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The fitness to practise adjudication service
of the Health and Care Professions Council.

HCPTS
Practice Notes

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Health and Care Professions Tribunal Service

PRACTICE NOTE

Admissions

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

Introduction

1. The purpose of this Practice Note is to provide guidance on how panels should approach admissions made by registrants at Conduct and Competence and Health Committee hearings to allegations regarding their fitness to practise.

2. A Registrant is under no obligation to make any admissions and should not do so, unless they accept that they did what is alleged against them.

3. This Practice Note is about admissions made to the HCPC in the course of its regulatory proceedings, and does not cover admissions made previously or outside those proceedings, for example, in employer disciplinary or employment proceedings. While such admissions may be admissible as evidence to prove that the registrant acted/failed to act in a particular way, they are not admissions for the purposes of this Practice Note.

4. Although the Health Professions Order 2001 and the Rules made pursuant to it do not expressly refer to panels accepting admissions by a registrant as proof of an alleged fact, there is authority for the proposition that if a procedure is not prohibited then, subject to it being fair, it can be adopted. The HCPC's approach is that, subject to the safeguards set out below, an admission of a fact is sufficient to prove that fact. In all adjudicatory contexts, including courts and tribunals, it is routine for findings of fact based on admissions to be accepted in order to focus on matters in dispute and streamline proceedings.

General principles

5. The burden of proving any alleged fact is on the HCPC and a panel considering a fitness to practise allegation at a final hearing can only find that an alleged fact is proved if it so satisfied on the balance of probabilities.

6. A registrant makes an admission when they accept or admit that they have done or failed to do what is alleged against them. It is therefore essential that a Registrant fully understands what the allegation is and the implications of admitting it. Registrants may admit all or some of the factual particulars which comprise the allegation.

7. If a Registrant admits only some of the facts, the HCPC will continue to pursue the remaining particulars, subject to there being sufficient evidence to do so and that it remains in the public interest. The HCPC will not cease to pursue some particulars of allegation purely because others have been admitted.

8. In some cases, a registrant may also indicate that they admit the ground(s) of impairment set out in the allegation and/or that their fitness to practise is impaired. Even if a registrant indicates that they admit the alleged ground of impairment (for example, that the admitted or proved facts amount to misconduct or lack of competence) it is a matter for the panel, in their judgement, to determine if that statutory ground and current impairment is or is not established.

Approach to admissions

9. It is of benefit to registrants, witnesses and panels that evidence is not called to prove a fact that the registrant admits, in circumstances where a panel can properly be satisfied that the registrant is in a position to make the admission and understands the implications of doing so. These benefits include:

    a. not putting a witness through the impact of giving evidence where that evidence is not disputed;
    b. reducing the impact of the proceedings on the registrant by narrowing the evidence for them to address, reducing the length of the hearing and enabling their hearing to be listed at the earliest opportunity as hearing utilisation is improved;
    c. allowing panels to focus on the issues in dispute;
    d. making the proceedings less adversarial for all stakeholders.

10. Subject to the need for the panel to ensure the overall fairness of the proceedings, they can treat an admission to an alleged fact as proof of that fact without the HCPC needing to prove it by calling witnesses and/or producing documentary evidence. It remains important that the Panel is provided, notwithstanding any admissions, with all relevant information to enable them to understand the context and seriousness of a case, so that even when facts are admitted, the Panel can make informed decisions regarding impairment and sanction. This may be achieved by agreeing with the Registrant or their representative Statements of Agreed Facts and/or including in the hearing bundle the evidence that would have been called to the hearing had the alleged facts not been admitted.

11. Therefore, a panel of the Conduct and Competence Committee or Health Committee can find a fact proved by virtue of that admission without receiving further evidence.

12. This approach is consistent with the overarching objective of the Council to protect the public and the obligation in Article 32(3) of the Health Professions Order 2001 to ensure that *'each stage in proceedings…shall be dealt with expeditiously'.*

Procedural safeguards

13. In considering its approach to admissions, particularly admissions from registrants who are not represented, a panel must ensure that the overall fairness of the proceedings is secured. Panels will therefore want to ensure that, by way of example:
    a. a registrant's admission is 'unequivocal' and that they are not making an admission for reasons of expediency or on some other inappropriate basis;
    b. if a registrant admits an inference to be drawn from facts (for example, dishonesty or sexual motivation) the panel is satisfied that the registrant understands the legal test to be applied to that alleged fact;
    c. a registrant understands that an allegation framed in terms of a '*failure'* to do something requires proof by the HCPC, or acceptance by the registrant, of a corresponding duty.
14. Legal Assessors can assist Panels by speaking to the Registrant before the hearing starts, in the presence of the Presenting Officer, and then sharing with Panels the Registrant's position on the admissions. Such a conversation should be confirmed once the hearing starts so that there is a record of it.

15. If a panel, having accepted an admission and having found proved a fact based on it, subsequently hears evidence which suggests that the admission was equivocal or for some other reason determines that it is not safe to rely on it, it can require the HCPC to prove that fact, irrespective of the admission. This may mean that the Presenting Officer will seek an adjournment to allow that evidence to be called.

Procedure before the hearing

16. After the HCPC has served the evidence upon which it intends to rely at a hearing, the registrant will be invited to indicate what particulars of the allegation, if any, are admitted.

17. If the Registrant indicates that any facts are admitted, the HCPC will liaise with the Registrant, particularly if the Registrant is unrepresented, to ensure that the admissions are unequivocal.

18. In preparing for the hearing, the HCPC will make use of its Standard Directions which allow Notices to Admit facts and evidence to be served and will work with the Registrant and their representative, if any, to define and narrow the issues

which the panel will need to determine at the final hearing. This may be done in an Agreed Statement of Facts.

19. The HCPC is committed to ensuring that its procedures are fair. If it appears to the HCPC that it would not be fair to rely on an admission from a Registrant, the HCPC will proceed as though the admission had not been made. This may arise when, for example, the admission appears equivocal or the HCPC cannot be satisfied that the Registrant has demonstrated an understanding of what they have admitted and the implications of doing so.

20. A preliminary hearing may be held where any matter regarding admissions needs to be resolved before the final hearing.

21. In the HCPC's skeleton argument or case summary, reference will be made to any admissions that have been communicated to the HCPC so that the panel is aware of the registrant's response to the allegation. If no response has been received, this will also be made clear. Any written confirmation from the Registrant that a fact is admitted may be included in the Panel's bundle, unless it would be prejudicial to the Registrant to do so.

Procedure at the hearing

22. At the start of the hearing, after any other preliminary matters have been dealt with, the Hearings Officer will read out the allegation and its particulars. The Panel Chair will ask the Registrant or their representative whether any of the particulars of the allegation are admitted.

23. If the Panel is satisfied that they can properly accept the admission, having received advice from the Legal Assessor, the Panel Chair will announce and record the admitted particulars of allegation proven by virtue of that admission, without the need for further evidence to be adduced by the HCPC to prove that fact.

24. If the panel determines that it cannot fairly and properly accept an admission, it should set out its reasons for not accepting the admission and the HCPC should be able to adduce evidence in support of that particular along with any other particulars that remain in dispute. The Presenting Officer may then need to make an application for an adjournment, if they are unable to proceed on the basis of the written and oral evidence that is available to the Panel.

25. A registrant may make no admissions at the start of the hearing but indicate at a later stage (for example after the HCPC has called its evidence) that some or all of the particulars are now admitted. In such circumstances, the Panel should proceed to consider and, if appropriate, record the admission as they would have done had it been given at the outset of the proceedings.

26. A registrant may admit an alleged fact but on a different factual basis to the one alleged by the HCPC. The HCPC will consider whether the basis upon which a

fact is admitted is acceptable and consistent with the evidence and its statutory objectives. If it is, then the panel will be invited to accept the admission and record it as above. If it is not, then the panel should hear evidence regarding any disputed parts of a particular of allegation and make determinations as it would in any case where alleged facts were disputed. It shall be open to the HCPC to make an application to amend the particulars of allegation to reflect the admission if it considers it to be consistent with the evidence and its statutory objectives. The panel should invite submissions from the registrant in response to any such application and give reasons for its decision whether or not to grant the application.

27. If a registrant, having admitted some or all of the factual particulars, then seeks to withdraw that admission at a later stage of the hearing, the panel will hear submissions from the parties before directing how to proceed. If the panel determines not to accept the admission as proof of the relevant fact it shall give reasons for that decision and allow the HCPC to call evidence to prove the fact as if the admission had not been made.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Case Management, Directions and Preliminary Hearings

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

Introduction

1. 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:

    a. the HCPC, which has the burden of proof[1], to set out its case;
    b. the registrant to identify in advance those parts of the HCPC's case which they dispute; and
    c. the parties to provide information in advance of a hearing to assist the Panel in the conduct of the case.

2. Registrants and all those involved in fitness to practise proceedings benefit from good case management. For example, identifying before any hearing what is and is not in dispute, agreeing what evidence can be agreed, which witnesses need to attend the hearing and resolving preliminary applications will ensure that the final hearing will proceed more smoothly.

Case management

3. Article 32(3) of the Health 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:

[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)*.

a. encourages engagement and co-operation by the parties;
b. requires the parties to identity the issues which the Panel needs to decide;
c. avoids inflexibility or unnecessary formality in the proceedings;
d. makes effective use of the time of the Panel and all those giving evidence; and
e. enables the parties to participate fully in the proceedings.

4. Panels should use their case management powers in appropriate cases to:

a. require the parties to identify the issues in dispute;
b. ensure that the Standard Directions are complied with;
c. issue additional Directions either in response to an application or of the Panel's own motion;
d. put arrangements in place to ensure that evidence, whether disputed or not, is prepared and presented clearly, effectively and by the most appropriate means;
e. ensure that the needs of any witnesses are considered before the hearing, including any application for measures to assist vulnerable witnesses;
f. encourage the use of agreed chronologies or statements of agreed facts;
g. ensure that cases are determined fairly and expeditiously.

Directions

5. 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.

6. There are two types of Directions which apply in HCPC proceedings. Standard Directions apply in *all* cases unless a Panel or a Chair of a Panel vary or disapply them. In addition to these Standard Directions, a Panel or Chair of a Panel can impose further directions where that is necessary or desirable to ensure that matters which can properly be resolved before a hearing are considered and determined.

Standard Directions

7. To improve the management of cases and for the benefit of all those involved in HCPC proceedings, the Standard Directions set out in Annex A apply as 'default' directions in *every* case.

8. These Standard Directions require that:

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

a. The HCPC serve on the registrant a copy of the documents it intends to rely upon at the hearing at least 42 days before that hearing;
b. The Registrant serve on the HCPC a copy of the documents they intend to rely upon at the hearing at least 28 days before that hearing;
c. The HCPC and Registrant confirm what evidence (including witness statements) is agreed and which witnesses will be called to give evidence at least 21 days before the hearing;
d. Where it has not been possible to resolve the issue at a preliminary hearing, the Registrant and the HCPC to indicate to each other and to the HCPTS any preliminary applications they intend to make at the hearing, including any legal and procedural issues by skeleton arguments at least 7 days before the hearing.

9. If a party fails to comply with any of the Standard Directions, this may be brought to the attention of the Panel and could result in that Panel not receiving evidence which that party intended to rely upon, subject to the need for Panels to ensure the overall fairness of the proceedings.

10. Parties are also reminded of the following Standard Directions which enable the parties to clarify the issues in dispute and agree evidence in advance of the hearing, upon service of a Notice on the other party. These Standard Directions allow each party to:

    a. Serve a Notice to admit facts
    b. Serve a Notice to admit documents
    c. Serve a Notice to admit witness statements

Special or additional directions

11. A Panel or Chair of a Panel may issue directions which:

    a. Vary or disapply a Standard Direction;

    b. Require compliance with a Standard Direction which has not been complied with;

    c. Supplement the Standard Directions by issuing directions which assist the effective and expeditious management of the case.

12. Any party who applies for additional directions must set out in their application the directions they want the Panel to make and the reasons why the directions are necessary.

Preliminary hearings

13. 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].

14. Most case management issues can be satisfactorily resolved 'on the papers' by issuing directions. The parties are also reminded of the importance of complying with the Standard Directions referred to above and set out in Annex A. In some cases it may be appropriate to hold a preliminary hearing.

15. 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.

16. The purpose of a preliminary hearing is to assist the Registrant, the HCPC and 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.

17. A preliminary hearing should not generally be used to deal with issues which are more properly a matter for the full Panel at a substantive hearing, such as making findings of fact in respect of disputed evidence or determining admissibility. There may however be cases where it is appropriate for an issue to be resolved before a substantive hearing takes place, especially where that issue is likely to affect the management of the hearing and the witnesses to be called. In these circumstances the preliminary hearing should be held by a full Panel rather than a Chair alone, even if the parties consent to it being considered by a Chair alone. This is because 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.

18. Having determined the issue in dispute, the Panel should indicate, having considered any views expressed by the parties, whether they recuse themselves as a panel or as individuals from sitting on any future hearing relating to the case. Before making that decision, the Panel should invite submissions from the Presenting Officer and the Registrant or their representative as to whether or not the Panel should recuse themselves. It is clearly established that the bar for recusal is a high one and Panels and Panel Members should not ordinarily recuse themselves simply because they have ruled on a preliminary issue or ruled that evidence seen by them should not be admitted. Panels should seek advice from

[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).

their legal assessor regarding the approach they should take to recusal and give reasons for their decisions.

Procedure

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

20. 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.

21. Where a party asks for a preliminary hearing to be 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.

22. 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.

23. 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 and any other Directions which have been issued. The Panel or Panel Chair may:

    a. consider issues relating to the hearing of the case including:

        i. the extent to which any evidence is agreed and where facts are not in dispute, requiring the parties to produce a statement of agreed facts;

        ii. where agreed between the parties, directing that witness statements are to stand as evidence in chief;

        iii. ordering the joinder of allegations;

        iv. issuing Witness Orders or Production Orders;

        v. determining any dispute regarding the admissibility of expert evidence

        vi. determining any dispute regarding the contents of bundles or redactions

        vii. determining applications for all or part of the hearing to be held heard in private;

viii. ordering special measures or providing for any other needs of vulnerable witnesses;

ix. determining whether any facilities are required for particular evidence, such as interpreters or equipment for recordings or other exhibits;

b. 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);

c. 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;

d. giving any additional directions, not covered by the Standard Directions, for the exchange of documents prior to the hearing, including:

i. requiring the mutual disclosure of documents and setting time limits or other requirements for disclosure or service;

ii. requiring agreed bundles or skeleton arguments to be submitted (the requirement for skeleton arguments should only be imposed if the parties are legally represented)

24. Determinations of preliminary hearings held in private to consider case management issues are not published. However, it remains important for Panels and Panel Chairs to produce a public version of their determination. This ensures transparency of process and that if a request is made for disclosure of the determination, there is a public version which can be provided.

Parties and their representatives

25. 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:

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

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 HCPC and the registrant shall, no later than 21 days before the date fixed for the hearing, agree what evidence is agreed and which witnesses are required to attend the hearing to give evidence;

(4) The HCPC and the registrant shall, no later than 7 days before the date fixed for the hearing, indicate to each other and the HCPTS any preliminary applications they intent to make including any procedural or legal issues, supported where appropriate by skeleton arguments;

(5) The parties shall, at the same time as they serve documents in accordance with this Direction, provide the Panel with a redacted copy of their bundle of 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. Independent expert evidence

(1) A party intending to rely on independent expert evidence must have served a copy of that expert evidence on the other party within 8 weeks of the service of the notice of allegation.

(2) In the event that a party is unable to serve the independent exert evidence on which they intend to rely on the other party within 8 weeks of the service of the notice of allegation, they must inform the other party of:

- their intention to rely on expert evidence
- the issue(s) to which that expert evidence is relevant
- the date by which they expect that expert evidence to be ready for service

(3) Where a party intends to rely on independent expert evidence in response to independent expert evidence served by the other party, within 3 weeks of the service of the other parties independent expert evidence they must notify the other party of:

- their intention to rely on expert evidence in response
- the date by which they expect that expert evidence to be ready for service.

Standard Direction 6 . 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]

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The fitness to practise adjudication service of the Health and Care Professions Council.

Health and Care Professions Tribunal Service

PRACTICE NOTE

"Case to Answer" Determinations

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

Introduction

1. Article 26(2) of the Health Professions Order 2001 provides that, where an allegation is referred to an Investigating Committee 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".

2. The procedure to be followed is set out in Article 26(2) to 26(10) and in the Health and Care Professions Council (Investigating Committee)(Procedure) Rules 2003.

The "realistic prospect" test

3. 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. The role of the Panel is therefore to decide whether there is a case to answer, not to determine the allegation.

4. 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."*

[1] [2001] 1 All ER 91

Applying the test

5. 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 proof)[2] will be able to prove the facts alleged and that there is a realistic prospect that a panel will find, as a matter of judgement, that those facts amount to the statutory ground alleged and to current impairment.

6. The test does not 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 of a finding of current impairment.

7. In reaching its decision, a Panel:

    a. should recognise that it is conducting a limited, paper-based, exercise and must not make findings of fact on the substantive issues;

    b. must assess the overall weight of the evidence but should not seek to resolve substantial and material conflicts in that evidence.

8. 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.

9. Resolving substantial conflicts in the available evidence, such as assessing the relative strengths of competing arguments is not a task which should be undertaken by the Panel because that is not their role and they do not have the ability to test the evidence in the way that a panel at a final hearing can. 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, has no bearing on that issue.

10. 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. Panels may find it helpful to refer to the Practice Note on *Fitness to Practise Impairment* but must remember that at this stage their consideration is limited only to whether there is a case to answer.

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

    a. the facts set out in the allegation;

[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).*

b. whether those facts amount to the 'statutory ground' of the allegation (e.g. misconduct or lack of competence); and

c. in consequence, whether fitness to practise is impaired.

12. Once the Panel has considered and applied the realistic prospect test to the alleged facts and statutory ground, they need to consider whether, based on those facts, there is a realistic prospect of a finding of impairment. At this stage, Panels must consider carefully any evidence, including evidence of insight, remediation and remorse which might suggest that, although the facts and statutory ground may be established, there is no realistic prospect of a finding of current impairment. In undertaking this task, Panels may find it helpful to refer to the Practice Note on *Fitness to Practise Impairment.*

13. It is important in all cases, that the Panels' reasons for their decisions are clear and that they demonstrate that they have considered the realistic prospect test at all three stages of their decision making. This is important because there will be cases where the facts and statutory ground can be established but there is no current impairment. For example, in a health case there may be a realistic prospect of establishing a health condition but that does not mean that the registrant's fitness to practise is impaired by reason of that condition.

Review and amendment of allegations

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

15. Having reviewed the evidence and in applying the realistic prospect test, the Panel may need to amend or delete elements of an allegation. 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 as revealed by the evidence.[3]

16. A panel may make minor amendments to an allegation without adjourning their consideration of the case. A minor amendment may be to correct a typographical error or to make a stylistic drafting change which does not affect the substance of the case alleged against the registrant.

17. If a Panel concludes that it is necessary to vary or amend an allegation to a material degree, where the changes alter the case against the registrant, both the registrant and the HCPC should be given a further opportunity to make

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

observations on the revised allegation before a final case to answer decision is made.

Impaired fitness to practise

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

19. 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.

20. A useful starting point for Panels is to consider whether the HCPC's case includes evidence which, if proven, would provide a realistic prospect that a panel would find that the registrant does not meet a key requirement of being fit to practise, which the HCPC regards as having the skills, knowledge. character and health to practise their profession safely.

No case to answer

21. 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.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Children as Witnesses

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

Introduction

1. Panels should take steps to ensure that when children appear as witnesses in fitness to practise proceedings, they are able to participate effectively. This includes taking steps to minimise any distress or sense of intimidation.

Background

2. The legal definition 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 the definition in the UN Convention on the Rights of the Child, to which the UK is a signatory. Article 1 of the UN Convention states:

   "For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."

3. Article 3.1 of the UN Convention 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."*

Special measures

4. 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

[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

the ‘special measures’ set out in those rules. Those special measures include but are not limited to:

a. use of video links;

b. use of pre-recorded evidence as the child’s evidence-in-chief;

c. use of intermediaries;

d. use of screens or other measures to prevent the identity of the witness being revealed or access to the witness by the registrant; and

e. the hearing of evidence in private.

5. 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 is a factor for a Panel to consider but is not a determinative factor: the particular circumstances of the facts of the case, and the witness' involvement and evidence, will dictate what special measures are necessary and appropriate.

Competence of child witnesses

6. General information about the competence of witnesses is set out in the HCPTS Practice Note titled Securing Witness Engagement: Competence, compellability and Orders to attend / produce documents.

7. There is no specific age below which children are regarded as not competent 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”.

8. However, by virtue of section 96 of the Children Act 1989, even if a child does not understand the nature of the oath, the child may give unsworn evidence if, in the opinion of the Panel, the child:

a. understands that it is his or her duty to speak the truth; and

b. has sufficient understanding to justify his or her evidence being heard.

9. 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. Whilst the chronological age of a child may help to inform the Panel's

[4] [1977] 1 WLR 234

decision about competency, in the end it is a decision about the individual child, and their competence to give evidence before the Panel.

Witness management

10. In any case where a child is to be called as a witness by the HCPC,[5] the HCPC will offer an early meeting between the child (supported as necessary by a parent, guardian or other appropriate adult), and the HCPC and/or its representatives. This will enable the HCPC to provide support and reassurance at an early stage. The HCPC will be responsible for arranging this meeting.

11. Normally, in the course of that meeting a vulnerable witness assessment will be conducted and will seek to 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.

Proactive Case Management

12. The HCPC should 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 that are available, taking account of the child's wishes and needs.

13. 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.

14. 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.

15. 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 circumstances, such as their 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.

[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.

16. 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. A child witness must always be given the opportunity to refresh their memory before being asked questions, whether by viewing their evidence in chief (if video-recorded) or reading any written statement they have made. If a child witness's evidence is video-recorded, a Panel should recognise that the child may be uncomfortable seeing themselves on video. The HCPC, or their lawyers, should ensure that the child witness views the footage prior to the hearing.

17. Panels should also direct that appropriate familiarisation takes place before the day of the hearing. The nature of this familiarisation will depend on the type of hearing. For a hearing in person, the child and their supporter should be offered a visit to the to the hearing venue. For a virtual hearing, they should be offered a demonstration of the software used to conduct virtual hearings. 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

18. 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.

19. As a minimum it is necessary to ensure that:

    a. the child's pre-recorded evidence-in-chief can be played;

    b. the child will be able to see the face of any person asking questions;

    c. if relevant, that the child cannot see the registrant.[6]

20. 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.

21. 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

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

22. Panels should be cognisant that any witness may experience difficulties in giving evidence when they are asked questions at too fast a pace, or which are too complex. This is a more relevant consideration when the witness is a child.

23. To ensure that they achieve best evidence, Panels need to recognise that children may need more time to process questions than adults.

24. 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.

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

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

27. Advocates also need to be encouraged to:

    a. speak slowly and pause after each question, to give children enough time to process and answer it;

    b. ask short and simple questions which address one point at a time;

    c. use simple, common language appropriate to the age and understanding of the child;

    d. avoid complex questions which require the child to remember too much detail in order to answer them;

    e. avoid questions which assert facts or contain other suggestive forms of speech, which a child witness may struggle to answer accurately when asked by an adult in a position of authority;

    f. adopt a structured approach which 'signposts' the subject and warns when the subject is about to change.

28. 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.

29. Further information about good practice when questioning children in legal proceedings can be found in the NSPCC/Nuffield Foundation publication *Measuring up? Good practice guidance in managing young witness cases*

and questioning children[7]. There is also some helpful information on good practise in the Ministry of Justice/National Police Chiefs' Council publication *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*[8], but please note that this guidance arises from a different legal framework and so aspects of it will not apply to HCPTS proceedings.

[7] https://www.nuffieldfoundation.org/sites/default/files/files/measuring_up_guidance_wdf66581.pdf

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051269/achieving-best-evidence-criminal-proceedings.pdf, see in particular paragraphs 2.34-2.77

Health and Care Professions Tribunal Service

PRACTICE NOTE

Concurrent Proceedings

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

Introduction

1. Article 32(3) of the Health 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.

2. Panels may be asked to consider staying proceedings brought by the HCPC because other proceedings are ongoing. The purpose of this Practice Note is to assist Panels in their consideration of such applications. Such 'other' proceedings may include civil, criminal, coronial or employment proceedings brought against a registrant who may claim that fitness to practise proceedings should not proceed until these other proceedings have concluded.

