Council 7 October 2009

Practice Notes

Executive summary and recommendations

Introduction

A number of practice notes have been produced to aid panels that make decisions relating to fitness to practise cases. Their purpose is also to assist those who appear before them on matters of law and procedure.

Cases are heard by panels of the statutory practice committees – the Investigating Committee when considering whether there is a case to answer and cases where the allegation is that a register entry has been incorrectly made or fraudulently procured, the Health Committee when the allegation is one where the registrants' fitness to practise is impaired by their physical or mental health and the Conduct and Competence Committee in all other types of cases.

Prior to 1 July 2009, the three statutory practice committees were constituted of Council members and had a strategic and oversight role. Panels of those committees made up of partners, were convened to consider fitness to practise cases. The statutory committees now only exist to hear and consider fitness to practise cases and the strategic and oversight role of the three committees has been replaced by a single fitness to practise committee.

Practice notes were previously approved by the three statutory committees. The Indicative Sanctions Policy and the Standard of Acceptance for Allegations have always been approved by the Council as are and were the direct responsibility of the Council. As there is no longer a statutory fitness to practise committee with a strategic and oversight role, the statutory responsibility for the approval of practice notes now resides with the Council

A number of the practice notes that are attached to this paper as an appendix were previously approved by the three statutory committees in April 2009. Due to the change in the governance arrangements of the practice committees, we are now asking for Council approval of those practice notes. Following a review of the practice notes, the indicative sanctions policy, stakeholder and legal assessor feedback and in accordance with the Fitness to Practise department workplan for 2009-10, a small number of new practice notes also require approval. The complete set is now bought to the Council for discussion and approval.

The Executive also proposes to produce this package of information as a manual for those who appear at fitness to practise hearings. Furthermore, those documents are also available on the HPC website.

In the future, practice notes will be considered by the Fitness to Practise committee and recommended for ratification thereafter by the Council.

Attached as an appendix to this paper is a summary of the practice notes outlining whether the practice note has previously been approved and what decision is required by the Council.

Decision

The Council is asked to discuss and approve the attached practice notes (subject to minor editorial amendments). The Council may in particular wish to focus on the new practice notes which are as follows:

1. Barring Allegations
2. Competence and Compellability of Witnesses
3. Conviction and Caution Allegations
4. Drafting Fitness to Practise Decisions
5. Health

The Council may also wish to focus on the practice note 'The Standard of Acceptance for Allegations' which has been updated to included further information on handling allegations about expert witnesses

Background information

As set out above

Resource implications

None

Financial implications

None

Appendices

Practice Note Summary
Practice Notes

Date of paper

25 September 2009

PRACTICE NOTE SUMMARY

page no.	Subject	Summary	Previously Approved	Decision
1-4	The Standard of Acceptance for Allegations (previously Allegations)	This practice note sets out the standard of acceptance for allegations. This document includes detail on the minimum level of information required to proceed with an allegation.	Investigating Committee	The Council is asked to discuss and approve the Practice Note 'The Standard of Acceptance for Allegations'.
5-9	Assessors and Expert Witnesses	This practice note sets out the function and role of assessors and expert witnesses and provides a pro-forma declaration and statement of truth.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Assessors and Expert Witnesses'.
10-12	Barring Allegations	This practice note provides panels guidance on the factors they should consider in determining whether to refer a case to the Independent Safeguarding Authority or the equivalent organisation in Scotland.	No Previous Approval	The Council is asked to discuss and approve the Practice Note 'Referring cases'.
13-17	Case Management and Directions	This practice note sets out the default directions that apply in fitness to practise cases. It also sets out the principals of case management adopted by the HPC.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Case Management and Directions'.

18-20	Case to Answer Determinations	This practice note provides guidance on determining whether there is a case to answer that a registrants' fitness to practise is impaired and the realistic prospect test.	Investigating Committee	The Council is asked to discuss and approve the Practice Note 'Case to Answer Determinations'.
21-23	Competence and Compellability of Witnesses	This practice note provides guidance on factors that should be considered when determining whether a witness is competence or compellable.	No Previous Approval	The Council is asked to discuss and approve the Practice Note 'Competence and Compellability of Witnesses'.
24-25	Concurrent Court Proceedings	This practice note provides guidance on proceeding with regulatory cases when there are other civil or criminal proceedings ongoing against the same registrant.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Concurrent Court Proceedings'.
26-29	Conducting Hearings in Private	This practice note sets out the factors panels must consider in determining whether all or part of a hearing should be held in private and when the press or public should be excluded from all or part of the hearing.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Conducting Hearings in Private'.
30-34	Conviction and Caution Allegations	This is a new practice note which sets out what factors panels should consider when dealing with allegations where a registrant has been convicted or cautioned for a criminal offence.	No Previous Approval	The Council is asked to discuss and approve the Practice Note 'Convictions and Caution Allegations'.
35-36	Cross-Examination in Cases of a Sexual	This practice notes sets out the procedure for undertaking cross-	Conduct and Competence Committee	The Council is asked to discuss and approve the

	Nature	examination in cases of a sexual nature.	Health Committee	Practice Note 'Cross-Examination in Cases of a Sexual Nature'.
37-47	Drafting Fitness to Practise Decisions	This practice note provides information on drafting decisions and provides examples of conditions of practice.	No Previous Approval	The Council is asked to discuss and approve the Practice Note 'Drafting Fitness to Practise Decisions'.
48-51	Disclosure	This practice note provides guidance to those appearing before Fitness to Practise panels on the disclosure of material that is obtained by HPC or those acting for them and which is not relied upon in the presentation of the case before a final hearing panel.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Disclosure'
52-55	Disposal of Cases via Consent	This practice note provides guidance and information on the disposal of cases via consent.	Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Disposal of Cases via Consent'.
56-63	Equal Treatment	This practice notes provides guidance on social diversity and equal treatment for panels and those appearing before them.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Equal Treatment'.
64-67	Finding that Fitness to Practise is Impaired	This practice note provides guidance on determining whether a registrants' fitness to practise is impaired and the different tasks which panels undertake in each step of the adjudicative process. It also provides guidance on	Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Finding that Fitness to Practise is Impaired'.

		considering each element leading to fitness to practise impairment sequentially.		
68-69	Hearing Venues	This practice note provides guidance on the location of hearings and the factors taken into account in determining where a hearing should be held.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Hearing Locations'.
70-73	Health Allegations	This practice note provides guidance to panels on dealing with health issues and the role of a medical assessor	No Previous Approval	The Council is asked to discuss and approve the Practice Note 'Health Allegations'.
74-77	Interim Orders	This practice note provides guidance on interim orders, the procedure to be adopted and when they can be made.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Interim Orders'.
78-79	Joinder	This practice note sets out the procedure by which two or more allegations against the same registrant or allegations against two or more registrants' can be joined.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Joinder'.
80-84	Mediation	This practice note sets out the principles of mediation and what issues panels should take into account when deciding whether mediation is an appropriate mechanism to adopt.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Mediation'.
85-87	Postponement and Adjournment of Proceedings	This practice note sets out the procedure for dealing with requests for postponements and adjournments and	Investigating Committee Conduct and Competence Committee	The Council is asked to discuss and approve the Practice Note

		the factors that should be considered when dealing with such requests.	Health Committee	'Postponement and Adjournment of Proceedings'.
88-89	Preliminary Hearings	This practice note provides guidance on conducting preliminary hearings.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Preliminary Hearings'.
90-91	Proceeding in the Absence of the Registrant	This practice note sets out the balance panels must strike and the factors that panels must consider when deciding whether to proceed with a hearing in the absence of the registrant concerned.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Proceeding in the Absence of the Registrant'.
92-98	Production of Information and Documents and Summonsing Witnesses	This practice note provides guidance on the production of information and documents and the summonsing of witnesses.	Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Production of Information and Summonsing Witnesses'.
99-101	Restoration to the Register	This practice note sets out the procedure and issues panels must consider when determining whether to grant an individual restoration to the register.	Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Restoration to the Register'.
102-105	Service of Documents	This practice note provides guidance to panels on: - Methods of service - Service by electronic means	Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Service of Documents'

		- Address for service - Deemed service - Proof of service		
106-107	Unrepresented Parties	This practice note sets out the balance panels must strike and the factors they must consider when deciding to proceed with a hearing in the absence of the registrant concerned.	Investigating Committee Conduct and Competence Committee Heath Committee	The Council is asked to discuss and approve the Practice Note 'Unrepresented Parties'.
108-109	Use of Welsh in Fitness to Practise Proceedings	This practice note sets out the arrangements which have been established to ensure that the principles enshrined in the Welsh Language Act 1993 is honoured and proceedings in Welsh are conducted fairly and effectively.	Investigating Committee Conduct and Competence Committee Health Committee	The Council is asked to discuss and approve the Practice Note 'Use of Welsh in Fitness to Practise Proceedings'.

PRACTICE NOTE

The Standard of Acceptance for Allegations

Introduction

Article 22(5) of the Health Professions Order 2001 (the **Order**) requires allegations against registrants to be received "in the form required by the Council".

An allegation should be regarded as meeting the HPC's initial "Standard of Acceptance" if it.

