

3. You must provide a copy of these records to the HCPC on a [*monthly et*c.] basis, the first report to be provided within [*time*] of the Operative Date or, alternatively, confirm that there have been no such cases during that period and must make those records available for inspection at all reasonable times by any person authorised to act on behalf of the HCPC.

E. Supervision requirements

1. You must place yourself and remain under the supervision of [*workplace supervisor, medical supervisor etc.*] registered by the HCPC or other appropriate statutory regulator and supply details of your supervisor to the HCPC within [*time period*] of the Operative Date. You must attend upon that supervisor as required and follow their advice and recommendations.

F. Treatment requirements

1. You must register with and remain under the care of a [*general practitioner/occupational health specialist etc.*] and inform him or her that you are subject to these conditions.

2. You must inform your [*general practitioner/occupational health specialist etc.*] about these conditions of practice and authorise that person to provide the HCPC with information about your health and any treatment you are receiving.

3. You must keep your professional commitments under review and limit your professional practice in accordance with the advice of your [*general practitioner/occupational health specialist/therapist*].

4. You must cease practising immediately if you are advised to do so by your [*general practitioner/occupational health specialist/therapist*].

G Substance dependency

1. You must make arrangements for the testing of your [*breath, blood, urine, saliva, hair*] for the [*recent and/or long-term*] ingestion of alcohol and other drugs every [*insert frequency*]. You must provide to the HCPC details of the testing arrangements and forward copies of the test results to the HCPC within [*insert frequency*] of them being received by you.

2. You must attend regular meetings of [*Alcoholics Anonymous/Narcotics Anonymous*] or any other recognised support group and must provide the HCPC with evidence of your attendance at such meetings.

3. You must [*limit your*][*abstain absolutely from the*] consumption of alcohol.

4. You must refrain from self-medication [, [*including*][*apart from*] *over the counter medicines* [*containing* [*active ingredient*] *and*] *which do not require a prescription*,] and only take medicines as prescribed for you by a healthcare practitioner who is responsible for your care.

H. Informing the HCPC and others

1. You must promptly inform the HCPC if you cease to be employed by your current employer or take up any other or further employment.

2. You must promptly inform the HCPC of any disciplinary proceedings taken against you by your employer.

3. You must inform the following parties that your registration is subject to these conditions:

   A. any organisation or person employing or contracting with you to undertake professional work;

   B. any agency you are registered with or apply to be registered with (at the time of application); and

   C. any prospective employer (at the time of your application).

I. Personal development

1. You must work with [*supervisor etc.*] to formulate a Personal Development Plan designed to address the deficiencies in the following areas of your practice:

   [*List areas found to be unacceptable or a cause for concern, or which the Panel have determined to be of concern*]

2. Within three months of the Operative Date you must forward a copy of your Personal Development Plan to the HCPC.

3. You must meet with [*supervisor etc.*] on a [*monthly etc.*] basis to consider your progress towards achieving the aims set out in your Personal Development Plan.

4. You must allow [*supervisor etc.*] to provide information to the HCPC about your progress towards achieving the aims set out in your Personal Development Plan.

5. You must maintain a reflective practice profile detailing every occasion when you [*specify activity etc.*] and must provide a copy of that profile to the HCPC on a [*monthly etc.*] basis or confirm that there have been no such occasions in that period, the first profile or confirmation to be provided within [*time*] of the Operative Date.

J. Costs, approvals etc.

1. You will be responsible for meeting any and all costs associated with complying with these conditions.

2. Any condition requiring you to [*provide any information to*] [*obtain the approval of*] the HCPC is to be met by you [*sending the information to the offices of the HCPC, marked for the attention of*] [*obtaining written approval from*] the Director of Fitness to Practise or Head of Case Management

Health and Care Professions Council

PRACTICE NOTE

Finding that Fitness to Practise is "Impaired"

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

Introduction

In determining whether an allegations is 'well founded', a Panel must decide whether the HCPC, which has the burden of persuasion in relation to the facts alleged, has discharged that burden and, in consequence, whether the registrant's fitness to practise is impaired. Whether those facts amount to the statutory ground of the allegation and constitute impairment is not a matter which needs to be 'proved' but is a matter of judgement for the Panel.[1]

Impairment

An allegation is comprised of three elements, which Panels are required to consider sequentially:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to the statutory ground set out in the allegation (e.g. misconduct or lack of competence); and
3. in consequence, whether the registrant's fitness to practise is impaired.

It is important for Panels to remember that the test of impairment is expressed in the present tense; that fitness to practice "is impaired". As the Court of Appeal noted in *GMC v Meadow*:[2]

> *"…the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past".*

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1 *CRHP v. GMC and Biswas* [2006] EWHC 464 (Admin).

2 [2006] EWCA Civ 1319

Although the Panel's task is not to "punish for past misdoings", it does need to take account of past acts or omissions in determining whether a registrant's present fitness to practice is impaired.

Factors to be taken into account

In Cohen v GMC[3] the High Court stated that it was "critically important" to appreciate the different tasks which Panels undertake at each of step in the adjudicative process.

The initial task for the Panel is:

> *"to consider the [allegations] and decide on the evidence whether the [allegations] are proved in a way in which a jury… has to decide whether the defendant is guilty of each count in the indictment. At this stage, the Panel is not considering any other aspect of the case, such as whether the [registrant] has a good record or… performed any other aspect of the work… with the required level of skill".*

Subsequently, the Panel is:

> *"concerned with the issue of whether in the light of any misconduct [etc.] proved, the fitness of the [registrant] to practise has been impaired taking account of the critically important public policy issues".*

Those "critically important public policy issues" which must be taken into account by Panels were described by the court as:

> *"the need to protect the individual [service user] and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect… and that public interest includes amongst other things the protection of [service users] and maintenance of public confidence in the profession".*

Thus, in determining whether fitness to practise is impaired, Panels must take account of a range of issues which, in essence, comprise two components:

the 'personal' component:	the current competence, behaviour etc. of the individual registrant; and
the 'public' component:	the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession.

[3] [2008] EWHC 581 (Admin)

As the court indicated in *Cohen*, the sequential approach to considering allegations means that not every finding of misconduct etc. will automatically result in a Panel concluding that fitness to practice is impaired, as:

> *"There must always be situations in which a Panel can properly conclude that the act… was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired…*
>
> *It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated".*

It is important for Panels to recognise that the need to address the "critically important public policy issues" identified in *Cohen* - to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession - means that they cannot adopt a simplistic view and conclude that fitness to practise is not impaired because, since the allegation arose, the registrant has corrected matters or "learned his or her lesson".

As indicated in *Brennan v HPC*,[4] in cases where a Panel makes a finding of impairment or imposes a sanction solely on the basis of the 'public' components of an allegation, it must explain the reasons for that decision. It is insufficient simply to recite that, for example, it is necessary in order to maintain public confidence in the profession.

Degree of harm and culpability

In assessing the likelihood of the registrant causing similar harm in the future, Panels should take account of:

- the degree of harm caused by the registrant; and
- the registrant's culpability for that harm.

In considering the degree of harm, Panels must consider the harm caused by the registrant, but should also recognise that it may have been greater or less than the harm which was intended or reasonably foreseeable.

The degree of harm cannot be considered in isolation, as even death or serious injury may result from an unintentional act which is unlikely to be repeated. The registrant's culpability for that harm should also be considered. In assessing culpability, Panels should recognise that deliberate and intentional harm is more serious than harm arising from the registrant's reckless disregard of risk which, in turn, is more serious than that arising from a negligent act where the harm may not have been foreseen by the registrant.

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[4] [2011] EWHC 41 (Admin)

Character evidence

In deciding whether conduct "is easily remediable, has been remedied and is highly unlikely to be repeated", Panels may also need to consider 'character evidence' of a kind which, in other proceedings, might only be heard as mitigation or aggravation as to sanction after a finding had been made.

Whilst it is appropriate for Panels to do so, in admitting character evidence for the purpose of determining impairment, they must exercise caution. As the Court of Appeal noted in *The Queen (Campbell) v General Medical Council,*[5] issues of culpability and mitigation are distinct and need to be decided sequentially and:

> *"The fact that in some cases there will be an overlap, or that the same material may be relevant to both issues, if they arise, does not justify treating evidence which is exclusively relevant to personal mitigation as relevant to the prior question, whether [the allegation] has been established."*

In deciding whether to admit character evidence, Panels must draw a distinction between evidence which has a direct bearing on the findings it must make and evidence which is simply about the registrant's general character. The latter will only be relevant if the Panel needs to hear mitigation against sanction.

For example, in considering allegations involving dishonesty, Panels may need to consider character evidence in determining whether the registrant's actions were dishonest, in reaching a decision about impairment or as mitigation in relation to sanction.

When considering impairment, Panels may properly take account of evidence such as the registrant's competence in relation to the subject matter of the allegation; the registrant's actions since the events giving rise to the allegations; or the absence of similar events. However, Panels should not normally rely on such evidence if it is disputed by the registrant and has not yet been the subject of a determination by a regulatory body, tribunal or court.

Character evidence of a more general nature which has no direct bearing on the findings to be made by the Panel, should not be admitted at this point. Expressions of regret or remorse will usually fall within the latter category. However, where there is evidence that, by reason of insight, that regret or remorse has been reflected in modifications to the registrant's practice, then it may be relevant to the question of impairment.

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[5] [2005] EWCA Civ 250

In deciding whether to admit character evidence at the impairment rather than the sanction phase, Panels need to consider whether the evidence may assist them to determine whether fitness to practise is impaired. Whilst caution needs to be exercised, an over-strict approach should not be adopted as, it is important that all evidence which is relevant to the question of impairment is considered, such as evidence as to the registrant's general competence in relation to a competence allegation.

In considering evidence of impairment, Panel's will readily recognise and be able to disregard character evidence of a general nature which is unlikely to be relevant. However, as the decision in *Cheatle v GMC*[6] highlights, a Panel must be careful not to refuse to hear evidence at the impairment phase about a registrant's general professional conduct which, when heard at the sanction phase, may raise doubts about its conclusion that the registrant's fitness to practise is impaired.

The sequential approach

In determining whether fitness to practise is impaired, Panels should act in a manner which makes it clear that they are applying the sequential approach by:

- first determining whether the facts as alleged are proved;
- if so, then determining whether the proven facts amount to the statutory ground (e.g. misconduct) of the allegation;
- if so, hearing further argument on the issue of impairment and determining whether the registrant's fitness to practise is impaired; and
- if so, hearing submissions on the question of sanction and then determining what, if any, sanction to impose.

It is important that these four steps should be and be seen to be separate but this does not mean that, for example, Panels must retire four times in every case.

The management of the steps in the process will depend upon the nature and complexity of the case and, as the court accepted in *Saha v. GMC*[7], the fitness to practise process is composed of "steps" rather than formal "stages".

6 [2009] EWHC 645 (Admin)

7 [2009] EWHC 1907 (Admin),

Findings of fact

Whilst there is no general obligation in law to give separate decisions on finding of fact, in more complex cases it may be necessary to do so. As the Court of Appeal stated in *Phipps v General Medical Council*:[8]

> *"every Tribunal ... needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?*
>
> *If in asking itself those questions the Tribunal comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents ... are entitled to know in clear terms why such findings have been made."*

[Date]

[8] [2006] EWCA Civ 397

Health and Care Professions Council

PRACTICE NOTE

'Half-Time' Submissions

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

Introduction

A registrant may make a 'half-time' submission that there is 'no case to answer'[1] after the HCPC has presented its case. It is a submission to the effect that the HCPC has failed to discharge the burden of persuasion, and in consequence, that the case (or a part of it) should not proceed further.

The Panel rules[2] make no express provision for half-time submissions, but it is entirely proper for a Panel to consider and rule upon a half- time submission made by or on behalf of a registrant.

No useful purpose is served by a Panel continuing proceedings if, based upon the case which it has been put before the Panel there is no real prospect of the HCPC proving the facts alleged or of the Panel concluding that the facts amount to the statutory ground of the allegation (e.g. misconduct) and, in turn, that fitness to practise is impaired.[3]

Managing half-time submissions

Fitness to practise proceedings are civil in nature, but share some of the characteristics of criminal proceedings in that they are not based upon a dispute between parties but upon an allegation made against a registrant by a public authority. Consequently, in dealing with half-time submissions, Panels should have regard to the test which applies in criminal proceedings laid down in *R v Galbraith*[4]:

> *"If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.*

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[1] This is a challenge to the case which the HCPC has been put before the Panel at the hearing, not the earlier case to answer decision made by an Investigating Panel.

[2] HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; HCPC (Health Committee) (Procedure) Rules 2003.

[3] The HCPC has the burden of proving the facts alleged. Whether those facts amount the statutory ground and, in turn, whether fitness to practise is impaired are matters of judgement for the Panel which do not require separate proof *CRHP v GMC and Biswas* [2006] EWHC 464 (Admin).

[4] [1981] 1 WLR 1039, per Lord Lane CJ

Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case.

Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witnesses reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Procedure

The approach which Panel should adopt in dealing with half-time submissions proceedings is first to address the following question in respect of each disputed allegation (or element of an allegation) :

1. has the HCPC presented <u>any</u> evidence upon which the Panel could find that allegation or element proved?

If not, then the answer is straightforward. The burden of proof has not been discharged and there is no case to answer in respect of that allegation or element.

Where the HCPC has presented some relevant evidence, then the Panel should move on to address the following questions:

2. is the evidence so unsatisfactory in nature that the Panel could not find the allegation or element proved?

3. if the strength of the evidence rests upon the Panel's assessment of the reliability of a witness, is that witness so unreliable or discredited that the allegation or element is not capable of being proved?

In addressing these questions, the Panel must take care in applying the burden and standard of proof, remembering that it is for the HCPC to prove the facts alleged and that the requisite standard of proof is the balance of probabilities. If either question is answered in the affirmative, then again there is no case to answer in respect of that allegation or element.

If the case proceeded to its conclusion, the decision of whether it is 'well founded' would require the Panel to determine whether, in its judgement, the facts alleged:

- amount to the statutory ground of the allegation; and
- in turn, establish that a registrant's fitness to practise is impaired.

Consequently, in dealing with any half-time submission, the Panel may also need to address those issues by answering the following question:

4. is the evidence which the HCPC has presented such that, when taken at its highest, no reasonable Panel could properly conclude that:
   (a) the statutory ground of the allegation is met; or
   (b) the registrant's fitness to practise is impaired?