3. When considering applications to stay proceedings brought by the HCPC until the resolution of other proceedings, Panels must consider carefully the nature of the other proceedings, the basis of and reasons for the application and give detailed reasons for their decision. That decision should be made in the context of assistance which can be found in case law and the Panel's legal assessor will advise Panels of the principles derived from the relevant cases.

4. It is important, however, to note that decisions in previous cases are fact specific and that although they provide guidance regarding the correct approach, Panels must not over rely on them. Each case must be considered on its own merits.

5. Whilst there may be 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.

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

Concurrent criminal proceedings

6. In many cases, the HCPC will await the outcome of criminal proceedings before progressing fitness to practise proceedings. In appropriate cases, the public and the public interest can be protected by applying for an interim order during this period. The HCPC will liaise with the police and prosecuting authorities to check on the progress of the criminal proceedings and keep under review its decision regarding how to proceed where there are concurrent criminal proceedings.

7. 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.

8. 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]

9. 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.

10. Panels will be aware 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.

11. 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

12. 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

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[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.

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

[5] [2014] EWHC 2618 (Admin)

proceedings. As Stanley Burnton J. stated in *R v Executive Council 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".

13. 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."

14. Whether there is "a real risk of serious prejudice which may lead to injustice" is a matter for the Panel and will depend upon the facts of the case.

15. 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 fitness to practise case.

Staying proceedings

16. 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:

    a. Panels must exercise the discretion to stay concurrent proceedings sparingly and with great care;

    b. 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;

    c. 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;

    d. 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.

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6 [2002] EWHC 2086

7 [1992] BCC 524

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 Tribunal Service

PRACTICE NOTE

Conditions Bank

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

Introduction

1. Conditions of Practice Orders may be made:

    a. On an interim basis[1], before a finding of impairment has been made or to cover an appeal period following a finding of impairment; or

    b. As a final order[2], following a finding of impairment.

2. In drafting Conditions of Practice Orders, Panels need to consider the following issues:

- **Are the conditions proportionate?**

3. Each individual condition, and the combined effect of them, must be proportionate. This means that they must be sufficient to protect the public and address the risk of harm (including harm to public confidence), but no more onerous than is necessary.

4. Where it is possible to formulate conditions that would adequately protect the public and address the risk of harm, proportionality requires that this should be done, regardless of whether the Registrant is currently able to meet the conditions (for example, because the conditions require the support of an employer, and the Registrant is not currently employed)[3]. However, proportionality also requires that a Panel does not impose conditions that can never be met and are the equivalent of a suspension[4].

5. Conditions of practice may sometimes amount to a reasonable adjustment, that is, a measure put in place to ensure that someone with a disability is not

[1] Health Professions Order 2001 Article 31
[2] Health Professions Order 2001 Articles 29 and 30
[3] *Perry v Nursing and Midwifery Council* [2012] EWHC 2275 (Admin)
[4] *Udom v General Medical Council* [2010] EWHC 3242 (Admin)

discriminated against or disadvantaged, by enabling them to continue to practise safely.

6. In order to be a reasonable adjustment, conditions must be proportionate, which includes being sufficient to protect the public and address the risk of harm. If the conditions/adjustment do not result in the public being adequately protected, they are not reasonable.

- **Are the conditions verifiable?**

7. It is important that it is clear to everyone how compliance with the conditions can be verified. To achieve this, the conditions should set out precisely:

    a. What, if anything, must be done to demonstrate compliance?
    b. Who it must be done by?
    c. When it must be done by?

8. Where the draft conditions in the sample conditions bank below include timescales for compliance, Panels may amend these timescales to ensure that the conditions are proportionate in the particular circumstances of the case.

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

9. Although compliance with conditions may depend on input from others, conditions should be expressed in a way that makes clear that the obligation is on the Registrant. For example, compliance with a condition may require that a supervisor signs a record, but the condition must be worded in such a way that makes clear that the obligation to obtain and provide that signed record to the HCPC rests with the Registrant.

- **Is the scope of the conditions clear?**

10. Panels may not impose conditions which expressly restrict the Registrant's ability to carry out non-professional work.

11. When imposing conditions, Panels must ensure that it is clear which conditions apply at all times, and which (if any) only apply when the Registrant is engaged to carry out professional work.

12. "Professional work" is defined in the glossary of terms.

13. It must also be clear whether all conditions apply at the same time, or whether one or more only come into effect once a particular circumstance has arisen or another condition has been met.

- **Are all necessary consequential conditions included?**

14. For instance, whenever conditions have been imposed which require the Registrant to provide information to the HCPC, or to obtain its approval, condition [J2] should always be included.

Sample 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 within seven days of receiving them.

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 within seven days of receiving them.

3. Within [*time period*] of the Operative Date you must complete further training in the following areas:

   A. [list areas of practice]

   B. You must forward a copy of your results to the HCPC within seven days of receiving them.

4.Within [*time period*] of the Operative Date you must arrange with your [*line manager/mentor/supervisor/training supervisor etc.*] for an assessment of the following [*area(s) of practice/skills/techniques etc.*]

Following this assessment, you must arrange for your [*line manager/mentor/supervisor/training supervisor etc.*] to send a report to the HCPC on the assessment within [*time period*].

5. 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 within seven days of receiving them.

C. Practice restrictions

1. You must confine your professional practice to [*set out restriction, which may include a restriction to a particular employer or setting, or a restricted type of employer/setting e.g. not an agency]*].

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

3. You must maintain a record of every case where you have undertaken [*type of work or procedure*] 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.

    C. ensure that the records comply with the following requirements:

        (i) the records provide the dates [*and* times] on which you have undertaken [*type of work or procedure*];

        (ii) the records set out the nature of the [*type of work or procedure*];

        (iii) the records provide feedback from [*your supervisor*] on the [*quality/nature/appropriateness/standard etc.*] of your performance; and

        (iv) the records are signed by [your *supervisor*] [for each individual entry/each day/before submission to the HCPC].

4. Except in life threatening emergencies you must not undertake [*work/consultations*] with [*type(s) of service user*]. You must maintain a record of every case where you have undertaken [*work/consultations*] and provide this record to the HCPC every [x months].

5. You must not undertake [*work/consultations*] with individual service users on a one-to-one basis.

6. Except in life threatening emergencies you must not undertake intimate examinations of [*type(s) of service*]. You must maintain a record of every case where you have undertaken intimate examinations to [*type(s) of service*] and provide this record to the HCPC every [x months].

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

8. You must not carry out [*locum/agency work*].

9. You must not carry out professional work in a private practice setting.

10. You must not be involved in the ownership or management of your own private practice [a joint private practice with others].

11. You must not be involved with the provision of professional work within the prison or criminal justice system.

12. You must not be involved with the provision of professional work within care homes or specialist hospitals.

13. You must not work more than x hours [*in a single shift/per week*].

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

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

16. You must not act as a supplementary prescriber.

17. You must not provide specialist advice to other healthcare professionals.

18. You must not act as an expert witness/provide expert advice for the purposes of any legal proceedings in your capacity as a registered professional.

19. You must not carry out visits to a service user's private residence.

20. You must not be involved in the training of [*students/colleagues/other healthcare professionals/members of the public*].

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. *[Where necessary, insert any particular requirements for a chaperone e.g. any necessary qualifications/registration/experience requirements for the chaperone, whether any particular person e.g. the Registrant's spouse or business partner should not be a chaperone, etc]*

2. You must maintain a record of:

   A. every case where you have been involved in the direct provision of services to [*female service users etc.*], in each case signed by the chaperone and containing their name [and *information which confirms compliance with any particular requirement imposed by the panel]*; and

   B. every case where you have been 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 etc*.] 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 [*direct/indirect*] 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.[*Such supervision may/may not be carried out online*]. *[Where necessary, insert any further particular requirements for the supervisor e.g. qualifications or experience requirements].*

2. You must arrange for an audit of the following areas of your practice by your supervisor every [x] months:

    A. [list areas of practice]

    B. You must send the HCPC a copy of the results of each audit within seven days of receipt.

F. Treatment requirements

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

2. You must provide the HCPC with the contact details of [*your general practitioner/occupational health specialist etc*] within seven days of the Operative Date.

3. 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.

4. You must arrange for the provision of reports from your [*general practitioner/occupational health specialist etc.*] to the HCPC every [*x*] months beginning on the Operative Date covering:

    [*list matters for report to cover e.g. compliance with treatment, current medication, prognosis etc].*

5. 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*].

6. You must cease practising immediately if you are advised to do so by your [*general practitioner/occupational health specialist/therapist*]. You must inform the HCPC within seven days of receiving this advice.

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/specific drugs to be listed*]. The first test(s) must be within [X] months of Operative Date. After that, the test(s) must be every [X] months. You must provide 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 provide confirmation to the HCPC of your attendance at such meetings. Where possible this should include independent evidence of your attendance from the support group leader or other similar evidence.

3. You must [*limit your*][*abstain absolutely from the*] consumption of alcohol [*as advised by your general practitioner/other specified healthcare professional*] .

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 inform the HCPC within seven days if you cease to be employed by your current employer.

2. You must inform the HCPC within seven days if you take up any other or further professional work.

3. You must inform the HCPC within seven days if you take up work requiring registration with a professional body outside the United Kingdom [and]

4. You must inform the HCPC within seven days of returning to practice in the United Kingdom.

5. You must inform the HCPC within seven days of becoming aware of:

   A. any patient safety incident you are involved in;
   B. any investigation started against you; and
   C. any disciplinary proceedings taken against you.

6. 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 to undertake professional work (at the time of application);

    C. any prospective employer for professional work (at the time of your application);

    D. any organisation through which you are undertaking professional training;

    E. any healthcare professional involved with your current treatment for [*specify medical condition/conditions*];

    F. the occupational health provider for your current [*employer/contracting body*]

    [*G. Only where appropriate: any chaperone/supervisor required by these conditions*].

    [H. Only where proportionate in the particular circumstances of the case: Patients/service users / any particular class of patients/service users]

7. You must allow the HCPC to share, as necessary, details about your performance, compliance with, and/or progress under these conditions with:

    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 to undertake professional work (at the time of application);

    C. any prospective employer for professional work (at the time of your application);

    D. any organisation through which you are undertaking professional training;

    E. any medical professional involved with your current treatment for [*specify medical condition/conditions*];

    F. the occupational health provider for your current [*employer/contracting body*].

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.

6. Your reflective practice profile must be signed off by a designated [supervisor etc.], who should provide feedback on each occasion when you [*specify activity etc.*]

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 relevant Case Manager.

Glossary of terms

Intimate examination	For the purposes of these conditions an intimate examination is an examination of breasts, genitalia or the rectum, or an examination that requires exposure of these areas.
Life threatening emergencies	Situations where the Registrant genuinely believes, or is instructed, that a person's life is at risk and the specified activity is required in order to treat them.
Operative Date	This is the date when the conditions of practice come into effect. In the case of an interim order this will be immediate. In the case of an order imposed following a final hearing, this will follow a 28-day appeal period, though interim conditions may be imposed with immediate effect from the date of the decision. In the case of an order imposed following a hearing to review a final suspension or conditions of practice order, this will be when the new order replaces any previous order in place.
Personal Development Plan (PDP)	A prioritised list of a Registrant's educational needs, intended learning aims, and plans for continuing professional development over a defined period. The PDP must specifically set out an action plan for addressing the deficiencies listed in the relevant condition. Against each action, the PDP should set out measures that will help assess whether the action has been achieved and a target date for completing the action. The Registrant's supervisor or mentor may give guidance on preparation of the plan, but it is the Registrant's responsibility to: • prepare the PDP;

	• seek approval from their line manager or mentor of the plan; • carry out the activities needed; and • reflect on the impact of their learning on their performance and practice.
Professional work	Any work which requires professional registration with the HCPC to carry out.
Reflective practice profile	A record of every case or piece of work carried out in a specified area, or in relation to a particular practice/activity. It is important that a reflective practice profile contains the Registrant's own thoughts and reflections for each case, as well as feedback from a supervisor/mentor where specified.
Supervision <u>Direct supervision</u> <u>Indirect supervision</u>	 The Registrant may not work in the relevant area as a single-handed practitioner. The supervisor is responsible for ensuring that all aspects of work in the relevant area are subject to oversight from a qualified and appropriate professional, though this does not have to be the supervisor themselves unless otherwise specified in the condition. The Registrant may work single-handed in the relevant area subject to the restrictions and measures put in place by their supervisor. While it is not expected that the Registrant will be monitored at all times, it is expected that the supervisor will schedule regular check ins with the Registrant, and will have general oversight of their work in this area.
Types of work <u>Locum work/agency work</u>	 Where a Registrant stands in for an absent practitioner, or temporarily covers a vacancy in an established post or position. A locum or agency worker is often, but not always, employed by an agency.

Work in an NHS post or setting	This covers any professional work carried out while employed by an NHS Trust/organisation.
Work in a private practice setting	This covers any paid or unpaid position where a Registrant is employed or contracted to carry out professional work within a private organisation or private setting. This includes providing services to NHS patients in a private setting.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Conduct of Representatives

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

Introduction

1. This Practice Note provides guidance on the responsibilities and behaviours expected of representatives. Issues regarding the conduct of representatives are likely to be rare and in the majority of cases, representatives will contribute effectively to the smooth running of hearings.

2. This Practice Note sets out the standards of conduct expected and the ways in which all those involved in hearings can ensure that those standards are maintained.

3. Panels are entitled to expect that anyone representing either the HCPC, or the registrant in proceedings before a Panel will conduct themselves appropriately. In exceptional circumstances where these standards are not met and where the conduct of representatives has an adverse effect on the proper presentation of the case, the Panel may need to act to preserve the integrity of the proceedings. This Practice Note provides guidance to panels, legal assessors and representatives when considering the conduct of representatives and its impact on proceedings.

Standards of conduct

4. Panels are entitled to expect all representatives appearing before a Panel to comply with the following minimum standards of conduct:

    a. to comply with the standard and any bespoke directions made by a panel regarding case management so that, to the benefit of the registrant and all those involved in the hearing, it runs smoothly --

    b. 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;

c. not to send abusive or offensive correspondence to, or otherwise communicate in a similar manner with, any person in connection with the proceedings;

d. to be punctual and adequately prepared;

e. to be courteous and fair to everyone involved;

f. to focus on the evidence, ensuring that any challenge to that evidence is on the basis of fact;

g. to avoid unprofessional, improper, disorderly or disruptive behaviour and to discourage such behaviour by others;

h. not to waste time on irrelevant matters or make frivolous or vexatious objections;

i. not to knowingly assist or condone any unlawful conduct, including the giving of perjured evidence;

j. not to engage in attacks which appear to the Panel to be purely personal or in acrimonious, sarcastic, or intimidatory exchanges with anyone involved in the proceedings;

k. to test or challenge evidence by proper means and not to be abusive, offensive or unnecessarily confrontational when cross-examining witnesses;

l. to comply with and respect the Panel's decision, and not to attempt to re-open a matter which has been ruled upon

Registrants' representatives

5. The Panel rules enable registrants to be represented by any person[1] they choose, who may be, but does not need to be, legally qualified. Registrants' representatives play a key role in ensuring that registrants are supported to put their case in the most clear and coherent manner and to ensure that any evidence which is not admitted is subject to proper challenge and scrutiny. They act in the best interests of the registrant.

6. Registrants are often represented by someone who is not a qualified lawyer (a "lay representative"). These lay representatives may be friends or colleagues who have never undertaken the task before, others will be union or professional body representatives with greater experience. To ensure the overall fairness of the proceedings, the Panel Chair, panel members, legal assessor and the HCPC's presenting officer should act at all times to promote effective participation by the registrant and any lay representatives. This may include explaining the Panel's procedures and assisting a lay representative to put questions in a manner which is appropriate to the proceedings.

[1] other than a member of the Council or one of its committees, or a Council employee.

7. Whether legally qualified or not, all representatives of registrants share the same responsibilities; to ensure that the rights of the registrant concerned as well as any witnesses are respected. Representatives have a key role in representing the interests of the registrant in the best manner possible by all proper and lawful means.

Misconduct of Representatives

8. All representatives must conduct themselves appropriately. Lawyers authorised[2] to act in a UK jurisdiction must act in accordance with the professional conduct rules which apply to them.

9. Whilst lay representatives are not subject to the same professional conduct rules which apply to qualified lawyers, Panels will expect lay representatives to conform to the standards of conduct set out in this Practice Note.

10. Panels will not tolerate unlawful, disruptive or other improper behaviour by any representative. They expect all representatives to treat the registrant, witnesses, the Panel, the legal assessor and other representatives with courtesy and respect. Panel Chairs should deal promptly and firmly with unlawful, disruptive or other improper behaviour[3] by warning the representative that such behaviour will not be tolerated and that the representative should desist from such conduct.

11. Legal Assessors should also intervene when representatives behave contrary to their professional conduct rules or in the case of lay representatives, the standards of conduct set out in this Practice Note or in any way which the Panel regards as disruptive and contrary to the fairness of the proceedings, which includes fairness to the registrant and to witnesses.

12. If any representative disregards the Panel's warnings or rulings or persists in any inappropriate behaviour then, as a last resort, the Panel may need to consider excluding that person from the proceedings. The Panel rules[4] 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.*" A Panel should take legal advice before taking this action and must consider the impact it would have on the registrant who would then be unrepresented. Panels would need to consider whether an adjournment might be necessary to enable a registrant to obtain alternative representation.

[2] Solicitors, barristers, advocates, chartered legal executives and other lawyers authorised to practise as such in a UK jurisdiction.

[3] Serious misconduct by qualified lawyers or barristers should be reported to the relevant regulatory body.

[4] 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 Tribunal Service

PRACTICE NOTE

Conducting Hearings in Private

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

Introduction

1. 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.

2. Whether all or part of a hearing is held in private is a decision for the Panel concerned and must be consistent with any procedural rules which apply to that hearing and 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

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

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

4. One of the objectives of regulation is to ensure public confidence in the professions the HCPC regulates. Open justice where hearings are in public promotes transparency and complies with Human Rights Act protections and Convention rights.

5. The Panel rules[1] reflect Article 6(1) ECHR and provide that, in hearings to which they apply:

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

"... 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;..."

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

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

Deciding to sit in private

7. The decision to sit in private may relate to <u>all or part</u> 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.

8. 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:

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

9. 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 in public.

10. 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.

11. For example, most health allegations[2] will require Panels to consider details of a registrant's physical or mental condition. A Panel is likely to be justified in hearing

(Procedure) Rules 2003; Rule 8(1) of the HCPC (Investigating Committee) (Procedure) Rules 2003

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

such a case in private in order to protect the registrant's privacy, but even in such cases the panel should consider whether any part of the hearing can be in public. The decision to hear such a case in private is unlikely to be contentious but, nonetheless, is one which the Panel should make formally, setting out the reasons for their decision and after giving the parties the opportunity to make representations.

The interests of justice

12. 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.

13. 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.*"

14. 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:

    a. criminal proceedings which would be frustrated if all or part of the HCPTS hearing was held in public;
    b. national security issues;
    c. witnesses whose identity needs to be protected; or
    d. a risk of public disorder.

15. 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.[3]

To protect private life

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

    a. the registrant concerned;
    b. the complainant;

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

c. a witness giving evidence; or
d. a service user.

17. 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.

18. Doing so is not justified merely to save the registrant 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.

19. For example, in *L v. Law Society*[4] 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

20. It is rare for children to give evidence in HCPC proceedings; where this is proposed, panels need to be aware of the particular approach that must be taken and the factors to consider as set out in the HCPTS Practice Note Children as Witnesses.

Interim Order Hearings

21. The provisions of the 2003 Procedure Rules[5] relating to public and private hearings do not apply to interim order hearings, so when considering whether all or part of an interim order hearing should be in private, the Panel should consider Article 6(1) of the ECHR.

22. This says that everyone is entitled to a fair and public hearing, and that judgment shall be pronounced publicly, but the press and public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This means that the hearing may be held in private in the interests of justice or for the protection of private life.

[4] [2008] EWCA Civ 811
[5] Rule 8 of the HCPC (Investigating Committee) (Procedure) Rules 2003; Rule 6 of the HCPC (Conduct and Competence) (Procedure) Rules 2003 and HCPC (Health Committee) (Procedure) Rules 2003

Public pronouncement of decisions

23. Article 6(1) of the ECHR requires that panel decisions are pronounced publicly. In cases where a panel has decided to hear a case wholly or partially in private, the panel will need carefully to consider what parts of their decision can be announced in public and published and which parts need to be redacted. This will ensure that the purpose behind the application is not frustrated by 'private' details referred to in the application and decision being made public.

24. Panels should note the guidance set out in the HCPC's Publication Policy: Fitness to Practise Proceedings and in particular from paragraph 25 which sets out the appropriate approach in cases which involve hearings held wholly or partly in private.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Conviction and Caution Allegations

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

Introduction

1. Article 22(1)(a)(iii) of the Health 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,".

2. Thus, what are often termed "conviction allegations" include allegations that a registrant's fitness to practise is impaired as a consequence of:
    a. being convicted for an offence by a criminal court in any part of the UK;
    b. accepting a caution for an offence from a UK police force or other law enforcement agency;
    c. being convicted by a court outside of the UK, but for an offence which is recognised as a crime in English law; or
    d. being convicted by a Court Martial.

3. 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

4. The practice for administering cautions varies in England and Wales, Scotland and Northern Ireland but certain common principles apply throughout the UK. It remains important however to check that the correct approach is taken depending upon the country in which the caution or equivalent was imposed.

5. 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.

6. 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 be administered where:
    a. the evidence is sufficient to provide a realistic prospect of conviction;
    b. the offender unequivocally admits having committed the offence; and
    c. the offender agrees to accept the caution and understands the significance of, doing so

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

Binding Over and Discharge

8. 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.

9. 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.

10. 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.

11. Different terms and approaches are used in Scotland and Panels should ensure that they understand the significance of these type of orders when considering disposals in Scotland.

Dealing with conviction allegations

12. 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;"

13. 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.

14. 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.

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

16. 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.

17. 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.

18. 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. In any event, the purpose of imposing sentences in criminal cases and sanctions in regulatory proceedings is different.

19. 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.*"

Health and Care Professions Tribunal Service

PRACTICE NOTE

Cross-Examination in Cases of a Sexual Nature

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

Introduction

1. 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 a legally qualified person

2. In cases involving allegations of a sexual nature, a registrant who is conducting their own defence is only permitted to cross-examine a witness who is the alleged victim (the witness) with the witnesses' written consent. Where the witness 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 HCPTS, at its own expense, must appoint a legally qualified person to conduct the cross-examination on the registrant's 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.

Background

3. The decision to appoint a legally qualified person 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 HCPTS has appointed someone to do so on their behalf.

4. 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 their own defence and requires that the complainant be cross-examined, 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 inform the HCPTS, who should make arrangements for a legally qualified person to be appointed.

The role of the legally qualified person

5. The appointment of a legally qualified person in one which is made in the interests of justice, to ensure that the registrant is able to 'test the evidence' as part of their right to a fair hearing.

6. The legally qualified person's function is to ask questions on behalf of the registrant and, for that purpose, legally qualified person 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 legally qualified person to exercise normal professional judgement about the handling of the case and the questions to be asked by way of cross-examination. This may also include the legally qualified person making applications to the panel which may relate to the cross-examination of the witness. For example, an application to admit a late document which the legally qualified person intends to ask the witness about.[2]

7. The role of the legally qualified person is intended to be limited to cross-examining those witnesses whom the registrant is prohibited from cross-examining. The legally qualified person's appointment under this rule will terminate at the conclusion of the cross-examination of those witnesses. In some cases, a legally qualified person may continue to act for the registrant. This is not subject the above rule and the legally qualified person will not be funded by the HCPTS for any representation outside of the scope of their appointment. Any agreements to further represent the registrant and its funding will be matter between the legally qualified person and the registrant.

[2] Abbas v CPS [2015] EWHC 579, at [48].

Procedure

8. 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.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Discontinuance of proceedings

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

Introduction

1. After an Investigating Panel has determined that there is a 'case to answer' in respect of an allegation, objective appraisal by the HCPC of the evidence it has gathered since that decision was made may reveal that the HCPC does not have a realistic prospect of being able to establish all or part of the allegation.