- is made in the form required by the Council;
- concerns a current HPC registrant;[1] and
- relates to the fitness to practise of that registrant.

Form of allegation

For the purpose of Article 22(5), an allegation is in the form required by the Council if it:

1. is made in writing;
2. sufficiently identifies the registrant who is the subject of the allegation;
3. identifies the person who is making the allegation; and
4. is signed by or on behalf of that person.

An allegation will also be considered to be in the form required by the Council if it is a notice or certificate issued by a court, law enforcement agency or regulatory body to the effect that a registrant has been convicted of an offence, received a police caution or been the subject of a decision or determination by a regulatory or licensing body.

Telephone complaints

Although the standard of acceptance requires allegations to be in writing, where a complainant's initial contact with the HPC is by telephone, HPC case managers should assist the complainant to submit any allegation in writing by:

[1] this includes a registrant who is subject to a suspension order as, by virtue of Article 22(8) of the Order, a registrant who is suspended may be the subject of a fitness to practise allegation.

- obtaining the complainant's name and contact details;
- obtaining details of the registrant who is the subject of the allegation;
- ascertaining what has happened and where and when it occurred;
- advising the complainant about the HPC's standard of acceptance and:
  - sending a complaint form to the complainant (which may be partly completed using the information provided);
  - taking a statement of complaint over the telephone and sending it to the complainant for verification and signing; or
  - giving the complainant advice on putting the allegation in writing.

Anonymous complaints

Generally, the HPC will not take action in respect of anonymous allegations which, in this context, means both an allegation made by a person whose identity is unknown to the HPC and an allegation made by a person who has asked the HPC not to disclose his or her identity. It is extremely difficult to operate a fair and transparent process if the complainant is unknown or refuses to be identified.

The procedures set out in the Order and the rules made under require the HPC to provide registrants with a copy of any complaint made against them, to allow the registrant to comment and then enable the HPC to seek any necessary clarification from the complainant before proceeding further. Other than in exceptional circumstances, a copy of any complaint which forms the basis of an allegation will be sent to the registrant and this must be made clear to any complainant who asks for their identity to be withheld. Failure to agree to disclosure of the complaint may prevent the case progressing further.

The policy of generally not accepting anonymous allegations is not unbending. The primary function of the HPC is to protect the public and there may be circumstances in which an anonymous allegation relates to credible concerns about a registrant's fitness to practise which are so serious that any should be taken. In such circumstances the Council will consider exercising its power under Article 22(6) of the Order to investigate the matter.

Complaints against registrants acting as expert witnesses

The decision of the Court of Appeal in *GMC v Meadows*[2] clarified that, in acting as expert witnesses, registrants do not enjoy any general immunity from fitness to practise proceedings. However, in dealing with complaints made against registrants who are acting or have acted as an expert witness in other proceedings, the HPC must be careful not to interfere in matters within the jurisdiction of that other body.

As a general principle, the admission of expert evidence is a matter for the court or tribunal in question. It is for that body to decide whether and, if so, what expert evidence it needs to hear, and generally to control experts, their reports and the evidence they give. As the leading case of *R v Turner*[3] notes:

[2] [2006] EWCA Civ 1390

[3] [1975] QB 834, 841

"An expert's opinion is admissible to furnish the court with… information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

Consequently, where a complaint is made about a registrant who is acting as an expert witness in proceedings which have not concluded, in the first instance, the complainant should be advised to raise their complaint with the court or tribunal concerned.

If a complaint is made after the relevant proceedings have concluded, then it should be treated in a similar manner to any other complaint, provided that:

- any relevant rights of appeal or challenge have been exhausted or are unlikely to be exercised; and
- the complaint includes evidence which is sufficient to indicate that there may be a realistic prospect of establishing impaired fitness to practise, for example, that the registrant, in acting as an expert witness:
    - made false claims of expertise or gave evidence outside of the registrant's expertise;
    - breached the expert's paramount duty to asist the court or tribunal; or
    - breached the obligation to produce an objective, unbiased, independent report based upon all material facts.

Fitness to practise proceedings should not be used as a forum for re-trying cases heard elsewhere, nor for settling differences of professional opinion which are a reality of legal proceedings and, of themselves, will rarely be sufficient to sustain a fitness to practise allegation.

If a complaint appears to be an attempt to raise issues which should have been pursued before the original court or tribunal, to re-try a case which has already been heard elsewhere or to settle differences of professional opinion, the complainant should be asked to clarify the situation before further action is taken by the HPC.

Case handling

When a compliant is received in the appropriate form, steps should be taken to establish that the allegation meets the other requirements of the standard of acceptance, by confirming that the complaint relates to:

- a current HPC registrant; and
- the fitness to practise of that registrant.

Where the person concerned is not registered with HPC but may be registered with another regulator, appropriate advice and contact information should be given to the complainant and, with their consent, any relevant documents passed to that regulator.[4]

Although allegations must relate to impairment of fitness to practise, an over-strict interpretation of that term should not be adopted. Fitness to practise is not just about professional performance but also encompasses acts by a registrant which may have an impact upon public protection, the reputation of profession concerned or confidence in the regulatory process.

There will often be circumstances in which matters seemingly unconnected with professional practice may nonetheless have a bearing on fitness to practise. Any doubts on this point can usually be resolved by further investigation of the allegation. If a decision is taken not to pursue an allegation further, it is important that the reasons for doing so are recorded.

Every allegation received by HPC must be considered on its merits and, as HPC's main objective is public protection, there is a presumption in favour of making further inquiries about an allegation unless it is clearly not within HPC's jurisdiction, frivolous or vexatious. However, that presumption should not lead to the adoption of a one-sided approach to the investigation of allegations. All relevant lines of inquiry should be pursued, with the evidence being gathered in a fair and balanced manner and presented in a form which will assist an Investigating Committee Panel to reach a decision.

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[4] the allegation may also have arisen because a person is falsely claiming to be HPC registered or misusing a protected title. In that event the matter should be referred to the HPC criminal justice case team.

PRACTICE NOTE

Assessors and Expert Witnesses

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

Introduction

The rules on the admissibility of evidence before Practice Committee Panels are those which apply in civil proceedings in the part of the United Kingdom in which the Panel is sitting. Consequently, as in any other civil proceedings, Panels have the discretion to admit opinion evidence which is given by expert witnesses.

In addition, Articles 35 and 36 of the Health Professions Order 2001[1] (the Order) enable the HPC to appoint **medical assessors**[2] to give advice on matters within their professional competence and **registrant assessors**[3] to give advice on matters of professional practice arising in connection with cases being considered by Panels.

The role of those assessors is set out in the Health Professions Council (Functions of Assessors) Rules 2003[4] Those rules also refer to the appointment of **legal assessors**. However, the appointment of legal assessors is not discretionary. A legal assessor must be present at all Panel hearings.

Assessors

A Panel may request the appointment of a medical assessor or registrant assessor in respect of any case it is considering. The decision as to whether an assessor is required in a particular case is a matter for the Panel alone. However, it is open to the parties to request that an assessor be appointed. Such a request must made in writing to the Panel setting out the issues on which the party concerned believes the Panel will need the assistance of an assessor.

Where a Panel proposes that an assessor be appointed it will, not less than 28 days before an appointment is made, notify the parties in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance.

A party that wishes to object to the appointment of an assessor or in respect of the assessor's qualification must do so in writing and the objection must be received by the Panel not more than 14 days after the Panel's notice was issued. Any objections should be taken into account by the Panel in deciding whether the appointment is to be confirmed.

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1 SI 2002/254

2 medical assessors are appointed from among suitably qualified registered medical practitioners

3 registrant assessors are appointed from among suitably qualified members of the professions which the HPC regulates

4 SI 2003/1577

Assessors' reports should be prepared in a similar format to an Experts' report (see below)[5] and must contain a copy of the instructions given to the assessor by the Panel in preparing that report. Any report prepared by an assessor must be sent to each of the parties not less than 14 days before the hearing.

Assessors should normally be present at the hearing and may participate in the proceedings as directed by the Panel, in accordance with the Health Professions Council (Functions of Assessors) Rules 2003. However, an assessor should not appear as a witness to give oral evidence or be open to cross-examination.

Expert witnesses

Whether expert evidence of any kind is required is a matter within the discretion of the Panel. Consequently, the consent of the Panel is always required either to call an expert or to put an expert's report in evidence.

Panels should only give consent where they are satisfied that expert evidence will assist then to deal with the case and should limit the use of oral expert evidence to that which is reasonably required. Wherever possible, Panels should direct that matters requiring expert evidence are to be dealt with in a single or joint expert report.

Where a Panel has directed that evidence is to be given by one expert but a number of disciplines involved, a leading expert in the dominant discipline should be identified as the single expert. That expert should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.

The expert's role

The paramount duty of any 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.

An expert should make it clear:

- when a question or issue falls outside the expert's expertise; and
- when the expert is not able to reach a definite opinion, for example because of a lack of information.