This question is likely to arise in one of two ways, where it submitted either that

- the evidence is unsatisfactory, for example, being tenuous, vague, weak or inconsistent; or
- the allegation is misconceived, in that the evidence is not disputed but the undisputed facts are insufficient to establish the statutory ground and, in turn, impairment.

If either limb of that question is answered in the affirmative then the Panel is entitled to conclude that there is no case to answer in respect of that allegation or element.

Proceeding further

Unlike a judge sitting with a jury, Panels must decide matters of both law and fact. In dealing with half-time submissions Panels need to recognise that, having considered a submission, they may disagree with it. In that event, the Panel will need to proceed further and hear any evidence that the registrant wishes to present. Panels must do so fairly and objectively, retaining and applying an open mind in relation to all the facts.

For that reason, in reaching a decision on any half-time submission, the Panel should only consider the evidence which has been presented by the HCPC. It should disregard any evidence which the registrant has provided in advance but has not yet presented to the Panel.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Health Allegations

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

Introduction

the Health and Social Work Professions Order 2001 (the Order) provides[1] that one of the statutory grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of his or her "physical or mental health".

If the Investigating Committee concludes that there is a 'case to answer' in respect of a health allegation, it may refer that allegation to the Health Committee.[2] In addition, if the Conduct and Competence Committee is considering an allegation based upon another statutory ground (e.g. misconduct) but considers that the matter would be "*better dealt with by the Health Committee*", it may suspend its consideration of that allegation and cross-refer it to the Health Committee.[3]

What constitutes a health allegation?

Health allegations are rare, as they are principal concerned with unmanaged ill health. Most registrants whose health may impair their ability to practise understand the situation, seek appropriate advice and treatment and, where necessary, modify or restrict their practice.

Deciding that an allegation is a health allegation will often be quite straightforward. This is likely to occur in cases where:

- fitness to practise concerns arise as a direct consequence of the registrant's physical or mental health;
- there is evidence to suggest that the registrant is not managing his or her health appropriately and lacks insight into its potential impact upon service users or the wider public; and
- there is no evidence to suggest that other material factors are involved.

The decision is less straightforward in cases where health is only one facet of broader or more serious concerns about the registrant's fitness to practise. Equally there will be cases where, at the outset, the evidence may not disclose an underlying health issue but where such an issue comes to light as the case progresses. For example,

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1 Article 22(1)(a)(iv)

2 Art. 26(6)(b)(ii) of the Order

3 HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.4(1). The Health Committee has a corresponding power to cross-refer an allegation to the Conduct and Competence Committee.

it would be wrong to assume in respect of every allegation where alcohol has played a part, that the registrant has some form of alcohol dependency.

In deciding whether to refer an allegation to the Health Committee, the factors which should be taken into account include:

- the extent to which health issues are the cause of allegation;
- the overall seriousness of the allegation; and
- the sanctions which are available to the Health Committee, including, in particular, that striking off is not an option. [4]

In *Crabbie v GMC*[5] the Privy Council held that:

> *"The power to refer [to the Health Committee] is a discretionary one… in considering whether or not to exercise the power, the [decision maker], should take into account all the circumstances of the case including the scope of the powers available to the Health Committee.*
>
> *…the Health Committee has no power to direct erasure… if the case is one in which erasure is a serious possibility, neither [decision maker] should refer the case to the Health Committee notwithstanding that it may be one where the fitness to practise of the practitioner in question appears to be seriously impaired by reason of his or her physical or mental condition."*

Similarly, in *R (Toth) v GMC*[6], a case which concerned the cross referral of an allegation to the Health Committee, the court held that:

> *"whilst the possibility of erasure remains, the [Committee] cannot lawfully refer the case to the Health Committee. That Committee cannot impose a sanction of erasure and it is one that the [Committee] may have to impose in the public interest. Whilst that remains a possibility, [it] should retain jurisdiction."*
>
> *I would only add that even where the [Committee] does conclude that erasure is not a possible sanction, it may still be inappropriate to refer a case to the Health Committee because the public interest in complaints being determined in public and the need to maintain professional standards may outweigh the advantages of referring the matter to the Health Committee. However, once erasure has been discounted as a possible sanction, the power to transfer arises and it is for the [Committee] to weigh the considerations for and against exercising that power."*

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4 By Art. 29(6) of the Order the Health Committee may only impose a striking off order where the registrant concerned has been continuously suspended or subject to a conditions of practice order for at least two years

5 [2002] UKPC 45. In that case a registrant imprisoned for causing death by dangerous driving argued that, because of her alcohol dependency, the case should have been heard by the GMC's Health Committee.

6 (2003) EWHC 1675 (Admin).

Cross-referral

Where a case is cross referred from the Conduct and Competence Committee to a Panel of the Health Committee, the Panel may certify to the Conduct and Competence Committee that:

- the fitness to practise of the registrant is not impaired by reason of physical or mental health (leaving the Conduct and Competence Committee to resume and conclude its consideration of the allegation); or
- it has dealt with the allegation and that the Conduct and Competence Committee is not required to take any further action in relation to the allegation.

When an allegation is cross-referred from the Conduct and Competence Committee, it will be formulated on the basis of a statutory ground other than impairment by reason of the registrant's "physical or mental health". As a preliminary issue, the Panel will need to consider how it will treat the allegation as if it was a health allegation and, if possible, seek to agree any necessary modifications to the allegation with the registrant concerned.

Expert evidence as to health

In cases where health issues arise, Panels will often be able to draw appropriate inferences and conclusions from the evidence about a registrant's health without the need for expert evidence. Whether evidence from medical or other experts is required is a matter for the Panel, based upon the well-established principle in *R v Turner*[7] that:

> *"an expert's opinion is admissible to furnish information which is likely to be outside the [Panel's] experience and knowledge. If on the proven facts the [Panel] can form their own conclusions without help, then the opinion of an expert is unnecessary."*

Panels should not go beyond the bounds of their own expertise, for example by seeking to make diagnoses. However, in many cases Panels will be able to understand and assess the available evidence and reach conclusions as to how the registrant's health is affecting his or her fitness to practise.

In considering medical or other expert reports which form part of the evidence, to the extent that it is relevant to do so, Panels should take account of:

- the expert's professional qualifications and area of specialisation;
- the extent of the expert's knowledge of the case, for example whether the expert has been involved in the registrant's care over a lengthy period of time;
- the nature of any assessment undertaken by the expert, such as whether a report is based on a recent physical examination or simply a review of notes made by others;
- how closely in time the expert's report was prepared to the matters in issue.

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7 [1975] QB 834

Panels should also recognise that there are often logical reasons for seemingly conflicting expert evidence. For example, a GP's view of a relatively rare condition, based on symptoms present at its onset may understandably differ from the view of a consultant who is more familiar with the condition and generally sees patients at a later stage and when the symptoms are distinct.

Medical Assessors

In cases where Panels need the assistance of an expert, they have the option of seeking the advice of a suitably qualified medical assessor. The role medical assessors is set out in more detail in the "Assessors and Expert Witnesses" Practice Note. It is also open to the parties to request that a medical assessor be appointed, but the decision as to whether a medical assessor is required is a matter for the Panel, in line with the principle set out in *R v Turner*.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Hearing Venues

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

Introduction

Article 22(7) of the Health and Social Work Professions Order 2001 provides that Panel hearings (including preliminary hearings) at which the person concerned is entitled to be present or represented must be held:

- in the UK country where that person's registered address is situated;
- if not registered, in the UK country where that person resides; or
- in any other case, in England.

These are mandatory requirements which cannot be waived by the HCPC or the person concerned.

Venues

Although hearings must be held in the relevant UK country, Panels do have a discretion as to exactly where a hearing is held within that country. Hearings do not need to be confined to Belfast, Cardiff, Edinburgh and London. However, before deciding to hold a hearing in a different location. Panels should give careful consideration to the practical and financial implications of doing so.

The HCPC has a purpose built and dedicated hearing centre in London and access to carefully selected hearing venues in Belfast, Cardiff and Edinburgh. Those venues have all of the facilities necessary for conducting hearings, including arrangements for evidence to be given via video-link or other special measures, private consultation rooms for the parties and their representatives, separate retiring rooms for Panels and office support, printing and refreshment arrangements.

Finding equally suitable venues in other locations, at relatively short notice and within the finite resources and funds available may not always be feasible.

Procedure

A request for a Panel to change the venue for a hearing should normally be dealt with by the Panel Chair by means of directions. Only in exceptional cases should it be necessary to hold a preliminary hearing for this purpose.

In reaching a decision on venue, the overriding consideration is to ensure that a fair hearing will take place.

In doing so, the factors to be taken into account include (but are not limited to):

- the personal circumstances of the registrant concerned, for example, whether the registrant is the carer of elderly relatives or young children;
- the needs of witnesses, particularly where special measures may be needed or witnesses are disabled or frail;
- the effect that the location of the hearing may have on the quality of evidence given by witnesses at the hearing;
- the number of witnesses and their respective locations, including the financial implications of witness travel and the impact the hearing may have on the services provided by several witnesses from a single organisation;
- the financial implications for both the HCPC and the registrant concerned, including whether, in the opinion of the Panel, a decision in favour of the HCPC would cause undue hardship to the registrant concerned.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Interim Orders

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

Introduction

Article 31 of the Health and Social Work Professions Order 2001 (the Order) sets out the procedure by which a Panel may impose an interim order.

An interim order is a temporary measure that will usually apply until a final decision is made in relation to an allegation (or pending an appeal against such a final decision) and may be either:

- an interim conditions of practice order, imposing conditions with which the registrant must comply for a specified time; or
- an interim suspension order, suspending the registrant for a specified time.

The specified duration cannot exceed eighteen months. Panels should not regard eighteen months as the 'default' position, as an interim order should only be imposed for as long as the Panel considers it to be necessary.[1]

When orders may be made

A Panel of the Investigating Committee may make an interim order:

- when an allegation has been referred to that Committee, but it has not yet taken a final decision in relation to the allegation[2];
- when, having considered an allegation, it decides that there is a case to answer, and refers that case to another Practice Committee (but the interim order must be made before the case is referred);[3] or

[1] in reaching its decision a Panel should be aware that an interim order can be varied or revoked, but cannot be extended, by a reviewing Panel.

[2] separate proceedings at which the Panel will only consider whether an interim order should be imposed.

[3] as case to answer decisions are made 'on the papers' and without the registrant present, the Panel would need to reach a 'minded to' decision and then adjourn without referring the case on, to give the registrant an opportunity to appear before the Panel and be heard on whether an interim order should be imposed. In practice, this power is rarely used.

- when it makes an order that an entry in the register has been fraudulently procured or incorrectly made but the time for appealing against that order has not yet passed or an appeal is in progress.

A Panel of the Conduct and Competence Committee or Health Committee may make an interim order:

- when an allegation has been referred to that Committee but it has not yet reached a decision on the matter;[4] or
- when, having decided that an allegation is well founded, the Panel makes a striking-off order, a suspension order or a conditions of practice order but the time for appealing against that order has not yet passed or an appeal is in progress.

Right to be heard

Article 31(5) of the Order provides that the registrant concerned must be afforded "an opportunity" to appear before, and be heard by, a Panel before it decides whether to make an interim order. The absence of the registrant does not preclude the proceedings from taking place if the registrant has been given that opportunity.

Article 31 does not set out detailed notice requirements for interim order proceedings and, as they are separate proceedings held solely to consider whether and, if so, in what terms an interim order should be made, the notice requirements in the Panel rules[5] do not apply to them.

The nature of interim order applications means that they need to be considered promptly. Normally, the registrant should be given seven days' notice of interim order proceedings unless there are exceptional circumstances which make it necessary for the Panel to hold a hearing at shorter notice.

As interim order proceedings are usually conducted at short notice, applications to adjourn them should normally be considered by the Panel on the day and only be granted in the most compelling circumstances.

Imposing an order

A Panel may impose an interim order only if it is satisfied that in doing so:

- is necessary for the protection of members of the public;
- is in the interests of the registrant concerned; or
- is otherwise in the public interest.

[4] a separate hearing at which the Panel will only consider whether an interim order should be imposed.

[5] HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; and HCPC (Health Committee) (Procedure) Rules 2003.

The appropriate place to consider and weigh all of the evidence in relation to an allegation is when that allegation is being considered at a fitness to practise hearing. Therefore, in determining whether to impose an interim order, a Panel will rarely be in a position to consider and weigh all of the relevant evidence but must act on the information that is available.

At this stage the Panel is not determining the allegation. In essence, the Panel's task is to consider whether the nature and severity of the allegation is such that:

- the registrant, if permitted to remain in unrestricted practice, may pose a risk to the public or to himself or herself; or
- for wider public interest reasons the registrant's freedom to practise should be curtailed.

In doing so the Panel may have regard to the overall strength of the evidence, whether the allegation is serious and credible and the likelihood of harm or further harm occurring if an interim order is not made.

The decision to issue an interim order is not one that should be taken lightly and will depend upon the circumstances in each case. Although this list is not exhaustive, the types of case in which an interim order is likely to be made are those where:

- there may be an ongoing risk to service users from the registrant's serious or persistent competence failures or serious lack or professional knowledge or skills;
- the registrant may pose an ongoing risk to service users, such as allegations involving violence, sexual abuse or other serious misconduct;
- a registrant with apparent serious health problems is practising whilst unfit to do so and may pose a serious risk to service users or others, or be at risk of self-harm;
- although there may be no evidence of a direct link to professional practice, the allegation is so serious that public confidence in the profession and the regulatory process would be seriously harmed if the registrant was allowed to remain in unrestricted practice (for example, allegations of murder, rape, the sexual abuse of children or other very serious offences);
- the registrant has breached an existing suspension or conditions of practice order.

The Panel must balance the need for an interim order against the consequences for the registrant and ensure that they are not disproportionate to the risk from which the Panel is seeking to protect the public. This includes the financial and other impacts which an interim order may have on a registrant.

In making an interim order application, the HCPC may ask for an interim suspension order to be imposed. However, regardless of the terms of an application, a Panel should always consider whether an interim conditions of practice order would be the more proportionate means of securing a degree of protection which the Panel considers necessary. An interim suspension order should only be imposed if the Panel considers that a conditions of practice order would be inadequate for that purpose.

In imposing an interim conditions of practice order, a Panel must take account of the fact that it is doing so on an interim basis and has not heard all of the evidence in the case. Normally, it should not impose conditions of the kind which may be appropriate after an allegation has been determined to be well founded at a final hearing, such as conditions requiring the registrant to undertake additional training.