2. This may occur for a number of reasons including when new evidence becomes available after the case to answer decision is made or because, as the HCPC prepares the case for hearing, new and significant doubts arise in relation to the quality or viability of the evidence that was considered by the Investigating Panel.[1]

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

Discontinuance

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

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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. A Panel cannot simply agree to discontinuance without due inquiry. It needs to be satisfied that the HCPC's rationale for seeking discontinuance is sound and, in particular, does not amount to 'under-prosecution'. 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."*

6. In order to be satisfied that discontinuance is appropriate the Panel's task is not to re-consider the decision reached by the Investigating Panel, but to ensure that the HCPC has proper grounds for discontinuing all or part of the allegation, i.e. that there is no realistic prospect of the allegation (or part of it) being established.

7. The nature and scope of the Panel's inquiry will depend upon the reasons 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 objectively justified explanation of why there is not a realistic prospect of the HCPC establishing that the allegation is well founded. The reasons for discontinuance may apply to one or more of the relevant stages, i.e. the alleged facts and/or the statutory ground and/or impairment.

8. The HCPC is expected to provide the Panel with a skeleton argument[6], in advance of the hearing, setting out:
   a. a summary of the case, including a brief chronology and a general description of the allegations and the events giving rise to them;
   b. details of the new evidence that has come to light, or the evidential concerns that have arisen, since the case to answer decision was made;
   c. an explanation of why that new evidence or those concerns mean there is no longer a realistic prospect of the allegation being established;
   d. an explanation of what steps, if any, the HCPC has taken to resolve the situation (for example, by seeking other witnesses or compelling the production of documents) or why such steps are unavailable or inappropriate;
   e. an assessment of the extent to which the allegations engage the 'public components' of impairment[7] and, in consequence, whether discontinuance would be consistent with the HCPC's over-arching statutory objective of public protection.

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[5] [2004] EWCA Civ 1356

[6] for both partial and full discontinuance applications

[7] derived from *Cohen v GMC* [2008] EWHC 581 (Admin) - the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. These are more fully considered in the Practice Note on finding that fitness to practise is 'impaired'

9. In most cases where discontinuance is appropriate, the arguments for doing so should be clear and straightforward. Panels should not need to conduct a detailed examination of the evidence and, in particular, should avoid doing so where only partial discontinuance is being sought. If evidence needs to be tested or material evidential conflicts need to be resolved, that should take place at a full substantive hearing. Discontinuance is unlikely to be appropriate in cases of that kind.

Partial discontinuance

10. If a Panel is asked to discontinue only part of an allegation, it must first consider whether it is appropriate and in the public interest to do so. It should then go on to consider whether those elements of the allegation which it is being asked to leave in place amount to a viable allegation.

11. 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 factual 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.

12. If an allegation is partially discontinued, a freshly constituted panel will consider the revised allegation. The Panel considering the discontinuance application 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.[8]

The effect of discontinuance

13. 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.

14. If the decision has been taken on the basis of insufficient evidence and there is the prospect of further proceedings taking place if new and significant evidence comes to light or circumstances arise that require action to be taken in order to protect the public, this should be made clear in the Panel's written determination so that the registrant is on notice that such action may be taken at a later date.

[8] 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

Health and Care Professions Tribunal Service

PRACTICE NOTE

Disposal of Cases by Consent

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

Introduction

1. Disposing of cases by consent is an effective case management tool. Attending a fitness to practise hearing can be a stressful event, and therefore in cases that meet the criteria set out in this Practice Note, disposal by consent can provide a fairer method of concluding a case, which reduces the time taken to deal with allegations. 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:

    a. the appropriate level of public protection is being secured; and

    b. doing so would not be detrimental to the wider public interest.

Disposal by consent

2. 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 full substantive hearing. The process may also be used where a Panel is due to review an existing conditions of practice order or suspension order, to enable the order to be varied, replaced or revoked without the need for a contested hearing.[2]

3. 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 and

[1] Article 3(4), Health Profession Order 2001.

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

supporting skeleton argument[3] put before it by the HCPC. Equally, it may reject that proposal and set the case down for a full substantive hearing.[4]

4. 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:

    a. has provided a clear, appropriately detailed and objectively justified explanation within its supporting skeleton argument of why the matter is suitable for disposal by consent on the terms set out in the draft Consent Order; and

    b. 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.

5. 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.

6. 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 those matters to the Panel's attention.

7. The HCPC's governing legislation[5] prevents a registrant from resigning from the HCPC register whilst the subject of an allegation or a conditions of practice order or suspension order.

8. 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.

9. 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.

10. 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.

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[3] the HCPC is expected to present a draft Consent Order and supporting skeleton argument to the Panel in advance of any consent application hearing. In particular, the skeleton argument must address the appropriateness of concluding the allegations without a full hearing, having regard to the extent to which they engage the 'public components' of impairment identified in *Cohen v GMC* [2008] EWHC 581 (Admin) (more fully considered in the Practice Note on finding that fitness to practise is 'impaired').

[4] the decision of the Panel is published in accordance with the Fitness to Practise Publication Policy

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

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

Annex A

HCPC Policy on Consensual Disposal

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

    a. 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;

    b. 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

    c. 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.

2. 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.

3. 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 the Panel's attention.

Annex B

Health and Care Professions Tribunal Service
[Conduct and Competence] [Health] Panel

CONSENT ORDER

TAKE NOTICE that, in respect of the [allegation made] [review of the order made by the Tribunal] 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

Health and Care Professions Tribunal Service
[Conduct and Competence] [Health] Panel

NOTICE OF WITHDRAWAL

TAKE NOTICE that:

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

[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: _____

PRACTICE NOTE

Drafting Fitness to Practise Decisions

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

Introduction

1. This practice note provides guidance on the drafting of fitness to practise decisions by HCPC's Practice Committees.

2. Panels need to explain their decisions, also called determinations, and provide adequate reasons for them:
    a. so that everyone involved in a case, as well as members of the public, can understand the decision;
    b. so that the registrant concerned is able to decide whether to exercise the right of appeal;
    c. as part of the obligation to provide a fair hearing under Article 6 of the European Convention on Human Rights[1]; and
    d. in order to enable the Professional Standards Authority (PSA) to consider whether to exercise its statutory powers to challenge a decision.

What a 'reasoned' decision should include

3. Every decision needs to explain what the Panel decided and, just as importantly, why it did so. It 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.

4. The reasons should provide a logical explanation of how and why the Panel decision was reached.

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

[1] As given effect by the Human Rights Act 1998

a. any relevant procedural issues

i. A decision should record any significant procedural steps and how they were dealt with, such as adjournment requests, proceeding in absence, Human Rights Act and other legal challenges, and any advice given by the Legal Assessor.

ii. Any decision by a Panel to disregard the Legal Assessor's advice must be recorded in detail.[2]

b. the allegations or a description of them

i. Where the allegations are lengthy, complex, or of a technical nature, an overview may be helpful.

e.g. *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]*.

c. the Panel's findings on questions of fact

i. The Panel should set out the undisputed facts, the facts alleged, the facts in dispute, and in relation to the latter the findings of fact which it made and why.

ii. Where the credibility and/ or reliability of witnesses is in issue, or two witnesses give contradictory evidence, the Panel should set out any factors that it considered in giving appropriate weight to a witness' evidence, or which led to the evidence of one witness being preferred over another. This will help readers understand why a Panel has reached a particular decision on a particular issue.

d. whether the facts found proved amount to one or more of the statutory ground(s) of the allegation and why

i. There are five statutory grounds upon which allegations can be based:

- misconduct
- lack of competence
- conviction or caution
- physical or mental health
- determination by another regulator

[2] The requirement for a Committee to record any occasion where they do not accept the advice tendered by a legal assessor at a hearing is set out in article 5 of the Health Professions Order 2001 (Legal Assessors) Order of Council 2003

ii. 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.

iii. The decision should demonstrate that the Panel has considered the relevant HCPC standards. It should state which standards are relevant, explaining whether or not they have been breached, and giving reasons for the Panel's decision.

e. whether or not fitness to practise is impaired and why

i. Panels should refer to the Finding Impairment Practice Note when reaching their decision on impairment.

ii. This aspect of a decision should address the current and forward-looking nature of the impairment test, any mitigating or aggravating features, and consideration of the wider public interest. When addressing the public interest, Panels should address both the personal and public components of impairment, and give reasons as to why impairment is or is not found for each component.

iii. Where a Panel decides that fitness to practise is not impaired, it must take particular care to ensure that the decision clearly sets out its reasoning as to why the registrant's fitness to practise is not currently impaired, on both public protection and public interest grounds. The Panel should explain the basis on which it concludes that a fully informed member of the public would not have concerns about the reputation of the profession or the regulatory process if a finding of impairment were not made.

f. any sanction that was imposed and why it was appropriate

i. The Panel must explain what sanction was imposed and why, and how the sanction will protect the public and wider public interest. In writing any decision on sanction, the Panel must provide clear and detailed reasoning to support its decision, explaining the issues it has considered and the impact any aggravating or mitigating factors have had on the outcome.

ii. The Panel should consider each sanction in turn, in order of the least to most restrictive, and should explain in its decision why each sanction is or is not appropriate and proportionate in the particular case. It is not sufficient to assert that something is "appropriate" or "disproportionate" without explaining the reasons why.

iii. The registrant's own interests, and the public interest in retaining a safe practitioner, are factors that are likely to be relevant to the

Panel's assessment of proportionality, and should be covered in the Panel's reasons where that is the case.

iv. As well as providing reasons for the type of sanction imposed, the Panel should also provide full reasons for the length of the sanction decided.

v. It is usually helpful to refer in the decision to relevant paragraphs of the HCPC's Sanctions Policy. If the sanction imposed may appear to deviate from any part of the Sanctions Policy, this must be addressed in the Panel's reasons.

Drafting Style

6. Decisions should be written in plain English and should be concise, while still providing all the relevant information. Any determination should be a standalone document so that anyone reading it can understand the Panel's reasons. Panels should also bear in mind that their decisions may be reviewed by bodies such as the High Court or the PSA.

7. Decisions should be written:
    a. using clear and unambiguous terms, short sentences and short paragraphs;
    b. using precise but everyday language rather than complicated or unfamiliar words (e.g. "start" instead of "commence); and
    c. avoiding jargon, technical or esoteric language (or explaining any that must be used).

8. Panels should also be conscious of the "tone of voice" of written decisions and ensure this is appropriate, particularly where the registrant and/or witnesses may be vulnerable. Whilst panels should give clear reasons for their assessment of the credibility or reliability of a witness, language which is overly critical of a party's evidence, or adversarial language, should be avoided.

Sanctions

9. Panels must refer to the HCPC's Sanctions Policy when reaching a decision on the appropriate sanction to impose. Any sanction imposed by a Panel must be set out in the form of an order, which is addressed to the HCPC's Registrar. The Registrar will then annotate or amend a registrant's entry in the HCPC Register, in accordance with the Panel's decision, from the date that the order takes effect.

10. Caution Orders and Suspension Orders need to direct the Registrar to annotate or suspend a register entry for a specified period.

11. A Striking Off Order needs to direct the Registrar to strike a registrant from the Register.

12. Conditions of Practice Orders should:

    a. direct the Registrar to annotate the Register (to show that the registrant is subject to the conditions);
    b. set out the conditions with which the registrant must comply;
    c. specify the length of the Order;
    d. specify any review periods required.

13. Those detailed conditions should be written in the second person ('you', 'your') so that they are clearly addressed to the registrant concerned.

14. A set of sample conditions can be found in the Conditions Bank document. The conditions set out in this document are not prescriptive, and merely act as guidance on the type of conditions a Panel can impose.

Assistance from the Legal Assessor

15. Panels are reminded that Legal Assessors will assist a Panel in the drafting of its decision but will not take any part in the decision making process.

Appendix 1

Quick reference list of quality indicators for decisions

1. The decision includes the allegations against the registrant.
2. If the allegations are lengthy, complex, or technical, the Panel provided an overview.
3. The Panel sets out whether the facts are proved or not, including how and why they came to their decision.
4. The Panel sets out if the facts amount to the ground(s) alleged, including how and why they came to their decision.
5. The Panel sets out their findings on impairment, explaining its conclusions about what the public interest requires. This may include reference to both the personal and public components of impairment.
6. The Panel set out how and why they have come to a decision on what sanction, if any, to impose, or why they have not imposed a sanction.
7. Any sanction is in line with the Sanctions Policy and where not, the Panel provided clear reasons for diverting from the policy.
8. The Panel's reasoning is consistent at each stage (facts / grounds / impairment).
9. Only relevant factors are considered at each stage.
10. The Panel provided clear reasons for any assessment on the credibility and/or reliability of any witness.
11. The decision is self-contained, so that without any other materials the average person is able to understand the case before the Panel, the decision it reached, and why it did so.
12. The decision is written in plain English and in clear and unambiguous terms, using short sentences and short paragraphs.
13. The decision is written in an appropriate tone of voice, having particular regard to any vulnerable registrants or witnesses.

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[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, expert evidence and hearsay evidence can be admissible.[2]

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[3]; 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

[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] Civil Evidence Act 1972 section 3

[3] *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*[4] 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*[5] 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*.[6], 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

4 [2014] EWCA Civ 257

5 [2004] EWCA Civ 1659

6 [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.[7]

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 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.

[7] 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[8] 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

[8] *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 Udoye* [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.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Fitness to Practise Impairment

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

Introduction

1. This note provides guidance on how Panels approach decisions on whether a Registrant's fitness to practise is impaired.

2. The HCPC's overarching objective is protection of the public and the purpose of fitness to practise proceedings is not to punish registrants for their past acts and omissions, but to protect the public from those who are not fit to practise. It does this by:

    a. protecting, promoting and maintaining the health, safety and well-being of the public
    b. promoting and maintaining public confidence in the professions it regulates
    c. promoting and maintaining proper professional standards and conduct for members of those professions.

3. Fitness to practise is not defined in the Health Professions Order 2001, but it is generally accepted to mean that a registrant has the skills, knowledge, character and health to practise safely and effectively.

4. Impaired fitness to practise means more than a suggestion that a registrant has done something wrong. It means a concern about their conduct, competence, health or character which is serious enough to suggest that the registrant is unfit to practise without restriction, or at all.

The sequential approach

5. Fitness to practise allegations comprise three steps which Panels must consider sequentially. Although each step must be considered separately, it is important that panels ensure that each decision they make is consistent with each previous step. For example, if a panel considering impairment find that there is a real risk of repetition, this should follow through to the panel's decision at the sanction stage and should be reflected in the sanction imposed. Panels may find it helpful to pause before they finalise their decision at each stage to ensure that it is 'joined up' and consistent with their earlier findings and the reasons they have given to explain those findings. The steps are:

    a. whether the facts set out in the allegation are proved;

    b. whether those facts amount to one or more of the 'statutory grounds' alleged (e.g. misconduct or lack of competence);

    c. if so, whether the registrant's fitness to practise is currently impaired.

6. A sanction can only be imposed if a panel finds that a registrant's fitness to practise is impaired. If a finding of impairment is made, Panels will then hear submissions on the question of sanction and determine what, if any, sanction to impose.

7. It is important that these steps should be and be seen to be separate but this does not mean that, for example, Panels must always retire to consider each individual step separately in every case. They are 'steps' rather than formal stages and their management will depend upon the nature and complexity of the case. Although it is for the Panel to decide the approach, it is often helpful to agree what approach best suits the circumstances of the case with the presenting officer and the registrant or their representatives. Whatever approach is adopted, it is important that the determination should reflect the Panel's decision relating to each step separately and that every decision it makes is properly reasoned.

8. The HCPC has to provide sufficient evidence to persuade the Panel that the facts alleged are proved. This is sometimes referred to as the burden of proof and it is on the HCPC. Whether those facts amount to the statutory ground and whether fitness to practise is impaired are matters of judgement, rather than proof, for the Panel.

9. When a Panel is considering whether an alleged fact is proved, the standard of proof required is on the balance of probabilities. In other words, a panel must be satisfied that the act or omission alleged is more likely than not to have occurred before it can find it proved. If any of the facts alleged are proved, the Panel, then has to decide whether they amount to one or more of the statutory grounds. The fact that a panel has found some facts proved does not mean that a finding of a statutory ground will follow. Similarly, if a panel finds a statutory ground, a finding of impairment is not automatic. Each stage must be considered separately and reasons given for the panel's decision Panels are reminded that although each

stage is separate, their decision must be consistent and follow through from decisions made at earlier stages (see paragraph 5 above,)

Fitness to Practise Impairment

10. As stated above, the test of impairment is expressed in the present tense; that fitness to practise "is impaired."

11. A Registrant may have been impaired at the time of the failing identified in the allegation, however the Panel's task is to form a view about the registrant's ***current*** fitness to practise by taking account of the way in which the registrant has acted or failed to act in the past and, looking forwards whether they consider that the registrant's ability to practise safely is compromised and/or whether public confidence in the profession would be undermined in the absence of a finding of impairment.

12. When considering whether a registrant's fitness to practise is impaired and, if it is, what sanction should be imposed, a panel will need to consider what impact, if any, a registrant's denial of the alleged facts has on their assessment of impairment and sanction.

13. Each case must be considered on its own facts and panels should take account of the following principles and approach as set out in *Sawati v General Medical Council [2022] EWHC 283.*

    a. Registrants are entitled to a fair hearing, and this includes defending themselves against allegations which they deny. As the court said in *Sawati*, registrants should be given a *'fair chance before a Tribunal to resist allegations, particularly of dishonesty, without finding that the resistance itself unfairly counting against them if they are unsuccessful'*.
    b. Panels should consider the nature of the primary allegation against the registrants. A rejected defence of honesty may be more relevant to take into account where dishonesty (e.g. deceit, fraud, forgery etc) is the primary allegation than in cases where dishonesty is alleged, as a secondary allegation, to aggravate alleged facts which are not inherently dishonest.
    c. Panels should consider what it is that the registrant is actually denying. There is a difference between denying the primary facts (i.e. what the registrant is alleged to have done or not done) and denying a secondary fact of dishonesty based on an assessment of those primary facts. Such an assessment requires an evaluation of what a registrant knew or thought at the time. As the court said: *'resistance to the objectively verifiable is potentially more problematic behaviour (and more relevant to sanction) than insistence on an honest subjective perspective'*. However, panels should note that if a registrant denies a secondary allegation of dishonesty at the unreasonable end of the spectrum this may also be relevant to sanction.

d. Panels should ask themselves what other evidence of a lack of insight there is, other than the denial or defence which has been rejected. The court noted that *'a rejected defence which on a fair analysis adds to an evidenced history of faulty understanding is more likely to be relevant fairly to sanction than one said to constitute such faulty understanding in and of itself'.*
e. Panels should consider the nature and quality of the rejected defence. It is not appropriate to conclude that a registrant has not told the truth to the panel simply because a panel has rejected the defence. As the court said: *'it is going to require some thought to be given to the nature of the rejected defence. Was it a blatant and manufactured lie, a genuine act of dishonesty, deceit or misconduct in its own right? Did it wrongly implicate and blame others, or brand witnesses giving a different account as deluded or liars? Or was it just a failed attempt to tell the story in a better light that eventually proved warranted?*'.
f. The court said: *'These are evaluative matters. Tribunals need to make up their own minds about them, and their relevance and weight, on the facts they have found. But they do need to direct their minds to the tension of principles which is engaged, and check they are being fair to both the (registrant) and the public. They need to think about what they are doing before they use a (registrant's) defence against them, to bring the analysis back down to its simplest essence'*.

14. Panels should follow this approach at both the impairment stage when they are considering the issue of insight and risk of repetition and at the sanction stage when deciding which sanction, if any, should be imposed. Panels are reminded of the importance of considering the Sanctions Policy in all cases and that caution should be exercised before concluding that a registrant's denial of an allegation, in circumstances where that denial has been rejected by the panel, is of itself an aggravating factor. Panels should take account of the principles and approach set out above. Particular care should be taken in cases of dishonesty where a panel has rejected the registrant's defence. Although this *may* be regarded as an aggravating feature, panels must approach their consideration as outlined above and make clear in their reasons that they have done so.

Character evidence

15. When considering impairment, Panels may properly take account of evidence as to the registrant's general competence in relation to the subject matter of an allegation; the registrant's actions since the events giving rise to the allegation; or the absence of similar events.

16. In fitness to practise proceedings Panels may need to consider 'character evidence' of a kind which, in other proceedings, is only heard as personal mitigation in relation to sanction.

17. In admitting character evidence for the purpose of determining impairment, Panels must exercise caution but should not adopt an over-strict approach. It is important that all evidence which is relevant to the question of impairment is considered. Panels must be careful not to refuse to hear evidence at the impairment phase about, for example, a registrant's general professional conduct which, when heard at the sanction phase, may raise doubts about the conclusion that the registrant's fitness to practise is impaired.

18. 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. That distinction is not always clear. Expressions of regret or remorse may fall within the latter category but, character evidence of this sort may be helpful in a Panel's assessment of risk and the likelihood of repetition. Where insight, regret or remorse has been reflected in modifications to the registrant's practice, it is relevant to the question of current impairment. Evidence of remediation and reflection are likely to be particularly relevant at this stage.

Protecting the public

19. As fitness to practise is about public protection, in considering allegations Panels need to address what the case law describes as the 'critically important public policy issues' of:

    a. protecting service users;
    b. declaring and upholding proper standards of behaviour; and
    c. maintaining public confidence in the profession concerned.

20. Thus, in determining fitness to practise allegations, Panels must take account of two broad components:

    a. the 'personal' component: the current competence, behaviour etc. of the registrant concerned; and
    b. the 'public' component: those critically important public policy issues outlined above.

21. Although panels are likely to find it helpful to approach their consideration of impairment in this way, it is important that panels recognise that both aspects are interrelated and that both are components of the *public* interest.

5.1 Personal component

22. The personal component must be considered first, and the Panel's task is to form a view about the registrant's current fitness to practise based on, among other

things, the registrant's past acts or omissions. The key questions which need to be answered are:

a. are the acts or omissions which led to the allegation remediable?
b. has the registrant taken remedial action?
c. are those acts or omissions likely to be repeated?

23. There are some cases, including those involving serious attitudinal or behavioural issues, which may be more difficult to remediate or where public confidence in the profession (see below) requires a finding of impairment to be made.

24. An important factor will be the registrant's insight into those acts or omissions, the extent to which the registrant:

a. accepts that their behaviour fell below professional standards, understands how and why it occurred and its consequences for those affected; and
b. can demonstrate they have taken action to address that failure in a manner which remedies any issue and avoids any future repetition.

25. Insight is concerned with future risk of repetition. It is different to remorse for past misconduct and it is wrong to equate maintenance of innocence with lack of insight.

26. A panel must determine what insight a registrant has shown and make that clear in their reasoned decision.

Public Component

27. Next, Panels must consider the three elements of the public component. The first element of the public component - the need to protect service users - overlaps with the personal component. A registrant who has insight and is unlikely to repeat past acts or omissions may not present an ongoing/ future risk to service users.

28. The other two elements of the public component are maintaining professional standards and public confidence in the profession concerned. The HCPC has set out the standards it expects of registrants and panels should refer to those Standards and the importance of upholding them at the impairment decision-making stage. Panels should consider the need for the public to have confidence in the registrants who treat them. The public is entitled to expect registrants to be professionally competent and act with decency, honesty and integrity. The public should also be able to rely on the regulatory process to be robust, fair and transparent.

29. The key question to be answered here is, given the nature of the allegation and the facts found proved, would public confidence in the profession and how it is regulated be undermined if there were to be no finding of impairment?

Risk of harm

30. When considering impairment, panels will often have to assess the risk of harm. In assessing the likelihood of a registrant causing similar harm in the future, Panels should take account of:

    a. the risk of or degree of harm caused by the registrant; and
    b. the registrant's culpability for that harm or the risk of exposure of a service user, colleague or member of the public to unwarranted harm

31. In assessing harm and future risk, panels should take account of the fact that harm can be caused in different ways. It may be that the harm has an adverse affect on physical or mental health. In other cases, for example inappropriate conduct towards colleagues, including conduct which is sexual in nature or sexually motivated the harm may include a breakdown in trust within a wider team that may affect the safe and effective delivery of care.

32. The degree of or risk 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 or, conversely, the harm suffered may be less than that which was intended or reasonably foreseeable.

33. In assessing culpability, Panels should take into account that deliberate and intentional harm is more serious than harm arising from a 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.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Freedom of expression

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

Introduction

1. The purpose of this practice note is to provide guidance on how panels should approach a decision that involves a registrant's freedom of expression and freedom of thought, conscience and religion[1], to ensure a consistent, evidence based and fair approach to their decision making. This practice note should be read with the practice note on professional boundaries, which provides support to panels considering matters involving professional boundaries, and our guidance on social media.