Experts' reports

Experts' reports should be addressed to the Panel, not to the party who instructed the expert. An expert's report must:

- set out details of the expert's qualifications;

[5] and should also include the statement of truth

- provide details of any literature or other material which the expert has relied on in preparing the report;
- contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- make clear which of the facts stated in the report are within the expert's own knowledge;
- identify any person who carried out any examination, measurement, test or experiment used by the expert for the report, the qualifications of that person, and whether the task was carried out under the expert's supervision; and
- where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion.

An expert's report must be supported by a Declaration and Statement of Truth in the form set out in the Annex to this Practice Note.

Instructions

The instructions given to an expert are not protected by privilege, but an expert may not be cross-examined on those instructions without the consent of the Panel. Consent should usually only be given if there are reasonable grounds for considering that the statement in the report of the substance of those instructions is inaccurate or incomplete.

Questions To experts

Questions asked for the purpose of clarifying the expert's report should be put to the expert in writing no later than 28 days after the expert's report is provided to the parties.

Where a party sends a written question or questions direct to an expert, a copy of the questions should, at the same time, be sent to the other parties and the Panel. The party instructing the expert must pay any fees charged by that expert for answering those questions.

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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 above.

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.

PRACTICE NOTE

"Barring" Allegations

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

Introduction

Articles 22(1)(a)(vi) and (vii) of the Health Professions Order 2001 (the **Order**) provides that the grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of:

"(vi) the Independent Barring Board including the person in a barred list (within the meaning of the Safeguarding Vulnerable Groups Act 2006 or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007), or

(vii) the Scottish Ministers including the person in the children's list or the adults' list (within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007)."

Background

The "barring" legislation – the Safeguarding Vulnerable Groups Act 2006, the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007 and the Protection of Vulnerable Groups (Scotland) Act 2007 – was enacted in order to implement a key recommendation of the Bichard Report[1], that:

> *"new arrangements should be introduced requiring those who wish to work with children, or vulnerable adults, to be registered. The register would confirm that there is no known reason why an individual should not work with these clients."*

The legislation introduces a new framework for the vetting and, if necessary, barring of people who work with children and vulnerable adults[2]. Although the arrangements in Scotland differ in certain respects from those in England and Wales and Northern Ireland, the barring arrangements throughout the UK provide for the maintenance of two separate but aligned lists:[3]

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1 The Report of the Inquiry conducted by Sir Michael Bichard arising from the murder of Jessica Chapman and Holly Wells ('the Soham Murders'); HC653, 2004

2 In Scotland this group is referred to as "protected adults"

3 maintained by the Independent Safeguarding Authority (in England, Wales and Northern Ireland) and Disclosure Scotland.

- a list of people barred from certain types of work with children; and
- a list of people barred from certain types of work with vulnerable (or protected) adults.

Barred individuals can be placed on one or both of these lists. The barring body's decision will be made based upon a range of information, including:

- convictions or cautions for certain offences;
- relevant decisions of regulatory bodies[4];
- 'soft' intelligence or other evidence of:
    - inappropriate behaviour; and
    - behaviour that is likely to harm a child or vulnerable adult.

In the most serious of cases, where a person is convicted of a sexual or violent offence which indicates that he or she poses a clear risk of harm to children or vulnerable adults and there cannot be any mitigating circumstances that might explain the offence, barring will be automatic. For slightly less serious offences, the person concerned will be given the opportunity to make representations to the barring body.

The effect of barring

A person who is included in a barring list is prohibited from undertaking certain types of work - both paid and unpaid - with children and/or vulnerable or protected adults (as the case may be). Breach of such a prohibition is punishable as a criminal offence.

In England, Wales and Northern Ireland the prohibited work falls into two categories:

> "regulated activity" – frequent, intensive or overnight contact with children or vulnerable adults for the purposes of proving health or social care, teaching, training etc. or in certain specified places such as schools and care homes;
>
> "controlled activity" - frequent or intensive <u>support</u> work in health, social care or education settings or where there is access to sensitive personal records (this category of activity extends to cleaners, receptionists, catering staff etc.). A barred individual cannot undertake a regulated activity but may be permitted to undertake a controlled activity subject to safeguards being put in place.

For these purposes "frequent" means once a month or more or "intensive" means three or more days in any 30-day period.

[4] The HPC has a duty to inform the barring bodies of relevant decisions taken in respect of registrants. That task is undertaken by the Director of Fitness to Practise, normally after a case has concluded.

In Scotland, broadly similar constraints apply but under a single category of "regulated work".

Children and Vulnerable Adults

The legislation defines a child as a person under 18 years of age and "vulnerable adults" (in Scotland "protected adults") form a very broad categories which includes adults:

- in residential accommodation or sheltered housing;
- detained in prison or other lawful custody;
- receiving prescribed welfare services;
- receiving any form of health care (which includes treatment, therapy or palliative care of any description).

The latter category means that there will be only a limited number of registrants whose daily work does not bring them into contact with vulnerable adults.

Procedure

Many matters which may lead to a barring decision being made against a registrant are likely to come to the HPC's attention in the form of allegations relating to misconduct or conviction for a criminal offence rather than as "barring allegations".

Where a barring allegation is made, Panels must be careful not to “go behind” decision of the relevant barring body. The Panel's task is to determine whether the registrant's fitness to practise is impaired, based upon his or her inclusion in a barring list, and if so, whether any sanction needs to be imposed.

Although the full range of sanctions under Part V of the Order is available in barring cases, Panels need to recognise that inclusion in a barring list will prevent many registrants from exercising their profession in any form.

In cases where a registrant is included in one list but not both (for example, prevented from working with children but not adults) and some form of practice restriction is being considered, Panels need to take account of:

- the likelihood of the registrant complying with any such conditions, given that barring list have arisen because of an abuse of trust; and
- public protection in its broadest sense, including whether permitting the registrant to remain in practice would bring the profession into disrepute or undermine public confidence in that profession or the regulatory process.

Inclusion in a barring list is intended to secure public protection from those who pose a significant risk to children and/or vulnerable or protected adults. Generally, Panels should regard it as incompatible with HPC’s obligation to protect the public to allow a person to maintain unrestricted registration whilst they are on a barring list.

PRACTICE NOTE

Case Management and Directions

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

Introduction

Practice Committee Panels determine whether an allegation is well founded by means of an adversarial hearing process which is civil in nature and, consequently, to which the civil rules of evidence and the civil standard of proof ("the balance of probabilities") apply. However, in such proceedings:

- it is for the HPC to prove its case; and
- the registrant has a right against self-incrimination.

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

- the HPC to set out its case;
- the registrant to identify in advance those elements of the HPC's case which he or she disputes; and
- the parties to provide information to assist the Panel in the management of the case.

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

Case management

Effective case management is a process which enables:

- the issues in dispute to be identified at an early stage;
- arrangements to be put in place to ensure that evidence, whether disputed or not, is presented clearly and effectively;
- the needs of any witnesses to be taken into account; and
- an effective programme and timetable to be established for the conduct of the proceedings.

Directions

Article 32(3) of the Health Professions Order 2001 requires fitness to practise proceedings to be conducted expeditiously and, for that purpose, enables Practice Committees to give directions for the conduct of cases and for the consequences of failure to comply with such directions.

Where appropriate, Panels are expected to use their powers to give Directions to ensure that, at an early stage, the parties:

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

Standard Directions

To improve the management of cases the following Standard Directions will apply automatically as “default” directions in every case.

Panels should actively manage cases to ensure compliance with those Directions or, where a Panel considers it appropriate, the Panel may (of its own motion or at the request of one of the parties) give Special Directions for the conduct of that case which disapply, vary or supplement the Standard Directions.

Standard Direction 1. Exchange of Documents

(1) The HPC 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 HPC 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 HPC a copy of the documents which he or she intends to rely upon at the hearing.

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

Standard Direction 2. Notice to admit facts

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

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

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

Standard Direction 3. Notice to admit documents

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

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

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

Standard Direction 4. Notice to admit witness statements

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

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

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

Standard Direction 5. Withdrawal of admissions

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

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[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 HPC 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 HPC 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 HPC or name of other party]
[Address]

DO NOT IGNORE THIS NOTICE

If you dispute [any of the facts][the authenticity of any of those documents][any of those 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 HPC or name of other party] as I have indicated above.

Signed: _____ Date: _____

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

PRACTICE NOTE

"Case to Answer" Determinations

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

Introduction

Article 26(3) of the Health Professions Order 2001[1] provides that, where an allegation is referred to the Investigating Committee, it shall consider, in the light of the information which it has been able to obtain and any representations or other observations made to it, whether in its opinion, there is a "case to answer".

The "realistic prospect" test

In deciding whether there is a case to answer, the test to be applied by a Panel is whether, based upon the evidence before it, there is a "realistic prospect" that the HPC will be able to establish at a hearing that the registrant's fitness to practise is impaired.

That test (which in some proceedings is also known as the "real prospect" test) is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman*[2]:

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

Applying the test

In determining whether there is a case to answer, the Panel must decide whether, in its opinion, there is a "realistic prospect" that the HPC (which has the burden of proof) will be able to establish that the registrant's fitness to practise is impaired.