Consequently, interim conditions of practice are likely to be limited to specific restrictions on practice, for example, not to provide services to children, not to act as an expert witness or not to undertake unsupervised home visits. An interim conditions of practice order may also specify supervision requirements, including a requirement to provide regular supervisory reports to any Panel reviewing the order.[6]

Orders in the public interest

Careful consideration must be given to the imposition of an interim order solely on public interest grounds, and striking the appropriate balance may not always be straightforward.

In *Christou v NMC*[7] the court discharged an interim order imposed on a registrant who had accepted a caution for assault and failed to report it to the NMC, on the basis that it was difficult to identify why the Panel thought an order was needed to reflect public concern, given that this could be done appropriately when the case was finally heard.

In contrast, in *NH v GMC*[8] the court upheld a decision to impose an interim order on a registrant who was awaiting trial for allegedly assaulting and falsefully imprisoning his younger sister for bringing 'dishonour' on their family.[9] In that case, the court said that the question to be answered is:

> *"would an average member of the public be shocked or troubled to learn, if there is a conviction in this case, that the [registrant] had continued to practise whilst on bail awaiting trial?"*

[6] If conditions of this kind would be appropriate for a practising registrant, being unemployed should not be regarded as an obstacle to their imposition (*Perry v NMC* [2012] EWHC 2275 (Admin)).

[7] [2016] EWHC 1947 (Admin)

[8] [2016] EWHC 2348 (Admin)

[9] NH was also alleged to have given his sister emergency contraception without prescription.

Reasons

The draconian nature of an interim order means that a Panel must be very clear in its decision as to why an interim order is necessary and, if applicable, why an interim suspension order has been imposed rather than interim conditions of practice.

Interim orders during appeal periods

Where the Panel is considering imposing an interim order at the conclusion of a final hearing (in order to restrict or remove the registrant's right to practise during the appeal period) the decision will be made as part of that hearing and not in separate proceedings.

Imposing an interim order should not be regarded as an automatic and inevitable step at the end of a final hearing just because a relevant sanction was imposed. If a Panel is considering imposing an interim order, it should give the registrant an opportunity to address the Panel on whether doing so is necessary.

Review, variation, revocation and replacement

Interim orders must be reviewed on a regular basis; within six months of the date when it was made and then every three months from the date of the preceding review until the interim order ceases to have effect. A registrant may also ask for an interim order to be reviewed at any time if new information becomes available or circumstances change.

If an interim order is replaced by another interim order or extended by the court before it is first reviewed, that first review does need not to take place until six months after the order was replaced or extended. If replacement or extension occurs after the first review, then the next review must take place within three months of the order being replaced or extended.

Orders may be varied or revoked at any time and the person who is subject to the order may also apply to the appropriate court for the order to be varied or revoked.

If one type of interim order is replaced by another, the replacement order may only have effect up to the date on which the original order would have expired (including any time by which the order was extended by a court).

The HCPC may apply to the appropriate court[10] to extend an interim order for up to twelve months.

[10] The High Court in England and Wales or Northern Ireland or, in Scotland, the Court of Session.

Terminating an interim order

Interim orders can be brought to an end in three ways:

- by the court, on the application of the person who is subject to the order;
- by the Practice Committee currently dealing with the allegation to which the interim order relates; or
- automatically, when it lapses or the circumstances under which the order was made no longer exist:
  - if the order was made before a final decision is reached in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
  - if an order was made after a final decision was reached, to have effect during the 'appeal period', either when that period expires or, if an appeal is made, when the appeal is concluded or withdrawn.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Joinder

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

Introduction

The Panel rules[1] provide that, where it would be just to do so, a Panel may consider and determine together:

- two or more allegations against the same registrant; or
- allegations against two or more registrants.

Joining allegations

Joinder is a discretionary power which must be carefully exercised by Panels. Joining several allegations against a registrant or dealing jointly with registrants accused of related allegations provides obvious practical benefits, such as reducing demands on resources and witnesses' time. However, the overriding factor which Panels must take into account is whether it would be just to do so.

In exercising that discretion, the principles applied by the criminal courts offer helpful guidance, most notably those derived from the decision in *R v Assim*:[2]

- the governing factor in making joinder decisions is whether it is just to do so. In reaching a decision, Panels need to consider the interests of justice as a whole and foremost among those interests must be those of the registrant(s) concerned;
- joining allegations against a single registrant will be appropriate where the allegations are linked in nature, time or by other factors, such as where the registrant faces several allegations:
  - of the same or a similar character;
  - based on the same acts, events or course of dealing; or
  - based on connected or related acts, events or courses of dealing.
- as a general principle, it would be inappropriate for a Panel to join unconnected allegations against several registrants;
- joining allegations against more than one registrant will be appropriate where they are subject to the same allegation, where there is evidence that they acted in concert or the allegations are linked in time or by other factors, for example where:

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[1] HCPC (Investigating Committee) (Procedure) Rules 2003, r.4(8) and r. 6(7); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.5(4); HCPC (Health Committee) (Procedure) Rules 2003, r.5(4).

[2] (1966) 50 Cr. App. Rep. 224.

- the allegations concern participation in the same act, event or course of dealing (or any series of them);
- the allegations are based upon connected or related acts, events or courses of dealing; or
- the allegations relate to actions taken in furtherance of a common enterprise.

- where joinder would be appropriate based on the nature of the allegations, there may be other reasons why the discretion to do so should not be exercised. For example, where one registrant has failed to respond and joinder might cause delay or unfairness in dealing with another registrant or where it is apparent that registrants will present antagonistic or mutually exclusive defences.

Joinder and fitness to practise

The criminal law is not of direct application in fitness to practise proceedings and, whilst it provides helpful guidance, Panels should not take the analogy too far. As the court stated in *Wisson v HPC*[3] the criminal rules on joinder exist in part because a defendant will be tried:

> *"...by a jury who cannot be expected necessarily to have the expertise to be able to differentiate between conduct on one occasion and another; and they might well be adversely affected if there is a joinder of charges against an individual where there is no proper link and no proper basis for that joinder....The situation is somewhat different when one is dealing with a panel of specialists..."*

Ultimately, a Panel will need to decide whether a registrant's fitness to practise is impaired and, where that is found to be the case, what steps need to be taken to protect the public. A Panel will be aided in that task if it has a proper understanding of all that the registrant is alleged to have done. In *Reza v GMC*[4] the Privy Council set out the Panel's need:

> *"...to be informed of all the facts alleged and all the background which would help them to determine in the interests of the public and the profession what if anything is to be done by way of [sanction]."*

This does not mean that allegations against the same registrant should always be joined. A balance must be struck and justice will always be the governing factor, but the connection between allegations or the relevance of one to another are important considerations. This was explained in *Wisson* in the following terms:

> *"it is always necessary that the totality of any alleged conduct is decided where there are issues and where there are disputes before any sanction is to be imposed. That does not of itself necessarily mean that the same Panel must deal with all issues but it is a pointer in that direction..."*

[3] [2013] EWHC 1036 (Admin)

[4] [1991] 2 AC 182

Evidence management

If allegations against more than one registrant are joined, it will not necessarily be the case that all of the evidence presented is relevant to all of the allegations faced by all of those registrants.

Each registrant is entitled to have their case decided solely on the evidence against them and Panels must take care to consider evidence only in relation to the allegation and registrant to which it relates.

Severance

The decision to join allegations will often be taken at an early stage in the case management process and, as matters progress, it may become apparent that it would be more appropriate for those allegations to be dealt with separately. For example, where witnesses are not available in respect of all the joined allegations or where one registrant is causing delays which will unfairly affect another. A Panel's discretion to join allegations includes the discretion to sever and deal separately with joined allegations where it would be just to do so.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Mediation

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

Introduction

The Health and Social Work Professions Order 2001 provides that, in relation to a fitness to practise allegation:

- if an Investigating Panel concludes that there is a case to answer, it may undertake mediation instead of referring the allegation to a Conduct and Competence Panel or Health Panel[1]; and
- if a Conduct and Competence Panel or Health Panel finds that an allegation is well founded, it may undertake mediation if it satisfied that it does not need to impose any further sanction on the registrant[2].

Mediation and fitness to practise

The HCPC's overarching statutory objective is the protection of the public.[3] In considering the use of mediation, Panels must ensure that they act, and are seen to act, in a manner which is consistent with that objective.

Mediation is an effective means of resolving private disputes. In cases which involve conflict between a service user and a registrant, the service user may well prefer to resolve matters by mediation rather than taking matters further. However, it is the HCPC which makes an allegation against a registrant and the HCPC, acting in the public interest, may need to pursue an allegation further even when the service user concerned would prefer that the HCPC did not do so.

In deciding whether referral to mediation is appropriate, Panels must take account of the "critically important public policy issues" which form part of protecting the public, identified in *Cohen v GMC*[4]. These include the need to:

- protect service users;
- declare and uphold proper standards of behaviour; and
- maintain public confidence in the profession.

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[1] Article 26(6)

[2] Article 29(4)

[3] Article 3(4), Health and Social Work Profession Order 2001.

[4] [2008] EWHC 581 (Admin)

A consensual process

Mediation is a consensual process and any decision to mediate will fail unless it is supported by both the registrant concerned and the other party.

Clearly, there can be no guarantee that mediation will achieve a mutually acceptable resolution. Consequently, before determining that mediation may be appropriate, a Panel must be satisfied that, regardless of the outcome of the mediation, it does not need to take any further steps to protect the public.

Although mediation is typically assumed to involve an unresolved dispute between a registrant and a complainant, there is no reason why, in appropriate circumstances, the registrant and the HCPC cannot be the parties in a mediation.

Mediation may only to be used after a decision has been made that there is a case to answer or where it is determined that an allegation is well founded. As both of those decisions are a matter of public record, in order to provide transparency and accountability, the fact that an allegation was resolved by means of mediation may form part of the information which the HCPC makes available to the public.

Normally, the outcome of a mediation is a private matter between the parties. If the mediator is to be able to inform the HCPC of the outcome, a Panel must obtain the consent of the parties and address this issue in its Order for mediation.

A draft Order referring an allegation to mediation is set out in the Annex to this Practice Note.

What is mediation?

Mediation is a decision-making process in which the parties, with the assistance of a neutral and independent mediator, meet to identify the disputed issues, develop options, consider alternatives and attempt to reach a mutually acceptable outcome.

Mediation involves use of a common-sense approach which:

- gives the parties an opportunity to step back and think about how they could put the situation right; and
- enables participants to come up with their own practical solution which will benefit all sides.

Mediation is a collaborative problem-solving process which focuses on the future and places emphasis on rebuilding relationships rather than apportioning blame for what has happened in the past. It also makes use of the belief that acknowledging feelings as well as facts allows participants to release their anger or upset and move forward.

Mediation is also a voluntary process. The participants choose to attend, making a free and informed choice to enter and if preferred, leave the process. If the process and the outcome is to be fair, all parties must have the willingness and capacity to negotiate and there must be a balance of power between the parties.

What is the role of the mediator?

The mediator acts in an advisory role in regard to the content of the dispute and may advise on the resolution process but has no power to impose a decision on the parties.

Mediators do not advise those in dispute, but help them to communicate with one another. The role of the mediator is to be impartial and help the parties identify their needs, clarify issues, explore solutions and negotiate their own agreement.

How is mediation conducted?

Typically, the mediator will meet each party separately and ask them to explain how they see the current situation, how they would like it to be in the future and what suggestions they have for resolving the disagreement. If both parties agree to meet, the following steps then take place:

- the mediator will explain the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting;
- each party will then have a chance to talk about the problem as it affects them. The mediator will try to make sure that each party understands what the other party has said, and allow them to respond;
- the mediator will then help both parties identify the issues that need to be resolved. Sometimes this leads to solutions that no one had thought of before, helping the parties to reach an agreement;
- the agreement is then recorded and signed by both parties and the mediator.

In practice, mediation is not undertaken by the Panel itself but by a trained mediator appointed to act on its behalf. The HCPC has standing arrangements for the appointment of mediators at the request of Panels.

Referral criteria

Panels should recognise that certain types of case should not be referred to mediation.

As mediation is a closed and confidential process, its use is inappropriate in cases which raise wider public interest issues. The use of mediation in cases involving serious misconduct, criminal acts, serious or persistent lapses in competence, or abuse or manipulation of service users would fail to provide necessary public safeguards and seriously undermine confidence in the regulatory process.

Mediation will also be inappropriate in cases where a complainant has no wish to face the registrant again or where there is a power imbalance which cannot be addressed; with the result that the dominant party may be able to prevent the needs and interests of the other party from being not met.

Suitable cases

Mediation may (but will not always) be appropriate in minor cases that have not resulted in harm, where the risk of repetition or further issues arising is low, which are not indicative of more serious or continuing concerns about a registrant's fitness to practise . For example:

- involve low levels of impairment where the Panel feels that no sanction needs to be imposed;
- could be resolved with an apology, but where the Panel is satisfied that any failure to apologise is not indicative of a lack of insight or other deep-seated concerns;
- are about complaints of overcharging or over-servicing but where there is no evidence to suggest fraud or any other form of abuse of the professional relationship;
- are about management or contractual arrangements between practitioners, where there is no evidence to suggest any impropriety;
- involve poor communication, but which is insufficient to suggest that any service user has been put at risk or compromised.

Unsuitable Cases

Mediation is not appropriate in cases which raise wider public protection issues and cannot reasonably be regarded as a limited dispute between the registrant and the service user. This includes (but is not limited to) cases involving:

- serious misconduct;
- abuse of trust; boundary violations, predatory or manipulative behaviour;
- serious or persistent lapses in professional competence;
- criminal acts, dishonesty or fraud;
- serious concerns arising from the unmanaged health of the registrant;
- substance abuse; or
- repeated allegations.

[Date]

Annex

ORDER OF REFERRAL TO MEDIATION

The decision of the Panel in respect of the allegation made on [date] against [name of registrant] is that [there is a case to answer in respect of the allegation] [the allegation is well founded] for the following reasons:

[set out reasons]

Having considered all of the options open to it the Panel is satisfied, for the following reasons, that it would not be appropriate to [refer this matter to a Conduct and Competence Panel or Health Panel] [take any further action]:

[set out reasons]

The following matter(s) remains unresolved between [name of registrant] and [name of other party]:

[set out matter(s)]

and they have consented to that matter being referred to mediation and have further agreed:

- to attend the mediation;
- to inform each other and the mediator in writing, before mediation commences, of what they regard as the issues to be mediated;
- to file sufficient documents or other material with the mediator to enable mediation to be conducted effectively; and
- that the mediator may inform the HCPC of the outcome of the mediation.