What is freedom of expression and freedom of thought, conscience and religion

2. Freedom of expression is the right to express and receive opinions, ideas and information in any medium. Expression and exchanges of views can take place in action, words and pictures but also increasingly take place online, including through social media platforms, websites and search engines.

3. The right to freedom of thought, conscience and religion includes the freedom to express religious, political and philosophical beliefs. For a belief to be protected it must be serious, concern important aspects of human life or behaviour, be sincerely held, and be worthy of respect[2] in a democratic society. It is unlawful to discriminate against someone because of their religion or belief or because of a lack of belief [3] as this is a therefore "protected characteristic ". Examples of beliefs that courts or tribunals have found to be protected on the

[1] Article 10 and 9 of the European Convention on Human Rights (ECHR)
[2] In the case of *Maya Forstater v CGD Europe UKEAT/0105/20/JOJ* , applying the the fifth criterion in *Grainger plc v Nicholson [*2010] ICR 360, the Employment Appeal Tribunal found that only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights (such as totalitarianism or Nazism), would it be one that was not worthy of respect in a democratic society and thereby liable to be excluded from the protection of rights under Articles 9 and 10 by virtue of Article 17.
[3] Under the Equality Act 2010 in England, Scotland and Wales and the Fair Employment and Treatment (Northern Ireland) Order 1998 in Northern Ireland and a genuinely held belief or lack of belief is also protected by Article 9.

facts of the case include religious beliefs, beliefs closely linked to or based on those beliefs, lack of religion, and non-religious beliefs including atheism, agnosticism, ethical veganism, pacifism, and gender-critical beliefs. The Human Rights Act 1998 requires all public bodies to comply with the rights set out in the European Convention on Human Rights (ECHR). It also set out that UK law must be applied by UK courts and public authorities in way which is compatible with the rights conferred by the ECHR and its case law as it is possible to do so[4] .

4. This includes Article 10, which protects freedom of expression and Article 9 which protects freedom of thought, conscience and religion . Article 10 is not an unrestricted right and is subject to legal limits. "*Everyone has the right to freedom of expression*"[5] but also recognises that this freedom may by subject to restrictions for a variety of reasons, including to protect the reputation or rights of others:

> *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[6]*

5. Under Article 9 everyone is free to hold a broad range of views, beliefs and thoughts, and to follow a religious faith. The right to manifest those beliefs may be limited only in specified circumstances.

> *"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[7]*

6. There is a distinction between protected beliefs under Article 9 and ideas and opinions covered by Article 10 although these rights may overlap in practice.[8] These freedoms are also subject to a range of restrictions prescribed in UK law, including the:

[4] s.3, Human Rights Act 1998 (HRA) : interpretation of legislation
[5] Article 10(1)
[6] Article 10 (2)
[7] Article 9(2)
[8] In certain cases, Article 9 may also overlap with Articles 8 (right to private and family life), 11 (freedom of assembly), 12 (right to marry) and 14 (non-discrimination). In particular, Article 14 specifically recognises religion as one of the grounds on which discrimination is prohibited while 'any other status' within Article 14 covers non-religious beliefs too.

a. Public Order Act 1986, which contains offences for stirring up hatred on the grounds of race, religion or sexual discrimination.

b. Malicious Communications Act 1988 and the Communications Act 2003, which criminalises "indecent or grossly offensive" messages and threats.

c. Terrorism Act 2006, which criminalises the publication and dissemination of material that could be seen as encouraging acts of terrorism.

7. Online Safety Act 2023 which criminalises a series of new communications offences including the sending photographs or film of genitals (cyber-flashing).

8. Further information about freedom of expression and freedom of thought, conscience and religion can be found at the Equality and Human Rights Commission (EHRC) website.

Our role as a regulator

9. Our Standards of Conduct, Performance and Ethics (the Standards) and this practice note recognise a registrant's right to freedom of expression as well as the right to freedom of thought, conscience and religion[9]. We also recognise social media, networking websites and on-line communications as ways in which registrants may express their opinions, beliefs and share information raise particular issues.

10. However, we also recognise that there may be some circumstances where a registrant's actions could impact on their fitness to practise.

11. When expressing their views registrants must meet the Standards at all times. This includes a professional duty to:

    a. use all forms of communication appropriately and responsibly, including social media and networking websites *(Standard 2.10)*
    b. make sure that their conduct justifies the public's trust and confidence in them and their profession *(Standard 9.1)*
    c. treat information about service users as confidential *(Standard 5.1)*
    d. keep their relationships with service users and carers professional *(Standard 1.9)*
    e. make reasonable checks to ensure information shared is accurate, true, does not mislead the public and is in line with the duty to promote public health when sharing information on media sharing networks and social networking sites (*Standard 2.11*)
    f. use media sharing networks and social networking sites responsibly, maintaining professional boundaries at all times and protecting service user/carer privacy. (*Standard 2.12*)

[9] Article 10 and 9 of the European Convention on Human Rights (ECHR)

12. Breaches of professional duties may put others at risk of harm, as well as undermining the public's trust and confidence in registrants and the professions.

13. Social media is one way in which registrants express their opinions, beliefs and share information and in order to comply with our guidance on social media and our Standards registrants should:
    a. Challenge discrimination[10];
    b. Maintain appropriate professional boundaries[11];
    c. Communicate appropriately[12];
    d. Respect confidentiality[13];
    e. Be honest and trustworthy[14].

How do these freedoms apply to professional regulation?

14. We recognise that regulation of the professions needs to strike the right balance between the public interest in maintaining public confidence in the professions and the rights of the individual registrant, under the Human Rights Act 1998 and equalities legislation.

15. Articles 9 and / or 10 may be engaged where reported conduct involves the registrant exercising their right to express themselves, for example, by expressing their views on social media, at a protest, in correspondence and / or in their conduct in professional life. Freedom of expression includes:

> "*… not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having* …"[15]

    The right to manifest one's beliefs and freedom of expression are qualified rights, which means regulatory action may be justified in circumstances where a registrant's conduct, arising from the manifestation of a protected belief or the views and opinions expressed is potentially in breach of the Standards and such action can be justified. It is incumbent on HCPC as a regulator to consider concerns as and when they are raised in order to determine whether or not there has been a breach of the Standards.

16. This applies to a registrant's conduct in their professional and non-professional life[16].

[10] Standards 1.5 and 1.6
[11] Standards 1.8, 1.9, 1.10, 1.11 and 1.12
[12] Standards 2.10 , 2.11 and 2.12
[13] Standard 5.1
[14] Standard 9.1.9.2 and 9.3
[15] Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 7 BHRC 375, [20]
[16] This approach has long been recognised by the courts – see for example R (on the application of Remedy UK Ltd) v General Medical Council [2010] EWHC 1245 (Admin); Khan v Bar Standards Board [2018] EWHC 2184 (Admin); Ryan Beckwith v Solicitors Regulation Authority [2020] EWHC 3231 (Admin); AB v Bar Standards Board [2020] EWHC 3285 (Admin) and is reflected in Standard 1.8.

17. We also recognise that our regulation of such conduct may engage a registrant's rights under Article 8 ECHR (the right to respect for private and family life, home and correspondence). Other qualified rights may also be engaged in particular cases, such as Article 11 (the right to freedom of assembly and association).

18. The HCPC must be satisfied that the interference with an ECHR right is 'proportionate', in other words that it is appropriate and no more than necessary to address the issue concerned. Even if far removed from a registrant's professional practice their conduct may have the potential to damage public confidence in and the perception of the profession.

19. In *Ngole v University of Sheffield [2017] EWHC 2699*, the Court said this:

> "*Professional discipline, rightly, sits relatively lightly on its members outside the workplace, but it is never entirely absent where conduct in public is concerned. There, it always requires attention to the perceptions of others, especially those most directly interested in the performance of professional functions*."

20. Professional standards require a measure of personal responsibility to be taken for conformity to the ethos of the profession, and for awareness that personal conduct in public - whether or not in a work-related environment - can have an impact on the perception of the profession. There is an overriding obligation to do nothing which might affect the trust that the public has in the profession.

21. As such, the HCPC has a legitimate right to consider a concern relating to a registrant's expression of their opinions and beliefs. This is to ensure registrants are able and trusted to perform their role, as well as having regard to how that conduct may have been perceived, considering if there has been a risk to the public confidence and trust in the profession.

22. However, the HCPC must not take matters too far. Certain acts might damage the registrant's reputation but not necessarily their reputation as a provider of professional services or the profession's reputation. In *Beckwith v SRA [2020] EWHC 3231.* The Court commented that there is a distinction;

> "*between conduct that does or may tend to undermine public trust in the [profession] and conduct that would be generally regarded as wrong, inappropriate or even for the person concerned, disgraceful. Whether that line between personal opprobrium on the one hand and harm to the standing of the person as a provider of [professional] services or harm to the profession per se on the other hand has been crossed, will be a matter of assessment [by the Committee] from case to case*."

23. Where that line lies and whether it has been crossed depends on whether what a registrant has said or done raises fundamental concerns about their practice or professionalism. Restriction on a registrant's Article 9 and/ or Article 10 rights

must not be arbitrarily applied and panels should consider the contextual and fact specific position in each case

Questions for Panels to consider

24. There are a series of questions that the UK courts have decided should form the structure to be considered when applying Article 10[17] so that any interference with this right is justified and lawful. The questions are:

    a. Is what the defendant [registrant] did in exercise of one of the rights in Article 10?

    b. If so, is there an interference by a public authority with that right? A decision that there is a case to answer in respect of an allegation of impairment, a decision that conduct amounts to misconduct impairing fitness to practise, and / or a decision to impose a sanction following a finding of impairment are all likely to amount to an interference.

    c. If there is an interference, is it 'prescribed by law'[18]?

    d. If so, is the interference in pursuit of a legitimate aim as set out in Article 10 (2)?

    e. If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim? This question will in turn require consideration some further questions in order to assess whether an interference is proportionate:

        i. is the aim sufficiently important to justify inference with a fundamental right?

        ii. is there a rational connection between the means chosen and the aim in view?

        iii. **are there less restrictive alternative means available to achieve that aim**? If so this approach should be pursued

        iv. is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

[17] Most recently in *Adil v GMC* [2023] EWHC Civ 1261 quoting *DPP v Ziegler [2020] QB 235* and approved and applied by the Supreme Court *(*'the Ziegler test')[17]

[18] The following are two of the requirements flowing from the expression 'prescribed by law'; "the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able to – if need be with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" *The Sunday Times v United [1979] 4 WLUK 163*

25. In *Adil v GMC*[19], the registrant argued that it would be an unlawful interference with freedom of expression to sanction a doctor for views on matters of medical, scientific or political significance. He argued that a doctor should always be able to express their views save where they are seriously offensive to others, particularly groups with protected characteristics. The Court of Appeal did not agree and noted the submission *"obscures the need to focus on the particular views expressed by [Mr A] in this case".* The Court emphasised that "*all depends upon the facts of each individual case*", also stating that:

> *"The legitimate aims in article 10.2 which are potentially engaged are the interests of public safety and protection of health.... Sanctioning doctors for comments likely to undermine public health and cause harm to the public so as to deter such behaviour also directly engages the aim of protection of public health and safety"*

26. As the Court of Appeal has flagged in *Adil,* panels need to ensure that they conduct a thorough analysis of the conduct and consider the series of questions set out above in cases where Article 10 is invoked. There should be consideration of the extent of the restriction, and the justification for it.

27. When considering whether free expression should be limited, courts will question whether doing so could have a 'chilling effect' on free speech, the value of the particular form of expression and the medium used.

28. In *Professional Standards Authority for Health and Social Care v General Pharmaceutical Council (Ali)* [2024] EWHC 577 (Admin), the High Court stated that

> *"To that end, legal frameworks, whether in the criminal or in the regulatory sphere, must be interpreted and applied so as to avoid the "chilling" of legitimate political speech, which attracts the highest level of protection under Article 10 ECHR, as given effect in this jurisdiction by the HRA"*

Our general approach

29. Panels should respect the right to freedom of expression and will only make a finding of misconduct and that a registrant's fitness to practise is impaired when it is necessary and proportionate to our aims as a health and care regulator.

30. Panels need to consider whether what a registrant has said or done raises fundamental concerns about their practice or professionalism, guided by the Standards and our guidance on social media. When making decisions, panels must be careful to recognise that they may have personal views on a subject, and ensure that notwithstanding those views, they consider the matter neutrally. Panels should also recognise that people raising concerns about what has been said or done may have conflicting views to those expressed, but this does not

[19] [2023] EWHC Civ 126

it and of itself render the views expressed unacceptable. Panels will need to carefully review all the relevant circumstances of each case including:

a. what has been expressed;

b. where and to whom the comments were made;

c. whether there is a link to practice or status as a registrant and, if so, what this is (for example, its likely to be relevant to consider if the behaviour happened in work, outside of work related to a professional topic or work unrelated to a professional topic);

d. if views expressed amount to a protected belief ;

e. if viewed expressed amount to discrimination, harassment, bullying or victimisation of others;

f. the way in which views or beliefs have been expressed.

Where there is a link to professional practice

31. Registrants can express and manifest their views, opinions and beliefs at work but not in a way which;

    a. constitutes discrimination, harassment, bullying or victimisation of others;

    b. means that they are not delivering the fundamentals of care effectively, or are not listening to people and responding to their preferences and concern; or

    c. contravenes the requirement of the Standards.

32. Registrants have the right to practise in accordance with a protected belief, provided it is within the law and does not deny people who use services access to appropriate care or otherwise contravene the Standards.

33. Registrants can express their views and opinions and ask challenging questions about their work , subject to what has been expressed and where and to whom the comments were made. This can strengthen our regulated professions.

34. When a registrant promotes a position on a professional matter, especially where they rely on their registered status to do this, they should keep in mind the relevant provisions of the Standards. Panels should not take action just because they have expressed a controversial opinion on an issue relating to professional practice, registrants should be aware of how their behaviour can affect and influence the behaviour of others, as well as undermine public confidence in their profession. They should consider if they may need to qualify what they say, for example by pointing out that it is just their opinion or setting out the limitations of their experience in an area.

Where behaviour is unrelated to a Registrant's registered status or practice

35. Registrants are free to express themselves and their protected beliefs outside work. It is not usually the panel's role to monitor what registrants say or do which is outside, or unrelated to, professional practice. Panels should not take action simply because something a registrant has said or done has shocked, disturbed or caused offence to someone. They should only do so where it is necessary and proportionate to do so, for example the way a registrant expressed themselves results in a criminal conviction or could mean they pose a risk of harm to the public or undermine confidence in the profession.

36. Regulatory action should not be taken purely because a registrant has attended a lawful protest or is taking lawful industrial action. For example, a registrant might attend a lawful protest opposing the use of oil without questions arising as to their fitness to practise. Registrants enjoy a right to protest and manifest their personal beliefs. However, if a registrant engaged in criminal activity at the protest this may mean their fitness to practise could be impaired.

37. For example, a registrant might campaign for curbs to immigration or discuss their religious belief (protected in law) in an emotive way[20]. However, were they to use racist, homophobic, sexist or other discriminatory language, or suggest that they would discriminate against others as a result of these views, in a professional context, their fitness to practise could be impaired.

38. Registrants who share content from others or links to such content might reasonably appear to be supporting the views or language found there. When sharing, they should consider the Standards and whether it would be appropriate to say they disagree with the content or explain their purpose for sharing it. If they do not this may mean their fitness to practise could be impaired.

[20] *Ngole v University of Sheffield [2017] EWHC 2699*

Health and Care Professions Tribunal Service

PRACTICE NOTE

Health Concerns

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

Introduction

1. The Health Professions Order 2001 (the Order) provides 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[1].

2. If an Investigating Panel 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 impairment by reason of physical or mental health?

3. 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 practise. Health concerns that require formal intervention by the HCPC arise where the registrant fails to demonstrate that they are managing their health issues in a way that avoids any detrimental impact to service users. As a result, there is a concern regarding their current fitness to practise.

4. Deciding that a health concern needs to be treated formally as an allegation will often be quite straightforward. This is likely to occur in cases where:

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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 under the HCPC (Health Committee) (Procedure) Rules 2003 to cross-refer an allegation to the Conduct and Competence Committee.

a. fitness to practise concerns arise as a direct consequence of the registrant's physical or mental health;

b. there is evidence to suggest that the registrant is not managing their health appropriately and lacks insight into its potential impact upon service users, the wider public or themselves; and

c. there is no evidence to suggest that other material factors relating to the registrant's conduct or competence are involved.

5. 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, which also relate to their conduct or competence. Equally, there may be cases where, at the outset, the evidence may not suggest that the registrant has an underlying health issue, but where a health issue becomes known as the case progresses.

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

   a. the extent to which the registrant's physical or mental health condition the primary cause of the alleged facts set out in the allegation;

   b. the overall seriousness of the allegation; and

   c. the sanctions which are available to the Health Committee, including, in particular, that striking off is not an option,[4]unless the registrant has already been continuously suspended or subject to a conditions of practice order for at least 2 years.

Relevant case law

7. 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."

[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.

8. 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."

Conducting hearings in private

9. 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. Health cases will usually require panels to consider personal and sensitive details of a registrant's physical or mental health condition. A panel is justified in hearing such cases in private in order to protect the registrant's privacy, unless there are compelling public interest grounds for not doing so. 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 HCPTS Practice Note on Conducting Hearings in Private explains in more detail the issues that need to considered when deciding whether a hearing should be held in private. It also reminds panels that they should consider whether it is feasible for only part of the hearing to be in private before concluding that all of the hearing should be.

Vulnerable registrants

10. The fitness to practise process can be a stressful and anxious time for all registrants, but this may be exacerbated for registrants who are particularly vulnerable due to their physical or mental health and especially if they are unrepresented. The HCPTS Practice Note on Unrepresented Registrants sets out how such registrants may be supported through the hearing process. The Health and Care Professions Tribunal Service website also provides guidance and assistance for vulnerable parties attending a hearing, including registrants.

Cross-referral

[6] (2003) EWHC 1675 (Admin).

11. The Panel Rules[7] enable allegations to be cross-referred between the Health Committee and the Conduct and Competence Committee where the Panel considering an allegation on behalf of one of those committees considers that it would be better dealt with by the other committee.

12. Health Panels can only make findings on allegations of impairment of fitness to practise which are based upon the statutory ground of physical or mental health. Conduct and Competence Panels can only make findings on allegations of impairment of fitness to practise which are based upon one of the other statutory grounds.[8]

13. If the issue giving rise to a potential cross-referral was known at the time the Investigating Committee Panel considered the matter, the Investigating Committee Panel will have made findings about which factual particulars have a realistic prospect of being found proved, and which of the statutory grounds of impairment those factual particulars support. Where this has happened, the Panel considering cross-referral should have regard to the findings of the Investigating Committee Panel. Unless new evidence has arisen, the Panel considering cross-referral should only cross-refer those factual particulars on which the Investigating Committee found a case to answer.

14. If the issue giving rise to potential cross-referral was not known at the time the Investigating Committee Panel considered the matter, or if new evidence on the issue has arisen, the Panel considering cross-referral should take account of the different powers of further investigation set out within the Panel Rules. In particular, only the Health Committee has power to invite the registrant to undergo a medical examination by a registered medical practitioner nominated by the Committee[9].

15. If the Panel is considering cross-referral of its own motion, it must give the parties an opportunity to comment, and take any comments received into account before making a decision.

16. If cross-referral is being considered at the request of the registrant or the HCPC, the Panel is entitled to expect the requesting party to set out a clear and cogent case as to why cross-referral is appropriate. The Panel must take full account of the submissions from both parties before reaching a decision.

17. Where an allegation is cross-referred – whether of the Panel's own motion or at the request of one or both of the parties – the Panel must provide clear reasons for its decision, in sufficient detail to enable the receiving Panel to understand the rationale for the decision, to issue directions and to consider the revised allegation. It must also set out the particulars of the allegation that it is referring.

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

[8] misconduct, lack of competence, criminal conviction or caution or a determination by another regulatory body.

[9] HCPC (Health Committee) (Procedure) Rules 2003, r.8(1)(d)

18. In respect of an allegation which is cross-referred, the receiving Panel's disposal options are to certify to the referring Panel that:

    a. the fitness to practise of the registrant is not impaired by reason of the substituted statutory ground (leaving the referring Panel to resume and conclude its consideration of the allegation); or

    b. it has dealt with the allegation and that the referring Panel is not required to take any further action in relation to the allegation.

19. Where a receiving panel decides that a registrant is not impaired in relation to the allegation it has considered, the panel should refer the suspended allegations back to the original referring panel in order that they can be disposed of. For example, where a Conduct and Competence Committee has suspended their consideration of the allegations to refer a matter to the Health Committee, but the latter has found no impairment on the grounds of health, the Health Committee should refer the matter back to the Conduct and Competence Committee for consideration of the suspended allegations.

20. There may be instances when the Conduct and Competence Committee considers allegations that a registrant has committed misconduct, and that misconduct was a result of the registrant's health condition (HCPTS Practice Note: Mixed Allegations). In some cases, the misconduct may lead to strike off. However, where it becomes clear that a striking off order is not likely, the panel should ensure it addresses the concerns raised by the health condition before reaching a final decision on sanction, for example by referring the allegation to the Heath Committee or seeking up to date information about the registrant's health. This is to ensure that there are no outstanding questions about the registrant's fitness to practise on any relevant grounds of impairment.

Expert evidence as to health

21. 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*[10] 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."

22. 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 their fitness to practise.

[10] [1975] QB 834

23. 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:

    a. the expert's professional qualifications and area of specialisation;

    b. 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 sustained period;

    c. 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;

    d. how closely in time the expert's report was prepared to the matters in issue.

24. Panels must also recognise that there can be 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 differ from the view of a specialist who may be more familiar with the condition and may generally see patients at a later stage when symptoms become acute . Where there is a conflict in the expert evidence, panels should ensure they provide clear reasons for why they have preferred the advice of one expert to that of another expert.

Medical Assessors

25. 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 of medical assessor is set out in detail in the HCPTS Practice Note: Evidence. It is open to both 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*[11].

Reasonable adjustments

26. The Health and Care Professions Tribunal Service (HCPTS) will endeavour to accommodate any reasonable adjustments which registrants, or other parties attending proceedings, may require. The HCPC or HCPTS should be notified in advance to allow time for any such adjustments to be made.

[11] [1975] QB 834

Health and Care Professions Tribunal Service

PRACTICE NOTE

Hearing Format and Location

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

Introduction

1. Panels may conduct hearings using different formats:

    a. **A physical hearing** is one where all (or the majority) of the hearing attendees[1] are in the same physical location. Hearings where some of the attendees are in the same physical location, while others attend by audio or video conferencing, are sometimes referred to as **hybrid hearings**.

    b. **A remote hearing** (sometimes also referred to as a virtual hearing) is a hearing held by audio or video conferencing (or a combination of the two). At a remote hearing, the hearing attendees attend remotely from different physical locations, using telephone or video links.

2. For some types of hearing activity, such as interim order reviews, preliminary hearings, it may be possible for the hearing to take place on the papers. The Health and Care Professions Tribunal Service (HCPTS) will notify the parties when it may be appropriate for the hearing to take place in this way.

3. The decision about which format a hearing should take is a case management decision. This Practice Note sets out the approach to be taken when making that decision, and the process that will be followed.

4. This Practice Note also covers the approach and process for making case management decisions on the location of physical/hybrid hearings.

Power to hold remote hearings

[1] Hearing attendees may include Panel members, their legal assessor, the Health and Care Professions Council (HCPC) presenting officer, the registrant (if they choose to attend), their representative (if they have one), any witnesses, and any members of the public who wish to observe a public hearing.

5. The HCPC's Procedural Rules[2] make provision for hearings to be conducted using audio or video conferencing facilities. They do not confine this power to any particular type of hearing or set of circumstances.

Remote and hybrid hearing requirements

6. Remote and hybrid hearings must comply with all relevant legislation. Every effort must be made to ensure that the usual requirements for a fair hearing are met, notwithstanding the fact that the hearing is taking place remotely. These usual requirements include, but are not limited to, the following:

    a. Enabling appropriate participation by everyone

    b. Maintaining confidentiality and preventing unauthorised recording

    c. Ensuring appropriate and respectable behaviours from all attendees

    d. Managing undue influence

    e. Ensuring a complete and accurate record is made

7. Requirements that arise uniquely from the fact that the hearing is taking place remotely, for example, the need to take more frequent breaks, will also be met.

