

## 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<sup>1</sup>, 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.

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<sup>1</sup> 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<sup>2</sup>:
  - 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<sup>3</sup>
  - b. Its duty to conduct each stage of the fitness to practise process expeditiously<sup>4</sup>
  - 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<sup>5</sup>. 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<sup>6</sup>.

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<sup>2</sup> Article 26(6) of the Health Professions Order 2001

<sup>3</sup> Article 3(4) and (4A) of the Health Professions Order 2001

<sup>4</sup> Article 32(3) of the Health Professions Order 2001

<sup>5</sup> Rule 4 of the Health and Care Professions Council (Health Committee) (Procedure) Rules 2003

<sup>6</sup> 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<sup>7</sup>. However, the powers of the HCPC or its panels are not limited to powers expressly given in its legislation, because powers can be implied<sup>8</sup>.

### **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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<sup>7</sup> *R (Ireland) v HCPC* [2015] 1 WLR 4643 at [22]

<sup>8</sup> 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 *Viridi 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?**

#### The matters that the Panel will determine

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.