THE ORDER OF THE PANEL is that:

1. the matter set out above be referred to mediation;
2. the mediation be conducted by [name of mediator or description of how the mediator is to be appointed];
3. the mediator inform the HCPC of the outcome of the mediation.

Signed: _____ Panel Chair

Date: _____

Health and Care Professions Council

PRACTICE NOTE

Opinion Evidence, Experts and Assessors

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

Introduction

The Panel rules[1] provide that, at hearings before a Panel, the rules on the admissibility of evidence are those that apply in civil proceedings in the part of the United Kingdom where 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 experts and others.

Opinion evidence

As a general principle, witnesses may give evidence of facts but not opinion evidence. That principle is based upon the premise that the Panel should reach its own conclusions on the factual evidence put before it, rather than deferring to the opinion of others.

The two main exceptions to that principle are:

- evidence provided by expert witnesses, who may give opinions on matters requiring specialist knowledge within their field of expertise; and
- evidence provided by non-expert witnesses who, in describing facts, express an opinion on matters within the competence of lay people generally (such as the approximate speed of a moving vehicle seen by the witness).

In proceedings like those before a Panel, where issues of professional practice and other technical issues arise on a regular basis, it is not uncommon for witnesses of fact to have specialist expertise. Panels should not assume that they can only admit expert evidence if it is provided by an 'expert witness' in the strict and narrow sense.

In *Hoyle v Rogers*[2] the court held that the regime for the control of expert witnesses "who [have] been instructed to give or prepare expert evidence for the purpose of proceedings" only regulates the use of a particular category of expert evidence and does not amount to "a comprehensive and exclusive code" regulating the admission of all expert evidence.

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1 HCPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(b); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10(1)(b); HCPC (Health Committee) (Procedure) Rules 2003, r.10(1)(b).

2 [2014] EWCA Civ 257

In *DN v London Borough of Greenwich*[3] it was held to be wrong to decline to allow the defendants to a professional negligence claim to rely on opinion evidence in the witness statement of an educational psychologist who was said to have been negligent.

That decision was applied in *Multiplex Constructions (UK) Ltd v Cleveland Bridge Ltd*.[4], where the court allowed an engineer giving factual evidence to also provide statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience.

Panels should be aware that a witness of fact who is able to provide opinion evidence based upon their specialist knowledge or expertise does not owe the same paramount duty to the Panel as an expert witness. However, that does not mean that such evidence must be excluded. As the court recognised in *Hoyle*, in dealing with mixed fact and opinion evidence provided by witnesses who are not expert witnesses in the strict sense, an important distinction has to be drawn between the admissibility of that evidence and the weight to be given to it.

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 will be required to call an expert witness or submit an expert's report in evidence.

A Panel should only agree to receive expert evidence where its consider that it will assist the Panel 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 are involved, an 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 an 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 might detract from their opinion and should provide objective, unbiased opinion on matters within their expertise.

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3 [2004] EWCA Civ 1659

4 2008] EWHC 2220 (TCC)

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 upon 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 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 any written question(s) directly to an expert, a copy of the question(s should, at the same time, be sent to the other parties and the Panel. The party instructing the expert is responsible for paying any fees charged by that expert in answering those questions.

Assessors

Articles 35 and 36 of the Health and Social Work Professions Order 2001 provide for the appointment of:

- registrant assessors, to advise on professional practice issues; and
- medical assessors, to advise on medical issues.[5]

A Panel may request the appointment of a registrant assessor or medical assessor in any case. It is also open to the parties to request that an assessor be appointed, but the decision as to whether an assessor is required is a matter for the Panel alone. Any request from a party must made in writing to the Panel, setting out the 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 should notify the parties in writing of the name of the proposed assessor; of the matter(s) 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 must do so in writing. 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 expert's report 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. However, an assessor should not appear as a witness or be cross-examined.

[Date]

[5] The functions which registrant assessors and medical assessor may perform are set out in the Health Professions Council (Functions of Assessors) Rules Order of Council 2003.

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.

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.

Health and Care Professions Council

PRACTICE NOTE

Postponement and Adjournment of Proceedings

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

Introduction

Panels have a statutory obligation to conduct fitness to practise proceedings expeditiously[1] and it is in the interest of all parties, and the wider public interest, that allegations are heard and resolved as quickly as possible. Where a time and venue for a hearing have been set, Panels should always aim to proceed as scheduled. Accordingly, the parties and their representatives should also be ready to proceed.

Adjournments and postponement requests should be subjected to rigorous scrutiny and should not be granted without good and compelling reasons. Panels proceedings should not be postponed or adjourned unless it is shown that failing to do so will create a potential injustice.

Postponements and adjournments

In relation to fitness to practice proceedings, a distinction is made between:

postponement which is an administrative action that may be taken on behalf of a Panel[2] at any time up to 28 days before the date on which a hearing is due to begin; and

adjournment which is a decision for the Panel or the Panel Chair, taken at any time after that 28 day limit has passed or once the proceedings have begun or are part heard.

Postponements

An application for a postponement must be made in writing (letter, email or fax) to the Head of Adjudication at least 28 days before the hearing date. The application should set out the background to and reasons for the request and be supported by relevant evidence.

In considering postponement requests, the Head of Adjudication will consider whether, in all the circumstances the request is reasonable, taking into account:

- the reasons for the request;
- the length of notice that was given for the hearing;

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1 Health and Social Work Professions Order 2001, Art. 32(3)

2 by the Head of Adjudication or his/her nominee

- the time remaining before the hearing is due to commence; and
- whether the case has previously been postponed.

If a postponement application is refused, the applicant will be advised to attend the hearing on the scheduled date. The applicant and any representative must do so ready to proceed, but subject to the right to apply to the Panel for an adjournment.

Adjournments

Applications for adjournment must be made in writing as early as possible and, other than in exceptional circumstances, no later than 14 days prior to the scheduled date for the hearing. An application must specify the reasons why the adjournment is sought and be accompanied by supporting evidence, such as medical certificates.

Where, due to exceptional circumstances, an application for an adjournment is made less than five working days prior to the date for the hearing, it is unlikely that the Panel will be able to consider it before the scheduled hearing date.

Unless advised by the Panel that an adjournment has been granted, the parties and their representatives must attend the hearing on the scheduled date ready to proceed.

Panels should control and decide all requests for adjournments. In determining whether to grant an adjournment, Panels should have regard to the following factors, derived from the decision in *CPS v Picton*[3]:

- the general need for expedition in the conduct of proceedings;
- where an adjournment is sought by the HCPC, the interest of the registrant in having the matter dealt with balanced with the public interest;
- where an adjournment is sought by the registrant, if not granted, whether the registrant will be able fully to present his or her case and, if not, the degree to which the ability to do so is compromised;
- the likely consequences of the proposed adjournment, in particular its likely length and the need to decide the facts while recollections are fresh;
- the reason that the adjournment is required. If it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment;
- the history of the case, and whether there have been earlier adjournments, at whose request and why.

The factors to be considered cannot be comprehensively stated but will depend upon the particular circumstances of each case, and they will often overlap.

[3] (2006) EWHC 1108

A Panel must exercise its discretion judicially, the crucial factor is that the registrant is entitled to a fair hearing, but the convenience of the parties or their representatives is not sufficient reason for an adjournment.

New dates

Where a postponement or adjournment is granted, a new date or alternative dates for the hearing should be agreed at that time. Where that is not possible, arrangements need to be put in place in order for the case to be re-listed for hearing. If necessary, Panels should issues Directions for this purpose.

Communication

So far as possible, communications relating to postponements and adjournments should be sent electronically, in order to ensure that they are dealt with as expeditiously as possible.

Supporting evidence

Applications for postponements or adjournments must be supported by proper evidence and a strict approach should be adopted in evaluating that evidence.

For example, claims that a person is unfit to attend a hearing should be supported by specific medical evidence to that effect. Medical certificates which simply state that a person is “off work” or “unfit to work” should generally be regarded as insufficient to establish that a person is too ill to attend a hearing. An application for a postponement or adjournment on medical grounds should normally be supported by a letter from a doctor which expressly states that the person concerned is too ill to attend a hearing.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Proceeding in the Absence of the Registrant

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

Introduction

As a general principle, a registrant who is facing a fitness to practise allegation has the right to be present and represented at a hearing. However, the Panel rules[1] provide that, if a registrant is neither present nor represented at a hearing, the Panel has the discretion to proceed if it is satisfied that all reasonable steps have been taken to serve notice of the hearing on the registrant.

In exercising the discretion to proceed in absence, Panels must strike a balance between fairness to the registrant and fairness to the wider public interest. Fairness to the registrant is of prime importance, but the overarching statutory objective of regulation is to protect the public. As the Court of Appeal has made clear, the fair, economical, expeditious and efficient disposal of allegations made against registrants is of very real importance.[2]

Exercise of discretion

In deciding whether to proceed in the absence of the registrant, Panels must consider all of the circumstances of the case and, in particular, whether the registrant has chosen not to be present or represented.

The first issue to be addressed is whether notice of the proceedings has been served on the registrant. The Panel rules require notice to be sent to the registrant's address "as it appears in the register". This is a point on which detailed inquiry by a Panel will rarely be necessary. Registrants have an obligation to keep their register entry up to date and, as the Court of Appeal stated in *Adeogba*:

> *"there is a burden on…all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."*[3]

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[1] HCPC (Investigating Committee) (Procedure) Rules 2003, Rule 9; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, Rule 11; HCPC (Health Committee) (Procedure) Rules 2003, Rule 11.

[2] *GMC v Adeogba* [2016] EWCA Civ 162

[3] paragraph 20

The decision in *Adeogba* makes clear that, in terms of service, the HCPC's only obligation is to communicate with the registrant at the address shown in the register.

Further, in *Jatta v NMC*[4] the court held that a Panel is entitled to proceed in absence where a registrant is no longer at his or her registered address and has failed to provide revised contact details, even though the only address that the regulator has is one at which the Panel knows the document would not have come to the registrant's attention.

If the Panel is satisfied on the issue of notice, it must then decide whether to proceed in the registrant's absence, having regard to all the circumstances of which the Panel is aware and balancing fairness to the registrant with fairness to the HCPC and the interests of the public.

In reaching its decision, the Panel should have regard to the factors identified by the Court of Appeal in *R v Hayward*[5] and approved by the House of Lords in *R v Jones*.[6]

However, those cases concerned the absence of criminal defendants and, as the court noted in *Adeogba* "*it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far."*[7] As the court pointed out in that case, where criminal proceedings are adjourned because of the defendant's absence, the defendant can be arrested and brought before the court. That remedy is not available in regulatory proceedings.

The factors identified in *Hayward* (appropriately modified as set out below) are:

- the nature and circumstances of the registrant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;
- whether an adjournment is likely to result in the registrant attending the proceedings at a later date;
- the likely length of any such adjournment;
- whether the registrant, despite being absent, wished to be represented at the hearing or has waived that right;
- the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant;
- the extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case;
- the general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates;

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[4] 2009] EWCA Civ 824

[5] [2001] EWCA Crim. 168

[6] [2002] UKHL 5

[7] paragraph 18

- the effect of delay on the memories of witnesses;
- where allegations against more than one registrant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.

Procedure

In deciding whether to proceed in absence, the key issue for the Panel is whether the registrant has chosen not to engage in the process.

In many cases where the registrant fails to attend a hearing, there will be a history of failure to engage with the fitness to practise process and, in such cases, adjourning the proceedings to provide the registrant with a further opportunity to attend is likely to be a fruitless exercise.

In cases where there has been a lack of engagement by the registrant and non-attendance is anticipated by the HCPC, Panels are entitled to expect HCPC Presenting Officers to assist them by providing a brief chronology of the registrant's interaction with the HCPC.

In cases where the registrant fails to appear at a hearing and there has been either a lack of engagement or a point at which a registrant has clearly chosen to disengage, Panels should resist the temptation to ask hearing officers to attempt to contact the registrant by telephone. A registrant who has decided, for whatever reason, not to attend a hearing is unlikely to be willing to provide a full and frank response when put on the spot in this manner.

If the Panel decides that a hearing should take place or continue in the absence of the registrant, the decision reached and the reasons for doing so should be clearly recorded as part of the record of the proceedings. The Panel must also ensure that the hearing is as fair as the circumstances permit. This includes taking reasonable steps during the giving of evidence to test the HCPC's case and to make such points on behalf of the registrant as the evidence permits.

The Panel must also avoid drawing any improper conclusion from the absence of the registrant. In particular, it must not treat the registrant's absence as an admission that an allegation is well founded.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Restoration to the Register

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

Introduction

Article 33(1) of the Health and Social Work Professions Order 2001 (the **Order**) provides that a person who has been struck off the HCPC Register and who wishes to return to the Register must make an application for restoration.[1]

Applications for restoration must be made in writing to the Registrar, but the Order requires the Registrar to refer restoration applications to a Panel of the Practice Committee which made the striking off order.[2] In most cases this will be a Conduct and Competence Panel.

When a restoration application can be made

A restoration application cannot be made until five years have elapsed since the striking off order came into force. In addition, a person may not make more than one application for restoration in any period of twelve months.

If a person makes two or more applications for restoration which are refused, the Panel refusing the second application may make a direction suspending the applicant's right to make further restoration applications. If such a direction is made, the applicant may apply to have it reviewed three years after it was made, and at three yearly intervals after that.

These time constraints are subject to Article 30(7) of the Order, which enables a Panel to review a striking off order at any time if new evidence comes to light which is relevant to the making of that order. A review of that kind should be treated in all other respects as if it was an application for restoration.

Article 33 of the Order and the Panel Rules[3] provide for restoration applications to be considered at a hearing before a Panel.

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[1] an order of the Investigating Committee, removing a person's Register entry because it was fraudulently or incorrectly made, is not a striking off order and cannot be the subject of a restoration application.

[2] or, where previous applications have been made in connection with the same striking-off order, the Committee which heard the last application.

[3] the HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 and the HCPC (Health Committee) (Procedure) Rules 2003.

The procedure to be followed will be similar to that for other fitness to practise proceedings and, for example, Panels may hold preliminary hearings, order the production of documents or the attendance of witnesses, etc. as they consider appropriate.