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

In reaching its decision, a Panel:

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

[1] SI 2002/254

[2] [2001] 1 AllER 91

- may assess the overall weight of the evidence but should not seek to resolve substantial conflicts in that evidence. The assessment of the relative strengths of competing evidence can only be properly undertaken at a full hearing.

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

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

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

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

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

It will be rare for separate evidence to be provided on the "ground" or the issue of impairment and these will largely be a matter of inference for the Panel, such as whether the factual evidence suggests that the service provided by the registrant fell below the standard expected of a reasonably competent practitioner or that the registrant's actions constitute misconduct when judged against the established norms of the profession. In reaching that decision the Panel may wish to have regard to the HPC Standards of Proficiency or Standards of Conduct, Performance and Ethics.

Impaired fitness to practise

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

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

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

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

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

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

No case to answer

A decision that there is "no case to answer" should only be made if there is no realistic prospect of the HPC proving its case, for example, because there is insufficient evidence to substantiate the allegation or the available evidence is manifestly unreliable or discredited. 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.

October 2009

PRACTICE NOTE

Competence and Compellability of Witnesses

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

Introduction

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

Background

Proceedings before Practice Committee Panels are civil in nature and the procedural rules[1] which apply to those proceedings provide Panels with the power to compel witnesses to attend and give evidence.

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

In proceedings before Panels 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 the proceedings.

Competence

Competence deals with the question of whether a witness may legally give evidence. In this context, ‘competent’ does not mean ‘reliable’.

Questions of competence are a matter for the Panel. Most witnesses will give their evidence without any challenge to their competence. However, if the issue of competence 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 will lie upon the party seeking to call the witness.
Any necessary questioning of the witness by the Panel should take place in the presence of the parties and, if necessary, the Panel may hear expert evidence on the competence of a witness.

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

2 for example, refusing to disclose lawyer - client communications, 'without prejudice' correspondence or matters which are subject to public interest immunity.

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 by Bridge LJ in *R v Hayes*[3] in the following terms:

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

Children

There is no fixed age below which children are 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[4] does not meet that test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

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

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

Intellectual capacity

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

A witness may be prevented by incapacity, such as mental illness or drunkenness, from being competent but that lack of competence is only co-extensive with the incapacity. Thus a mentally ill person is competent during lucid intervals and a a person who is drunk will be competent once sober. Where incapacity is only temporary, Panels have the discretion to postpone the proceedings until that incapacity has ended.

A person who has a mental illness may still be a competent witness if that illness only affects an aspect of their 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.

Compellability

3 [1977] 1 WLR 238

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

Compellability deals with the question of whether, as a matter of law, a witness can be required to give evidence when they do not wish to do so.

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

As noted above, Article 32(2)(m) of the Health Professions Order 2001 provides that 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.

A witness who, without reasonable excuse refuses to attend, or to answer admissible questions put to them in, Panel proceedings commits an offence and is liable on summary conviction to a fine of up to level 5 on the standard scale (£5,000).

October 2009

PRACTICE NOTE

Concurrent Court Proceedings

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

Introduction

Article 32(3) of the Health Professions Order 2001[1] 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.

As a general principle, whilst it may be appropriate for HPC fitness to practise proceedings to be postponed if the person concerned is being tried concurrently for related criminal charges, postponement will rarely be appropriate simply because the person concerned or the subject matter of the allegation is the subject of civil proceedings.

Concurrent criminal proceedings

A potential injustice may arise if regulatory proceedings are conducted at the same time as a related criminal trial. As more restrictive rules of evidence will apply in criminal proceedings, there is a risk that evidence which has not been admitted at that trial may enter the public domain by being admitted in the course of the regulatory proceedings. For that reason, HPC fitness to practise proceedings may be postponed until any related criminal trial has concluded.[2]

In addition, acquittal in the criminal courts will not always mean that no regulatory action will follow, as 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.

Concurrent civil proceedings

In relation to civil proceedings similar issues do not arise and the courts have shown a marked reluctance to stay regulatory proceedings when asked to do so by parties who are the subject of a concurrent civil action. As Stanley Burnton J. stated in *R v Executive Counsel of the Joint Disciplinary Scheme*[3]:

1 SI 2002/254

2 where FTP proceedings are postponed, it is open to HPC to seek an interim order in appropriate cases

3 [2002] EWHC 2086

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

The need for the discretion to stay one set of concurrent civil and regulatory proceedings to be exercised sparingly and with great care was highlighted by the Court of Appeal in *R v Panel on Takeovers and Mergers ex parte Fayed*[4] (emphasis added):

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

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

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

If Panels are asked to stay proceedings on the basis that a party is subject to concurrent civil action, the approach which should be adopted, derived from the decisions of the courts[5], is as follows:

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

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4 [1992] BCC 524

5 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*

PRACTICE NOTE

Conducting Hearings in Private

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

Introduction

Although most fitness to practice proceedings are normally held in public, in appropriate cases, Panels have the discretion to exclude the press or public from all or part of a hearing.

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

Hearings in private

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

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

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

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

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

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

1 *Scott v Scott* 1913 AC 417

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

In line with Article 6(1) ECHR, the procedural rules for each of the HPC Practice Committees provide[3] that:

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

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

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

Deciding to sit in private

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

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

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

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

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

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

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

The interests of justice

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

On that basis, the provision in the procedural rules that permits a Panel to conduct proceedings in private where doing so "is in the interests of justice" must be construed in line with the narrower test set out in Article 6 ECHR, which provides that proceedings may be held in private "to the extent strictly necessary in the opinion of the [Panel] in special circumstances where publicity would prejudice the interests of justice."

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

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

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

[4] i.e. 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

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

In order to protect the private life

As noted above, a decision to hear all or part of a case in private may be taken in order to protect the private life of:

- the person who is the subject of the allegation;
- the complainant;
- a witness giving evidence; or
- a service user.

The protection of a person's private life is not subject to the 'strict necessity' test under Article 6(1), but nonetheless Panels do need to establish a compelling reason for deciding that a hearing should be held in private. It is not justified merely to save parties, witnesses or others from embarrassment or to conceal facts which, on general grounds, it might be desirable to keep secret. The risk that a person's reputation may be damaged because of a public hearing is not, of itself, sufficient reason to hear all or part of a case in private unless the Panel is satisfied that the person would suffer disproportionate damage.

Children

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

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

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

October 2009

PRACTICE NOTE

Conviction and Caution Allegations

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

Introduction

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:

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

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

- being convicted for an offence by a criminal court in any part of the UK;
- accepting a caution for an offence from a UK police force or law enforcement agency;
- being convicted by a court outside of the UK, but for an offence which is recognised as a crime in English law[1]; or
- being convicted by a Court Martial.[2]

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*"[3]

Cautions

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

[1] in cases involving convictions by a court outside of the UK, at an early in the investigative process HPC will seek legal advice to confirm whether the conviction is for an offence which is also an offence under English law and to identify the equivalent English law offence.

[2] Article 22(2) of the Order extends the definition of conviction to include convictions by Courts Martial.

[3] Zidderman v GDC [1976] 1 WLR 330

Cautions are generally a discretionary, non-statutory,[4] means of disposing of offences without the need for the offender to appear before a court. Typically, they are used for first time, low level offences by adults, where diversion from the courts is appropriate for both the offence and the offender.

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

- the evidence of guilt is sufficient to provide a realistic prospect of conviction;
- the offender make a clear and reliable admission of the offence; and
- the offender understands the significance of, and gives informed consent to accepting, the caution.

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

Binding Over and Discharge

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

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

Consequently, in cases where a registrant is bound over or receives an absolute or conditional discharge, a conviction allegation cannot be made against the registrant, but the HPC will investigate the circumstances which led to that action being taken, in order to determine whether an allegation of misconduct should be made against the registrant.

Dealing with conviction allegations

The procedural rules for Practice Committee Panels provide that:

[4] In England and Wales, the Police and Justice Act 2006 provides for statutory 'conditional cautions', which allow offenders to be cautioned for more serious or repeat offending, subject to complying with specified rehabilitation or reparation conditions. Panels should deal with conditional cautions in a similar manner to any other conviction or caution.

"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;"[5]

Those rules also provide[6] that, evidence is admissible before a Panel if it would be admissible in civil proceedings before the appropriate court[7] in that part of the UK where the Panel is sitting. In all three UK jurisdictions, evidence that a person has been convicted of an offence is generally admissible in civil proceedings as proof that the person concerned committed that offence, regardless of whether or not the person pleaded guilty to that offence.

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

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

In considering the nature, circumstances and gravity of the offence, Panels need to take account of public protection in its broadest sense, including whether the registrant's actions bring the profession concerned into disrepute or may undermine public confidence in that profession. In doing so, Panels are entitled to adopt a 'retrospective' approach and consider the conviction as if the registrant was applying for registration with the HPC.[8]

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

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

5 HPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(d); HPC (Conduct and Competence Committee) (Procedure) Rules 2003 and HPC (Health Committee) (Procedure) Rules 2003, r.10(1)(d).

6 ibid, r.8(1)(b) and r.10(1)(b).