The general approach to making a decision on hearing format

8. When listing a hearing, the HCPTS will consider whether a case is most suitable to be heard remotely, physically or as a hybrid. The approach to be taken will be considered on an individual basis, taking into account the relevant factors in each case. Those factors include, but are not limited to, the following (this list is not exhaustive, and the factors below are not listed in any order of importance or priority - each case will be considered on its own merits):

    a. Any technical, logistical, personal or circumstantial barriers that might prevent a participant engaging effectively in the proceedings and/or which could cause delay in the resolution of the case

    b. Any features of the case which makes it particularly difficult for it to be held remotely (for example, it can be more difficult to co-ordinate cases with a large number of attendees at a remote hearing than at a physical hearing)

[2] Health and Care Professions Council (Investigating Committee)(Procedure) Rules 2003, Health and Care Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003, Health and Care Professions Council (Health Committee) (Procedure) Rules 2003

c. Whether there are reasonable adjustments or special measures required to allow a participant to engage fully and effectively in the proceedings, which cannot be accommodated remotely

d. Any evidence that suggests the integrity, fairness or smooth running of the hearing may be impacted by holding it in a particular format

e. The views of the registrant. The HCPTS will seek the views of registrants and/or their representatives on its initial assessment of the type of hearing to be held, and their reasoned views will be taken into account before the HCPTS lists the hearing. However, there may be a number of competing factors that the HCPTS needs to assess when deciding on the hearing format, and these may override a registrant's preferences. As such, a registrant's preferred means of holding a hearing cannot be the determinative factor in deciding how to proceed.

Process for making decisions on final hearing format

9. A member of the HCPTS will write to the registrant setting out the proposed means of holding the hearing, and a date range for when they propose to schedule the hearing.

10. Registrants are asked to complete a pro-forma to provide the with information to be taken into account in determining the date and format of the hearing. This includes the opportunity for the registrant to provide their view on the type of hearing that should be held. Registrants are encouraged to provide as much information as possible, and to contact the HCPTS if they need assistance completing the form.

11. Registrants are given 14 days to return the pro-forma and provide their reasons if they object to the type of hearing proposed by the HCPTS.

12. A pre-hearing case management teleconference may be scheduled with the parties, once a provisional hearing date has been identified, to resolve issues relating to the management of the hearing in advance, including any concerns about the hearing format. For example, to discuss potential technical difficulties. The teleconference will be facilitated by HCPTS and representatives from the HCPC as well as the registrant and/or their representative will be invited to attend.

13. If there remain concerns and/or a party disagrees with the HCPTS's decision to list a case as a physical, hybrid or remote hearing, the matter will be considered by a Panel Chair of the relevant practice committee, who will give directions. The Panel Chair will consider representations from the parties before deciding whether the hearing should proceed in the format listed, or be relisted for a different type of hearing (which is likely to be at a later date).

14. Where disagreement about the appropriateness of the hearing format arises after a hearing has already commenced, this may be dealt with through the HCPTS Postponement and Adjournment process. The final decision on the

hearing format always rests with the Panel. If it considers that the hearing cannot fairly proceed in its current format, it can make directions for the hearing to continue in a different format.

15. In all cases, the Panel and/or the Panel Chair must ensure the proceedings are fair, in the interests of justice and comply with legislation. There may be additional issues relevant to individual cases and all relevant matters should be considered, including attendees' physical and emotional needs.

Process for other hearing types

16. All other hearing types will be listed as a remote hearing. If there is a concern or disagreement with the hearing format, the approach would follow that set out for final hearings above.

Conducting remote and hybrid hearings

17. Access to the legal assessor

a. The Panel needs to ensure that all relevant legal factors can be considered and satisfied during the hearing. They need to ensure that the legal assessor can participate effectively in the remote hearing and is present throughout.

18. Effective participation

a. Where a remote/hybrid hearing does take place, the HCPTS will use videoconferencing facilities to conduct the hearing. If required a member of the HCPTS Hearings Team will conduct test calls with participants prior to the hearing to ensure any technical difficulties are resolved in advance and participants can engage fully in the process. They will also provide all hearing participants with a copy of our guidance on attending a remote hearing.

b. At the start of the hearing (and as required during the hearing), the Panel will need to ensure that all parties can participate effectively. The Panel Chair needs to confirm that the parties:

i. Can hear (and where the hearing is conducted via video conferencing, see) everything that takes place while they are present at the hearing

ii. Have access to any documents that they need to refer to during the hearing, and are able to access those documents without compromising their ability to see and hear what is happening in the hearing

iii. Can communicate confidentially with their representative (where relevant) and/or other sources of support required during the hearing

c. When deciding whether to proceed in the absence of a registrant, extra care may need to be taken, particularly where the registrant is unrepresented and has indicated an intention to attend. The Panel should make appropriate enquiries as to any technical barriers that may affect or prevent the registrant attending, and what steps have or may be taken to explore and address any such barriers.

d. If a registrant is unrepresented and speaks directly during a hearing, steps should be taken to address whether the registrant is giving evidence or making submissions. If they are giving evidence, the relevant considerations for witnesses apply (see below).

19. Maintaining confidentiality and preventing unauthorised recording

a. The Panel Chair should remind all attendees that the proceedings must not be recorded and that confidential information disclosed during the hearing must not be disclosed further without necessary consent(s).

b. Please see below for more information on public and private remote hearings.

20. Witnesses

a. Witnesses are required to take an oath, or to affirm, before giving evidence. If the relevant holy book is not available to remote witnesses, the Hearing Officer will take the witness through the required affirmation.

b. Witnesses should be invited to join and give evidence only at the appropriate time and warned not to discuss their evidence while they are under oath. Care should be taken to ensure that other witnesses are not present in the remote hearing during the evidence of a witness.

c. The Panel should be mindful of the risk of witness interference while the witness is giving evidence. The Panel must ensure that the witness is alone while giving evidence, or, if they are accompanied for support, the Panel must ensure that the witness and the person present are clear about the role of the supporter and what they may and may not do. When a witness is giving evidence using a video link, where possible, both the witness and supporter should be visible on screen at the same time. The Panel should ensure that witnesses are given very clear instructions on what they may and may not do during a break.

d. The panel should also take extra care when considering what is fair for a vulnerable witness. Some vulnerable witnesses may, for example, have difficulty using the technology involved in remote hearings or may require special measures. The Panel is ultimately responsible for ensuring that witnesses are treated fairly and supported to give their best evidence.

21. Public and private remote hearings

a. The HCPTS is required by law to hold its hearings in public. This means that hearings are publicised on the HCPTS website in advance of the event and allow any interested parties, including members of the media, to attend the event and report on proceedings. This approach applies to remote and hybrid hearings. Details of remote and hybrid hearings will be listed on the HCPTS website in line with its publication policy, and members of the public or press who wish to attend are invited to contact the HCPTS.

b. The HCPTS will provide members of the public or press who having made contact, wishing to attend a remote hearing, with a virtual link. A virtual link is not published on the HCPTS website. This is to enable the HCPTS to set out expectations, including confirmation that any recording of proceedings is strictly prohibited. The recording function on video conferencing facilities is disabled for external parties, so that they cannot use it to make recording to make a recording of the hearing.

c. Panels have the discretion to exclude members of the public from the hearing where appropriate, for example if there is any disruption or if the Panel is concerned that they are not completing with the HCPTS guidance for doing so. In such cases, a new link to the remote hearing may be provided to allow the hearing to continue without access to the excluded parties.

d. As with physical hearings, all or part of a remote hearing may be held in private in line with the Practice Note on Conducting Hearings in Private. It is open to the registrant or HCPC to make an application to the panel, either before or during any part of a virtual hearing, for the whole or remainder of that hearing, or any part of it, as may be the case, to be held in private.

e. Panels must take care to ensure there are no unauthorised persons present when the Panel considers it necessary to start a remote hearing in private, switch a public remote hearing to private during the course of the hearing, or deliberate in private.

f. Where a hearing goes into private session, or a panel needs to deliberate in private, separate 'rooms' will be made available on video conferencing facilities to facilitate this.

Geographical location of hearings

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

    a. in the UK country where that person's registered address is situated;

    b. if not registered, in the UK country where that person resides; or

    c. in any other case, in England.

23. These are mandatory requirements which cannot be waived by the HCPC or the person concerned. Accordingly, where a physical hearing takes place, it must be at a location which complies with these requirements.

24. Regardless of where the panel members or any other parties to the hearing are physically situated, remote and hybrid hearings are deemed to take place in accordance with these requirements.

25. Although physical hearings must be held in the relevant UK country, the HCPTS (and ultimately, the Panel) does 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, the Panel should give careful consideration to the practical and financial implications of doing so.

26. The HCPTS has a purpose built and dedicated hearing space in London and access to carefully selected hearing venues in Belfast, Cardiff and Edinburgh.

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

28. Before making a decision that a hearing should take place outside one of the HCPTS's hearing venues in London, Belfast, Cardiff or Edinburgh, the Panel should consider whether any issues identified could be better addressed by directing that all or part of the hearing should be held remotely, or that a hybrid hearing should be held.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Interim Orders

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

Introduction

1. The HCPC has the power to apply to a Panel of any of the three Practice Committees for an interim order to be imposed on registrants.

2. The purpose of an interim order is to put in place interim safeguards to protect the public interest, including the protection of the public, whilst concerns about a registrant's fitness to practise remain unresolved.

3. Accordingly, an interim order is a temporary measure that will restrict the registrant's ability to practice and will usually apply until a final decision is made in relation to an allegation (including on any appeal), or it is revoked.

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

Considering an Application for an Interim Order

5. When considering an application for an Interim Order a Panel should consider the following in sequence: Basis; Grounds; Nature; Duration.

Basis for an Interim Order

6. First, the Panel must be satisfied that, on the face of the information presented, there is sufficient evidence of a case against the registrant.

7. A Panel considering an interim order can't make findings of fact and does not have to decide whether there is a 'case to answer'. In order to take action the Panel only needs to be satisfied there's sufficient evidence to support the concern, even though this may later be disproved.

8. The Panel should consider the nature and cogency of the evidence. This means looking at both the evidence that supports a particular fact or version of events, and any evidence that contradicts or undermines it.

9. When considering the nature of the evidence, there is no requirement for the Panel to receive oral or formal evidence from witnesses before making an interim order[1].

10. When assessing the overall cogency of the evidence, the Panel will need to consider a number of factors, including:

    a. The source of the evidence. Direct evidence is likely to be more reliable than information from an indirect or unknown source. If evidence is disputed, it is unlikely to be fair to rely on anonymous or multiple hearsay as the only basis for imposing an interim order.

    b. Whether the evidence is sufficiently clear for the registrant and Panel to be able to understand the concern.

    c. The consistency of the evidence. Although the Panel can't make a decision on the facts of any disputed allegation, it should not rely on evidence which is inconsistent with objective or undisputed evidence.

11. Where the referral concerns an allegation of criminal offending, a criminal charge is likely to provide sufficiently cogent evidence of a concern[2]. However, this is not the only basis for concluding that there is sufficiently cogent evidence of a concern in a case involving an allegation of criminal offending. All of the information available, and the factors set out above, must be considered.

Grounds for an Interim Order

12. If the Panel is satisfied that there is enough evidence to make out a concern, they should go on to consider whether one or more of the three grounds for imposing an interim order applies. These are[3]:

    a. It is necessary for the protection of members of the public; and/or
    b. It is otherwise in the public interest; and/or
    c. It is in the interests of the registrant concerned.

13. For an interim order to be necessary for the protection of the public, the Panel must be satisfied that there is a real risk to patients, colleagues or other members of the public if an order is not made.

14. The factors which are especially important to this consideration are:

[1] Perry v NMC [2013] EWCA Civ 145
[2] Fallon v Horseracing Regulatory Authority [2006] EWHC 2030.
[3] Health Professions Order 2001 Article 31(2)

a. The seriousness of the regulatory concern. This will depend on how much harm the alleged conduct has already caused, or could have caused.

b. The likelihood of the alleged conduct being repeated if an interim order were not imposed.

15. Each case will be considered on its own facts. There may be other relevant factors the Panel needs to consider in a particular case to decide whether to make an interim order on public protection grounds.

16. Interim orders solely on the ground that an order is otherwise in the public interest are relatively rare. The threshold for the imposition of an order solely on this ground is high. In *R (Shiekh) v General Dental Council*[4], the court said:

"It is a very serious thing indeed for a dentist or a doctor to be suspended. It is serious in many cases just because of the impact on that person's right to earn a living. It is serious in all cases because of the detriment to him in reputational terms. Accordingly, it is, in my view, likely to be a relatively rare case where a suspension order will be made on an interim basis on the ground that it is in the public interest."

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17. In *NH v GMC*[5], the court upheld a decision to impose an interim order on a registrant who was awaiting trial for allegedly assaulting and falsely imprisoning his younger sister for bringing 'dishonour' on their family. 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?"

18. The mere fact that an informed member of the public would be "concerned" if the registrant was allowed to practice without restriction during the investigation is not sufficient to justify an interim order on public interest grounds. In *Nursing and Midwifery Council v Persand*[6], the court said:

"… an order on public interest grounds is only justifiable in a relatively rare case. There must be something in the evidence of the individual case which far more substantial than anything arising here to justify a public interest suspension. That must be far more than a concern that a hypothetical member of the public might have a concern if no interim sanction was imposed."

[4] [2007] EWHC 2972 (Admin)
[5] [2016] EWHC 2348 (Admin)
[6] [2023] EWHC 3356 (Admin)

19. The court said that the onus is on the regulator to show that it is necessary for an interim order to be imposed, and that the test is:

    "Something close to saying that an interim order is essential, in the sense that a responsible regulator would not be acting properly in failing to act on a proven risk to the public".

20. When considering whether an interim order is in the interests of the registrant, the Panel will often be concerned with evidence suggesting that the registrant's work is adversely affecting their health and there is the potential for this to impact on their ability to practice safely.

21. There are particular considerations that apply in a case where a Panel is considering whether it may be necessary to impose conditions restricting the registrant's right to freedom of expression because the registrant is alleged to have published harmful material. Before imposing such an interim order, as well as being satisfied that at least one of the statutory grounds for an interim order is met, the Panel must also be satisfied that at a final hearing, the HCPC is likely to establish that publication of the material should not be allowed.[7]

Nature of the Interim Order

22. If a Panel determines that it is appropriate to make an interim order, it must then decide whether to make:

    a. An interim conditions of practice order, or
    b. An interim suspension order.

23. A Panel should always consider whether a conditions of practice order would be the more proportionate means of securing the degree of protection which the Panel considers necessary.

24. When considering the imposition of conditions the Panel must ensure that any conditions imposed are proportionate, workable, enforceable and will protect the public, the wider public interest or the registrant's own interest.

25. 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, etc. An interim conditions of practice order may also specify supervision requirements, including a requirement to provide regular reports from the supervisor to any Panel reviewing the order.

[7] *White v General Medical Council* [2021] EWHC 3286 (Admin)

26. Normally, a Panel should not impose conditions of a kind which may be more 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.

27. An interim suspension order should be imposed only if the Panel considers that a conditions of practice order would be inadequate to protect the public, the wider public interest or the registrant's own interest.

Duration

28. The Panel must determine the duration of the interim order. They cannot exceed 18 months.

29. Panels should not regard 18 months as the ‘default’ position: an interim order should be imposed only for as long as the Panel considers it to be necessary.

30. In reaching its decision on duration, the Panel should be aware that a reviewing Panel can vary or revoke the interim order, but cannot extend it.

Proportionality

31. The decision to make an interim order is one that must not be taken lightly and will depend upon the circumstances in each case.

32. 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 that the Panel is seeking to address. This includes the financial and other impacts which an interim order may have on a registrant.

Procedure

When Interim Orders may be applied for

33. The HCPC may apply for an interim order to a Panel of HCPC’s Practice Committees at any stage between being first notified of a concern about a registrant up to immediately after a sanction is imposed, although there are limitations.

34. The HCPC can apply to the Investigating Committee for an interim order at any time (subject to notice requirement - see below) between first notification of the matter received by the HCPC up to the moment the Investigating Committee determines whether or not to refer the case to

the Conduct and Competence or Health Committee. A separate Investigating Committee Panel will be arranged to hear the application.

35. The HCPC may also apply for an interim order when the Investigating Committee 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.

36. The HCPC may apply to the Conduct and Competence or Health Committee (as appropriate and on notice – see below) for an interim order at any time between the Investigating Committee referring the case to the relevant Practice Committee and that Committee making a determination on impairment. Any such application will be made to a panel arranged specifically to hear the application or the final hearing Panel if it has met.

37. The HCPC may apply to the Conduct and Competence or Health Committee for an interim order after a Panel has determined to impose a sanction. Further guidance is given below.

Notice of Interim Order Hearing

38. As the need for an interim order may arise as a matter of urgency, the usual notice period that applies to other proceedings such as final hearings do not apply.

39. No interim order can be applied for, and no existing interim order can be varied or replaced on a review, unless the registrant "*has been afforded an opportunity of appearing before the Committee and being heard"* on whether an interim order should be granted.[8]

40. Article 31 does not set out specific notice requirements for interim order application or review hearings, and the notice requirements in the Panel rules[9] for other types of hearing do not apply to them.

41. Ordinarily, the HCPC will provide registrants with seven days' notice of an application for an interim order. In exceptional circumstances, such as when the concerns are particularly serious or raise urgent public protection needs, the notice period may be substantially less, provided the registrant is afforded the opportunity of appearing and being heard. Usually, the HCPC informs the registrant of its intention to seek an interim order before serving formal notice of the application.

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[8] Article 31(15) of the Health Professions Order 2001.

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

42. The HCPC will send notice by email and/or by post to the registrant's registered address. It may also attempt to correspond with them at any other known address if this can reasonably be done and appears likely to be effective at bringing the matter to the registrant's attention. In considering what is reasonable, the HCPC will have regard to data security and its duty to comply with the General Data Protection Regulation. It will not be reasonable for the HCPC to send personal data to addresses on a speculative basis, without having good grounds to believe that by doing so the data will reach the intended recipient and be secure.

43. The sending of a Notice of Interim Order Hearing to a registrant's email address (where one has been notified to the HCPC) or their registered address provides registrants with an opportunity of attending and being heard. Registrants are under an obligation to notify the HCPC of changes to their registered address[10], and generally to engage with their regulator[11]. For more information about proceeding in absence, see the separate guidance relating to final and review hearings.

44. The HCPC is under no obligation to seek out alternative addresses for the registrant, but may make reasonable enquiries where there is good reason to do so, and this would not unreasonably delay matters. For instance, when the HCPC has been informed that a registrant has been sentenced to a term of imprisonment, it may seek to establish their location in order to serve notice on them in prison, as well as via email and/or their registered address. However, as interim orders impose restrictions necessary for the protection of the public, otherwise in the public interest, or in the registrant's own interest, it is important that consideration is not delayed pending receipt of information about the registrant's location from a third party. Imprisonment does not remove the obligation on a registrant to inform the HCPC about a change to their registered address (although it may make it more difficult to comply with that obligation).

Proceeding in the absence of the registrant, attendance from abroad, and applications to adjourn

45. The absence of the registrant does not preclude the proceedings from taking place, provided he or she has been offered the opportunity of attending. In the event that the registrant does not attend, the HCPC may make an application to proceed in the absence of the registrant. There is separate guidance regarding applications to proceed in absence relating to final and review hearings. The same/similar principles apply in relation to interim order proceedings, with the added factor being the urgent need to consider if an interim order is required.

[10] Rule 9(1) of The Health and Care Professions Council (Registration and Fees) Rules 2003 (as amended)
[11] *GMC v Adeogba* [2016] EWCA Civ 162

These are separate proceedings held solely to consider the risk presented by a registrant's practice, rather than to make findings of fact in relation to a particular allegation. Given this, it will usually be appropriate for a Panel to proceed with an interim order application or review hearing in the registrant's absence if they fail to attend, provided that the registrant has been given an opportunity to be heard. In considering whether to exercise its discretion to proceed in the absence of a registrant, the Panel can have regard to the fact that if an interim order is made, confirmed or varied, it is then subject to regular review and may be reviewed at any time where relevant new evidence becomes available.

46. Sometimes, registrants attend remote interim order hearings from outside the UK. When this happens, there may be legal restrictions on them giving oral evidence during the course of the hearing[12]. This should not prevent the interim order hearing from proceeding, provided that it is fair to do so. There is no absolute right to give oral evidence at an interim order hearing. As noted above, the legislation requires that the registrant be afforded an opportunity to appear before the Committee and be heard. The registrant is able to make oral submissions, and will also be able to rely on written evidence. The notice of interim order hearing will have notified the registrant about the potential restrictions on giving evidence from abroad and the alternative ways in which they may be heard.

47. Applications by registrants to adjourn will normally be considered by the Panel on the day. Due to the urgent nature of the risks, applications to adjourn should be granted only in the most compelling circumstances. Panels will decide the application based on the information available. If an interim order is made it is then subject to regular review. A registrant has the right to ask for a review of an interim order at any time outside the scheduled regular review cycle. Therefore, where an interim order has been imposed in the absence of a registrant, the registrant may ask for the interim order to be reviewed should they wish later to appear before the Panel.

Interim orders imposed at final hearings after a sanction has been imposed

48. Once a final hearing Panel reaches a final decision in respect of the substantive allegation (which includes the imposition of any sanction following a finding of impairment), any pre-existing interim order terminates[13]. The Registrant will then not be subject to any practice restrictions until a restrictive sanction order is made and comes into effect, unless an interim order is imposed. A sanction order will not come into effect until either (a) the expiry of the appeal period (28 days from

[12] For more information about this, please see the HCPTS briefing note on giving evidence from abroad
[13] Article 31(5) (a) of the Health Professions Order 2001

service of the determination[14]), or if there is an appeal, (b) the determination of that appeal[15].

49. In cases when the sanction is restrictive, namely a Striking Off Order, a Suspension Order, or a Conditions of Practice Order, the HCPC may apply immediately after a sanction is declared for an interim order to restrict the registrant's practice during the appeal period and any subsequent appeal proceedings up to the maximum of 18 months (and thereafter subject to the HCPC making an application to the High Court / Court of Session.)

50. If present at the final hearing, the registrant must be given the opportunity of making representations regarding the application for an interim order. If registrants are taken by surprise by the application for an interim order they may be incapable of formulating meaningful submissions, especially if they are unrepresented. This issue was considered in the case of *Gupta v GMC.*[16] The court held that, in view of the potentially severe consequences of interim orders for registrants, the common law principle of fairness requires panels to give registrants notice of any intention to consider an interim order so that they have an opportunity to make meaningful representations.

51. Panels should therefore specifically warn the registrant after the impairment stage that an interim order might be considered at the final hearing, and that they will be entitled to make representations in relation to it.

52. If the registrant is absent, the HCPC will first have to make, and the Panel will have to determine, an application to proceed in the registrant's absence. The HCPC will need to show that the registrant has been given notice that an application for an interim order to cover the appeal period may be made. Such notice may be contained within the Notice of Final Hearing. As before, the overriding statutory objective of protecting the public and the wider public interest will weigh heavily in favour of an application proceeding in absence, particularly when the Panel has made a finding that fitness to practise is impaired.

53. Thereafter, the considerations to be given to an interim order are as set out above with regards to grounds, nature of the order and duration, and the factors to consider, along with the additional factor that the Panel will have made a finding of impairment and decided that a restrictive sanction is required.

Reasons

[14] Article 29(10) of the Health Professions Order 2001
[15] Article 29(11) of the Health Professions Order 2001
[16] [2001] EWHC Admin 631

54. 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.

55. Panels need to conduct a balancing exercise, balancing the need for protecting the public or registrant, or the public interest generally, against the other consequences that an interim order would have on a registrant, and to consider whether the consequences of making the order are proportionate to the risk from which they are seeking to protect the public (or registrant for their own protection)

Multiple Referrals

56. There can only ever be one interim order in place at any one time. Therefore, where a registrant is the subject of two or more referrals, or where further concerns are raised about a registrant who is already subject to an interim order, the Panel must consider the information about all of the referrals. This is so that consideration of an interim order application or review can be carried out by a Panel with all relevant material being available

Review, variation, revocation and replacement

57. 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[17].

58. A registrant may also ask the HCPC for an interim order to be reviewed at any time if new information becomes available or circumstances change[18]. A registrant may also appeal to the appropriate court for the order to be varied or revoked[19].

59. At a review, an interim order may be confirmed, varied, revoked, or replaced[20]. 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[21].