However, one significant difference is that, as the applicant has the burden of proof in a restoration case, the Panel Rules[4] require the Panel to adopt an order of proceedings which provides for the applicant to present his or her case first and for the HCPC Presenting Officer to speak after that.

Panels should always make it clear to applicants that they have the burden of proof and explain what this means; that it is for the applicant to prove that he or she should be restored to the Register and not for the HCPC to prove the contrary.

Although the Panel Rules require the applicant to present his or her case first, it is often helpful at the start of a hearing for the HCPC Presenting Officer to set out the history of the case and the circumstances which led to a striking off order being made. Permitting the Presenting Officer to do so will not be contrary to the Rules if their comments are limited to background information of that kind and do not include any substantive arguments which the HCPC wishes to put to the Panel in relation to the restoration application.

Issues for the Panel

Article 33(5) of the Order provides that a Panel must not grant an application for restoration unless it is satisfied[5], on such evidence as it may require, that the applicant:

- meets the general requirements for registration; and
- is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

Striking off is a sanction of last resort, which should only be used in cases involving serious, deliberate or reckless acts and where there may be a lack of insight, continuing problems or denial or where public protection in its widest sense[6] cannot be secured by any lesser means.

The reasons why the applicant was struck off the Register will invariably be highly relevant to the Panel's consideration of the application and it is insufficient for an applicant merely to establish that they meet the requisite standard of proficiency and the other general requirements for registration.

[4] rule 13(10)

[5] "satisfied" in this context means satisfied on the balance of probabilities

[6] this includes not only protection of the public but also the maintenance of public confidence in the profession and the regulatory process and the wider public interest

An application for restoration is not an appeal from, or review of, the original decision. Panels should avoid being drawn into 'going behind' the findings of the original Panel or the sanction it imposed and attempts by the applicant to persuade the Panel to do so may be indicators of a continuing lack of insight or continuing denial.

In determining restoration applications, the issues which a Panel should consider include:

- the matters which led to striking off and the reasons given by the original Panel for imposing that sanction;
- whether the applicant accepts and has insight into those matters;
- whether the applicant has resolved those matters, has the willingness and ability to do so, or whether they are capable of being resolved by the applicant;
- what other remedial or rehabilitative steps the applicant has taken;
- what steps the applicant has taken to keep his or her professional knowledge and skills up to date.

Conditional restoration

If a Panel grants an application for restoration, it may do so unconditionally or subject to the applicant:

- meeting any applicable education and training requirements specified by the Council; or
- complying with a conditions of practice order imposed by the Panel.

The only "applicable education and training requirements" would be the requirements for 'return to practice'. These are generic requirements, primarily designed for registrants who have taken a career break but where there is no cause for concern about their fitness to practise. Consequently, they may be of limited use in dealing with restoration cases.

If a Panel considers that 'return to practice' requirements are appropriate, it should also consider whether the updating period needs to be satisfactorily completed before the applicant may return to unrestricted practice and draft its order accordingly.

Where Panels wish to impose bespoke requirements on a registrant who is being restored to the Register, replacing the striking off order with a conditions of practice order offers a better and more flexible alternative. Conditions of practice can be tailored to meet the specific needs of a particular case, will be reviewed and, if necessary, can be extended. Such an order also provides the added safeguard that swift action can be taken against the registrant if there is any breach of those conditions.

Appeals

An applicant may appeal to the appropriate court if the Panel:

- refuses an application for restoration;
- allows an application, but subject to the applicant satisfying education and training requirements under Article 33(6); or
- makes a direction under Article 33(9) suspending indefinitely the applicant's right to make further restoration applications.

Panels should ensure that applicants are made aware of any right of appeal. For this purpose the "the appropriate court" means the High Court in England and Wales, the High Court in Northern Ireland or, in Scotland, the Court of Session.[7]

Drafting Restoration Orders

Where a Panel decides to restore a person to the Register, it must clearly set out the order which it has made. The order should be addressed to the Registrar, who must amend or annotate the Register as required.

A restoration order should provide that it is only to take effect once the applicant has:

- provided the Registrar with the information and declarations required from any applicant seeking admission to the Register; and
- paid the prescribed restoration fee.

A restoration order template is out below:

ORDER: The Registrar is directed to restore the name of [*name*] (the **Applicant**) to the [relevant profession] Part of the Register, but restoration is only to take effect once the Applicant has:

(a) provided the Registrar with the information and declarations required for admission to the Register; and

(b) paid the prescribed restoration fee.

[The Registrar is further directed to annotate the Register to show that, from the date that this Order takes effect (the **Operative Date**), the Applicant must:

(a) undertake a 60 day period of professional updating in accordance with the HCPC Standards for Return to Practice; and

[7] in the case of an appeal relating to a social worker in England, the appropriate court means the High Court in England and Wales regardless of where the applicant resides.

(b) limit [*his*][*her*] practice to the completion of that updating until such time as the Applicant provides evidence which satisfies the Registrar that the Applicant has successfully completed that period of updating.]

OR

[The Registrar is further directed to annotate the Register to show that, for a period of [*time*] from the date that this Order takes effect (the **Operative Date**), the Applicant must comply with the following conditions of practice:

[*set out conditions*]].

[Date]

Health and Care Professions Council

PRACTICE NOTE

Service of Documents

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

Introduction

The Health and Social Work Professions Order 2001 and the Panel Rules[1] contain provisions about the documents to be served in fitness to practise proceedings, the manner and time limits for doing so and the addresses at which service is to be effected.

This Practice Note supplements but cannot replace those statutory requirements, which must be followed in all cases.

Service requirements

In order to establish that a person has been given notice, the Panel Rules only require proof of posting (rather than of service) and provide that documents sent by post are to be treated as having been sent on the day of posting.

Normally, documents relating to Panel proceedings will be posted or delivered by the HCPC weeks in advance of the relevant proceedings. However, if any question arises as to when a document was received by the recipient, unless evidence to the contrary is available, Panels should regard documents to have been received as follows:

First class post (or an alternative service which provides for delivery on the next business day)	the second business day after it was posted.
Delivering the document to, or leaving it at, a relevant address:	the next business day after it was delivered to or left at that address.

Where an alternative to posting or hand delivery is used (see below):

[1] HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; HCPC (Health Committee) (Procedure) Rules 2003.

By fax, transmitted: before 4pm on a business day; in any other case;	 that day. the next business day.
Personal service, if served: before 4pm on a business day; in any other case;	 that day. the next business day.

The relevant address

The relevant addresses for service are set out in the Panel Rules, as follows:

for the HCPC, its committees or the Registrar:	the offices of the HCPC;
for a registrant:	his or her address in the HCPC register
For any other person,	the last known address of that person

The last known address of a person may include:

for an individual:	his or her usual or last known residence or usual or last known place of business;
for the owner(s) of a business:	his or her usual or last known place of business or usual or last known residence;
for a company, body corporate or other organisation:	its principal or registered office or any other office or place of business which is connected to the proceedings.

Methods of service

The normal method of service to be used in relation to Panel proceedings is by post to a relevant address.

In addition, documents may be served:

- by leaving the document at a relevant address;
- by personal service, effected by leaving the document with an individual or, in the case of a corporation, with a director, officer or manager of that corporation at a relevant address;
- with the prior consent of the recipient, by fax or other electronic means; or
- by such other method as a Panel may direct.

Service by electronic means

Unless a Panel directs otherwise, documents may only be served by electronic means if the party in question has:

- previously agreed in writing to accept service by such means;
- provided a fax number, e-mail address or other electronic identification to which documents should be sent;

and subject to any limitation which the recipient may have specified in agreeing to accept such service as to the format in which documents are to be sent and the maximum size of attachments that may be received.

For this purpose 'business day' means any day except Saturday, Sunday or a bank holiday in the relevant part of the United Kingdom and 'bank holiday' includes Christmas Day and Good Friday.

Proof of service

Panels should accept that documents which were created using the CMS and endorsed with proof of service were posted on the date, and to the address, shown. A separate certificate of service or other proof should not be required unless there are credible grounds for considering that the process set out above has not been followed.

If necessary, service of documents may be proved by means of a certificate of service which contains a signed statement of truth in a form that enables it to be treated in the same manner as any other witness statement. A template for such a certificate is set out in the annex to this Practice Note.

[Date]

Certificate of Service

On [date] the [document], a copy of which is attached to this certificate, was served on [name and position]:

by first class post:	
by delivering to or leaving it:	
by personally handing it to or leaving it with: (please specify)	
by fax machine (and a copy of the transmission sheet is attached):	
by other electronic means: (please specify)	
by other means permitted by the Panel: (please specify)	

at: (insert address where service effected including fax number or e-mail address:	

being [his][her]:

address in the HCPC register		[usual][last known] residence	
[principal][office][usual][last known][place of business]			
other (please specify)			

The date of receipt is regarded to be: [date]

I believe that the facts stated in this Certificate are true.

Signed: Date:

Name and position:

Health and Care Professions Council

PRACTICE NOTE

Special Measures

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

Introduction

The Panel rules[1] allow certain categories of witness to be treated as a 'vulnerable witness' who may give evidence subject one or more special measures. Special measures are the arrangements that a Panel may use to help ensure that vulnerable witnesses give their best evidence. They can also reduce some of the stress associated with giving evidence.

Eligibility for special measures

The Panel rules provide that the following categories of witness, if the quality of their evidence is likely to be adversely affected, may be treated as a vulnerable witness who is eligible for special measures:

- a witness who is under the age of 17 at the time of the hearing;
- a witness who has a mental disorder (within the meaning of the Mental Health Act 1983);
- a witness who is significantly impaired in relation to intelligence and social functioning;
- a witness with physical disabilities who requires assistance to give evidence;
- a witness who, in a case involving an allegation of a sexual nature, was the alleged victim; and
- a witness who complains of intimidation.

Special measures

A Panel may adopt any measures it considers desirable to enable it to receive evidence from a vulnerable witness. They include, but are not limited to:

- use of video links;
- use of pre-recorded evidence as the witness's evidence-in-chief, provided that the witness is available at the hearing for cross-examination and questioning by the Panel;

[1] HCPC (Investigating Committee) (Procedure) Rules 2003, r.8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10A; HCPC (Health Committee) (Procedure) Rules 2003, r.10A.

- use of interpreters (including signers and translators) or intermediaries[2];
- use of screens or such other measures as the Panel consider necessary in the circumstances, in order to prevent:
  - the identity of the witness being revealed to the press or public; or
  - access to the witness by the registrant; and
- the hearing of evidence by the Panel in private.

Panels are not limited to those special measures which are specified in the rules and can consider other arrangements that would help to ensure that the quality of a vulnerable witness's evidence is not diminished.

In considering the use of special measures, Panels should also have regard to whether a vulnerable witness may benefit from other, less formal, arrangements which may help them to give their evidence. For example, it may be appropriate for a vulnerable witness to make a familiarisation visit to the hearing venue ahead of the proceedings or for their evidence to be given based upon a timetable that allows for regular breaks. A Panel may need to give directions to ensure that such arrangements are put in place.

Special measures applications

The fact that a witness is eligible to be regarded as a vulnerable witness does not mean that special measures should automatically be put in place. Their use is at the discretion of the Panel.

If the party calling a witness considers that special measures are needed, they must make an application to the Panel for directions to that effect (a Special Measures Application template is set out in the Annex to this Practice Note).

Many applications are unlikely to be contested, such as where a witness has a disability and the measures sought are clearly necessary to avoid the quality of the witness's evidence from being diminished. In less straightforward cases the Panel may need to hold a preliminary hearing in order to consider an application.

A special measures application should be made as soon as reasonably practicable. Other than in urgent cases, Panels should expect the parties to reach agreement on the need for, and extent of, any special measures or, if agreement cannot be reached, to identify the issues in dispute which need to be determined by the Panel.

In order to ensure that the Panel has sufficient information to make a decision, a special measures application must:

- explain how the witness is eligible to be classified as vulnerable;

[2] Intermediaries facilitate communication between a witness and the Panel and others at a hearing. They are independent of the parties and owe their duty to the Panel. They may explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence

- explain why special measures are likely to improve the quality of the witness's evidence;
- propose the measure(s) that would be likely to do so; and
- set out any views on the proposed measures expressed by the witness (or those acting on behalf of the witness).

A special measures application should also be supported by information about the practical implementation of the measures proposed. For example, the location and arrangements for a live video link or when, where and in whose presence a witness's evidence-in-chief would be video recorded.

In dealing with applications, Panels should make full use of their case management powers. For example, Panels should seek to limit the issues on which a vulnerable witness needs to give evidence by exploring the extent to which facts are admitted. Panels should also set a timetable that enables familiarisation visits, etc. to take place ahead of the hearing so that the witness has time to provide an informed view about any special measures and, if necessary, for an application to be made to vary them.

Where evidence is to be video-recorded, Panels should seek to ensure that any viewing of the video by the witness for the purpose of refreshing their memory does not take place on the day of the hearing. This avoids the need for the witness to have to view twice in the same day a recording of their account of what may have been an unpleasant or harrowing event.

Intimidation

Under the Panel rules a witness may be regarded as vulnerable if the witness "complains of intimidation". Panels should not interpret that phrase literally (merely complaining of intimidation is insufficient) but, equally, they should not engage in a degree of inquiry that amounts to pre-judging issues which are properly a matter for the later substantive hearing of the case. A witness may have justified feelings of intimidation due to circumstances, even if no one intends to intimidate them. Accordingly, the test to be applied is whether the complaint of intimidation is 'genuine', having regard to the particular circumstances of the witness and the case.[3]

Explaining the use of special measures

If a witness is permitted to give evidence from behind a screen or by video link, the registrant concerned may feel that the Panel has pre-judged the witness's evidence or will draw adverse inferences from the use of that special measure. Panels should allay unfounded concerns of that kind and explain that the measure has been adopted simply to put the witness at ease and ensure that they give their best evidence.

