

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Evidence

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

### Introduction

1. The Panel rules<sup>1</sup> 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, expert evidence and hearsay evidence can be admissible.<sup>2</sup>

### Opinion evidence

2. 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.
3. The two main exceptions to that principle are:
  - a. evidence provided by expert witnesses, who may give opinions on matters requiring specialist knowledge within their field of expertise<sup>3</sup>; and
  - b. 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).
4. 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

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<sup>1</sup> 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).

<sup>2</sup> Civil Evidence Act 1972 section 3

<sup>3</sup> *R v Turner [1975] QB 834*

they can only admit expert evidence if it is provided by an independent expert witness instructed by one or both of the parties.

5. In *Hoyle v Rogers*<sup>4</sup> 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.
6. In *DN v London Borough of Greenwich*<sup>5</sup> 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.
7. That decision was applied in *Multiplex Constructions (UK) Ltd v Cleveland Bridge Ltd*.<sup>6</sup>, 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.
8. 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 independent 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. Nevertheless, Panels should take care to ensure that where a witness does give an opinion, that witness does have specialist knowledge in that field of expertise.

### **Independent expert witnesses**

9. Whether independent expert evidence of any kind is required is ultimately a matter within the discretion of the Panel. Where a party seeks to rely on evidence from an independent expert, and the Panel considers that it is not necessary, the Panel may decide that the independent expert evidence is inadmissible. Generally, any dispute regarding the admissibility of expert evidence should be resolved at a preliminary hearing and before the final hearing. Please see the Practice Note on *Case Management* which sets out the procedure for relying upon expert evidence.

### **The independent expert’s role**

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<sup>4</sup> [2014] EWCA Civ 257

<sup>5</sup> [2004] EWCA Civ 1659

<sup>6</sup> [2008] EWHC 2220 (TCC)

10. The paramount duty of an independent 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.
11. An expert should make it clear:
  - a. when a question or issue falls outside the expert's expertise; and
  - b. when the expert is not able to reach a definite opinion, for example because of a lack of information.
12. It can be a serious matter for expert witnesses to give evidence about matters which fall outside their expertise, as it has the potential to lead to injustice. Panels should be careful to ensure that evidence is only given by an expert about matters which fall within their expertise.

### **Independent experts' reports**

13. Experts' reports should be addressed to the Panel, not to the party who instructed the expert. An expert's report must:
  - a. set out details of the expert's qualifications;
  - b. provide details of any literature or other material which the expert has relied upon in preparing the report;
  - c. 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;
  - d. make clear which of the facts stated in the report are within the expert's own knowledge;
  - e. 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
  - f. where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion.
14. 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**

15. 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.

## Case management

16. Standard directions relating to expert evidence are set out in the Practice Note on *Case Management, Directions and Preliminary Hearings*. It is particularly important that parties comply with those standard directions, as late service or service without notice of expert evidence may result in a panel refusing to admit the evidence. It is also likely to result in delays to the resolution of the matter, and may lead to the adjournment of final hearings.
17. The standard directions require a party seeking to rely on expert evidence to serve it on the other party within 8 weeks of the service of the notice of allegation. Where a party has served expert evidence before service of the notice of allegation (for example, prior to consideration of the matter by an Investigating Committee Panel), that direction will have been met.
18. If, having received expert evidence, a party wishes to challenge its admissibility, they should notify the other party promptly, setting out the grounds on which admissibility is challenged, which may include:
  - a. it is not relevant to the issues in the case;
  - b. it is not a matter requiring expertise; and/or
  - c. the purported expert does not in fact have the skills and knowledge required to give an independent expert opinion on the matter in question.
19. Where the parties are unable to agree on the admissibility of expert evidence, where possible, this issue should be resolved at a preliminary hearing in advance of the final hearing. If that is not possible, the decision on admissibility should be taken during the final hearing at the point the Panel considers most appropriate. In some matters, it may be necessary for the panel to hear the expert evidence in full before making its decision on admissibility. If, having done that, the Panel considers that the independent expert evidence is inadmissible, as a professional panel it is capable of disregarding the independent expert evidence.
20. The approach to be taken by the Panel considering a challenge to the admissibility of expert evidence will depend upon the nature of the challenge. For example, if the concern raised is that the expert does not have the relevant skills, then the Panel will need to hear submissions and consider evidence relating to that issue. If the challenge is that the matters upon which an expert gives an opinion do not require such evidence then the Panel must determine, and are well placed to do so, whether such evidence will assist them in making informed decisions about the matters in dispute.
21. If expert evidence was considered by the Panel of the Investigating Committee which referred the case, the Panel later considering its admissibility may be assisted in knowing whether any challenge was made to its consideration at

that stage. Panels should however be mindful that their roles at these stages are different and the presence or otherwise of expert evidence at an earlier stage of decision making may have limited relevance to decisions Panels need to make at a final hearing.

22. It is unusual for there to be any dispute about the admissibility of expert evidence, but in cases where such a dispute arises the Panel should receive legal advice from the legal assessor. They must clearly record their decision and give reasons setting out what they have decided and why.

### **Single joint experts**

23. 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.

### **Questions to experts**

24. 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.
25. 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**

26. Articles 35 and 36 of the Health Professions Order 2001 provide for the appointment of:
- a. registrant assessors, to advise on professional practice issues; and
  - b. medical assessors, to advise on medical issues.<sup>7</sup>
27. 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 be 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.

