

## Fitness to Practise Forum 23 April 2008

### Internet social networking sites

### Executive summary and recommendations

#### **Introduction**

This paper relates to the conduct of registrants when using internet social networking sites.

There has been an increase in the number of cases referred to the Fitness to Practise Department where the conduct of our registrants has been called into question. These complaints can originate from any Internet Social networking sites but will predominantly come from the most popular such as Facebook and MySpace. There have also been occasions where comments have been made on profession specific internet forums.

#### **Decision**

The forum is asked to discuss the advice and recommend that the Investigating Committee approve the advice as shown in appendix 1, and that it is incorporated into the Fitness to Practise operational guidance.

#### **Background information**

This advice has to be considered in accordance with the Standard of Acceptance for Allegations, approved by Council on 14 December 2006. See appendix 2. The Case to Answer practice note shows how this type information should be dealt with by a panel of the Investigating Committee at the 'case to answer' stage. See appendix 3.

#### **Resource implications**

None

#### **Financial implications**

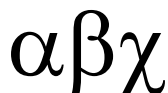
None

#### **Appendices**

- 1 Advice from Jonathan Bracken, Partner, Bircham Dyson Bell
- 2 The Standard of Acceptance for Allegations
- 3 Case to Answer practice note

#### **Date of paper**

11 April 2008



Solicitors and  
Parliamentary  
Agents

Russell Brown  
Lead Case Manager  
Health Professions Council  
Park House  
184 Kennington Park Road  
London SE11 4BU

Your Ref  
  
Our Ref  
JKB/Y030370  
  
Date  
9 April 2008

Bircham Dyson Bell  
LLP  
50 Broadway  
London  
SW1H 0BL  
  
Tel +44 (0)20 7227  
7000  
  
Fax +44 (0)20 7222  
3480  
DX 2317 Victoria  
www.bdb-law.co.uk

Dear Russell

### Internet social networks

We spoke yesterday about what action HPC may be able to take when it receives complaints about registrants' activities outside of work on internet social networks such as Facebook, Myspace, and Bebo.

In those cases where the registrant can be identified and the activity in question, if conducted by other means, would amount to misconduct, the matter should be dealt with in a similar manner to any other fitness to practise allegation. However, such cases will be rare and in many instances it may not be possible to identify the person concerned with any certainty. Further, in many instances evidential considerations may prevent further action being taken, including:

- the generalised and tenuous nature of the comments which may have given rise to the complaint, which may amount to little more than "letting off steam" or be the internet equivalent of "coffee room banter" (albeit then transmitted around the world on the web);
- the complaint may relate to selected or isolated comments which are taken out of context and may not represent the properly balanced views of the person concerned. HPC may not have access to the relevant 'string' of comments which provides that context, for example, by showing that the comments were jocular, qualified in some way or the person concerned has apologised for them;
- the extent to which a complainant may be regarded as having consented to whatever has taken place by participating in the network in question. A recent prosecution for harassment using Facebook failed on exactly this ground;
- the transient nature of some of these websites and the evidential problems this creates, such as where a website does not even exist at the time a case is heard.

**Brussels** Rond Point Schuman 6, box 5 1040 Brussels Tel +32 2 234 Fax +32 2 234 7911  
**Cardiff** Temple Court Cathedral Road Cardiff CF11 Tel +44 (0)29 Fax +44 (0)29 2078 6573  
**Edinburgh** 1-3 St Colme Street Edinburgh EH3 6AA Tel +44 (0)131 Fax +44 (0)131 220 8394

Bircham Dyson Bell is the trading name of Bircham Dyson Bell LLP which is a limited liability partnership registered in England and Wales with registered number OC320798. Its registered office and principal place of business is 50 Broadway, London SW1H 0BL where a list of members' names is available for inspection. Bircham Dyson Bell LLP is regulated by the Solicitors Regulation Authority and is a member of Lexwork International, an association of independent law firms. We use the word partner to refer exclusively to a member of Bircham Dyson Bell LLP.

# αβχ

In addition, whilst decisions about impaired fitness to practise can properly take account of the reputation of the profession in question, we now live in a diverse society in which individual rights to privacy and freedom of expression are protected. This places severe limitations on the extent to which private conduct may be regarded as being damaging to the public standing of a particular profession.