[Date]

[3] *R (Levett) v Health and Care Professions Council* [2013] EWHC 3330 (Admin)

Annex

SPECIAL MEASURES APPLICATION

Case Reference:	
Name of Witness:	

Is a preliminary hearing likely to be needed to determine this application?	**YES**		**NO**	

If YES, please explain why:

Why is the witness vulnerable?	
child or young person under 17:	
witness with a mental disorder:	
witness with impaired intelligence and social functioning:	
witness with a physical disability:	
alleged victim in respect of an allegation of a sexual nature:	
witness complaining of intimidation:	

Explain the nature of the vulnerability and how it is likely to affect the quality of the witness's evidence:

Which special measures are likely to improve the witness's ability to give evidence?	
video link:	
pre-recorded evidence in chief:	
interpreter or intermediary:	
use of screens:	
hearing evidence in private:	
other measures (specify below):	

Explain why these special measures are likely to improve the witness's ability to give evidence and provide supporting detail about their practical implementation:

Please give details of any view expressed by the witness (or any person acting on behalf of the witness) about the special measures proposed:

Is any supporting material provided with this application?	**YES**		**NO**	

If YES, please list the supporting material provided:

Signed: _____ Date: _____

Health and Care Professions Council

PRACTICE NOTE

Striking Off Reviews: New Evidence and Article 30(7)

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

Introduction

Article 29(7) of the Health and Social Work Professions Order 2001 (the Order) provides that a person who has been struck off the HCPC Register may not apply for restoration to the Register within five years of the date on which that striking off order took effect.

However, Article 30(7) of the Order enables a striking off order to reviewed at any time where "new evidence relevant to a striking-off order" becomes available after such an order has been made. That Article also provides for review applications to be dealt with in a manner similar to applications for restoration to the Register.

Procedure

Under Article 33 of the Order and the Panel rules[1], the procedure to be followed by Panels when hearing Article 30(7) reviews and other restoration applications will generally be the same as for other fitness to practise proceedings, but subject to one important modification.

Rule 13(10) of the Panel rules provides that, in cases where the application is made by the person concerned, the applicant is to present his or her case first and the HCPC is to respond to that case. This modification reflects the fact that the burden of proof is upon the applicant and that it is for the applicant to prove his or her case and not for the HCPC to prove the contrary.

Issues to be addressed

In considering Article 30(7) review applications, Panels need to address three issues:

1. whether new evidence has become available which is relevant to the striking-off order which was made;
2. if so, whether to admit (i.e. to hear and consider) that evidence; and
3. if that evidence is admitted, having conducted a substantive review, deciding whether or not to maintain the striking-off order.

[1] the HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 and the HCPC (Health Committee) (Procedure) Rules 2003.

The need to address these three distinct issues does not mean that a Panel must hold more than one hearing. It is open to a Panel to address all three issues at the same hearing. Equally, it may be appropriate for a Panel to deal with the first two issues at one hearing and then undertake any substantive review at a subsequent hearing. The approach adopted will depend upon the facts and complexity of the particular case, but the latter course of action may be appropriate if, for example, witnesses need to be called to give evidence at the substantive review stage.

New evidence

"New evidence" under Article 30(7) is any evidence that, for whatever reason, was not available to the Panel which made the striking-off order but which is "relevant to" the making of that order.

Whether evidence is relevant is a matter for the judgement of the Panel conducting the review but an overly restrictive approach to the question of relevance should not be adopted and, in relation to the original decision, "new evidence" may be relevant to:

- the finding that the allegations were well-founded;
- the finding that fitness to practise is impaired; or
- the decision to impose the sanction of striking off.

Admitting new evidence

Whether new evidence may be admitted is a question of law. As with other proceedings under the Order, a Panel may admit evidence if it would be admissible in civil proceedings in the part of the United Kingdom in which the case is being heard and, in addition, Rule 10(1)(c) of the Panel rules provides a discretion to admit other evidence if the Panel is satisfied that doing so is necessary in order to protect members of the public;

Whether new evidence should be admitted is a matter within a Panel's discretion. In exercising that discretion, the factors to be taken into account and the weight to be attached to each of them will depend upon the facts of the case but should include:

- the significance of the new evidence;
- the *Ladd v Marshall*[2] criteria for reception of fresh evidence, namely:
  - whether with reasonable diligence the evidence could have been obtained and presented at the original hearing;
  - whether the evidence is such that it could have an important influence on the result of the case; and
  - whether the evidence is credible;

[2] [1954] 1 WLR 1489

- any explanation of why the new evidence could not have been presented at the original hearing or, if it could have been, whether there is a reasonable explanation for not doing so;
- if the original hearing proceeded in the absence of the registrant, evidence that the registrant did not receive proper notice of the hearing;
- the public interest, including the impact upon others (such as vulnerable witnesses) if the case is re-opened, the need for "finality in litigation" and the countervailing public interest factor identified in *Muscat v Health Professions Council*[3], that there is:

  "...a real public interest in the outcome of the proceedings. It [is] important from the public perspective that the correct decision [is] reached. It is not in the public interest that a qualified health professional, capable of giving good service to patients, should be struck off [the] professional register".

The weight that is given to any new evidence will depend upon the facts of the case and the nature and importance of that evidence. However, even if a Panel finds that new evidence exists it is not obliged to admit the evidence and conduct a substantive review of the striking-off order. Whether it does so will be a matter for the Panel's judgement, having regard to all the relevant factors.

Restoration following an Article 30(7) review

As with any other restoration application, Article 33(5) of the Order provides that a person must not be restored to the register following an Article 30(7) review unless the Panel is satisfied that the applicant:

- meets the general requirements for registration; and
- is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

If a Panel determines that a person is to be restored to the Register following an Article 30(7) review, restoration may be unconditional or the Panel may exercise its power under Article 33(7) of the Order to replace the striking off order with a conditions of practice order. Further guidance on this issue may be found in the Practice Note *Restoration to the Register*.

[Date]

[3] [2009] EWCA Civ 1090

Health and Care Professions Council

PRACTICE NOTE

Unrepresented Registrants

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

Introduction

Although proceedings before Panels have been designed to enable registrants to represent themselves, for many registrants the prospect of having to appear before a Panel may nonetheless be a daunting experience.

An unrepresented registrant may be apprehensive or nervous about having to present a case before a Panel and this may manifest itself in apparently hostile, belligerent or even rude behaviour. Panels need to be aware of this and should take all reasonable steps to put unrepresented registrants at ease, including:

- being patient at all times and making appropriate use of adjournments;
- explaining what will happen in straightforward terms, avoiding legal jargon or, where it cannot be avoided, explaining it;
- explaining what the registrant may or may not do, why and when;
- trying to get the registrant to identify the issues in dispute and ensuring that the registrant has said what he or she needs to say;
- giving clear reasons for any rulings or decisions that are made.

Maintaining a fair balance

Unrepresented registrants are unlikely to be familiar with law or procedure and should be allowed some latitude in the presentation of their case, in order to ensure that they receive a fair hearing. However, this does not mean that they should be allowed to exploit or abuse their lack of representation.

In particular, unrepresented registrants tend to find the following two aspects of the hearing process challenging:

- that as each party is heard in turn, matters which are in dispute must be addressed when it is the registrant's turn to speak rather than by interjection; and
- that evidence is presented by the examination and cross-examination of witnesses.

Panels should ensure that an unrepresented registrant has every reasonable opportunity to make his or her case. For example, it may be necessary for the Panel to help the registrant to put a point to a witness in the form of a question. However, Panels must be careful not to interfere in matters which must be decided by the registrant alone, such as whether or not to give evidence.

Panels are expected to give clear procedural guidance in every case before them, but it is especially important to do so in cases where a registrant is unrepresented. As a minimum the following should be explained:

- who the members of the Panel are and how they should be addressed;
- who the other people present are and their respective functions;
- the procedure which the Panel will follow, including:
  - that the HCPC will open and then call witnesses to give evidence;
  - an explanation of the normal order of examining witnesses (examination in chief, cross-examination and re-examination);
  - that the registrant may raise objections to the admission of evidence;
  - that, once the HCPC has put its case, the registrant may give evidence personally (and may be cross-examined) and may call and question witnesses; and
  - that when all the evidence has been heard, the registrant may address the Panel and thus will have the 'last word';
- that the registrant may make notes, and may have a friend or colleague sitting alongside to make notes or help to present the case;
- that everyone will have the opportunity to present their case, and that the registrant should not interrupt when someone else is speaking, but should make a note of the point and raise it when it is their turn to speak;
- that, if the registrant would like a short break in the proceedings at any time, that is likely to be granted;
- that, if the registrant does not understand something or has a problem about the case, the Panel should be told so that it can be addressed.

Protecting witnesses

A person who is unfamiliar with the presentation of evidence by means of examination and cross-examination is likely to make statements to, rather than asking questions of, witnesses and may adopt an aggressive, offensive or unnecessarily confrontational approach to the questioning of witnesses.

Although such behaviour is likely to arise inadvertently, Panels should protect witnesses from questioning by an unrepresented registrant which goes beyond the acceptable limits of testing or challenging their evidence by means of cross-examination. Striking the right balance on this issue will often be difficult, but Panels must intervene as necessary in order to protect both the interests of witness and the registrant's right to a fair hearing.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Use of Welsh in Fitness to Practise Proceedings

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

Introduction

This Practice Note reflects the HCPC's support for the principle set out in the Welsh Language Act 1993 that, in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.

Background

Article 22(7) of the Health and Social Work Professions Order 2001 provides that fitness to practise proceedings must take place in the UK country of the registrant. Thus, if a person's address on the HCPC register is in Wales, then the proceedings must takes place in Wales.

The relatively small size of many of the HCPC professions and the need for Panels to include at least one person from the same profession as that of the registrant concerned means that only a limited number of Welsh-speaking Panel members are available to the HCPC. Given that fact, and the HCPC's very limited caseload in Wales, it will rarely be feasible for Panels to be appointed which are able to conduct proceedings in Welsh without prior notice.[1]

Case management

Panels should manage cases effectively to ensure that proceedings in Wales are conducted fairly, with the English and Welsh languages treated on the basis of equality.

The primary responsibility for informing a Panel that Welsh may be used in proceedings rests upon the parties or their representatives. They should do so at the earliest opportunity, so that the Panel can ensure that appropriate case management arrangements are made.

An early indication that Welsh may be used will help the Panel to manage the case more effectively and so should not be delayed until more definitive information or detail about the use of Welsh is available.

[1] for the avoidance of doubt, it should be noted that the arrangements set out in this Practice Note only apply to proceedings which take place in Wales.

Once more detailed information is available it should be provided to the Panel. This includes details of:

- any person wishing to give oral evidence in Welsh; and
- any documents or records in Welsh which a party expects to use.

Directions and preliminary hearings

Panels may need to give directions or hold a preliminary hearing for the management of a case, either in respect of the use of Welsh or more generally.

At this stage, it would assist the Panel if parties could indicate whether Welsh may be used in the proceedings if they have not already done so. Equally, where a party has already done so, it would be helpful if this could be confirmed or not (as the case may be).

Interpreters

If an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the Panel will appoint an interpreter.

Where possible, and unless the nature of the case calls for some special linguistic expertise, interpreters should be drawn from the list of approved interpreters maintained by the Welsh Language Unit of HM Courts and Tribunals Service or have similar experience of simultaneous interpretation in legal proceedings.

Oaths and affirmations

When witnesses are called in hearings held in Wales, Panels should ensure they are informed that they may choose to be sworn or affirm in Welsh or English.

[Date]

Health and Care Professions Council

PRACTICE NOTE

Witness and Production Orders

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

Introduction

Panels may require any person (other than the registrant concerned) to attend a hearing and give evidence or produce documents. Failure to comply with a requirement imposed by a Panel is a criminal offence.

The powers of Panels

The Panel rules[1] enable Panels to require a person to attend and give evidence at a hearing or to produce documents. Those powers are set out in similar form, as follows:

> *"… The [Panel] may require any person (other than the registrant) to attend a hearing and give evidence or produce documents."*

The exercise of the Panel's powers

The power to require a person to attend a hearing and give evidence or to produce certain documents should be exercised by means of a Witness Order or Production Order (a template for which is annexed to this Practice Note).

A Panel may decide on its own motion to issue an Order and any party to the proceedings may also request the issue of such an Order.

A party should not apply for an Order unless that party has first asked the witness to attend and the witness has:

- refused to attend or confirm that they will do so;
- agreed to attend, but the applicant has reasonable grounds for believing that the witness will not do so; or
- agreed to attend, but only if ordered to do so. This may arise, for example, where a witness is concerned that confidentiality obligations prevent the witness from giving evidence voluntarily.

[1] HCPC (Investigating Committee) (Procedure) Rules 2003, r. 6(8); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r. 10(3) and 13(6); HCPC (Health Committee) (Procedure) Rules 2003, r. 10(3) and 13(6).

A party seeking to have an Order issued to any person must apply to the Panel in writing setting out:

- the name and address of the person concerned;
- the terms of the Order sought;
- details of any information being sought;
- the steps which the applicant has taken to secure the attendance of, or production by, that person on a voluntary basis; and
- evidence to show why attendance or production by that person is likely to support the case of the applicant.

Unless a Panel directs otherwise, a copy of the application and any evidence in support of it must be sent to the person concerned. A Panel may deal with the application without holding a hearing if the parties consent or if the Panel considers that a hearing is unnecessary.

An Order which requires the production of documents should either identify the documents individually or by reference to a class of documents or some other criteria which are sufficient for the recipient of the Order to understand the obligation which has been imposed by the Panel.

Normally, the party seeking to compel a person to attend a hearing must meet their reasonable costs of doing so and the Panel may require an undertaking to that effect before an Order is granted.

Compliance with Orders

A person should not be required to attend in response to a Witness Order unless it has been served at least seven days before the hearing or, if served within that period, the person has informed the Panel that he or she is willing to attend.

Where, in the case of any document, a person could comply with an Order by delivering a copy of all or part of the document or by making it available for inspection, he or she should not be compelled to do more than:

- produce a photographic or other facsimile copy of the document or the relevant parts of it; and
- make them available for inspection by the Panel.

The power to require a witness to attend a hearing and give evidence does not extend to compelling the witness to prepare and provide a witness statement in advance of the hearing.

A person who, in response to an Order, attends a hearing and gives evidence is a witness of the party who asked for the Order to be issued. The witness should not be cross-examined by that party without leave of the Panel. Normally, this should only be permitted if the Panel decides that the witness is to be treated as a hostile witness.

Limits of the Panel's powers

A Panel cannot exercise its powers in order to obtain:

- information which a person is prohibited from disclosing by or under any other enactment[2]; or
- information or documents which a person could not be compelled to supply or produce in civil proceedings[3].

Material which a person could not be compelled to supply or produce in civil proceedings will generally be material which is:

- subject to legal professional privilege:
  - communications between lawyer and client for the purposes of giving or receiving legal advice, or
  - communications whose dominant purpose relates to pending or contemplated litigation;
- correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings; or
- subject to Public Interest Immunity, for example on the grounds of national security.