60. 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

[17] Article 31(6) (a) of the Health Professions Order 2001
[18] Article 31(6) (b) of the Health Professions Order 2001
[19] Article 31(12) of the Health Professions Order 2001
[20] Article 31(7) of the Health Professions Order 2001
[21] Article 31(11) of the Health Professions Order 2001

have expired (including any time by which the order was extended by a court).

61. The HCPC may apply to the appropriate court to extend an interim order for up to twelve months[22]. Registrants will be put on notice of any such application.

62. When an interim order is imposed in the absence of a registrant, or despite an application to adjourn, the registrant can apply for the interim order to be reviewed. This will often be a significant factor in support of a decision to proceed with an interim order hearing despite the registrant's absence or application to adjourn.

63. Reviews of orders can take place without a hearing and upon review of the papers only. This may be appropriate when there is agreement between the parties as to the outcome of the review or if a registrant is not engaging and there has been no material change in circumstances. Whether a review on the papers is appropriate will be considered on a case by case basis. The usual requirements of notice, proceeding in absence and establishment of grounds for an order continue to apply.

Terminating an interim order

64. Interim orders can be brought to an end in three ways[23]:

    a. By the court, on the application of the person who is subject to the order;

    b. By the Practice Committee currently dealing with the allegation to which the interim order relates; or

    c. Automatically, when it lapses or the circumstances under which the order was made no longer exist:

        i. 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

        ii. 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.

[22] Article 31(9) of the Health Professions Order 2001
[23] Article 31(5) of the Health Professions Order 2001

Health and Care Professions Tribunal Service

PRACTICE NOTE

Joinder

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

Introduction

1. The Panel rules[1] provide that, where it would be just to do so, a Panel may consider and determine together:
    a. two or more allegations against the same registrant; or
    b. allegations against two or more registrants.

Joining allegations

2. 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.

3. 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]
    a. 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;
    b. 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:
        i. of the same or a similar character;
        ii. based on the same acts, events or course of dealing; or

[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.

iii. based on connected or related acts, events or courses of dealing.

c. as a general principle, it would be inappropriate for a Panel to join unconnected allegations against several registrants;

d. 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:

i. the allegations concern participation in the same act, event or course of dealing (or any series of them);

ii. the allegations are based upon connected or related acts, events or courses of dealing; or

iii. the allegations relate to actions taken in furtherance of a common enterprise.

e. 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

4. 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..."

5. 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]."

[3] [2013] EWHC 1036 (Admin)

[4] [1991] 2 AC 182

6. 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..."

Evidence management

7. 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.

8. 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

9. 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.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Making decisions on a registrant's state of mind

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

Introduction

1. This practice note provides guidance on how Panels should approach decisions that require findings about a registrant's state of mind or motivation at the time of alleged conduct. This most commonly arises in relation to alleged dishonesty, sexually motivated conduct and cases in which it is alleged that the registrant's conduct was racially motivated. The principles of this practice note will apply to any other allegations where state of mind is being alleged.

2. Allegations of dishonesty, racial motivation or sexual motivation must be expressly set out in the allegation if justified on the facts. If the Panel considers that dishonesty, racial motivation or sexual motivation may form part of the case to be considered, and this has not been alleged, the Panel should consider whether there is a risk of under prosecution. If so, the Panel may invite submissions from both parties on amending the allegation.

3. Panels should make findings about what happened before determining the registrant's state of mind or motivation at the time of the behaviour in question. The findings about what happened will form an important part of the evidence to be examined when determining the registrant's state of mind or motivation.

Evidence and the standard of proof

4. The question of what a person's state of mind was is a question of fact. Panels must decide questions about a person's state of mind on the usual civil standard of proof (the balance of probabilities).

5. The state of a person's mind is not something that can be proved by direct observation. A person's state of mind can only be proved by inference or deduction from the surrounding evidence.[1]

[1]. Basson v GMC [2018] EWHC 505 (Admin), para 17

6. Panels must examine all the evidence and the circumstances, including the facts, the history, the registrant's explanation and any evidence as to character[2], and then consider whether the alleged state of mind can reasonably be inferred from the evidence.

Dishonesty

7. When making decisions involving alleged dishonesty, Panels will need to determine whether the registrant acted as an honest person would have acted in the circumstances. This means asking two questions[3]:

a) What did the registrant know or believe as to the facts and circumstances in which the alleged dishonesty arose?

i. Although this list is not exhaustive, in determining what the Registrant knew or believed as to the facts and circumstances in which the alleged dishonesty arose, Panels should consider the following factors:

a. Any surrounding evidence speaking to what the registrant knew or believed about what they were doing, for instance, what they said about it, what they have been told about it, what information was available to them, and what they recorded about it;
b. Any evidence relating to what was expected of the registrant in the particular circumstances;
c. Any evidence relating to the registrant's understanding of the wider context, for example, any rules or practices in the workplace, any individual requirements of the service user and so on;
d. Any subsequent account given by the registrant as to what they knew or believed, and the credibility of that account.

ii. When assessing the registrant's understanding of the circumstances (and in particular, the credibility of their account of what they knew or believed), evidence of good character, including testimonials, can be considered.[4]

b) Given the registrant's knowledge and belief of the circumstances they were in, was the registrant's conduct dishonest by the standards of an "ordinary decent person"?

[2] Arunkalaivanan v GMC [2014] EWHC 873 (Admin), paras 52, 62

[3] Ivey v Genting Casinos (UK) Ltd [2017] UKSC 67, para 74; Raychaudhuri v GMC [2018] EWCA Civ 2027, para 54

[4] Bryant and Bench v SRA [2007] EWHC 3043, paras 159-162

i. Panels should ask themselves whether, taking account of the registrant's understanding of the circumstances, an ordinary decent person would find the conduct to be dishonest. This is purely an objective test. The registrant's own standards of honesty are irrelevant here; they are held to the standards of society in general.

Sexual Motivation

8. In determining sexual motivation, Panels must decide whether the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship.[5]

9. Although this list is not exhaustive, in determining sexual motivation, Panels should consider the following factors:

    a. The character of the conduct (i.e. is it overtly sexual, e.g. the touching of sexual organs);
    b. The clinical appropriateness of the conduct;
    c. The clinical justification or lack thereof for the conduct;
    d. Any evidence regarding consent; and
    e. The plausibility of any alternative explanation for the conduct.

10. The best evidence of a registrant's motivation is their behaviour.[6] If the conduct is overtly sexual in nature, the absence of a plausible, innocent explanation for the conduct will invariably result in a finding of sexual motivation.[7]

11. Panels must take a broad view by putting all of the circumstances into the balance and then coming to a conclusion, on the balance of probabilities, as to whether the registrant had the alleged motivation.[8] Panels should nonetheless be cautious as to what weight, if any, to give to the existence or otherwise of factors such as:

    a. that there were lots of patients waiting to see the registrant at the time of the conduct;
    b. that the room where the alleged conduct took place was not locked;
    c. that the registrant did not ask the patient to undress;
    d. that no complaint was made about the registrant;
    e. that the registrant did not suggest they were sexually attracted to the patient, and so on.

[5] Basson v GMC [2018] EWHC 505 (Admin), para 14

[6] Haris v GMC [2021] EWCA Civ 763, para 37

[7] Haris v GMC [2021] EWCA Civ 763, paras 51, 58

[8] Arunkalaivanan v GMC [2014] EWHC 873 (Admin), para 66

12. For example, while locking a treatment room door might provide some evidence in support of a finding of sexual motivation, its absence does not necessarily negate such a finding.[9]

13. Consideration should be given to the vulnerability of the patient or victim and whether the registrant was aware of the vulnerability. If a Panel considers that a victim's vulnerability may have formed part of the registrant's motivation for the alleged conduct (i.e. they may have been targeted *because* they were vulnerable) it should invite submissions from both parties on amending the allegation to include this as a factual allegation.[10]

14. In some cases, the allegation may have been drafted as the registrant's conduct being "sexual in nature" rather than "sexually motivated". In these cases, Panels should not make a finding on what the registrant's state of mind was in relation to the conduct, only whether the conduct was, in itself, sexual in nature. Panels will be assisted in considering the test for a criminal offence of sexual assault, for instance, whether the conduct was:

    a. an act which was, whatever the circumstances, sexual; For instance, this could include the deliberate touching of the complainant's genitalia in circumstances where there was no clinical justification for it; or

    b. an act that because of its nature may be sexual, and because of the circumstances is sexual[11]. An example of this might be where a registrant sends a text message to a complainant which is capable of being read in different ways, one of which is sexual, and the circumstances suggest that the registrant intended it to be read in that way.

Racial motivation

15. The HCPC may allege that a registrant's conduct is '*racist'* or *'racially motivated*'. In cases where a panel is considering whether words used are *'racist'*, the intention of the registrant is irrelevant to whether or not the conduct was racist. The panel must simply determine, as a question of objective fact, whether the conduct was or was not racist.

16. If a panel is considering a case in which it is alleged that the registrant's conduct is *'racially motivated',* the panel must investigate the context and intention to determine whether or not 'racial motivation' is established. In Lambert Simpson v HCPC (2023) EWHC 481 (Admin), the High Court ruled that conduct will be racially motivated when (i) the act in question…had a purpose behind it which at least in significant part was referable to race and (ii) the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group'.

[9] Raza v GMC [2011] EWHC 790 (Admin), para 34

[10] PSA v HCPC and Wood [2019] EWHC 2819 (Admin), para 64

[11] s78 Sexual Offences Act 2003

17. In these cases, panels must therefore firstly decide whether the registrant's alleged words or conduct are proved on the balance of probabilities. If they are, then the panel should consider whether the conduct was racially motivated by applying the approach and test set out in paragraph 16 above.

State of mind relating to other allegations of discrimination

18. It may be alleged that a registrant's conduct is motivated by other discriminatory behaviour, for example regarding protected characteristics. Protected characteristics include age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

19. In such cases, panels should adopt the same approach to their decision making as set out above. This means that they should consider the facts alleged first. Then, depending on how the allegation is framed, consider if the proven facts demonstrate discriminatory behaviour and/or conduct motivated by discrimination.

Setting out decisions in state of mind cases

20. Panels are referred to the Practice Note on Drafting Fitness to Practise Decisions.

21. When setting out their decision on the facts in a state of mind case, Panels should:

    a. State the test to be applied – e.g. *Ivey* (dishonesty); *Basson/Haris* (sexual motivation); *Lambert-Simpson (racial motivation).*
    b. State the conclusion for each limb of the relevant test; and
    c. Explain the reasoning for those conclusions, including a brief analysis of the most relevant facts.

22. When making their decision on sanction Panels should have regard to any particularly relevant sections of the Sanctions Policy[12], including the following sections:

    a. Dishonesty – paragraphs 56-58

    b. Abuse of Professional Position – paragraphs 67-75 (see sections relating to Predatory Behaviour pp71-72 and Vulnerability pp73-75)

    c. Sexual Misconduct – paragraphs 76-79

[12] As updated

d. Discrimination (paragraphs 63-66)

23. When setting out their decision, Panels must explain how they have applied the Sanctions Policy, and must take particular care to explain any deviation from it.

Health and Care Professions Tribunal Service

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

1. The Health Professions Order 2001 provides that, in relation to a fitness to practise allegation:
    a. 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
    b. 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

2. 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.

3. 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.

[1] Article 26(6)
[2] Article 29(4)
[3] Article 3(4), Health Profession Order 2001.

4. 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:
    a. protect service users;
    b. declare and uphold proper standards of behaviour; and
    c. maintain public confidence in the profession.

A consensual process

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

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

What is mediation?

11. 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.

12. Mediation involves use of a common-sense approach which:

[4] [2008] EWHC 581 (Admin)

a. gives the parties an opportunity to step back and think about how they could put the situation right; and

b. enables participants to come up with their own practical solution which will benefit all sides.

13. 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.

14. 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?

15. 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.

16. 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?

17. 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:

    a. the mediator will explain the structure of the meeting and ask the parties to agree to some basic rules, such as listening without interrupting;

    b. 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;

    c. 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;

    d. the agreement is then recorded and signed by both parties and the mediator.

18. 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

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

20. 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.

21. 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

22. 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:

    a. involve low levels of impairment where the Panel feels that no sanction needs to be imposed;

    b. 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;

    c. 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;

    d. are about management or contractual arrangements between practitioners, where there is no evidence to suggest any impropriety;

    e. involve poor communication, but which is insufficient to suggest that any service user has been put at risk or compromised.

Unsuitable Cases

23. 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:

    a. serious misconduct;

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

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 Tribunal Service

PRACTICE NOTE

Mixed Allegations

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

Introduction

1. This Practice Note provides an overview of the HCPC's approach to mixed allegations and the relevant factors to consider. It should be read in conjunction with the HCPTS Practice Notes: Case to Answer, Drafting Decisions, FTP Impairment and Health Concerns.

Background

2. Sometimes, concerns are raised about a registrant which suggest that their fitness to practise is impaired by reason of their health as well as one or more of the other statutory grounds[1], such as conviction and/or misconduct. These are referred to by the HCPC as "mixed allegation" cases.

3. Mixed allegation cases can arise in different factual circumstances, for example:

    a. where the facts said to give rise to impairment on the grounds of health are the same as the facts said to give rise to impairment on another ground(s), such as misconduct/lack of competence/conviction, etc.

    b. where the facts said to give rise to impairment on the grounds of misconduct/ lack of competence/conviction, etc are different to the facts said to give rise to impairment on the grounds of health. This may be the case where the registrant has become ill after the events in question and the illness was not in existence at the time of the misconduct/lack of competence/conviction, etc.

[1] The statutory grounds are set out in Article 22(1)(a) of the Health Professions Order 2001

4. The HCPC's legislation is not entirely clear as to how mixed allegation cases should be dealt with. It says that[2]:

    a. where the Investigating Committee (IC) considers that there is a case to answer in respect of an allegation of impairment by reason of health, it shall refer that allegation to the Health Committee (HC)

    b. where the IC considers that there is a case to answer in respect of an allegation of impairment by reason of one of the other statutory grounds, it shall refer that allegation to the Conduct and Competence Committee (CCC)

5. It does not say what the IC should do in a mixed allegation case.

6. This Practice Note sets out the HCPC's approach to mixed allegations, and provides guidance on how HCPTS panels should deal with them.

7. In formulating its approach, the HCPC has had regard to:

    a. Its statutory objective to protect the public[3]

    b. Its duty to conduct each stage of the fitness to practise process expeditiously[4]

    c. The wording of its legislation. In particular, that the legislation provides that:

        i. The HC has no jurisdiction to find proven an allegation of impairment on any of the statutory grounds other than health, and the CCC has no jurisdiction to find proven an allegation of impairment on the grounds of health.

        ii. The HC does have jurisdiction to receive/consider an allegation of impairment on one of the statutory grounds other than health, and if necessary, refer that allegation to the CCC[5]. Similarly, the CCC has jurisdiction to receive/consider an allegation of impairment on the grounds of health, and if necessary, refer that allegation to the HC[6].

[2] Article 26(6) of the Health Professions Order 2001

[3] Article 3(4) and (4A) of the Health Professions Order 2001

[4] Article 32(3) of the Health Professions Order 2001

[5] Rule 4 of the Health and Care Professions Council (Health Committee) (Procedure) Rules 2003

[6] Rule 4 of the Health and Care Professions Council (Conduct and Competence Committee (Procedure) Rules 2003

d. That the HCPC is a creature of statute and possesses no inherent jurisdiction[7]. However, the powers of the HCPC or its panels are not limited to powers expressly given in its legislation, because powers can be implied[8].

How should mixed allegations be dealt with at the Investigating Committee Panel (ICP) stage?

8. If, having investigated concerns about a registrant that relate both to health and another statutory ground or grounds of impairment, the HCPC is satisfied that the threshold test is met, the HCPC will request that an assessment is made at an IC Panel (ICP) of each statutory ground.

9. Panels should undertake a careful case by case analysis of these cases.

10. When making its decision, it is very important that the Panel should address each of the numbered particulars in the allegation.

11. Where the numbered particular alleges a fact, the Panel should determine:

12. Whether the evidence is sufficient to establish a case to answer on that fact.

13. If so, which of the grounds of impairment alleged that fact supports.

14. It is possible for a fact to support more than one ground of impairment. For instance, a particular alleging that the registrant attended work while intoxicated may support an allegation of impairment by misconduct and/or health. Equally, a conviction for stealing medication from the workplace could, in some instances, support a finding of impairment by reason of health (if the theft is caused by addiction), as well as a finding of impairment by conviction.

15. In contrast, a particular that a registrant assaulted a patient at a time when they were not suffering from a health condition, but subsequently developed a health condition, would not support an allegation of impairment by reason of ill-health.

16. The ICP should go on to consider whether, in light of the factual allegations on which there is a case to answer, there is a case to answer in respect of impairment on the basis of each of the statutory grounds alleged.

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[7] *R (Ireland) v HCPC* [2015] 1 WLR 4643 at [22]

[8] See Longmore LJ in the Court of Appeal in *R (Hill) v Institute of Chartered Accountants* [2014] 1 WLR 86 at [13] "… *I agree with Stanley Burnton LJ in Virdi v Law Society [2010] 1 WLR 2840, paras 28—31, that when one is dealing with byelaws and regulations of professional disciplinary bodies one cannot expect every contingency to be foreseen and provided for. The right question to ask of any procedure adopted should therefore be not whether it is permitted but whether it is prohibited. If one asks that question in this case after rejecting any application of the expressio unius principle, the answer is that the procedure adopted is not prohibited. It must, of course, still be fair and that to my mind is the critical issue in this appeal*."

17. The ICP may decide that:

    a. There is no case to answer on impairment by reason of any of the statutory grounds. In this situation, it will not refer the allegation on for further consideration.

    b. There is no case to answer on impairment by reason of one or more of the statutory grounds contained within the allegation, but there is a case to answer on impairment on another one or more of the statutory grounds alleged. In this situation, it will not refer the statutory ground on which there is no case to answer for further consideration.

    c. Where there is a case to answer on impairment on just one of the statutory grounds, it will refer the allegation to the HC (if that statutory ground is health), or to the CCC (if that statutory ground is anything other than health).

    d. Where there is a case to answer on impairment on one or more of the statutory grounds including health, it will need to consider which Practice Committee to refer the allegation to.

18. If the allegation is one which may result in a striking off order (taking account of the alleged facts and circumstances), it should be referred to the CCC.

19. If the allegation is not one that would result in a striking off order, the ICP should decide whether the allegation would be better dealt with by the CCC or by the HC, taking account of the nature of the allegation and evidence, and the procedural rules for the CCC and HC.

20. The ICP must give reasons explaining its decision about which Practice Committee it has referred the allegation to.

How should these allegations be dealt with at the final hearing stage?

<u>The matters that the Panel will determine</u>

21. At a final hearing involving a mixed allegation, there will be two or more statutory grounds before the Panel:

    a. The statutory ground(s) that the Panel may determine. At an HC hearing, this will be the statutory ground of health. At a CCC hearing, this will be the statutory ground(s) of misconduct, lack of competence, conviction or caution, or a finding by another body.

    b. The statutory ground(s) that the Panel may not determine. At an HC hearing, this will be the statutory ground(s) of misconduct, lack of competence, conviction or caution, or a finding by another body. At a CCC hearing, this will be the statutory ground of health.

22. At the start of the hearing, the Panel should clearly identify which statutory ground(s) it may determine, and which numbered particular(s) it needs to make findings on as a result. It should make clear which statutory ground(s) it may not determine, and which numbered particular(s) it will not be making findings on as a result.

23. When making findings, the Panel must not seek to make findings on any numbered particular of allegation that do not relate to the statutory ground(s) it may determine, nor must it seek to make any finding on the statutory ground that it may not determine.

The HCPC's presentation of the case

24. The HCPC will present its case on the statutory ground(s) that the Panel may determine. This will include all of the particulars of fact on which the ICP found a case to answer which support that statutory ground(s). The HCPC may call any evidence which is admissible and relevant to those facts and the statutory ground(s) that the Panel may determine.

25. The HCPC may also make reference to the statutory ground(s) that the Panel may not determine (and the evidence relevant to it) in some limited circumstances, for instance:

    a. To allow the facts underpinning the statutory ground(s) that the Panel may not determine to be considered in mitigation; or

    b. To facilitate consideration of the powers available to the CCC and HC respectively to transfer matters to the other Practice Committee as necessary.

26. In advance of the hearing, the HCPC should make clear what evidence it is intending to rely on to prove the facts of the statutory ground(s) that the Practice Committee may determine. Where necessary, it should set out why the evidence it proposes to call is admissible. It should also make clear in advance if it proposes to make reference to the statutory ground(s) that the Panel may not determine, and if so, why.

27. In advance of the hearing, the HCPC should also make clear its position on what should happen to the allegation on the statutory ground(s) that the Panel may not determine (i.e. in what, if any, circumstances it should be discontinued and/or transferred to the other Practice Committee for resolution).

Dealing with the matters that the Panel may not determine

28. The Panel must consider carefully how the HCPC's overarching duty of public protection can be discharged on any given set of facts.

29. If it the Panel considers that this can best be done by making a finding on impairment on the basis of the statutory ground(s) that it may determine, and

going on to impose a sanction in respect of that finding where necessary, the Panel should hear the case before it to conclusion.

30. If the Panel finds that the allegation on the statutory ground(s) it may determine is well-founded, and imposes a striking off order, no further action is required.

31. If the Panel does not impose a striking off order, it should consider what action, if any, it should take on the remainder of the allegation which it was not entitled to determine. The Panel should consider this before announcing its decision on sanction, and reach a provisional view, subject to submissions from the parties. It should announce its provisional view after announcing sanction, and invite submissions from those parties present before making a final decision.

32. It may decide to:

    a. Transfer the allegation for it to be discontinued. This will be appropriate where the Panel considers that the finding it has made (including any sanction imposed) is sufficient to meet the public interest (including the need to protect members of the public, as well as declare and uphold standards and maintain public confidence), and the public interest does not require any further consideration or resolution of the statutory ground(s) that the Panel did not determine.

        i. Where the Panel has decided that the allegation it may not determine should be referred for discontinuance, the Panel should make the referral and then reconvene itself as a panel of the other committee, and make the decision to discontinue.

    b. Transfer for full consideration. This will be appropriate where the Panel considers that its finding on the statutory ground(s) it has determined may not be sufficient to meet the public interest, and resolution of the remainder of the allegation is required. This may occur if, for instance:

        i. The Panel concludes that the statutory ground(s) it may determine is not well founded, and the duty to protect the public requires a finding to be made on the statutory ground(s) that it may not determine; or

        ii. The Panel concludes that the statutory ground(s) it may determine is well founded, but on its own, only merits a sanction which would potentially not protect the public adequately, given the nature and seriousness of the allegation on the statutory ground(s) that it may not determine.

    In these circumstances, the Panel should exercise its power under the relevant Committee Procedure Rules 2003 to transfer the matter to the other Practice Committee. The other Practice Committee will then consider and determine the allegation of impairment by reason of the statutory ground(s) it may determine. Generally, information about the determination made by the Practice Committee which transferred the

matter to it will be relevant background information for it to consider, subject to the rules of admissibility.

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Health and Care Professions Tribunal Service

PRACTICE NOTE

Postponement and Adjournment of Proceedings

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

Introduction

1. 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.

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

Postponements and adjournments

3. In relation to fitness to practise proceedings, a distinction is made between:

    i. **Postponement**

    This is an administrative action that may be taken on behalf of a Panel[2]:

    a. at any time up to 28 days before the date on which a hearing is due to begin

    b. at any time within 28 days of the date on which a hearing is due to begin and/or after the Notice of Hearing has been sent **and** the parties agree that the hearing should not go ahead on the scheduled date.

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[1] Health Professions Order 2001, Art. 32(3)

[2] by the Operational Manager - Hearing or their nom

and

ii. **Adjournment**

Which is a decision for the Panel or the Panel Chair, taken at any time after that 28-day limit has passed and the parties do not agree that the hearing should not go ahead, or once the proceedings have begun or are part heard.

Postponements

4. An application for a postponement must be made in writing (by letter or email) to the Operational Manager - Hearings 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.

5. In considering postponement requests, the Operational Manager - Hearings will consider whether, in all the circumstances the request is reasonable, taking into account:
    a. the reasons for the request;
    b. the length of notice that was given for the hearing;
    c. the time remaining before the hearing is due to commence; and
    d. whether the case has previously been postponed.

6. When considering the reasonableness of the request, they should have regard to the impact of their decision on all parties, including the registrant, the HCPC, referrers, complainants, witnesses and other people with an interest in the matter. The fairness of the proceedings is paramount.