In cases involving the use of internet social networks where there are insufficient grounds for an allegation to be made, but where the content in question may be damaging to the reputation of a particular profession and the registrant responsible can be identified, HPC does have the option of sending a letter of advice to that registrant:

1. drawing attention to the content in question; and
2. reminding the registrant of his or her obligation to comply with the HPC Standard of Conduct, Performance and Ethics and, in particular, Standards 14 and 16:

***14. You must behave with integrity and honesty.***

You must make sure that you behave with integrity and honesty and keep to high standards of personal and professional conduct at all times.

***16. You must make sure that your behaviour does not damage your profession's reputation.***

You must not get involved in any behaviour or activity which is likely to damage your profession's reputation or undermine public confidence in your profession.

Yours sincerely

**Jonathan Bracken**  
**Partner**

**For and on behalf of Bircham Dyson Bell LLP**

Direct Line: +44 (0)20 7227 7077  
Direct Fax: +44 (0)20 7233 1351  
Email: jonathanbracken@bdb-law.co.uk

**Health Professions Council  
Council – 14<sup>th</sup> December 2006**

**Standard of Acceptance for Allegations**

**Executive Summary and Recommendations**

**Introduction**

Article 22(5) of the Health Professions Order provides that ‘where an allegation is made to the Council or any of its Committees, as soon as reasonably practicable after the receipt of the allegation in the *form required by the Council*, the Council shall refer it to [a Practice Committee or Screeners as appropriate].’

Currently, all allegations made in the form required by Council are referred to a panel of the Investigating Committee to determine whether there is a case to answer. Council previously approved the practice note in relation to allegations in December 2004. However in order to improve the quality of information that is provided to HPC and to improve the process of making an allegation, the Executive is recommending to the Council a number of suggestions. This paper sets out those recommendations.

This paper is intended to supplement the practice note previously provided to the Council and a copy of that document is attached to this paper as an appendix.

The provision in Article 22(5) which allows Council to specify the form in which an allegation against a registrant must be made in order to be accepted by the HPC is of particular significance. The provision sets the “standard of acceptance for allegations”.

Once an allegation is received which meets that standard, other provisions of Part V of the 2001 Order automatically apply and require that;

- the allegation must, as soon as practicable, be referred to the Investigating Committee; and
- the Committee must, without delay, provide the registrant with a copy of the allegation.

Therefore, to a large extent, the form in which an allegation is received dictates the pace and extent of the subsequent investigation which is carried out by HPC.

At present, for the purpose of Article 22(5) of the Health Professions Order, an allegation is made in the form required by Council if it is

1. made in writing,
2. identifies (as far as is possible) the health professional who is the subject of the allegation,
3. identifies the person who is making the allegation and,
4. is signed by or on behalf of that person.

A notice or certificate that the health professional has

- a. been convicted of an offence;
- b. received a police caution; or
- c. been the subject of a decision or determination by any other regulatory or licensing body

will be considered to be an allegation in the form required by Council, if it is in writing, in a form normally adopted for such notices or certificates by the courts, police service, law enforcement agencies or regulatory bodies and sufficiently identifies the health professional concerned.

As a consequence, if a written complaint is received that contains scant information it must nonetheless be treated as an allegation. This can cause particular difficulties in relation to allegations made by lay complainants, most notably patients, who may provide very limited information about an allegation with the result that the allegation not being pursued further, largely because of the lack of evidence.

A standard complaint form is made available to complainants but its use is not mandatory and, even where the form is used, complainants may not understand the need to provide all of the necessary information or, for a variety of reasons, may not be able to do so.

## **Changes**

In order to improve the quality of information which complainants provide, it is proposed that the requirement of allegations should be retained (and that the use of the standard complaints form remains discretionary) but that the process is developed in three ways:

1. to require complainants to provide a minimum level of information in writing before a complaint is regarded as being an allegation in the specified form;
2. to enable allegations to be made by means of a “statement of complaint”, prepared by a member of the Fitness to Practise team (this will normally be a fitness to practise case manager) following a personal or telephone interview with the complainant, provided that the statement of complaint is subsequently verified and signed by the complainant; and
3. in a case where incomplete information has been provided by a complainant, to permit the Fitness to Practise team to conduct preliminary allegations if, based on the information first provided, in the opinion of the Director of Fitness to Practise, it appears to be necessary to do so in order to protect the public or the registrant, or is otherwise in the public interest.

In relation to the minimum level of information which must be provided in order to constitute an allegation, complainants would be required to provide information which:

- sufficiently identifies the registrant who is the subject of the allegation; and
- sets out the nature of the allegation and the events and circumstances giving rise to it in sufficient detail for that registrant to understand and to be able to respond to the allegation.