Panels must take appropriate steps to avoid exercising their powers in a manner which breaches those limitations. However, if an Order is issued and the recipient believes one of those limitations apply, he or she may apply for the Order to be set aside (see below).

Service user confidentiality

Registrants and others who are responsible for health and care records sometimes mistakenly assume that the Data Protection Act 1998 prevents them from disclosing information about service users to a Panel. That is not the case, as section 35(1) of that Act exempts personal data from the non-disclosure provisions where disclosure is required by or under any enactment, such as the Health and Social Work Professions Order 2001.

Equally, extra-statutory data protection measures (such as the Caldicott Guardian arrangements) do not prevent disclosure to the HCPC under the Order.

Registrants owe a duty of confidentiality to service users, who rightly expect that information which they entrust to registrants will be held in confidence and not shared with others. That common law duty is an essential part of health or social care practice, which helps to ensure that service users provide full and frank information.

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[2] if the prohibition operates because the information is capable of identifying an individual, an Order can be made which allows for the information to be provided in a form which is not capable of identifying that individual.

[3] i.e. proceedings before the court to which any appeal would be made against the decision of the Panel.

However, that duty of confidentiality does not, of itself, confer any evidential privilege. In general, the majority of personal, commercial and professional confidences (other than those covered by legal professional privilege) may be subject to compelled production.

Panels should seek to uphold the principle of service user confidentiality and, wherever possible, records should be obtained on the basis of consent from the service user concerned. However, whilst service users' rights to privacy are important they are not absolute and in situations where consent cannot be obtained but Panel is satisfied that access to those records is needed then the person holding them should be compelled to produce those records.

Setting aside

A person who has received a Witness or Production Order may apply to have it set aside (in whole or in part). An application must be made to the Panel in writing and, in the case of an Order issued at the request of a party to the proceedings, that party has a right to be heard on such an application.

Failure to comply

It is a criminal offence for a person, without reasonable excuse, to fail to comply with any requirement imposed by a Panel under Article 25(2) or rules made by virtue of Article 32(2)(m) (or any corresponding rule).Under Article 39(5) of the Order, i

Offences are punishable on summary conviction by a fine not exceeding level 5 on the standard scale (currently £5,000).

[Date]

Annex

[PRACTICE] COMMITTEE

[WITNESS] [PRODUCTION] ORDER

TO: [name and address]

An allegation relating to the fitness to practise of [name of registrant] has been made by the Health and Care Professions Council and a hearing in respect of that allegation will take place before a Panel of the Committee at:

[date, time and venue]

In accordance with the Health and Care Professions Council ([Practice] Committee) (Procedure) Rules 2003, **YOU ARE ORDERED TO**:

[attend that hearing to give evidence][and][produce the following documents:]

Signed: _____ Panel Chair

Date: _____

IGNORING THIS ORDER IS A CRIME

If you fail, without reasonable excuse, as required by this order to:

- produce any documents; or
- attend a hearing and give evidence or produce any documents;

you will be committing an offence under the Health and Social Work Professions Order 2001. On conviction, you will be liable to a fine of up to **£5000**.

Indicative Sanctions Policy

Introduction

1. This is the Health and Care Professions Council's indicative policy on how sanctions should be applied by Practice Committee Panels in fitness to practise cases.

2. The decision as to whether a sanction should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the Panel which heard the case. Panels operate independently from the Council and it would be inappropriate for the Council to seek to establish a fixed 'tariff' of sanctions.

3. Panels must decide each case on its merits and that includes deciding what, if any, sanction to impose. However, this policy is intended to assist Panels to make fair, consistent and transparent decisions. Where a Panel deviates from this policy, its written determination should provide clear and cogent reasons for doing so.

The purpose of sanctions

4. The purpose of fitness to practise proceedings is not to punish registrants, but to protect the public. Inevitably, a sanction may be punitive in effect, but should not be imposed simply for that purpose. The Panel's task is to determine whether, on the basis of the evidence before it, the registrant's fitness to practise is impaired. In effect, the task is to consider a registrant's past acts, determine whether the registrant's fitness to provide professional services is below accepted standards and to consider whether he or she may pose a risk to those who may need or use his or her services in the future. Where such a risk is identified, the Panel must then determine what degree of public protection is required.

5. It is important for Panels to remember that a sanction may only be imposed in relation to the facts which a Panel has found to be true or which are admitted by the registrant. Equally, it is important that any sanction addresses all of the relevant facts which have led to a finding of impairment.

6. The primary function of any sanction is to address public safety from the perspective of the risk which the registrant concerned may pose to those who use or need his or her services. However, in reaching their decisions, Panels must also give appropriate weight to the wider public interest, which includes:

- the deterrent effect to other registrants;
- the reputation of the profession concerned; and
- public confidence in the regulatory process.

7. If further action is to be taken then a range of sanctions is available which enables a Panel to take the most appropriate steps to protect the public. Article 29 of the Health and Social Work Professions Order 2001 (the Order) provides that those sanctions are:
   - mediation;
   - caution;
   - conditions of practice;
   - suspension;
   - striking off.

8. Even if a Panel has determined that fitness to practise is impaired, it is not obliged to impose a sanction. This is likely to be an exceptional outcome but, for example, may be appropriate in cases where a finding of impairment has been reached on the wider public interest grounds identified above but where the registrant has insight, has already taken remedial action and there is no risk of repetition.

Proportionality

9. In deciding what, if any, sanction to impose, Panels should apply the principle of proportionality, considering whether the chosen sanction:
   - is an appropriate exercise of the Panel's powers;
   - is a suitable means of attaining the degree of public protection identified by the Panel;
   - takes account of the wider public interest, such as maintaining public confidence in the profession;
   - is the least restrictive means of attaining that degree of public protection;
   - is proportionate in the strict sense and strikes a proper balance between the protection of the public and the rights of the registrant.

Insight and remorse

10. The HCPC is committed to promoting equality and valuing diversity and Panels are expected to adhere to that commitment and to conduct proceedings in a fair and non-discriminatory manner.

11. The primary purpose of fitness to practise proceedings is to identify and secure a proportionate measure of public protection rather than to punish. A key factor in many cases will be the extent to which a registrant recognises his or her failings and is willing to address them.

12. In taking account of any insight, explanation, apology or remorse offered by a registrant, Panels are reminded that there may be cultural differences in the way that these may be expressed - both verbally and non-verbally - and especially where the registrant may not be using his or her first language.

13. There is a significant difference between insight and remorse. The degree of insight displayed by a registrant is central to a proper determination of whether fitness to practise is impaired and, if so, what sanction (if any) is required. The issues which the Panel need to consider include whether the registrant:

    - has admitted or recognised any wrongdoing;
    - has genuinely recognised his or her failings;
    - has taken or is taking any appropriate remedial action;
    - is likely to repeat or compound that wrongdoing.

14. Those issues should be addressed by consideration of the evidence on those issues rather than focusing on the exact manner or form in which they may be explained or expressed.

15. Registrants are expected to be open and honest with service users and, generally, Panels should regard registrants' candid explanations, expressions of empathy and apologies as positive steps. Importantly, they will rarely amount to an admission of liability by the registrant concerned and, in the absence of evidence to the contrary, should not treated as such by Panels.

Sanctions and criminal convictions

16. A conviction or caution should only lead to further action being taken against a registrant by the HCPC if, as a consequence of that conviction or caution, the registrant's fitness to practise is found to be impaired. The Panel's role is not to punish the registrant twice for the same offence, but to protect the public and maintain high standards among registrants and public confidence in the profession concerned.

17. Where a registrant who has been convicted of a serious criminal offence and is still serving a sentence at the time the matter comes before a Panel, normally the Panel should not permit the registrant to resume unrestricted practice until that sentence has been satisfactorily completed.

Community Sentences

18. In considering any sentence imposed, Panels need to recognise that community sentences are used to address different aspects of an individual's offending behaviour. Consequently, they may not simply be an order to undertake unpaid community work but may also include other orders such as compliance with a curfew, exclusion from certain areas or an order to undergo mental health, drug or alcohol treatment.

19. Panels need to give careful consideration to the terms of any community sentence but, generally, should regard it as inappropriate to allow a registrant to remain in or return to unrestricted practice whilst they are subject to such a sentence.

Sex offender notification

20. Similar consideration needs to be given to any notification requirement under the Sexual Offences Act 2003. Although inclusion on the sex offenders' database is not a punishment, it is intended to secure public protection from those who have committed certain types of offences. Generally, Panels should regard it as incompatible with HCPC's obligation to protect the public to allow a registrant to remain in or return to unrestricted practice whilst subject to a notification requirement as a sex offender.

Child pornography offences

21. In dealing with offences relating to indecent images of children, the courts categorise offences based upon the nature of the images and offender's degree of involvement in their production. Mainly, this is to assist the court in reaching sentencing decisions.

22. The HCPC considers that any offence relating to child pornography involves some degree of exploitation or abuse of a child and, therefore, that conviction for such an offence is a serious matter which undermines the public's trust in registrants and public confidence in the profession concerned.

Procedure

23. The range of sanctions available to Panels should not influence the decision as to whether or not fitness to practise is impaired. The finding of impairment and sanctioning stages of a hearing should be (and be seen to be) separate elements of the process.

24. To reinforce this point, Panels should retire to determine whether or not fitness to practise is impaired and then return to announce their decision and the reasons for that decision. Where the Panel has decided that fitness to practise is impaired, it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring again to consider (in ascending order) what, if any, sanction to impose. The Panel should then return to announce that sanction and the reasons for that sanction.

25. Panels must ensure that registrants fully understand any sanction which is being imposed upon them. The Panel Chair should carefully explain what sanction, if any, the Panel has imposed, the reasons for doing so and the consequences for the registrant in clear and direct language which leaves no room for misunderstanding or ambiguity. In particular, Panel Chairs should avoid the temptation to give lectures, which often obscure clear communication of the Panel's decision.

Sanctions

Mediation

26. The Order provides that mediation may only be used if the Panel is satisfied that the only other appropriate course would be to take no further action. Thus, a case may only be referred to mediation if the Panel considers that no further sanction is required. Generally this will only be where impairment is minor and isolated in nature and unlikely to recur, where the registrant fully understands the nature and effect of that impairment and has taken appropriate corrective action.

27. Mediation is not really a sanction as such but is a consensual process and will be most appropriate where issues between the registrant and another party (e.g., the complainant or an employer) remain unresolved.

Caution Order

A caution order must be for a specified period of between one year and five years. Cautions appear on the register but do not restrict a registrant's ability to practise. However, a caution may be taken into account if a further allegation is made against the registrant concerned.

28. A caution order is an appropriate sanction for cases, where the lapse is isolated, limited or relatively minor in nature, there is a low risk of recurrence, the registrant has shown insight and taken appropriate remedial action. A caution order should also be considered in cases where the nature of the allegation means that meaningful practice restrictions cannot be imposed but where the registrant has shown insight, the conduct concerned is out of character, the risk of repetition is low and thus suspension from practice would be disproportionate. A caution order is unlikely to be appropriate in cases where the registrant lacks insight

29. At the Panel's discretion, a caution order may be imposed for any period between one and five years. In order to ensure that a fair and consistent approach is adopted, Panels should regard a period of three years as the 'benchmark' for a caution order. However, as Panels must consider sanctions in ascending order, the starting point for a caution is one year and a Panel should only impose a caution for a longer period if the facts of the case make it appropriate to do so. A Panel's decision should specify the duration of any caution order it imposes and its reasons for setting that duration.

Conditions of Practice Order

A conditions of practice order must be for a specified period not exceeding three years. Conditions appear on the register and, most often, will restrict a registrant's practice, require the registrant to take remedial action or impose a combination of both.

30. Conditions of practice will be most appropriate where a failure or deficiency is capable of being remedied and where the Panel is satisfied that allowing the registrant to remain in practice, albeit subject to conditions, poses no risk of harm or future harm. Panels need to recognise that, beyond the specific restrictions imposed by a Conditions of Practice Order, the registrant concerned is being permitted to remain in practice. Consequently, the Panel's decision will be regarded as confirmation that, beyond the conditions imposed, the registrant is capable of practising safely and effectively.

31. Conditions of Practice Orders must be limited to a maximum of three years and should be remedial or rehabilitative in nature. Before imposing conditions a Panel should be satisfied that:

- the issues which the conditions seek to address are capable of correction;
- there is no persistent or general failure which would prevent the registrant from doing so;
- appropriate, realistic and verifiable conditions can be formulated;
- the registrant can be expected to comply with them; and
- a reviewing Panel will be able to determine whether those conditions have or are being met.

32. Conditions of practice provide a very flexible means of disposing of cases. A combination of conditions may be imposed, including formal education and training requirements. Equally, in some cases it will be appropriate to impose a single condition for a relatively short period of time to address a specific concern (e.g. to undertake specific remedial training). In imposing conditions of practice, Panels must recognise that, to a large extent, the registrant will be trusted to comply with them. Consequently, before doing so, Panels need to be confident that the registrant will adhere to those conditions of practice.

33. Conditions will rarely be effective unless the registrant is genuinely committed to resolving the issues they seek to address and can be trusted to make a determined effort to do so. Therefore, conditions of practice are unlikely to be suitable in cases:

- where the registrant has failed to engage with the fitness to practise process, lacks insight or denies any wrongdoing;
- where there are serious or persistent overall failings; or
- which involve dishonesty, breach of trust or the abuse of service users.

34. Whilst conditions of practice can be drafted which include arrangements for verifying compliance, a Panel will need to consider carefully whether the registrant can be trusted to comply with them. Where an allegation relates to dishonesty, breach of trust or abuse, conditions of practice are unlikely to be appropriate unless the Panel is satisfied that the registrant's conduct was minor, out of character, capable of remediation and unlikely to be repeated.

35. If conditions of practice are being considered as a means of controlling the practice setting in which a registrant operates, careful thought needs to be given as to whether they are a realistic and appropriate remedy. In particular, the same or similar conditions of practice may not work for all professions.

36. Above all, conditions must be realistic and there is a limit to how far they may extend. For example, a combination of conditions which require a registrant not to carry out home visits, out of hours working, unsupervised care, or care outside of a particular setting may, in reality, amount to a suspension and thus be far too wide. Equally, care must be taken to ensure that the combined effect of the conditions imposed does not amount to a requirement only to perform the role of an unregistered assistant or support worker.

37. Similarly, whilst conditions of practice may be imposed on a registrant who is currently not practising, before doing so Panels should consider whether there are equally effective conditions which could be imposed and which are not dependent upon the registrant returning to practice. For example, not all training, reflection or development requires a registrant to be in practice or have a workplace-based mentor.