7 i.e., the High Court of Justice in England and Wales; the Court of Session; or the High Court of Justice in Northern Ireland;

8 CRHP v GDC and Fleischman [2005] EWHC 87 Admin

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.*"

As noted in *Fleischman*,[9] if a registrant has been convicted of a serious criminal offence and is still serving their sentence at the time the matter comes before a Panel, normally the Panel should not permit the registrant to resume their practice until that sentence has been satisfactorily completed.

Community Sentences

In considering any sentence imposed, Panels need to recognise that community sentences are used to address different aspects of an individual's offending behaviour and, therefore, may not simply be an order to undertake unpaid community work but may also include other orders such as compliance with a curfew, exclusion from certain areas or an order to undergo mental health, drug or alcohol treatment.

Panels need to give careful consideration to the terms of any community sentence but, generally, should regard it as inappropriate to allow a registrant to remain in or return to unrestricted practice whilst they are subject to such a sentence.

Sex Offenders Register

Similar consideration needs to be given to any requirement to register under the Sex Offenders Act 1997.

Although inclusion on the sex offenders' register is not a punishment, it is intended to secure public protection from those who have committed certain types of offences. Generally, Panels should regard it as incompatible with HPC's obligation to protect the public to allow a registrant to remain in or return to unrestricted practice whilst subject to registration as a sex offender.

Child Pornography Offences

The ease with which child pornography can be downloaded from the internet has resulted in a significant increase in cases involving child pornography before both the courts and regulatory bodies.

Panels should be aware that, in *R v Oliver*,[10] the Court of Appeal established a test for determining the seriousness of offences involving child pornography by reference to the nature of (1) the activity undertaken and (2) the images involved.

[9] CRHP v GDC and Fleischman [2005] EWHC 87 Admin

[10] [2003] 1 Cr. App. R 28

In relation to the nature of the activity, consideration needs to be given to:

- proximity to, and responsibility for, the original abuse. Taking the original photographs is more serious than downloading images, which, in turn, is more serious than merely locating images on the Internet; and
- any element of commercial gain or activity, which although not for gain, fuels demand for such images (e.g. swapping of material).

In relation to the nature of the images, a scale from 1 to 5 has been set based upon the harm caused to the children involved in producing those images:

Level 1:	erotic posing with no sexual activity;
Level 2:	sexual activity between children, or solo child masturbation;
Level 3:	non-penetrative sexual activity between adults and children;
Level 4:	penetrative sexual activity between children and adults;
Level 5:	sadism or bestiality.

Panels should have regard to the *Oliver* criteria, but need to recognise that the courts distinguish between degrees of seriousness largely to assist them in reaching sentencing decisions.

The Council considers that any offence relating to child pornography involves some degree of exploitation or abuse of a child and, therefore, that conviction for such an offence is a serious matter which seriously undermines public trust in the registrant and the profession concerned.

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PRACTICE NOTE

Cross-Examination in Cases of a Sexual Nature

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

Introduction

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

Background

The procedural rules[1] for fitness to practise proceedings provide that:

"(4) Where—

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

(b) a witness is an alleged victim; and

(c) the health professional is acting in person,

the health professional 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 health professional shall, not less than seven days before the hearing, appoint a legally qualified person to cross-examine the witness on his behalf and, in default, the Council shall appoint such a person on behalf of the health professional."

[1] HPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), r. 8A; HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), r. 10A; HPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), r. 10A.

The appointment of legal representatives

The decision to appoint a legal representative will be dictated by the nature of the allegation and willingness or otherwise of complainants to be questioned by the registrant concerned. The procedural 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 HPC has appointed someone to do so on his or her behalf.

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

The role of the legal representative

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

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

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

Procedure

Panels have the power to hold preliminary hearings for the purpose of case management and are encouraged to do so in cases of this nature, in order to resolve as many evidential or procedural issues as possible before the hearing takes place.
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[2] It is, of course, open to the registrant at his own expense to "adopt" the appointed representative at this stage for the remainder of the proceedings.

PRACTICE NOTE

Drafting Fitness to Practise Decisions

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

Introduction

Practice Committee Panels have a legal duty to provide reasons for their decisions, both at common law and as a facet of the right to a fair hearing which is protected by Article 6 of the European Convention on Human Rights.

Beyond that legal duty, Panels have an obligation to explain the decisions they reach and the reasons for them, as part of the open and transparent processes which the HPC seeks to operate.

Background

The decision in *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin) identified that Practice Committees have a duty to provide adequate reasons for their decisions and that the duty arises:

- at common law; on the basis that a Panel must give adequate reasons for its decision in order to enable the registrant concerned to exercise the right of appeal. Without knowing the basis for the decision, that right of appeal may be rendered illusory and both the parties and the appellate court must be able to understand why the Committee reached its decision.

- as part of the Article 6 ECHR obligations to provide a fair hearing associated with the determination of civil rights and obligations. In deciding whether the requirements of Article 6 are met, the whole of the proceedings, including the availability of an appeal to the courts, must be considered. Inevitably, the effectiveness of the right of appeal may depend on the Panel providing adequate reasons.

- as a practical consideration, in that Panels should give adequate reasons for their decisions to enable CHRE to consider whether it wishes to challenge the decision using its powers under section 29 of the NHS Reform and Healthcare Professions Act 2002.

What should a decision include?

Whatever decision a Panel reaches, it should be recorded in a manner which explains what the Panel decided and, just as importantly why it did so. The decision should be written in a form that enables the reasonably intelligent reader to understand the issues before the Panel, its findings and decision and the reasons for them without the need to refer to any other materials.

The decision should include:

- the findings of fact made by the Panel. Allegations are based upon facts and the Panels should identify the facts which were undisputed, the facts in dispute and in relation to latter, the findings of fact which it made and why;

- the conclusions reached by the Panel on any submissions made by the parties;

- whether or not the facts amount to the ground(s) set out in the allegation and why. For example, why the findings amount to misconduct, lack of competence etc.;

- in consequence, whether or not fitness to practise is impaired and why;

- any advice that was received from the Legal Assessor and whether that advice was accepted. It is of particularly important for Panels to record in detail any decision to disregard the advice given by a Legal Assessor and the reasons for so doing;

- any evidence given by way of mitigation or aggravation and the findings that the Panel made on basis of that evidence;

- any sanction that was imposed, why it was appropriate and, if it does not accord with the HPC Indicative Sanctions Policy, the specific circumstances of the case which justify that deviation;

- any other procedural issues such as requests for adjournments or Human Rights Act challenges and how they were dealt with.

Drafting Style

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

Decisions should:

- be written in clear and unambiguous terms; avoiding jargon, technical or esoteric language or explaining any which must be used;

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

Drafting Orders

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

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

Caution Order

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

Suspension Order

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

Striking Off Order

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

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

Conditions of Practice

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

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

Drafting Conditions of Practice

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

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

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

- **are the conditions realistic?**

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

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

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

- **are the conditions verifiable?**

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

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

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

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

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

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

Conditions Bank

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

Advice from the Legal Assessor

Panel members are reminded that Article 34(3) of the Order allows Legal Assessors to assist the Panel in drafting their decisions. Panels should take advantage of the expertise Legal Assessors can offer in helping them drafting their decisions, especially in relation to decisions which include conditions of practice orders.

The Legal Assessor's role is to assist in the drafting of the decision, not in the making of that decision. Panels should have established a clear outline of their, decision, including their findings they have made in relation to the evidence and on the issue impairment, before asking the Legal Assessor to join them to assist in drafting their decision.

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

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ANNEX

CONDITIONS BANK

A. INTRODUCTORY PARAGRAPH

ORDER: The Registrar is directed to annotate the HPC 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 (1) satisfactorily complete [name of course etc] and (2) forward a copy of your results to the HPC.

2. Within [time period] of the Operative Date you must (1) take and pass [name of examination etc.] and (2) forward a copy of your results to the HPC.

3. Before undertaking [type of practice, work or procedure] you must (1) satisfactorily complete [a period of supervised practice/refresher training/ examination etc.] and (2) forward a copy of your results to the HPC.

C. PRACTICE RESTRICTIONS

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

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

6. You must maintain a record of every case where you have undertaken [type of work or procedure] [which must be signed by [supervisor]] and you must:

   A. provide a copy of these records to the HPC 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 HPC.

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

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

9. You must not undertake any out-of-hours work or on-call duties [other than at [location]][without the prior approval of the HPC].

10. You must not [prescribe][administer][supply][possess][any or type of prescription medicines]

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

12. You must not act as a supplementary prescriber.

D CHAPERONES

13. 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.

14. You must maintain a record of:

    A. every case where you have be involved in the direct provision of services to [female service users etc.], in each case signed by the chaperone; and

    B. every case where you have be involved in the direct provision of services to such service users in a life-threatening emergency and without a chaperone being present.

15. You must provide a copy of these records to the HPC 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 HPC.

E. SUPERVISION REQUIREMENTS

16. You must place yourself and remain under the supervision of [workplace supervisor, medical supervisor etc.] approved by the HPC, attend upon that supervisor as required and follow their advice and recommendations.

F. TREATMENT REQUIREMENTS

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

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

19. 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].