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<sup>7</sup> 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.

28. 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.
29. 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.
30. 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.

### **Admissibility of evidence and hearsay applications**

31. The rules which govern proceedings before the Conduct and Competence Committee and the Health Committee state that the rules on admissibility of evidence that apply in civil proceedings shall apply in fitness to practise proceedings.
32. However, the rules also make it clear that a panel may hear evidence which would not be admissible in civil proceedings if the panel is satisfied that admission of that evidence is necessary in order to protect members of the public. (*Rule 10(1)(b) and (c) of the Conduct and Competence and Health Committee Rules*).
33. There are many circumstances in which Panels may be asked to decide if evidence should be admitted. The starting point for Panels should be consideration and application of the test set out above.
34. When the HCPC or a registrant wishes to rely on hearsay evidence, an application must be made to the Panel. This might be done at a preliminary hearing or during the final hearing.
35. The factors which panels must take into account are set out in caselaw. It is essential that panels receive advice from the legal assessor before considering and determining an application for the admission of hearsay evidence.
36. The following is not an exhaustive list but the relevant factors are likely to include:
  - a. the nature of the material or witness statement which is the subject of the application and the circumstances in which the document or witness statement were produced
  - b. whether the statement or document is the sole or decisive evidence in support of the allegation

- c. the nature and extent of the challenge to the contents of the document or statement
- d. whether there is any suggestion that a witness had reasons to fabricate the evidence
- e. the seriousness of the allegation and the impact the admission of the evidence may have on the registrant and the overall fairness of the proceedings
- f. the reason for the non-attendance of the maker of the statement
- g. whether the HCPC has taken all reasonable steps to secure the attendance of the witness.

37. The legal assessor will advise on the general approach to hearsay evidence, the relevant law and on any particular factors the Panel must take into account. The Panel's overriding duty is to ensure that the hearing is fair and this includes decisions regarding admissibility of evidence

38. A panel must give reasons for its decision on a hearsay application, setting out the matters it took into account in deciding whether or not to admit the evidence.

39. Panels must be careful not to conflate admissibility of evidence with the weight that might be attached to such evidence. The first consideration is always whether the evidence should be admitted. Only if it is fair to admit the evidence does the panel have to consider, as it does with all evidence, the weight which should be attached to it.

### **Registrants not giving evidence**

40. A registrant does not have to give evidence in fitness to practise proceedings. However, if they do not do so, subject to certain criteria being met and the need for panels to ensure procedural fairness, an adverse inference can be drawn.

41. The below is to assist panels of the Conduct and Competence and Health Committees when they are asked to consider whether or not it is appropriate to draw an adverse inference from a Registrant who does not give evidence.

42. The circumstances in which a panel considering fitness to practise proceedings may draw adverse inferences have been considered in a number of High Court cases<sup>8</sup> and the principles and approach set out in this Practice Note are taken from the decisions in those cases.

### **General principles**

43. Where it is fair to do so and would not create any procedural unfairness, panels can draw an adverse inference when a registrant does not attend a hearing or attends and does not give evidence, either at all or in relation to a specific part of the allegation. The inference may be that the registrant does not have a

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<sup>8</sup> *Iqbal v Solicitors Regulation Authority* [2012] EWHC 3251, *Radeke v General Dental Council* [2015] EWHC 778, *R(Kuzmin) v General Medical Council* [2019] EWHC 2129, *General Medical Council v Udoe* [2021] EWHC 1511.

justifiable explanation for some or all of the facts alleged against them, or that they do and that no inference should be drawn.

44. Before panels can draw such an inference, they must be satisfied that all of the relevant criteria are met. Even when they are, this does not mean that a panel should draw such an inference. It means only that they may do so.
45. The Panel should be provided with the documents relied on by the HCPC to establish that the Registrant knows that they do not need to give evidence but have been warned what the consequences of not giving evidence might be. Where a panel decides that it would be appropriate to draw an inference, panels must decide what weight to attach to that inference as part of its overall assessment of the evidence.
46. An adverse inference alone cannot be determinative of the allegation; it is a factor to take into account in deciding whether the facts alleged against a registrant are proved to the required standard.

*What are the relevant criteria?*

47. In *R (Kuzmin) v General Medical Council [2019] EWHC 2129*, the court ruled that even in the absence of a specific rule or power, the Medical Practitioners' Tribunal could draw inferences from a registrant's decision not to give evidence but only where 4 criteria are met. In proceedings before a panel of the HCPTS, the criteria which must therefore be met are as follows:
  - a. A prima facie case against the registrant has been established by the HCPC. This means that the HCPC has presented sufficient witness and/or documentary evidence to establish the alleged facts which a registrant is invited to respond to;
  - b. The registrant has been given appropriate notice and an appropriate warning that if they do not give evidence such an inference may be drawn by the panel; an opportunity to explain why it would not be reasonable for the registrant to give evidence and, if it is found that the registrant has no reasonable explanation, an opportunity to give evidence;
  - c. The registrant has no reasonable explanation for not giving evidence; it is for the panel to determine what is reasonable but it is likely to be appropriate to take into account contextual, cultural and medical factors of which the panel are aware;
  - d. The panel must be satisfied that there are no other circumstances in the particular case which would make it unfair to draw such an inference.

*Reasons*

48. In all cases, panels must make clear in their reasons how they have applied each of these criteria, what inference, if any, they have drawn and the weight they have attached to any inference in their overall assessment of the evidence

## 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.