38. Article 29(7)(c) of the Order enables Panels to specify a minimum period (of up to two years) for which a conditions of practice order is to have effect before the registrant may apply to vary, replace or revoke it. In general, Panels should only exercise that power in cases where either it is clear from the evidence that earlier review is unlikely to be of value or where the nature of the conditions imposed make early review inappropriate.

Suspension Order

A suspension order must be for a specified period not exceeding one year. Suspension completely prohibits a registrant from practising their profession.

39. Suspension should be considered where the Panel considers that a caution or conditions of practice would provide insufficient public protection or where the allegation is of a serious nature but unlikely to be repeated and, thus, striking off is not merited.

40. A registrant who is suspended cannot practise (and the register is marked accordingly). However, Article 22(8) of the Order provides that the registrant may be subject to further fitness to practice proceedings for events which occur whilst he or she is suspended.

41. If the evidence suggests that the registrant will be unable to resolve or remedy his or her failings then striking off may be the more appropriate option. However, where there are no psychological or other difficulties preventing the registrant from understanding and seeking to remedy the failings then suspension may be appropriate.

42. Panels need to be aware that suspension for short periods of time (i.e. less than a year) may have long term consequences for the registrant, including being dismissed from his or her current employment. However, short term suspension may be appropriate, in particular:

- where a less restrictive sanction would:
  - be unlikely to provide adequate public protection;
  - undermine public confidence; or
  - be unlikely to have a deterrent effect upon the registrant concerned or the profession at large; or
- to facilitate a staged return to practice, for example where the registrant concerned would be unable to respond to and comply with conditions of practice but may be capable of doing so in the future.

43. The latter approach is likely to be appropriate in cases involving, for example, substance dependency where, at the time of the case, the registrant is seeking or undergoing treatment but has not reached the stage where he or she could safely return to practice even subject to conditions. If a short term suspension is imposed for this sort of purpose, the Panel should give clear reasons for their decision, so that the registrant clearly understands what is expected of them.

44. Suspension orders cannot be made subject to conditions. However, where the Panel expects the registrant to address specific issues or take specific action before the suspension order is reviewed – for example, to undergo substance abuse treatment – clear guidance should be given to the registrant so that, when the order comes to be reviewed, the registrant understands what is expected of them and the evidence that may need to be submitted to the reviewing Panel. However, in imposing suspension orders, Panels should avoid being unduly prescriptive and must not seek to bind, or fetter the discretion of, a future reviewing Panel.

45. Article 29(7)(b) of the Order enables Panels to specify a minimum period (of up to 10 months) for which a suspension order is to have effect before the registrant may apply to vary, replace or revoke it. In general, Panels should only exercise that power in cases where it is clear from the evidence that earlier review is unlikely to be of value.

Striking Off Order

A Striking Off order removes a registrant's name from the Register and, on a permanent basis, prohibits the registrant from practising their profession.

46. A striking-off order may not be made in respect of an allegation relating to lack of competence or health unless the registrant has been continuously suspended, or subject to a conditions of practice order, for a period of two years at the date of the decision to strike off.

47. Striking off is a sanction of last resort for serious, deliberate or reckless acts involving abuse of trust such as sexual abuse, dishonesty or persistent failure.

48. Striking off should be used where there is no other way to protect the public, for example, where there is a lack of insight, continuing problems or denial. A registrant's inability or unwillingness to resolve matters will suggest that a lower sanction may not be appropriate.

49. Striking off may also be appropriate where the nature and gravity of the allegation are such that any lesser sanction would lack deterrent effect or undermine confidence in the profession concerned or the regulatory process. Where striking off is used to address these wider public protection issues, Panels should provide clear reasons for doing so. Those reasons must explain why striking off is appropriate and not merely repeat that it is being done to deter others or maintain public confidence.

50. Striking off is a long term sanction. Article 33(2) of the Order provides that, unless new evidence comes to light, a person may not apply for restoration to the register within five years of the date of a striking off order being made and Panels do not have the power to vary that restriction.

Interim Orders to give effect to decisions

51. If a Panel disposes of a case by making a striking-off order, suspension order or conditions of practice order, Article 31 of the Order provides the Panel with the discretionary power to impose an interim suspension or conditions of practice order which will apply during the time allowed for appealing against the final disposal order or, if such an appeal is made, whilst that appeal is in progress.

52. It is important to recognise that the power is discretionary and, consequently, Panels should not regard the imposition of an interim order as an automatic outcome of fitness to practise proceedings in which a striking-off, suspension or conditions of practice order is made.

53. If the Panel is considering imposing an interim order, before doing so it must give the parties a specific opportunity to address it on the issue of whether or not such an order should be made.

54. Whether an interim order is necessary will depend upon the circumstances in each case, but Panels should consider imposing such an order in cases where:

- there is a serious and on-going risk to service users or the public from the registrant's lack of professional knowledge or skills; conduct or unmanaged health problems; or
- the allegation is so serious that public confidence in the profession or the regulatory process would be seriously harmed if the registrant was allowed to remain in practice on an unrestricted basis.

Multiple sanctions

55. Article 29 of the Order provides an escalating range of sanctions and Panels may impose only one sanction at any one time. Similarly, when reviewing sanctions under Article 30 of the Order, a Panel may vary, extend, replace or revoke an existing sanction but cannot impose a second, additional sanction. Consequently, It will be rare for a registrant to be subject to more than one sanction at the same time. However, if that situation does arise, Panels need to ensure that there is no doubt as to the duration and effect of each sanction.

56. A registrant is only likely to be subject to multiple sanctions where a sanction has been imposed in respect of one allegation and the registrant is then the subject of separate proceedings in respect of another allegation. Even then the circumstances in which multiple sanctions would be appropriate are limited.

58. If the second allegation involves a repetition of prior conduct, is broadly similar in nature to the previous allegation or involves breach of the existing sanction, then escalation to a higher sanction is likely to be the more appropriate course of action. In addition, some sanctions will simply 'trump' others. For example, the imposition of a suspension order will have the effect of ending a conditions of practice order.

59. In practice, multiple sanctions are only likely to arise where a sanction has been imposed in respect of one allegation and a second needs to be imposed in respect of an entirely separate and unconnected allegation. For example, if an allegation based upon misconduct is made against a registrant who is already subject to a competence-related conditions of practice order, then provided that the misconduct is unconnected, does not amount to breach of the existing order or raise wider concerns about overall fitness to practise, it might be appropriate to impose a separate caution order in respect of that misconduct. In that event, the Panel should be very clear as to the effect (if any) of its order on the existing sanction. In the example given, the Panel would be expected to make clear that the order it has made has no effect on the terms and duration of the conditions of practice order to which the registrant is already subject.

[Date]

HCPC's Approach to Fitness to Practise

Introduction

1. The statutory function of the Health and Care Professions Council (HCPC) is to set and maintain standards for the professions it regulates, with the overarching objective of protecting the public. Set out here is the HCPC's approach to delivering public protection through its fitness to practise process.

Legislative context

2. The HCPC's powers in respect of fitness to practise are set out in Part V of the Health and Social Work Professions Order 2001. They are supplemented by statutory procedural rules made under that Order and by a suite of policy documents and Practice Notes to which Panels and all those who investigate or present on HCPC's behalf should have regard.

The purpose of fitness to practise proceedings

3. Most health and care professionals adhere to those standards without any intervention by the HCPC. They maintain their knowledge and skills, engage appropriately with service users and others, act with honesty and integrity and conduct their lives in a manner which justifies the public's trust in their professions. Only a small minority of registrants will ever face an allegation that their fitness to practise is impaired and, of those that do, very few will have acted maliciously. Finding that a registrant's fitness to practise is impaired means that there are concerns about their ability to practise safely and effectively. This may mean that they should not practise at all or should be limited in what they are allowed to do.

4. Critically, the test is expressed in the present tense; that fitness to practise is impaired. The process is not designed to punish registrants for past acts, but to consider those acts in determining whether they are fit to remain in unrestricted practice. A finding of current impairment will not always lead to striking off, as the legislation contains a graduated range of sanctions which allow for a proportionate response.[1]

[1] This is addressed in more detail in the HCPC Indicative Sanctions Policy. That policy is not, and does not purport to be, a tariff and Panels may depart from it where there is good reason for doing so. However, Panels should acknowledge that they have done so, to avoid the unfounded suggestion that they are unaware of or have ignored the policy.

5. The HCPC's resources are finite and, in order to ensure those resources are deployed to best effect, a proportionate and risk-based approach should be adopted in dealing with fitness to practise issues. It is important that an appropriate balance is struck by the HCPC and those acting on its behalf. Registrants do make mistakes and not every minor error or isolated lapse in judgement indicates that a registrant's fitness to practise is impaired. Fitness to practise proceedings are not a general complaints resolution process nor are they designed to resolve disputes between registrants and service users. The HCPC would not be protecting the public by creating a climate of fear among its registrants.

6. Being fit to practise is about more than just being a competent health and care professional. The need for registrants to keep their knowledge and skills up to date, to act competently and remain within the bounds of their competence are all important aspects of fitness to practise. But, fitness to practise also requires registrants to treat services users with dignity and respect, to collaborate and communicate effectively, to act with honesty and integrity and to manage any risk posed by their own health.

7. In considering the fitness to practise of registrants, the HCPC must also take account of the wider public interest, including the need to declare and uphold standards, to deter wrongdoing by registrants and to maintain public confidence in the professions it regulates. Inevitably, this means that a registrant's conduct outside of the workplace may be the basis of a fitness to practise allegation. The public would rightly criticise the HCPC if it failed to address conduct which has a bearing on a registrant's fitness to practise, such as being convicted of an offence involving violence, dishonesty, abuse of trust or predatory sexual behaviour.

How Fitness to Practice is assessed

8. In fitness to practise proceedings it is the HCPC that has the burden of persuasion. It must prove the facts alleged, to the civil standard of the balance of probabilities. Whether those facts amount to the 'statutory ground' alleged (for example, a lack of competence or misconduct) and, in turn, whether the registrant's fitness to practise is impaired do not need to be proved by the HCPC. They are both matters of judgement for the Panel which hears the case.

9. In investigating fitness to practise allegations, those acting on the HCPC's behalf must:

   - act as neutral fact finders, by gathering evidence regardless of whether it supports the HCPC's or the registrant's case and disclosing all relevant material to the registrant concerned;[2]
   - provide guidance on the fitness to practise process to complainants, witnesses and registrants, particularly where the registrant concerned may not have legal representation;

[2] It should be rare for the HCPC to possess 'unused' material that it has obtained in the course of investigating an allegation but which will not be included in the evidence put before a Panel. If any unused material does exist, it must be disclosed to the registrant concerned.

- ensure that allegations which do not raise fitness to practise concerns or are clearly not viable are not pursued any further than is appropriate.

10. In addressing the latter point, allegations should only proceed if they meet the HCPC's Standard of Acceptance Policy. Complaints will often be made to HCPC which raise wider issues such as the complainant's disagreement with a court ruling or health service policy but do not concern the fitness to practise of an individual registrant. Allowing cases of that kind to proceed is not only unfair to the registrant concerned but also misleads and is unfair to the complainant.

11. In determining whether fit to practise is impaired, in addition to gravity of the allegations, Panels need to be take three important factors into account:

    - the degree of insight displayed by the registrant;
    - any remedial steps which the registrant has taken (where it is feasible to do so); and
    - the risk of repetition.

12. Adopting a risk-based approach to those factors, impairment is more likely to be found where the registrant acted deliberately or recklessly, where there were persistent or repeated departures from accepted professional practice, or where the past conduct may be indicative of a propensity to be dishonest, violent, abuse trust or pose a similar threat to service users or others.

13. In some instances a registrant's conduct after an initial event will have a significant bearing on the case. For example, a registrant who makes an error in the course of practice but who admits that error, and takes appropriate steps to correct it and avoid its repetition poses a much lower risk than a registrant who takes no remedial steps and falsifies the service user's records in an attempt to hide the error.

Engagement with Fitness to Practise Proceedings

14. The HCPC's expectation is that all registrants will co-operate with fitness to practise investigations, whether they are subject to an allegation, a complainant, witness or involved in some other way. A registrant who is subject to an allegation cannot be compelled to co-operate with or participate in fitness to practise proceedings, but those representing the HCPC should encourage registrants to do so and warn them of the risks of not engaging, including the likelihood of the proceedings being concluded in their absence.

15. Where a registrant who is a complainant or witness fails to co-operate, appropriate steps[3] should be taken to compel them to produce evidence or attend a hearing. Consideration should also be given to making a fitness to practise allegation against the registrant[4] on the ground of misconduct.

[3] such as a statutory requirement made under Article 25(1) of the Health and Social Work Professions Order 2001 or by asking the Panel to issue a Production Order or Witness Order.

[4] under Article 22(6) of that Order

The Role of Panels and HCPC Presenting Officers

16. The determination of any fitness to practise allegation is a matter for a Panel of one of the HCPC's Practice Committees. Those Panels are independent of the Council and are supported by an adjudications team which is separate from those who investigate allegations on the HCPC's behalf.

17. Without seeking to interfere in the Panels' discretion to determine individual cases as they see fit, the HCPC expects Panels (with the support of the adjudications team) to:

    - deal with cases justly, consistent with the overarching objective of protecting the public but recognising the rights of registrants, particularly under Article 6 of the European Convention on Human Rights;
    - deal with the HCPC and registrants concerned fairly and equitably, and encourage them to co-operate with each other in progressing cases and conducting proceedings;
    - respect the interests of witnesses and ensure they are kept informed of the progress of cases;
    - undertake active case management, to ensure that cases are dealt with fairly, justly, expeditiously and proportionately (having regard to the gravity and complexity of the allegations) and, in particular:
        - giving directions and exercising powers under the procedural rules to ensure that cases are heard quickly and efficiently;
        - identifying and addressing the needs of witnesses;
        - identifying the issues in dispute;
        - setting timetables or otherwise controlling the progress of cases;
        - helping the parties to resolve issues;
    - deal with cases without the need for parties or others to attend in person, including by appropriate use of technology.

18. Those who represent the HCPC should assist Panels to the fullest extent possible, be ready to proceed when hearings are fixed and ensure that cases are conducted expeditiously. They should also seek to resolve cases by consent where that is appropriate and apply to discontinue allegations (in whole or part) where there is no longer a realistic prospect of the HCPC discharging the burden of persuasion.

[Date]