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

G SUBSTANCE DEPENDENCY

21. You must comply with arrangements made on behalf of the HPC for the testing [including unannounced testing], of your [breath, blood, urine, saliva, hair] for the [recent and/or long-term] ingestion of alcohol and other drugs.

22. You must attend regularly meetings of [Alcoholics Anonymous/Narcotics Anonymous] or any other support group approved by the HPC and must provide the HPC with evidence of your attendance at such meetings

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

24. 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 HPC AND OTHERS

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

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

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

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

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

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

I. PERSONAL DEVELOPMENT

28. 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]

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

30. 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.

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

32. 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 HPC on a [monthly etc.] basis or confirm that there have been no such occasions in that period, the first profile or confirmation to be provided within [time] of the Operative Date.

J. COSTS, APPROVALS ETC.

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

34. Any condition requiring you to [provide any information to] [obtain the approval of] the HPC is to be met by you [sending the information to the offices of the HPC, marked for the attention of] [obtaining written approval from] the Director of Fitness to Practise.

4.1.3 There are other areas where reasons might also be necessary, including:
• explaining important background facts or evidence which led the panel to the conclusion. In one case, for example, the panel said it was satisfied that the registrant had not been misusing controlled drugs, but did not refer by way of explanation to the fact it had seen medical reports, including drug test results.
• explaining whether a resumed hearing is necessary. This will normally be in cases in which a suspension or period of conditional registration has been imposed.
• specifying the sort of evidence the registrant would be expected to provide at a resumed hearing.
• properly relating the findings of the panel to the charges. For example, in one case, the panel's findings appeared not to relate to the charges at all, but to an allegation that was not included in the charges. This raises another issue in relation to whether the charges had been framed correctly (see 1.1).

PRACTICE NOTE

Disclosure

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

Introduction

The requirement that prosecution authorities disclose to the defence all material evidence for or against the accused is a facet of the right to a fair hearing protected by Article 6 of the European Convention on Human Rights.[1]

For this purpose, “prosecution authorities” include regulators[2] and that disclosure obligation requires the HPC to disclose to the registrant concerned any evidence which the HPC holds but which it will not rely on as a part of its case and which weakens its case or strengthens that of the registrant.

Background

In investigating allegations, HPC does not adopt the one-sided approach of only seeking evidence to prove that an allegation is well founded, buts act as an objective fact finder, gathering all relevant evidence in a fair and balanced manner and presenting it in a format which will assist a Panel to determine whether there is a ‘case to answer’ or that the allegation is well founded.

At the preliminary investigative stage, prior to the determination of whether there is a case to answer, registrants are entitled to see and comment upon all of the material that will be considered by the Panel in making that determination. Consequently, up to that point here will be no material in HPC's possession which has not been disclosed to the registrant concerned.

Where a decision is made that there is a case to answer, it is possible that material obtained by HPC in the course of its further investigations will not be included in the evidence relied upon by HPC for the final hearing. Generally, such unused material will be rare but, where it does exists, the material will be provided to the registrant or the registrant concerned will be made aware of its existence by means of a "Disclosure Schedule".

1 *Edwards v UK* (1992) 15 EHHR 417

2 *Feldbrugge v Netherlands* (1986) 8 EHRR 425

Disclosure Schedule

At the same time as they receive the evidence upon which the HPC proposes to rely at the final hearing, the registrant concerned will receive either a Disclosure Schedule (and, if in the view of the HPC, a document is disclosable, a copy of that document) or a letter confirming that no unused material exists.

The Disclosure Schedule will list the evidence and documents in the possession of the HPC or its solicitors which they do not propose to rely on as part of their formal case and, as a minimum, will contain the following information:

- the name or title of the document or class or category of document;
- the location of the document;
- a brief description of the document; and
- a statement setting out whether or not the document is disclosable.

A 'document' in this context means anything in which information of any description is recorded and therefore includes electronic documents, videos and photographs. It may also include 'real evidence' e.g. a physical object.

Class or categories of documents may be used where the group of documents can be said to be of the same or a similar character. For example, draft witness statements or correspondence between a witness and the HPC.

Applications for Disclosure

A registrant may apply to the HPC for disclosure of any document or evidence on the Disclosure Schedule which has not previously been disclosed.

Applications must be made in writing to the HPC and identify the documents or evidence sought. Whilst a registrant is not obliged to disclose details of his or her defence, it will be of assistance if the registrant sets out in the notice how the documents or evidence sought would assist in the preparation of their defence as, without that information, the HPC may not be able to determine whether it has a disclosure obligation.

Other than in exceptional circumstances, disclosure applications should be made at least 28 days before the final hearing. The HPC will normally respond to such applications within 7 days.

Limits on the duty to disclose

The obligation to disclosure (whether in relation to items identified in a Disclosure Schedule in a or otherwise) only applies to material which is in the possession of the HPC or its solicitors and which came into their possession in relation to the case in question. The HPC has no duty to seek or provide disclosure of material held by a third party.

The HPC will make a reasonable search for any material requested which is in its possession, but what is reasonable will depend of the facts of each case and will be for the HPC to determine. In doing so, the factors taken into account will include but not be limited to:

- the number of documents involved;
- the nature and complexity of proceedings;
- the ease and expense of retrieval of any particular document;
- the significance of what is likely to be located during the search; and
- the extent to which the registrant can use any documents disclosed.

The HPC has no obligation to disclose documents which are subject to legal privilege or public interest immunity.

Challenging the HPC's decision

A person who is dissatisfied with a decision the HPC in relation to disclosure may apply to a Panel of the Committee which is due to hear the case to seek a ruling on the request for disclosure.

An application should be made in writing, at least seven days before the final hearing is due to take place, setting out:

- the name, address and registration number of the registrant;
- details of the documents or evidence sought; and
- an explanation of why it is considered that disclosure will assist the defence.[3]

In all but exceptional cases, Panels should deal with such applications by means of correspondence. If doing so would be inappropriate then the Panel should hold a preliminary hearing to determine the application.

In order to make a determination, the Panel will need to be provided with a copy of the material in question[4] and any written submissions which the applicant and the HPC wish to make. In deciding whether a document is to be disclosed the fundamental question which the Panel must consider (the Disclosure Test) is:

> whether a document which the HPC has in its possession but does not seek to rely upon would assist the registrant in preparing his or her case?

If the answer is "yes" then, subject to any other constraints, disclosure should be ordered. If the answer is "no", then the document need not be disclosed.

[3] as noted above, this is not mandatory but will assist the Panel in determining the application

[4] unless it is subject to legal privilege

In determining an application, a panel should consider all relevant factors, taking account of whether:

- the document in the possession of the HPC or its solicitors;
- the Disclosure Test is met;
- the document is subject to legal privilege;
- the document is relevant to the allegations;
- the registrant would be prejudiced without it; and
- the HPC would be prejudiced if directed to disclose it?

Registrants' obligations with respect to disclosed material

A registrant should only use disclosed material for the purpose of the proceedings in which they are disclosed, unless:

- that material has been read or referred to in the course of public hearing;
- the Panel has given express permission for its use for other purposes; or
- the HPC has given such express permission.

In line with the decision in *Taylor v Director of Serious Fraud Office,*[5] material will only be disclosed if the registrant concerned provides an undertaking not to use the material for any purpose other than the proper conduct of the particular case.

October 2009

5 [1999] 2 AC 177

PRACTICE NOTE

Disposal of Cases by Consent

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

Introduction

Disposing of cases by consent is an effective case management tool which reduces the time taken to deal with allegations and the number of contested hearings which need to be held. However, as the Health Professions Order 2001 (the **Order**) imposes broad public protection obligations upon the HPC, neither the HPC nor a Panel should agree to resolve a case by consent unless they are satisfied that:

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

Disposal by consent

The consent process is a means by which the HPC and the registrant concerned can seek to conclude a case without the need for a contested hearing, by putting before a Panel an order of the kind which the Panel would have been likely to make in any event.

The HPC will only consider resolving a case by consent:

- after an Investigating Committee Panel has found that there is a "case to answer", so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full. 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 liability; and
- where any remedial action proposed by the registrant and to be embodied in the Consent Order is consistent with the expected outcome if the case was to proceed to a contested hearing.

The process may also be used when existing conditions of practice orders or suspension orders are reviewed, enabling orders to be varied , replaced or revoked without the need for a contested hearing.

Procedure

Disposal by consent does not affect the range of sanctions available to a Panel, it is merely a process by which the registrant and the HPC can propose an appropriate outcome to the case and ask the Panel, assuming that it is content with that outcome, to conclude the case on that basis.

The task for the Panel is to determine whether, on the basis of the evidence before it:

- to deal with the case in an expedited manner by approving the proposal set out in the draft Consent Order; or
- to reject that proposal and set the case down for a full contested hearing.

As the Panel must retain the option of rejecting a proposal for disposing of a case by consent, the HPC has an obligation to make it clear to registrants that co-operation and participation in the consent process will not automatically lead to a Consent Order being approved.

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

A Consent Order template is set out in Annex 1 to this Practice Note.