The term “sufficiently identifies the registrant” has been used here to cover both situations where the registrant is identified directly by name and situations where the registrant is identified indirectly.

Enabling the FTP team to complete statements of complaint on behalf of complainants would in many cases significantly improve the quality of information being provided to HPC and assist the investigative process. It would be of particular assistance to complainants for whom English is not their first language or who have poor levels of literacy and would otherwise have difficulty in seeking redress.

So far as preliminary investigations are concerned, under the 2001 Order, HPC has limited “policing” powers and, generally, investigative and enforcement activity is only triggered once an allegation is received. However, in situations where a complaint appears to raise valid concerns about a registrant’s fitness to practise but the complaint is poorly articulated, it would be helpful if the FTP case team conducted limited investigations to gain a better understanding of that complaint where doing so would support HPC’s primary objective of protecting the public.

This proposal would not change the overall approach of most FTP activity being allegation-led. It is an option which would be used only in appropriate cases and subject to the safeguard that investigation would need to be authorised by the Director of Fitness to Practise, and could only be authorised on the basis that, from the information already received by HPC, further investigation appears to be necessary in order to protect the public, the registrant or is otherwise in the public interest (the well-established “three option” public protection test which is applied in deciding whether to seek an interim order).

Formal certificates of conviction, caution or determination provided in standard form by the courts, police and other law enforcement and regulatory agencies would be unaffected by these proposals and would continue to be regarded as being in the specified form for the purposes of the 2001 Order.

## **Decision**

The Council is asked to agree the following resolution

1. That for the purposes of Article 22(5) of the Health Professions Order 2001 an allegation shall be treated as being in the form specified by the Council if it is received by the Council in writing and in a form which:
  - (1) sufficiently identifies the registrant against whom the allegation is made; and
  - (2) set outs:
    - (a) the nature of the impairment of that registrant's fitness to practise which the complainant alleges to exist; and
    - (b) the events and circumstances giving rise to the allegation;in sufficient detail for that registrant to be able to understand and respond to that allegation.
2. That an allegation shall also be treated as being in the specified form if it constitutes:
  - (1) a statement of complaint prepared on behalf of the complainant by a person authorised to do so by the Director of Fitness to Practise which:
    - (a) contains the information set out in Resolution 1; and
    - (b) has been verified and signed by the complainant; or
  - (2) a certificate of conviction, notice of caution or notice of any other determination provided by a court, the police or any other law enforcement or regulatory body.
3. That, in circumstances where a complaint is received by the Council which does not contain the information set out in Resolution 1, the Director of Fitness to Practise may authorise an investigation to be carried out with a view to obtaining that information if, based upon the information provided in that complaint, it appears to the Director that it is necessary to do so in order to protect the public or the registrant concerned or is otherwise in the public interest.

### **Background information**

Between April 2006 and November 2006 the case to answer rate for allegations considered by Investigating Panels was 67%. Between April 2005 and March 2006 the case to answer rate was 58%. The process set out above will further ensure the appropriateness of cases going beyond the case to answer phase of the fitness to practise process.

The FTP team are due to start a BTEC in Investigative Practice in February 2007. This BTEC has modules including:

- Law, Evidence Procedure and Best Practice
- Advanced Investigative Interviewing
- Conflict Management

The team also receive regular training in the following areas:

- The investigative process
- Offences under the 2001 Order
- Report writing
- Witness statements
- Witness interviews
- Requiring the disclosure of information
- Witness management
- Evidence management
- Interviews under caution
- The decision to prosecute
- Human rights
- Disclosure in criminal cases.

The case managers have also recently undergone update training in the drafting of particulars and allegations.

The Director of Fitness to Practise will produce appropriate documentation to ensure there is an audit trail as to the decisions taken

### **Resource implications**

It is anticipated that the FTP team administrator will undertake the initial logging of a complaint, which will then be allocated to the appropriate case manager to undertake the interview.

Two further case managers are joining the organisation on 7<sup>th</sup> December 2006, this is to ensure HPC can appropriately manage its case load and deal with allegations expeditiously.

### **Financial implications**

Travel costs in going to visit witnesses/complainants. The team currently visit witnesses when there is a need to undertake a vulnerable witness assessment. A risk assessment of a case will also be undertaken before a case manager goes to visit a witness/complainant and in some instances two cases managers will go to visit a witness/complainant.