7. When considering the length of notice that was given for the hearing, the Operational Manager – Hearings may take into account the following factors:

    a. the method by which the notice was sent;

    b. any other steps taken by the HCPC to bring the hearing to the attention of the registrant and/or their representative;

    c. the date on which notice would be deemed to be have been served under the Civil Procedure Rules, as set out at Annexe A. While the Civil Procedure Rules do not apply to HCPTS proceedings, they provide a useful benchmark; and

    d. the date on which notice was received by the registrant and/or their representative.

8. 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

9. 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.

10. 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.

11. 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.

12. 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]:

    a. the general need for expedition in the conduct of proceedings;

    b. where an adjournment is sought by the HCPC, the interest of the registrant in having the matter dealt with balanced with the public interest;

    c. 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;

    d. the likely consequences of the proposed adjournment, in particular its likely length and the need to decide the facts while recollections are fresh;

    e. 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; and

    f. the history of the case, and whether there have been earlier adjournments, at whose request and why.

13. The factors to be considered cannot be comprehensively stated but will depend

[3] (2006) EWHC 1108

upon the particular circumstances of each case, and they will often overlap.

14. 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

15. 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 issue Directions for this purpose.

Communication

16. 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

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

18. 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.

Annexe A: Civil procedure rules on deemed service[4]

Method of service	Deemed day of service
First class post (or other service which provides for delivery on the next business day)	• The second day after it was posted, left with, delivered to or collected by the relevant service provider provided that day is a business day; or • If not, the next business day after that
Document exchange	• The second day after it was left with, delivered to or collected by the relevant service provider provided that day is a business day; or If not, the next business day after that day.
Delivering the document to or leaving it at a permitted address	• If it is delivered to or left at the permitted address on a business day before 4.30pm, on that day; or • In any other case, on the next business day after that day.
Other electronic method	• If the email or other electronic transmission is sent on a business day before 4.30pm, on that day; or • In any other case, on the next business day after the day on which it was sent.
Personal Service	• If the document is served personally before 4.30pm on a business day, on that day; or • In any other case, on the next business day after that day.

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.

[4] CPR 6.26

Health and Care Professions Tribunal Service

PRACTICE NOTE

Proceeding in the Absence of the Registrant

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

Introduction

1. This practice note primarily applies to final and review hearings for registrants who are subject to a fitness to practise allegation. Separate guidance is available specifically for interim order hearings.

2. 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 and that it is fair to do so in the circumstances of the case.

3. 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, ensuring that there is adequate focus on public protection. Fairness to the registrant is of prime importance, but the overarching statutory objective of regulation is to protect the public.

4. Where a registrant does not attend a hearing and asks the Panel to adjourn, the Panel should have regard to the Practice Note on Postponements and Adjournments.

Notice of proceedings

5. The first issue to be addressed is whether notice of the proceedings has been served on the registrant in accordance with the Panel Rules. The Panel rules

[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.

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 *GMC v Adeogba*:[2]

"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]

6. The decision in *Adeogba* makes clear that, in terms of service, the HCPC's only obligation is to communicate using the address given by the registrant, as it appears in the register.

7. When deciding if the notice has served in accordance with the Panel Rules, the Panel should not have regard to any further efforts that could have been made by the HCPC to bring the notice to the registrant's attention. These are not required under the Panel Rules.

Deciding whether to proceed in absence

8. 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.

9. At this stage, the Panel may have regard to any steps that were taken by the HCPC to bring the notice to the registrant's attention, or any such steps that could reasonably and proportionately have been taken. Where a registrant is known not to be residing at their address in the register, the Panel may have regards to any efforts made by the HCPC to find out their address, provide notice of the hearing to that address, and/or otherwise communicate with the Registrant about the hearing.

10. It may also attempt to correspond with them at any other known address if this can reasonably be done and appears likely to be effective at bringing the matter to the registrant's attention. In considering what is reasonable, the HCPC will have regard to data security and its duty to comply with the General Data Protection Regulation. It will not be reasonable for the HCPC to send personal data to addresses on a speculative basis, without having good grounds to believe that by doing so the data will reach the intended recipient and be secure.

[2] 2016] EWCA Civ 162

[3] paragraph 20

11. In *Jatta v NMC*[4] the court held that a Panel is entitled to proceed in absence where a registrant is no longer at their registered address and has failed to provide revised contact details. This applies even where 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.

12. In the extremely rare event that there is an issue about whether a registrant could possibly have been expected to respond in time for the hearing, Panels should have regard to the Practice Note on Postponements and Adjournments (link). That Practice Note includes information about deemed service under the Civil Procedure Rules. While the Civil Procedure Rules do not apply to HCPTS proceedings, they may provide a useful benchmark as to how long it takes before service may be deemed to have taken place. The Panel should have regard to the factors which were identified as relevant to a decision to proceed in the absence of the defendant in criminal proceedings by the Court of Appeal in *R v Hayward*,[5] as qualified by the House of Lords in *R v Jones*.[6]The factors (modified to apply to fitness to practise proceedings) are as follows.

    a. 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.

        i. Public protection through the effective regulation of registrants is the overriding objective against which all of the other factors have to be balanced. The fair, economical, expeditious and efficient disposal of allegations made against registrants is fundamental to that objective. Hearings should be adjourned only where there is a compelling reason to do so that overrides the key objective of public protection.

    b. 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.

        i. Registrants are required to engage with the regulatory process, and must not be able to deliberately frustrate it by choosing not to appear. Cases should be adjourned only where there is a good reason for the registrant's non-attendance, such as ill-health or a serious injury. If a registrant provides appropriate evidence of inability to attend due to ill health, Panels should be slow to reject it.[77]
        ii. In cases where there has been a lack of engagement by the registrant and the HCPC expects non-attendance, Panels are

[4] [2009] EWCA Civ 824
[5] [2001] EWCA Crim. 168
[6] 2002] UKHL 5
[7] Hayat v GMC [2017] EWHC 1899 (Admin)

entitled to expect HCPC Presenting Officers to assist them by providing a brief chronology of the registrant's interaction with the HCPC, including confirmation of where correspondence from the HCPC has been sent.

iii. 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 they have 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.

c. Whether an adjournment is likely to result in the registrant attending the proceedings at a later date.

i. In many cases where the registrant fails to attend a hearing without good cause, 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.

ii. *Hayward* and *Jones* concerned criminal proceedings and, as the court noted in *Adeogba*, "it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far",[8] particularly in relation to this factor. As the court pointed out in that case, where a criminal defendant fails to appear, proceedings can be adjourned so that they can be arrested and brought before the court. That remedy is not available in regulatory proceedings, so, unless there is clear evidence that the registrant would be willing to attend a future hearing, it is unlikely to be a compelling reason to adjourn.

d. The extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case.

i. Panels should bear in mind that not giving live evidence may well put the registrant at a serious disadvantage particularly in terms of demonstrating insight. In Burrows v GMC[9] the Court held that failure to attend in cases relating to dishonesty amounts to courting removal from the register.

e. The likely length of any such adjournment.

f. Whether the registrant, despite being absent, wishes to be represented at the hearing or has waived that right.

[8] paragraph 18

[9] [2016] EWHC 1050 (Admin)

g. The extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant.

h. The effect of delay on the memories of witnesses.

i. 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 for proceeding in absence

13. 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 role of the legal assessor is particularly important in such circumstances.

14. 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, though in some cases where the registrant has deliberately failed to engage adverse inferences may be appropriate.[10]

10 Kearsey v Nursing and Midwifery Council [2016] EWHC 1603 (Admin), General Medical Council v. Udoye [2021] EWHC 1511 (Admin)

Health and Care Professions Tribunal Service

PRACTICE NOTE

Professional Boundaries

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

Introduction

1. Registrants are under a professional duty to maintain professional boundaries[1], and to avoid doing anything that could put the health and safety of a service user, carer or colleague at unacceptable risk[2]. Breaches of professional boundaries may put others at risk of harm, as well as undermining the public's trust and confidence in registrants and the professions.

2. The purpose of this practice note is to support panels considering matters involving professional boundaries, and ensure a consistent and fair approach to their decision making.

3. Its contents may be relevant to panels considering:

    a. Whether to impose an interim order as a result of concerns relating to professional boundaries.

    b. Whether there is a case to answer on an allegation of breach of professional boundaries.

    c. Whether the facts of an allegation of breach of professional boundaries are proved.

    d. Whether a registrant's fitness to practise is impaired as a result of a breach of professional boundaries.

    e. What sanction to impose following a finding of impairment involving a breach of professional boundaries.

Ways in which professional boundaries may be breached

[1] Standards 1.8 – 1.12 of the HCPC Standards of Conduct, Performance and Ethics
[2] Standard 6.2 of the HCPC Standards of Conduct, Performance and Ethics

4. Registrants have wide-reaching interactions with people using their services (and their carers) and their colleagues[3]. As a result, there are numerous different ways in which professional boundaries may be breached. The following is a non-exhaustive list, which is not intended to be in order of seriousness:

    a. The commission of criminal sexual acts (including rape and other sexual assault, whether resulting in a conviction or not) towards service users, carers and colleagues.

    b. Professionals entering or attempting to enter into inappropriate personal relationships with service users and/or their carers (including sexual and/or financial relationships, and relationships over social media).

    c. Professionals entering or attempting to enter into personal relationships with colleagues which are exploitative and/or abusive because of power imbalances.

    d. Sexual conduct towards service users, carers and colleagues. This may include conduct via social media.

    e. Sexually motivated behaviour – this may include conduct which is done for the purpose of sexual gratification or in pursuit of a sexual relationship[4], and may include conduct via social media[5].

    f. Sharing personal information with service users or their carers (particularly where this puts the needs of the registrant ahead of those of the service user or their carer).

    g. Seeking and/or using confidential information about service users, their carers or colleagues for purposes other than providing care to them.

    h. Improperly using or taking advantage of the power and trust that health and care professionals hold when in social or personal settings.

Risks of breaching professional boundaries

5. Professional boundaries are important for the health, safety and wellbeing of service users, carers, registrants and their colleagues. When professional

[3] We define colleagues as "Other health and care professionals, students and trainees, support workers, professional carers and others involved in providing care, treatment or other services to service users"

[4] *Basson v General Medical Council* [2018] EWHC 505 (Admin), *General Medical Council v Haris* [2020] EWHC 2518, *Haris v General Medical Council* [2021] EWCA Civ 763

[5] For more information about assessing sexual motivation, please refer to the Practice Note on Making decisions on a registrant's state of mind

boundaries are breached, people may be harmed or exposed to risk of harm, whether it be physical, emotional or financial.

6. Where a Registrant has breached professional boundaries with a service user, this may impair their professional judgement and adversely influence their decisions about future treatment and care. This may result in people not receiving the care they need, which in turn may cause harm.

7. Members of the public place great trust and confidence in healthcare professionals. Breaches of professional boundaries risk seriously undermining that trust and confidence, which can make it less likely that members of the public will seek treatment in future, or increase the risk that they will be suspicious of advice and treatment offered and less likely to engage with it effectively.

8. Within healthcare, effective team working is vital for the health and safety of service users and their carers. As well as causing or risking harm to the team members affected, breaches of professional boundaries between colleagues can undermine effective team working, risking harm to the people that the team exists to serve.

9. Registrants often work in demanding and stressful roles. Effective team support is essential to help them perform well in that environment. Anything which undermines that team support can adversely affect their performance, and/or cause them to leave the profession altogether.

Factors affecting the seriousness of boundary breaches

10. There are a number of factors that may aggravate the seriousness of a boundary breach. The non-exhaustive list below includes aggravating factors which may apply whether the boundary breached is with a service user, carer or colleague:
    a. Seriousness of harm/risk of harm caused

    b. Abuse of professional position, for instance by exploiting confidential information available only to someone by virtue of their professional position, or by exploiting the power to make a professional decision about another person, in order to pursue a personal relationship that breaches professional boundaries.

    c. Power imbalance between the registrant and the other person, whether it be because the person is a patient or carer, or a colleague who is in a junior position or is dependent on support from the registrant

    d. Vulnerability of service user, carer or colleague

    e. Predatory behaviour, including deliberate targeting/grooming

f. Covering up boundary breaches, including asking another person to give incorrect information if asked and/or to conceal or destroy evidence of the boundary breach.

g. Breach of trust, including misuse of confidential information gained for professional purposes

h. A pattern of behaviour, whether directed towards a single person or several different people

i. Registrants failing to set clear boundaries with service user

j. Failure to recognise warning signs (e.g. a service user developing an attraction towards a treating professional) and seek support

k. Deliberately ending a therapeutic relationship in order to pursue a personal relationship with a service user or carer where this leaves the service user without alternative professional treatment, care or support.

l. Overlap between the personal relationship and provision of treatment

11. In *PSA v GMC and Hanson* [2021] EWHC 588 (Admin), the High Court, examining the seriousness of an instance of sexual misconduct of a junior colleague, said:

    a. *First, although the Tribunal recognised that the misconduct found proven by the Tribunal was serious, it failed to recognise how serious. Dr Hanson, a doctor of many years' experience, was in a position of authority vis-à-vis Ms A, a relatively newly qualified nurse. He was a tall man; she was a small woman. He was many years her senior. He approached her at night, when he knew she would be alone. He deliberately guided her into a room away from others. His conduct on the way to the room and inside it was not limited to inappropriate remarks. It involved persistent and repeated touching, which was sexually motivated, and continued after she had made clear she considered it inappropriate and pushed him away. The experience caused her significant distress: she was off work for several weeks. If found proved to the criminal standard in a court, these facts would have constituted the offence of sexual assault contrary to s. 3 of the Sexual Offences Act 2003.*

    b. *Second, this was a calculated and deliberate abuse of power which foreseeably caused real harm to a fellow healthcare professional.*

12. As the High Court did in *Hanson,* Panels need to ensure that they conduct a thorough analysis of the conduct that they have found proved and clearly specify the aggravating factors.

13. Some factors (this is not an exhaustive list) which are unlikely to be relevant to the seriousness of a breach of professional boundary are:

a. The sex or gender identity of the registrant and/or the other person/people involved

b. The fact that the registrant and service user/carer continue to be in a settled personal relationship, or that the relationship lasted for a period of time (see factors to be aware of when assessing evidence about boundary breaches).

c. In a case involving a relationship with service user/carer or any other vulnerable person, the fact that the relationship was initiated by that person, or that they consented to it – but panels must explore these issues, which are potentially complex and unique in each case, very carefully.

14. Mitigating factors may include an absence of the aggravating factors listed above. They may also include the registrant's own health and/or vulnerability. When assessing this, panels should explore:

    a. The extent to which the registrant's health condition or vulnerability affected how they behaved

    b. The extent to which the registrant did, or should have recognised that they had a health condition or vulnerability that may have affected how they behaved, and took steps to address it.

15. For further information about general mitigating features, such as insight and remediation, please see the HCPTS's sanctions policy.

Factors to be aware of when assessing evidence about boundary breaches

16. The mere fact that a personal or sexual relationship between a registrant and a service user or carer began after the registrant had stopped treating the service user in question does not necessarily mean that there is no breach of professional boundaries. Panels should consider:

    a. The nature of the previous professional relationship

    b. The length of time since the registrant stopped treating the service user

    c. Whether any of the aggravating factors listed above are present

    along with any other factors which appear to be relevant on the particular facts of the case.

17. Witnesses who have been the victim of sexual abuse or other professional boundary breaches may find it very difficult to give evidence. The process may require them to give evidence about highly sensitive and distressing experiences. Panels must ensure that appropriate measures are put in place to

support witnesses and enable them to give the best possible evidence. Any witness where the allegation is of a sexual nature and the witness was the alleged victim may be treated by the panel as a vulnerable witness, for whom particular measures can be put in place to ensure that their evidence is not adversely affected.

18. In some cases involving allegations of boundary breaches, the only available evidence comes from the complainant and the Registrant. Panels must ensure that when they are assessing the evidence, they do not take account of irrelevant considerations or make any assumptions which are not supported by evidence. For instance, where a witness suffers from a health problem, and it is suggested that this might impact on the reliability of their evidence, the Panel must explore the evidence carefully, and only make such a finding if there is specific evidence to justify it.

19. Panels should be aware that having been a victim of sexual abuse, and having had previous experience of making complaints of sexual abuse, can impact on how a person presents when giving evidence. Further, there are various reasons why people who have been abused may not report immediately. Panels must be careful to avoid stereotypical assumptions that are not supported by evidence about how people are likely to behave after being abused or while giving evidence about abuse.

20. In other cases, the complaint may come from someone other than the service user, carer or colleague towards whom the Registrant breached professional boundaries. In these cases, Panels should not speculate about what that person might have said, and should assess the case on the evidence before them.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Restoration to the Register

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

Introduction

1. Article 33(1) of the Health 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]

2. 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

3. 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.

4. 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.

5. 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.

[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.

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

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

8. However, one significant difference is that as the applicant has the burden of proof in a restoration case, the Panel rules[4] provide for the applicant to present his or her case first.

9. 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 the facts they rely on and persuade the Panel that he or she should be restored to the Register, and not for the HCPC to prove the contrary.

10. 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 is not contrary to those 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

11. 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:

    a. meets the general requirements for registration; and

    b. is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

12. 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.

13. When considering if the applicant is a fit and proper person to practise the relevant profession, the panel should consider if their fitness to practise is

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

[4] rule 13(10)

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

[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

currently impaired. 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.

14. 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 denial.

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

    a. the matters which led to striking off and the reasons given by the original Panel for imposing that sanction;

    b. whether the applicant accepts and has insight into those matters;

    c. 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;

    d. what other remedial or rehabilitative steps the applicant has taken;

    e. what steps the applicant has taken to keep his or her professional knowledge and skills up to date.

Conditional restoration

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

    a. meeting any applicable education and training requirements* specified by the Council; or

    b. complying with a conditions of practice order imposed by the Panel.

17. "Applicable education and training requirements" include the requirements for return to practice[7]. These are generic requirements designed to ensure that people who have been out of practice for a period of time have up to date knowledge and skills. They are not intended to address any fitness to practise issues.

[7] Information about the requirements that everyone returning to practice must meet are set out in the HCPC's return to practice standards. Everyone who has been out of practice for five years or more is required to complete 60 days' of updating in a set period before being readmitted to the register. More information can be found at **https://www.hcpc-uk.org/registration/returning-to-practice/our-requirements/**.

18. Because an application for restoration cannot be made until five years after the striking off order took effect, the return to practice requirements must be satisfactorily fulfilled before the applicant is restored to the register, and Panels should make this clear in their decisions by directing that the applicant must satisfy the return to practice requirements. Failure to do so risks putting an applicant who seeks restoration after being struck off in a more favourable position that someone with no concerns about their fitness to practise who seeks to return to the register after a career break.

19. Where Panels wish to impose bespoke requirements on a registrant who is being restored to the Register in addition to the return to practice requirements, they may also make a conditions of practice order. 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. A conditions of practice order imposed in these circumstances will only become effective once the applicant has successfully completed the return to practise process, met the readmission requirements, and been readmitted to the register.

Appeals

20. An applicant may appeal to the appropriate court if the Panel:
    a. refuses an application for restoration;
    b. allows an application, but subject to the applicant satisfying education and training requirements under Article 33(6); or
    c. makes a direction under Article 33(9) suspending indefinitely the applicant's right to make further restoration applications.

21. 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.

Drafting Restoration Orders

22. 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, and should provide that it is only to take effect after the applicant has:
    a. provided the Registrar with the information and declarations required from any applicant seeking admission to the Register;
    b. satisfied the Registrar that appropriate cover under an indemnity arrangement is or will be in force in relation to the applicant;
    c. paid the prescribed restoration fee; and

d. if the Panel so decides, satisfied the Registrar that the applicant has successfully completed the 'return to practice' requirements.

23. 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 any information and declarations required for admission to the Register;

(b) paid the prescribed restoration fee; [and]

(c) satisfied the Registrar that, in relation to the Applicant, there is or will be in force appropriate cover under an indemnity arrangement[.] [; and]

(d) provided evidence which satisfies the Registrar that the Applicant has successfully completed a 60 day period of professional updating in accordance with the HCPC Standards for Return to Practice.

[And

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*]].

hcpts
health & care professions tribunal service

The fitness to practise adjudication service
of the Health and Care Professions Council.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Review of Article 30 Sanction Orders

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

Introduction

1. Article 30(1) of the Health Professions Order 2001 (the Order) requires all conditions of practice orders and suspension orders to be reviewed before they expire.

2. In addition to that mandatory review, Article 30(2) of the Order provides Panels with a discretionary power to review caution orders, conditions of practice orders and suspension orders at any time.

Article 30(1) mandatory reviews

3. Article 30(1) provides that a conditions of practice order or suspension order must be reviewed before it expires and that the reviewing Panel may:

    a. extend, or further extend the period for which the order has effect;

    b. make an order which could have been made when the order being reviewed was made; or

    c. replace a suspension order with a conditions of practice order.

4. Any order made following an Article 30(1) review only takes effect from the date on which the order under review expires, so the registrant must continue to comply with the expiring order until then.[1]

[1] The power to impose interim orders does not apply to Article 30 reviews. A Panel should only replace a suspension order with a conditions of practice order where it is satisfied that the registrant will continue to comply with the existing order. An interim order cannot be imposed to ensure that the registrant does so.

Article 30(2) early reviews

5. Article 30(2) of the Order provides that, on the application of the person concerned or otherwise, a caution order, conditions of practice order or suspension order may be reviewed at any time it is in force and that the reviewing Panel may:
    a. confirm the order;
    b. extend, or further extend, the duration of the order;
    c. reduce the duration of the order (but a caution order cannot be reduced to less than one year);
    d. replace the order with any other order which the Panel could have made (to run for the remaining term of the original order); or
    e. revoke the order or revoke or vary any condition imposed by it.

6. Article 30(2) is a discretionary power and does not specify the circumstances in which it may be exercised. Consequently, reviews are not limited to cases in which new evidence has come to light but may encompass any case where a significant and material change in circumstances has occurred since the original order was made, including breaches of that order by the registrant. If the HCPC has requested an early review because of concerns that there has been a breach of an order, Panels should expect the HCPC to present credible evidence of any alleged breach.

7. Any order made following an Article 30(2) review has immediate effect but, where an order is confirmed or replaced by another kind of order, it will only have effect for the remaining period of the order under review.

Extending Orders

8. The power to extend, or further extend, the duration of an order under Article 30(1) or (2) is subject to the following limitations in Article 30(5):
    a. a suspension order cannot be extended by more than one year at a time; and
    b. a conditions of practice order cannot be extended by more than three years at a time.

Procedure

9. Article 30(9) of the Order provides that, before a Panel exercises its powers under Article 30(1) or (2), the registrant concerned must be given the opportunity

to appear before and be heard by the Panel, in accordance with the relevant Panel rules.[2]

10. The procedure to be followed by a Panel when conducting an Article 30 review will generally be the same as for other fitness to practise proceedings. However, in the case of an Article 30(2) review on the application of the registrant concerned, Rule 13(10) of the Panel rules provides for the registrant (who has the burden of persuasion) to present his or her case first and for the HCPC to respond.

The issues to be addressed

11. The review process is not a mechanism for appealing against or 'going behind' the original finding that the registrant's fitness to practise is impaired. The purpose of review is to consider:
    a. whether the registrant's fitness to practise remains impaired; and
    b. if so, whether the existing order or another order needs to be in place to protect the public and maintain standards.

12. The key issue which needs to be addressed is what, if anything, has changed since the current order was imposed or last reviewed. The factors to be taken into account include:
    a. the steps which the registrant has taken to address any specific failings or other issues identified in the previous decision;
    b. the degree of insight shown and whether this has changed;[3]
    c. the steps which the registrant has taken to maintain or improve his or her professional knowledge and skills;
    d. whether any other fitness to practise issue have arisen;
    e. whether the registrant has complied with the existing order and, if it is a condition of practice order, has practised safely and effectively within the terms of that order.

13. The reviewing Panel's task "is to consider whether all the concerns raised in the original finding of impairment…[have] been sufficiently addressed".[4] As the decision in *Abraheam* indicates, in practical terms this places a "persuasive burden" on the registrant to demonstrate at a review hearing that he or she has

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

[3] A registrant who denied allegations which were held to be well founded and maintains that denial on review is entitled to do so and continuing refusal to accept the original findings should not be characterised as a lack of insight. However, that continuing denial is a relevant factor which the reviewing Panel may take into account: *Yusuff v GMC* [2018] EWHC 13 (Admin).

[4] *Abrahaem v GMC* [2008] EWHC 183 (Admin).

fully acknowledged the deficiencies which led to the original finding and has addressed that impairment sufficiently "through insight, application, education, supervision or other achievement...".