Voluntary Removal

Article 11(3) of the Order and Rule 12(3) of the Health Professions Council (Registration and Fees) Rules 2003 prevent a registrant from seeking resigning from the register whilst the registrant is the subject of an allegation or a conditions of practice order or suspension order made by a Panel.

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

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

A Discontinuance Notice template is set out in Annex 2 to this Practice Note.

October 2009

[PRACTICE] COMMITTEE

CONSENT ORDER

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

1. [name of registrant] consents to the Committee [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:

[set out reasons]

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:

[set out Order]

Signed: _____ Panel Chair

Date: _____

Signed: _____ Signed: _____

Date: _____ Date: _____

Note: the parties may consent to the Order by all signing one copy of this form or each signing separate copies.

[PRACTICE] COMMITTEE

NOTICE OF DISCONTINUANCE

TAKE NOTICE that:

On [date] the Investigating Committee, being satisfied that there was a realistic prospect of the Health Professions Council (**HPC**) proving its case, referred the following allegation (the **Allegation**) against [name] (the **Registrant**) for hearing by the [Practice] Committee:

[set out allegation]

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

1. the HPC agreed to withdraw, and discontinue all proceedings in relation to, the Allegation; and

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

   a. to resign from the HPC 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 HPC Register, in considering any such application the HPC 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 [Practice] Committee, being satisfied upon due inquiry that it is appropriate to do so, consents to the HPC discontinuing these proceedings.

Signed: _____ Panel Chair

Date: _____

PRACTICE NOTE

Equal Treatment

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

Introduction

Many people will find appearing before a Panel to be a daunting experience and it is vital that Panels, whilst remaining fair, independent and impartial, are aware of and responsive to the differing needs of those who appear before them.

Social diversity includes not only race and ethnicity but also differences in linguistic, religious and cultural backgrounds, as well as issues of gender, sexuality and disability. Unless everyone involved in proceedings before a Panel can understand the process, the material put before them and the meaning of the questions asked and answers given in the course of the proceedings, the process is at best impeded and, at worst, justice may be denied.

In a modern and diverse society, equal treatment does not simply mean treating everybody in exactly the same way, it is about ensuring fairness. In some cases it means providing special or different treatment, in order that justice is both done and seen to be done.

By its very nature, this Practice Note can only deal briefly with a broad and complex area or practice For further and more detailed guidance Panels are advised to consult more comprehensive guidance, such as the *Equal Treatment Benchbook* published by the Judicial Studies Board.

Effective communication

People with personal impairments or who are disadvantaged in society are entitled to a fair hearing, as are those who may have difficulty coping with the language, procedures or facilities of Panel proceedings.

Panels should make effective use of communication and recognise that, for example, just because someone remains silent does not mean that they necessarily understand or feel that they have been adequately understood. They may simply feel too intimidated or too inarticulate to speak up.

All of us view the world from our own perspective, based on our own knowledge understanding and cultural conditioning. There is a fine line between Panel members relying on this and resorting to stereotypes which can lead to injustice.

SOME BASIC DOS AND DON'TS

DO:

- ascertain how parties wish to be addressed;

- obtain advance information about any disability or health problem which a person who is appearing before you may have;
- allow more time for special arrangements, breaks etc. to accommodate special needs at hearings;
- be understanding of people's difficulties and needs;
- try to put yourself in their position – the stress of attending a hearing should not be made worse unnecessarily, through a failure to anticipate foreseeable problems;
- bear in mind the problems facing unrepresented parties;
- ensure that appropriate measures are taken to protect vulnerable witnesses.

DON'T

- underestimate the stress and worry faced by those appearing before you;
- overlook the use – unconscious or otherwise – of gender-based, racist or other stereotyping as an evidential short-cut;
- allow over rigorous cross-examination of vulnerable witnesses;
- allow anyone to be put in a position where they face hostility or ridicule;
- use inappropriate "value laden" language, for example, 'girl' other than when speaking to a child or 'British' as a synonym for white, English or Christian.

PEOPLE WITH DISABILITIES

The Disability Discrimination Act 1995 (DDA) defines a disabled person as "someone with a physical or mental impairment that has a substantial, adverse, long-term effect on their ability to carry out normal day-to-day activities". For the purpose of the DDA "long term" means as lasting for more than 12 months.

Disability may, for example, relate to mobility, manual dexterity, physical co-ordination, incontinence, speech, hearing or sight, memory or ability to concentrate, learn or understand. It is estimated that at least 8.5 million people in the UK meet the definition of disabled person under the DDA.

Panels have a duty under the DDA to take account of disabilities and, therefore, steps must be taken to accommodate the special needs of parties, witnesses or advocates appearing before the Panel. It is important that Panels identify such needs as early as possible, so that appropriate steps can then be taken such as arranging for hearings to take place in accessible rooms or for suitable facilities to be made available. Wherever possible, hearings should take place at venues which are accessible and fitted with a hearing induction loop.

Often simple solutions will help. Short breaks in the proceedings may help those whose concentration is impaired or who need to eat or drink more frequently, take medication or go to the lavatory at frequent intervals. A pre-arranged signal for an urgent trip to the lavatory may be appropriate. The presence of a carer or

helper may be necessary. It may help to re-arrange the order in which evidence is heard so that witnesses are not kept waiting.

Panels also need to consider how to overcome difficulties which may arise in the course of the proceedings, for example:

- by adopting a different approach to questioning where a witness has difficulties with memory or comprehension; or
- by using visual aids or providing sign language or speech interpreters to overcome communication difficulties.

In many instances the best solution will simply be for the Panel to find out what the best method of communicating should be, ahead of the hearing, from the person concerned.

The obligation imposed on Panels extends not only to the conduct of the proceedings but also to the decisions they reach. Panels must take care to ensure that decisions do not unfairly discriminate against disabled people.

This is best achieved by Panels dealing with every case on its merits and avoiding stereotypes or judgements about what disabled people can or cannot do. By considering each case individually, Panels will avoid making assumptions about disabled people or disability and instead make an informed decision based on the individual case.

RACE AND RELIGIOUS BELIEF

Many of the steps which Panels need to take to address issues of race or religious belief are about differences, such as different naming systems or different forms of oath. Understanding those differences is important, but it is not an end in itself. The true purpose is to assist Panels to ensure that they treat everyone who comes before them equally and with dignity and respect.

Panel members should remember:

- fair treatment involves taking account of difference, treating everyone in the same way is not the same thing as treating everyone fairly;
- everyone has prejudices, so recognise and guard against your own;
- do not make assumptions: all white people are not the same, nor are all black, or Asian, or Chinese or Middle Eastern people;
- do not project cultural stereotypes, for example that “all Asian people” avoid eye contact;
- when in doubt, ask. A polite question about how to pronounce a name or about a particular religious belief or language requirement will not be offensive when prompted by a genuine desire to get it right.

However committed Panel members may be to fairness and equality, they may still give the opposite impression by using inappropriate, dated or offensive words. There is no fixed code; language and ideas are living and developing all the time. Panel members need to be aware that acceptable language changes

and seek to keep abreast of such change. For example, “black”, which was once regarded as too direct is now acceptable to people of African or Caribbean origin whereas “coloured” is now an offensive term that should not be used.

Similarly, broad descriptors such as “Asian” should be used with care. People may prefer to identify themselves by reference to a specific country, region or religion and people of Asian origin born in Britain may refer to themselves as British or British Asians.

Names and naming systems vary considerably between minority groups and some are complex. It is more important for Panel members to treat people with courtesy and address them properly than to try to learn all the different naming systems. Ask people how they would like to be addressed, how to pronounce their name and how to spell it. Ask for their full name or first, middle and last names. Do not ask for their “Christian name” or “surname”.

Religious Diversity in the UK

Christianity has not only played a major part in the evolution of society among the white population in the UK, but has also attracted a significant number of adherents within minority groups. There are a number of Asian and Chinese Christian churches, and black churches are currently the fastest growing within the Christian communion. However, Panels will undoubtedly encounter people with a variety of different religious beliefs - or none. There are, in addition, many degrees of devotion within the practice of any faith.

Oath-taking

The Oaths Act 1978 provides for the forms in which oaths may be administered and that a solemn affirmation is of the same force and effect as an oath.

In today’s multicultural society everyone should be treated sensitively when making affirmations or swearing oaths. The question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice between two procedures, which are equally valid in legal terms. The primary consideration should be what binds the conscience of the individual and Panels should not assume that an individual belonging to a minority community will automatically prefer to swear an oath rather than affirm.

As a matter of good practice and to confirm the importance of giving truthful evidence, Panel members should sit quietly and pay attention to a person whilst they are swearing an oath or affirming.

All faiths have differing practices with regard to court proceedings and these should be handled by Panels sensitively, with respect. and not as though they are a nuisance.

Some witnesses may wish to perform some form of ritual washing, to remove shoes or cover their heads or bow with folded hands whilst taking an oath on their holy scripture. Panels should treat such requests sympathetically, especially as in some faiths the holy scripture is believed to contain the actual presence of Divinity and the request is being made in order to manifest respect to the presence of the Divine.

Jewish, Hindu, Muslim and Sikh women may prefer to affirm if having to give evidence during menstruation or shortly after childbirth.