### **Appendices**



Practice Note – Allegations  
Article 22 and 26 of the Health Professions Order

**Date of paper**

4<sup>th</sup> December 2006



## PRACTICE NOTE - ALLEGATIONS

### INTRODUCTION

Article 22(5) of the Health Professions Order 2001 provides that

‘where an allegation is made to the Council or any of its Committees, as soon as reasonably practicable after receipt of the allegation in *the form required by the Council*, the Council shall refer it to [a Practice Committee or Screeners as appropriate].’ Currently, all allegations made in the form required by Council are referred to a panel of the Investigating Committee to determine whether there is a case to answer. This practice note seeks to set out the form in which Council require an allegation to be made.

### PROCEDURE

The form in which the Council requires allegations to be made is as follows:

For the purpose of Article 22(5) of the Health Professions Order an allegation is made in the form required by Council if it is

1. made in writing,
2. identifies (as far as is possible) the health professional who is the subject of the allegation,
3. identifies the person who is making the allegation and,
4. is signed by or on behalf of that person.

A notice or certificate that the health professional has

- a. been convicted of an offence;
- b. received a police caution; or
- c. been the subject of a decision or determination by any other regulatory or licensing body

will be considered to be an allegation in the form required by Council, if it is in writing, in a form normally adopted for such notices or certificates by the courts, police service, law enforcement agencies or regulatory bodies and sufficiently identifies the health professional concerned.

The HPC seeks to operate fair and transparent procedures and, therefore, as a matter of policy the Council will normally not take further action in respect of allegations which are made anonymously. Anonymous allegations in this context means an allegation made by a person whose identity is unknown to the HPC rather than by a person who has asked the HPC not to disclose his or her identity.

Such a policy clearly disregards anonymous allegations and there is a good reason for this happening *in most cases*. The procedures as set out in the Health Professions

Order 2001 and the rules made under it are intended to provide health professionals with the information required to understand the nature and substance of any allegations made against them. The Investigating Committee can only consider documentation that the registrant has had an opportunity to comment upon. The policy currently adopted by the Health Professions Council is to provide the health professional with all documentation provided to the Council, to allow him or her to comment and then to seek any further clarification from the complainant. If the Council were to accept an anonymous allegation, it would be difficult for the Council to seek any further clarification from the complainant.

However, the HPC does not adopt an unbending policy of not accepting anonymous allegations as this is potentially unlawful. The primary function of the Health Professions Council is to protect the public and there are circumstances in which an anonymous allegation relates to serious and credible concerns about a registrant's fitness to practise, and in such circumstance the Council should consider exercising its power under Article 22(6) of the Health Professions Order 2001 to deal with a letter as if it was an allegation.

# PRACTICE NOTE

## “Case to Answer” determinations by Investigating Committee Panels

This Practice Note has been issued by the  
HPC Investigating Committee for the guidance of Panels

### Introduction

Article 26(3) of the Health Professions Order 2001<sup>1</sup> provides that, where an allegation is referred to the Investigating Committee, it shall 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 is whether, based upon the evidence before it, there is a “realistic prospect” that the Council will be able to establish at a hearing that the registrant’s fitness to practise is impaired.

That test (which is also known as the “real prospect” test) is used in other proceedings and is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman* [2001] 1 All ER 91, 92:

*“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 Council (which has the burden of proof) will be able to establish that the registrant’s fitness to practise is impaired.

The test applies to the whole of the allegation, that is:

---

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

1. the facts set out in the allegation;
2. whether those facts amount to the “ground” of the allegation (e.g. misconduct or lack of competence); and
3. 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 “ground” or the issue of impairment and these will largely be a matter of inference for the Panel, such as where the factual evidence suggests that the care 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 HPC Standards of Proficiency or Standards of Conduct, Performance and Ethics.

The test does not 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 Council will be able to establish its case.

In reaching its decision, the Panel:

- must recognise that it is conducting a limited, paper-based, exercise and should 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 conflicts in that evidence. The assessment of the relative strengths of the evidence can only be properly undertaken at a full hearing.

It is for the Council to prove its case. Registrants are not obliged to provide any evidence but many will do so voluntarily and any such evidence should be considered by the Panel. However, it will rarely resolve matters at this stage, as it will typically conflict or compete with the Council’s evidence and need to be tested at a hearing.

In applying the test the Panel need to take account of the wider public interest, including protection of the public and public confidence in the profession concerned and the regulatory process.

A decision that there is “no case to answer” should only be made if there is no realistic prospect of the Council proving its case, for example, because there is insufficient evidence to substantiate the allegation or the evidence is manifestly unreliable or discredited. At this stage, Panels should err on the side of caution and resolve cases where there is any element of doubt by deciding that there is a case to answer.