14. The decision reached must be proportionate, striking a fair balance between interfering with the registrant's ability to practise and the overarching objective of public protection.[5]

Early review applications

15. Where an Article 30(2) review application is made, Panels should expect an explanation as to why the application is appropriate.

16. In cases where new information has become available or circumstances have changed, that explanation should be straightforward and, in many cases, the appropriateness of the application will be self-evident. This will be the case where, for example, the registrant is breaching the terms of an existing order or is complying with an order which is ineffective.

17. In cases where there is no new evidence or change in circumstances, the Panel should expect the application to provide a compelling explanation as to why it is appropriate for the original order to be reviewed. That explanation must go beyond mere disagreement with the original order because that cannot alone be the basis of an early review. Review hearings should not be used as an opportunity to re-open findings made by a panel based on dissatisfaction with the decision.

18. Examples of cases where an early review may be appropriate include those where the order:

    a. is clearly impractical (for example, by requiring a registrant to undertake a training course which does not exist);

    b. is improper (for example, by imposing conditions of practice which, in effect, amount to suspension from the practice of the relevant profession); or

    c. exceeds the Panel's jurisdiction (for example, by purporting to impose obligations on a person other than the registrant - "your employer must...").

[5] Which includes protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the professions, and promoting and maintaining proper professionals standards and conduct

Health and Care Professions Tribunal Service

PRACTICE NOTE

Securing Witness Engagement: Competence, compellability, and Orders to attend / produce documents

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

Introduction

1. 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.

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

3. 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.

4. In Panel proceedings that general principle is subject to one important exception. Article 32(2)(m) of the Health 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

[1] HCPC (Investigating Committee) (Procedure) Rules 2003, r 8(3); 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).

[2] for example: the privilege against self-incrimination (giving evidence that might expose the witness to criminal prosecution), legal professional privilege (giving evidence about the confidential communications between a lawyer and their client) and 'without prejudice' communications (in regulatory proceedings, this will usually relate to communications between the parties in attempting to bring the proceedings to end with a consensual disposal).

5. 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.

6. 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.

7. 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.

8. Any necessary questioning of a witness by the Panel, to establish competence, 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."

9. 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

10. 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:

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3 [2010] EWCA Crim 4

4 [1977] 1 WLR 234

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

a. understands that it is his or her duty to speak the truth; and

b. has sufficient understanding to justify his or her evidence being heard.

11. 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. Further considerations about children giving evidence in these proceedings are contained in the HCPTS Practice Note titled Children as Witnesses[6].

Intellectual capacity

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

13. 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.

14. 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.

15. 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

16. 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.

17. 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.

18. 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.

[6] https://www.hcpts-uk.org/aboutus/publications/child-witnesses/

Witness and Production Orders

19. The Panel rules[7] 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

20. 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).

21. 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.

22. A party should not apply for an Order unless that party has first asked the witness to attend and the witness has:

    a. refused to attend or confirm that they will do so;

    b. agreed to attend, but the applicant has reasonable grounds for believing that the witness will not do so; or

    c. 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.

23. A party seeking to have an Order issued to any person must apply to the Panel in writing setting out:

    a. the name and address of the person concerned;

    b. the terms of the Order sought;

    c. details of any information being sought;

    d. the steps which the applicant has taken to secure the attendance of, or production by, that person on a voluntary basis; and

    e. evidence to show why attendance or production by that person is likely to support the case of the applicant.

24. 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

[7] HCPC (Investigating Committee) (Procedure) Rules 2003, r 8(3); 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).

the application without holding a hearing if the parties consent or if the Panel considers that a hearing is unnecessary.

25. 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.

26. 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.

27. The party calling the witness, and the Tribunal Service, must take steps to ensure that any reasonable adjustments that the witness needs in order to comply with the Order are put in place.

Compliance with Orders

28. There is no statutory requirement as to how far in advance of a hearing an Order must be made or served. However, reasonable notice should be given to the witness, ensuring that it would not be unfair to the person and is in the interest of justice.. This is to allow the person to make the practical arrangements for attending the hearing, to produce the documents or to made representations to the Panel to set aside an Order. The amount of time that may be reasonable will depend on the circumstances of the case, but when considering that question, Panels may wish to note that in other jurisdictions, 7 days' notice is likely to be reasonable[8].

29. A copy of the completed and signed Order, along with guidance on how to apply to set the Order aside, should be provided to the person as soon as is reasonably practicable by the party who applied for the Order. Consideration should be given to the HCPTS Practice Note titled the 'Service of Documents'[9] on how the Order should be communicated to the person.

30. 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:

    a. produce a photographic or other facsimile copy of the document or the relevant parts of it; and

    b. make them available for inspection by the Panel.

31. 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.

[8] Rule 34 of the Civil Procedure Rules requires the consent of the Court when an application for a witness summons is made with fewer than seven days' notice

[9] https://www.hcpts-uk.org/aboutus/publications/service-of-documents/

32. 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

33. A Panel cannot exercise its powers in order to obtain:
    a. information which a person is prohibited from disclosing by or under any other enactment[10]; or
    b. information or documents which a person could not be compelled to supply or produce in civil proceedings[11].

34. Material which a person could not be compelled to supply or produce in civil proceedings will generally be material which is:
    a. subject to legal professional privilege:
        i. communications between lawyer and client for the purposes of giving or receiving legal advice, or
        ii. communications whose dominant purpose relates to pending or contemplated litigation;
    b. correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings; or
    c. subject to Public Interest Immunity, for example on the grounds of national security.

    d. 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

35. Registrants and others who are responsible for health and care records sometimes mistakenly assume that the Data Protection Act 2018 and UK General Data Protection Regulations (GDPR) prevents them from disclosing information about service users to a Panel. That is not the case. Legislation sets out a lawful basis for such processing in connection with the investigation including disclosures as a witness under:

[10] 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.

[11] i.e. proceedings before the appropriate court to which any appeal would be made against the decision of the Panel, as defined in Article 38(4) of the Health Professions Order 2001.

a. GDPR Article 6(1)(c) where processing is required to comply with an enactment such as the Health Professions Order 2001;

b. GDPR Article 6(1)(e), where processing is necessary to carry out the tasks of the Panel in the interests of the public;

c. In the case of special category data:

    i. GPDR Article 9(2)(f), where the processing and disclosure is necessary to enable the Panel to act in its judicial capacity;

    ii. GDPR Article 9(2)(g), where there is a substantial public interest in the disclosure, such as where it is required by or under any enactment.

36. Schedule 2 of the DPA 2018 also includes an exemption from various rights of the data subjects where disclosures are required by order of the Panel.

37. Equally, extra-statutory data protection measures (such as the Caldicott Guardian arrangements) do not prevent disclosure to the HCPC under the Order.

38. 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.

39. 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.

40. 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

41. 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

42. 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, offences are punishable on summary conviction by an unlimited fine in England and Wales or not exceeding level 5 on the standard scale in Scotland and Northern Ireland. (currently £5,000).

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: _____

Important Notice – please read

It's important for us to tell you that, if you fail, without reasonable excuse, as required by this order to:

- produce any documents; and/or
- attend a hearing and give evidence;

Ignoring this order is a crime

You will be committing an offence under the Health Professions Order 2001. On conviction, you will be liable to an **unlimited fine** in England and Wales or a fine of up to **£5000** in Scotland and Northern Ireland.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Service of Documents

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

Introduction

1. The Health 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.

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

Service requirements

3. In order to establish that a person has been given notice, the Panel Rules only require proof of sending (rather than of receipt).

4. Within the Panel Rules, reference to the sending of a notice to a registrant is a reference to it being sent by post or electronic mail to them. The Panel Rules specify that any communications sent are to be treated as having been sent on the day the communication was posted or sent by electronic mail. What happens thereafter may be relevant to the Panel's decision whether to proceed with a hearing but will not affect its consideration of whether notice was sent in accordance with the Panel Rules.

The relevant address

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

For the HCPC, its committees or the	the offices of the HCPC;

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

Registrar,	
For a registrant,	his or her address in the HCPC register
For any other person,	the last known address of that person

6. 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

7. The normal methods of service to be used in relation to Panel proceedings are:

    a. Electronic mail, where the registrant has notified an electronic mail address as to the HCPC as an address for communications.
    b. Post to a relevant address.

8. In addition, documents may be served by leaving the document at a relevant address.

Proof of service

9. Where documents are sent by email, Panels should accept the email header as evidence of the email address to which the email was sent, and the date and time at which it was sent.

10. Where documents are sent by post, Panels should accept that documents which were created using the HCPC's case management system and endorsed with proof of service were posted on the date, and to the address, shown.

11. A separate certificate of service or other proof should not be required unless there are credible grounds for considering that this is not the case.

12. If necessary, postal 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.

13. When deciding if the notice has been served in accordance with the Panel Rules, the Panel should not have regard to any further efforts that could have been made by the HCPC to bring the notice to the registrant's attention. These are not required under the Panel Rules. They may become relevant when the Panel is considering exercising its discretion to proceed in absence following proof of service (see below).

14. The HCPC may also attempt to send documents to registrants at any other known address if this can reasonably be done. In considering what is reasonable, the HCPC will have regard to data security and its duty to comply with the General Data Protection Regulation. It will not be reasonable for the HCPC to send personal data to addresses on a speculative basis, without having good grounds to believe that by doing so the data will reach the intended recipient and be secure. However, as set out in paragraph 13, the Panel Rules only require that a notice is served on the registrant's address on the register.

Discretion to proceed with hearings following proof of service

15. Factors relevant to the exercise of this discretion, where it exists, are set out in the HCTS Practice Notes Postponements and Adjournments and Proceeding in the Absence of the Registrant.

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 leaving it:	
by other electronic means: (please specify)	

at: (insert address where service effected including 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)

In addition [set out any other attempts made to bring the notice to the attention of the recipient].

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 Tribunal Service

PRACTICE NOTE

Special Measures

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

Introduction

1. The Panel rules[1] allow certain categories of witness to be treated as a 'vulnerable witness' who may give evidence subject to 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

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

Special measures

3. A Panel may adopt any measures it considers desirable to enable it to receive evidence from a vulnerable witness. Some potential measures are specified in the Panel rules, but Panels are not limited to these and can consider other

[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.

arrangements that would help to ensure that the quality of a vulnerable witness's evidence is not diminished. Panels should ensure that reasonable adjustments are made to ensure that witnesses with a disability are not disadvantaged in giving their evidence[2].

4. Possible special measures include, but are not limited to:
    a. holding the hearing in person, virtually by video link, or as a "hybrid" hearing (where some parties attend in person and others by video link);
    b. 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 (whether in person or virtually by video link);
    c. use of interpreters (including signers and translators) or intermediaries[3];
    d. use of screens, not using a camera during a virtual hearing or while giving evidence remotely, or such other measures as the Panel consider necessary in the circumstances, in order to prevent:
        i. the identity of the witness being revealed to the press or public;
        ii. access to the witness by the registrant; or
        iii. the witness's ability to give evidence being hindered by being able to see the registrant; and
    e. the hearing of evidence by the Panel in private.

5. 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.

6. Where a witness has given previous evidence by video-recording, that witness should have the opportunity to view the recording before giving evidence, to refresh their memory of what was said. Panels should seek to ensure that this does not take place on the day the witness gives evidence at 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.

Special measures applications

[2] Equality Act 2010

[3] 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

7. 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.

8. 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).

9. 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.

10. 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.

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

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

    b. explain why special measures are likely to improve the quality of the witness's evidence;

    c. propose the measure(s) that would be likely to do so; and

    d. set out any views on the proposed measures expressed by the witness (or those acting on behalf of the witness).

12. A special measures application should also be supported by information about the practical implementation of the measures proposed. For example, when, where and in whose presence a witness's evidence-in-chief would be video recorded.

13. 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.

Intimidation

14. Under the Panel rules a witness may be regarded as vulnerable if the witness "complains of intimidation".[4] 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.[5]

Explaining the use of special measures

15. Where special measures have been used to allow a witness to give their best evidence, if the registrant concerned is not given a clear explanation of why this has been done, there is a risk that they may feel 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.

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

[5] *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 Tribunal Service

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

1. Article 29(7) of the Health 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.

2. 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.

3. Requesting a review under Article 30(7) is not the same as an appeal of the decision under Article 38. A request under Article 30(7) should only be made where new evidence has come to light that was not considered by the Panel that originally imposed the striking off order. Where there is no new evidence, but the person subject to the striking off order wishes to challenge the decision of the Panel then an appeal under Article 38 will be the more appropriate route.

Procedure

4. Under Article 30(7) the procedure to be adopted for review applications follows the same procedure as applications for restoration to the Register under Article 33 (4)-(8). This means that the applicant should be provided with an opportunity to attend a hearing to argue their case.

5. Under Rule 13 of the Panel rules[1], the applicant should be provided with a notice which informs them of their right to attend a hearing for their application to the be considered. The applicant then has a period of 28 days within which to confirm that they wish to attend a hearing. After this time, a date for the hearing will be fixed with at least 28 days' notice.

[1] The Health and Care Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 and The Health and Care Professions Council (Health Committee) (Procedure) Rules 2003

6. Under Article 33 of the Order and the Panel rules, 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.

7. 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

8. In considering Article 30(7) review applications, Panels need to address three issues:

    a. whether new evidence has become available which is relevant to the striking-off order which was made;
    b. if so, whether to admit (i.e. to hear and consider) that evidence; and
    c. if that evidence is admitted, having conducted a substantive review, deciding whether or not to maintain the striking-off order.

9. 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

10. “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.

11. 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:

    a. the finding that the allegations were well-founded;
    b. the finding that fitness to practise is impaired; or
    c. the decision to impose the sanction of striking off.

Admitting new evidence

12. Whether new evidence <u>may</u> 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;

13. 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:
    a. the significance of the new evidence;

    b. the *Ladd v Marshall*[2] criteria for reception of fresh evidence, namely:
        i. whether with reasonable diligence the evidence could have been obtained and presented at the original hearing;
        ii. whether the evidence is such that it could have an important influence on the result of the case; and
        iii. whether the evidence is credible;

    c. 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;

    d. if the original hearing proceeded in the absence of the registrant, evidence that the registrant did not receive proper notice of the hearing;

    e. 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".

14. 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

15. 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:

[2] [1954] 1 WLR 1489
[3] [2009] EWCA Civ 109

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

16. 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*.

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The fitness to practise adjudication service of the Health and Care Professions Council.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Submissions of No Case to Answer

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

Introduction

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

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

3. 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

4. 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 submissions of no case to answer, Panels should have regard to the test which applies in criminal proceedings laid down in *R v Galbraith*[4]:

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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

"(1) 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. (2) 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. (a) 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. (b) 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

5. The approach which Panel should adopt in dealing with submissions of no case to answer in proceedings is first to address the following question in respect of each disputed allegation (or element of an allegation):

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

6. 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.

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

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

    b. 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?

8. 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 element of question 2 is answered 'Yes', then again there is no case to answer in respect of that allegation or element.

9. 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:

    a. amount to the statutory ground of the allegation; and

b. in turn, establish that a registrant's fitness to practise is impaired.

10. Consequently, in dealing with any submission of no case to answer, the Panel may also need to address those issues by answering the following question:

    a. is the evidence which the HCPC has presented such that, when taken at its highest, no reasonable Panel could properly conclude that:

        i. the statutory ground of the allegation is met; or

        ii. the registrant's fitness to practise is impaired?

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

    a. the evidence is unsatisfactory, for example, being tenuous, vague, weak or inconsistent; or

    b. 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.

12. When considering the evidence at its 'highest', the Panel should consider the evidence as a whole and not just select the elements of the evidence that supports the allegation.[5] 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

13. Unlike a judge sitting with a jury, Panels must decide matters of both law and fact. In dealing with submissions of no case to answer, 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.

[5] R v Shippy [1988] Crim LR 767

Health and Care Professions Tribunal Service

PRACTICE NOTE

Unrepresented Registrants

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

Introduction

1. This Practice Note sets out the issues that Panels should consider when dealing with registrants who are unrepresented. It is also intended to assist unrepresented registrants and to enable greater engagement.

2. Proceedings before Panels are designed to enable registrants to represent themselves. But for many registrants the prospect of having to appear before a Panel may nonetheless be daunting.

3. An unrepresented registrant may be apprehensive or nervous about having to present a case before a Panel and this may manifest itself in apparently difficult, challenging or defensive behaviour. Panels and Legal Assessors need to be aware of this and must take reasonable steps to assist unrepresented registrants. A registrant, however anxious, who is engaged with the hearing is:

    a. more likely to provide relevant information and evidence, to assist the Panel in making informed decisions and meet its statutory objectives; and

    b. more likely to perceive that they have been listened to and treated fairly, and thereby have greater confidence in the regulatory process, irrespective of the outcome.

4. Helpful information about hearing procedure, as well as relevant legislation and Practice Notes can be found on the HCPTS website. Information for registrants preparing in advance of their hearing can be found at: HCPTS | Preparing for your hearing (hcpts-uk.org)

5. For details of useful contacts and support during the fitness to practise process please see: HCPTS | Contacts and support (hcpts-uk.org)

Maintaining a fair balance

6. Unrepresented registrants may be unfamiliar with law or procedure relevant to the proceedings and should be allowed some freedom in the presentation of their case.

7. Panels and Legal Assessors must ensure that an unrepresented registrant has every reasonable opportunity to make their case, to ensure the hearing progresses fairly and without any undue delay. Special care should be taken to ensure that unrepresented registrants understand what is happening and are put at ease, including:

    a. enabling the registrant every reasonable opportunity to make their case;
    b. being patient at all times and making appropriate use of adjournments;
    c. explaining what will happen in straightforward terms, avoiding legal jargon or, where it cannot be avoided, explaining what it means;
    d. explaining what the registrant may or may not do, why and when;
    e. trying to get the registrant to identify the issues in dispute and ensuring that the registrant has said what they need to say;
    f. giving clear reasons for any rulings or decisions that are made.

Guidance to be provided to Unrepresented Registrants

8. Panels and Legal Assessors must give clear procedural guidance in every case, but it is especially important to do so in cases where a registrant is unrepresented. As a minimum the following must be explained:
    a. who the members of the Panel are and how they should be addressed;
    b. who the other people present are and their respective roles;
    c. that, if the registrant has any special requirements or needs any reasonable adjustments, which the Panel have not already been notified of in advance of the hearing, they will need to raise this at the start of proceedings. If during the hearing, the Panel and/or Legal Assessor considers that the registrant may benefit from a reasonable adjustment, even if the registrant has not raised any special requirements, they should raise it with them;

d. the procedure which the Panel will follow – information on the procedure of different types of hearing can be found at: HCPTS | Stages of a hearing for Registrants (hcpts-uk.org)/;

    i. that the registrant may raise objections to the legal admissibility of evidence, but this does not include where the registrant simply disagrees with the content of the evidence. The registrant can challenge the content of evidence they disagree with through cross examination of the witness, in their own evidence to the Panel, or in their submissions to the Panel;

e. the implications of the registrant choosing whether or not to give evidence to the Panel (for example, that if the registrant chooses to give evidence they can be cross examined by the HCPC's Presenting Officer and asked questions by the Panel);

f. that the registrant may make notes, and may have a friend or colleague sitting alongside to make notes or offer moral support;

g. that both the HCPC and the registrant 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;

h. that, if the registrant would like a short break in the proceedings at any time, that is likely to be granted;

i. that, if the registrant does not understand something or has a problem related to the case, they should tell the Panel so that it can be addressed by the Panel Chair.

9. It will be extremely useful for preliminary discussions to take place before the start of a hearing with the Legal Assessor, the registrant, and the HCPC's Presenting Officer. During these discussions much of the above guidance can be provided to the registrant in a less formal setting to allow them a chance to absorb the information, and ask any questions before the hearing formally commences. Although it is important that procedural guidance is provided to unrepresented registrants, they must not be provided with guidance as to how to run their case.

10. It is important to ensure that the registrant has time to put their case as the hearing proceeds, but the Panel Chair needs to balance this appropriately with ensuring that the time allocated to the hearing is properly managed.

The role of the Legal Assessor

11. The role of the Legal Assessor is to provide advice and guidance on law and procedure to the Panel. They are independent of the Panel and do not play any part in the decision-making process although they may assist with the drafting of Panel decisions.

12. Where there is an unrepresented registrant, the Legal Assessor can assist the Panel by explaining procedures and giving guidance to the registrant.

13. The Legal Assessor can play a key role in assisting the registrant, for example, helping the registrant to put a point to a witness in the form of a question. However, Legal Assessors cannot act for an unrepresented registrant, for example, by putting questions on behalf of the registrant or making submissions on their behalf.

14. Panels and Legal Assessors should also be careful not to interfere in matters which must be decided by the registrant alone, such as whether to give evidence or make submissions.

15. Legal Assessors should not speak to unrepresented registrants without the HCPC Presenting Officer or HCPTS Hearings Officer being present. This is to ensure that there is no risk of any perceived bias or questions raised about what has or has not been said.

Questioning of witnesses

16. An unrepresented registrant who is unfamiliar with the process of examination and cross-examination may make statements to, rather than asking questions of, witnesses. They may also on occasion adopt an aggressive, offensive or unnecessarily confrontational approach to the questioning of witnesses.

17. Although such behaviour is likely to arise inadvertently, Panels should protect witnesses from questioning which goes beyond the acceptable limits of testing or challenging their evidence by means of cross-examination. Striking the right balance on this issue can be difficult, but Panels or the Legal Assessor should intervene as necessary in order to protect the interests of witnesses while respecting the registrant's right to a fair hearing.

18. Guidance on the appropriate way to question witnesses can be found at: HCPTS | Practical tips for effective questioning and probing techniques (hcpts-uk.org)

19. Panels should have due regard to the Cross Examination (Sexual Cases) Practice Note which sets out the procedure to be followed in cases involving allegations of

a sexual nature, which prevents an unrepresented registrant cross examining a witness in person in such cases.

Health and Care Professions Tribunal Service

PRACTICE NOTE

Use of Welsh in Fitness to Practise Proceedings in either Wales or England

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

Introduction

1. This Practice Note reflects the HCPC's requirement to comply with the Welsh Language Standards set out in a Compliance Notice[1] issued by the Welsh Language Commissioner to HCPC. The HCPC must comply with the majority of these Standards by and from 06 December 2023. In terms of the arrangements for hearings, the Welsh language should be treated no less favourably than the English language, regardless of whether a registrant lives in Wales or England.

Background

2. Article 22(7) of the Health 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 take place in Wales[2].

3. 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 experience of registrants requesting that legal proceedings be conducted in Welsh, it will rarely be feasible for Panels to be appointed which are able to conduct proceedings in Welsh without prior notice.[3]

[1] Such standards are contained within both the Compliance Notice and The Welsh Language Standards (No. 8) Regulations 2022.

[2] Any remote hearings concerning a person whose address on the HCPC register is in Wales are deemed to take place in Wales.

[3] For the avoidance of doubt, it should be noted that the arrangements set out in this Practice Note apply to legal proceedings which take place in Wales or England if the registrant wishes to use the Welsh language in those proceedings.

Case management

4. Registrants who are subject to an HCPC investigation or proceedings may submit forms and documents or make written representations in Welsh.

5. When first contacting a registrant under investigation, the HCPC is required to check if they wish to receive copies of forms or documents in Welsh. In addition, upon first contact from a registrant in response to proceedings, the HCPC is required to check or re-check if the registrant wishes to receive forms and documents in Welsh and ask whether the registrant wishes to speak in Welsh in those proceedings. The HCPC will notify a Panel in advance if a registrant has made such a request.

6. Panels should manage cases effectively to ensure that proceedings are conducted fairly, with the Welsh language being treated no less favourably than the English Language. The Panel can ensure that appropriate case management arrangements are made.

7. 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.

8. Once more detailed information is available it should be provided to the Panel. This includes details of:

    a. any person wishing to give oral evidence in Welsh; and

    b. any documents or records in Welsh which a party expects to use.

Directions and preliminary hearings

9. 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.

10. 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).

11. The Panel may direct that some or all of the legal proceedings will be conducted in Welsh or, if necessary, arrange for simultaneous or consecutive translation/ interpretation.

Interpreters

12. If an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the HCPTS will appoint an interpreter.

13. 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 from those who have similar experience of simultaneous or consecutive interpretation in legal proceedings.

Oaths and affirmations

14. When witnesses are called in hearings, Panels should ensure they are informed that they may choose to swear an oath or provide an affirmation in Welsh or English.