Panels should ensure that holy books of are available at hearings. It is likely that most demand will be for:

Bible (Old and New Testaments);

Hebrew Bible;

Qur'an (Muslim);

Gita (Hindu); and

Sunder Gutka (Sikh).

Holy books should be covered at all times when not in use in cloth or velvet bags. When uncovered, they should only be touched by the person taking the oath, not by Panel members or staff.

CHILDREN

Children rarely appear before Panels but, when they do, cases should be expedited as far as possible.

In legal terms a child is a person under the age of 18. Therefore the way in which Panels deal with children who appear as witnesses will to some extent depend upon the age of the child. However, research has shown that children's fears about going to court do not decrease with age, and adolescent witnesses are more likely to exhibit adverse psychological reactions than younger ones.

Panels need to be aware of the sort of stresses and worries going through a child's mind when involved in legal proceedings. This can relate to a fear of the unknown, pressure to withdraw the complaint, fear of retaliation or of publicity, having to relate intimate personal details in front of strangers, and insensitive questioning. Children may worry about having to repeat bad language, being shouted at, not being believed, having to give their address, being sent away or being sent to prison. Perhaps the greatest problem that a child might have to cope with is a feeling of guilt.

Panels should never underestimate how little of the proceedings a child understands. A child may not admit to the fact that they do not understand something, so vigilance and some second-guessing are vital.

The procedural rules[1] for Panels allow a broad discretion as to how evidence is given in the proceedings, and permit a child witness to give evidence through a video link or by any other means such as the video tape of an interview conducted in the context of a criminal investigation.

This power is particularly important where children are concerned in terms of achieving the overriding objective of dealing with cases justly, including ensuring that the parties are on an equal footing. What a child has said on a previous occasion can also be put before the Panel in the form of hearsay evidence.

If a child does have to give evidence in person then the Panel should:

- make appropriate arrangements to avoid any confrontation between the child and any party to the proceedings. This includes welfare provision during breaks and after the evidence is concluded.
- adopt procedures to ensure that the child's testimony may be adduced effectively and fairly.
- permit a third party, such as a parent, to sit near to the child provided that they do not disrupt the child's testimony;
- admit the child's evidence unless the child is incapable of giving intelligible testimony. The Panel must form a view on the child's competence at the earliest possible moment;
- ensure that advocates do not attempt over-rigorous cross-examination and use language that is free of jargon and appropriate to the age of the child.

GENDER

There have been many positive changes in society regarding gender roles but, even though women comprise more than half of the adult population, they remain disadvantaged in many areas of life. The disadvantages that women can suffer range from inadequate recognition of their contribution to the home or society to an underestimation of the problems women face as a result of gender bias.

Stereotypes and assumptions about women's lives can unfairly impede them and frequently undermine equality. Panels members must take care to ensure that their own experiences and aspirations, as women or of women they know, are not taken as representative of the experiences of all women. Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject.

In legal proceedings, women often feel humiliated, patronised and disbelieved and this is likely to be particularly true when any intimate health issue or issue of sexuality arises.

Panels need to be aware that it is a common misconception that a witness's demeanour, when giving evidence, will reflect the truthfulness of their account. This is not necessarily so. Victims of sexual or indecent acts often exhibit a

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

controlled response and in fact mask their feelings, appearing calm and composed. A woman may appear to minimise the impact of sexual harassment or sexual assault out of embarrassment and a wish to end the ordeal.

Sexual complainants, including those complaining of sexual harassment, can suffer when there is unnecessarily over-rigorous cross-examination regarding their previous sexual history or where the assailant is known to them. In cases involving allegations of a sexual nature, the procedural rules enable Panels to prevent a witness from being cross-examined by their alleged assailant but skilful and remorseless questioning by a detached advocate can be an equally demeaning experience. Panels should intervene to restrain insulting or offensive questions or the humiliation of a witness. The Human Rights Act also has implications for the extent to which a witness's right to respect for her private and family life may be infringed.

SEXUAL ORIENTATION

There is a historical background of widespread discrimination against homosexuals. Sexual orientation is just one of the many facets of a person's identity. Being a lesbian or a gay man is sometimes described as being as much an emotional orientation as a sexual one.

There is no evidence that being gay implies a propensity to commit any particular type of offence. A common, and extremely offensive stereotype, links homosexuality with a paedophile orientation. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is no evidence that gay men are more likely to abuse children than heterosexual men. Panels need to be aware of the harm caused by such stereotypical assumptions. It is equally misguided to:

- attribute feminine characteristics to gay men, or masculine characteristics to lesbians. Such attributions are not only offensive but can lead to dangerous assumptions, for example, that a lesbian may be more resilient to harassment than her heterosexual counterpart;
- assume that AIDS and HIV positive status are necessarily indicative of homosexual activity. HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging;
- make any assumptions as to the sexual orientation of transvestites or transsexuals. Where there is a question relating to a person's gender, the person should be asked what gender they consider themselves to be and treated as a member of that gender.

Many transsexual and transvestite people would not consider themselves gay or lesbian and should not be considered as merely a dimension or extension of gay and lesbian culture.

Additionally, there are basic differences within and between the transsexual and transvestite experiences. For many transvestites, cross-dressing is not a fetish, but an inescapable emotional need, which, particularly in public places, generates risk of conflict or ridicule. It is unlikely that a transvestite who cross-dresses in private and sometimes in public, will cross-dress when appearing before a Panel. However, this may not always be the case, and a desire or need to cross-dress may still be a relevant and important issue.

The process of gender reassignment is extremely complex, requiring great personal determination, with emotional and psychological factors playing a large role. Not all transsexual people undergo surgery, but for those that do, it is just part of a wider sequence of events and processes that are intended to help the physical identity match the person's inner sense of gender identity. Panels need to be aware that these events and processes are likely to involve great strain, and bring the transsexual person into situations of unwanted tension.

October 2009

PRACTICE NOTE

Finding that Fitness to Practise is "Impaired"

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

Introduction

In determining whether allegations are "well founded", Panels of the Conduct and Competence Committee and the Health Committee are required to decide whether the HPC, which has the burden of proof, has discharged that burden and proved[1] that the registrant's fitness to practise is impaired.

Impairment

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

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

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

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

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

1 to the civil standard of proof, the balance of probabilities

2 (2006) EWCA Civ 1319

Factors to be taken into account

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

The initial task for the Panel is:

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

Subsequently, the Panel is:

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

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

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

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

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

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

> *"There must always be situations in which a Panel can properly conclude that the act… was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired…*

[3] EWHC 581 (Admin

It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated".

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

Character evidence

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

Whilst it is appropriate for Panels to do so, in admitting character evidence for the purpose of determining impairment, they must exercise caution. As the Court of Appeal noted in *The Queen (Campbell) v General Medical Council,*[4] issues of culpability and mitigation are distinct and need to be decided sequentially and:

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

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

When considering impairment, Panels may properly take account of evidence such as the registrant's competence in relation to the subject matter of the allegation; the registrant's actions since the events giving rise to the allegation; or the existence or absence of similar events. Character evidence of a more general nature which has no direct bearing on the findings to be made by the Panel, such as the registrant's standing in the community, should not be admitted at this point. Expressions of regret or remorse will usually fall within the latter category. However, where there is evidence that, by reason of insight, that regret or remorse has been reflected in modifications to the registrant's practice, then it may be relevant to the question of impairment.

In deciding whether to admit character evidence at the impairment rather than the sanction phase, Panels need to consider whether the evidence may assist them to determine whether fitness to practise is impaired. Whilst caution needs to be

[4] [2005] EWCA Civ 250

exercised, an over-strict approach should not be adopted as, it is important that all evidence which is relevant to the question of impairment is considered, such as evidence as to the registrant's general competence in relation to a competence allegation. In considering evidence of impairment, Panel's will readily recognise and be able to disregard character evidence of a general nature which is unlikely to be relevant. As the decision in *Cheatle v GMC*[5] highlights, Panels must be careful not to refuse to hear evidence at the impairment phase about a registrant's general professional conduct which, when heard at the sanction phase, raises doubts about the conclusion that the registrant's fitness to practise is impaired.

The sequential approach

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

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

It is important that these four steps should be and be seen to be separate but that does not mean that Panels must retire four times in every case. Whether the Panel needs to retire at each and every step in the process will depend upon the nature and complexity of the case.

Whilst there is no general obligation in law to give separate decisions on finding of fact, in more complex cases may be necessary to do so. As the Court of Appeal stated in *Phipps v General Medical Council*:[6]

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

October 2009

[5] [2009] EWHC 645 (Admin)

[6] [2006] EWCA Civ 397

PRACTICE NOTE

Hearing Venues

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

Introduction

Article 22(7) of the Health Professions Order 2001 provides that:

> *"Hearings and preliminary meetings of the Practice Committees at which the person concerned is entitled to be present or to be represented are to be held in –*
>
> *(a) the United Kingdom country in which the registered address of the person concerned is situated; or*
>
> *(b) if he is not registered and resides in the United Kingdom, in the country in which he resides; and*
>
> *(c) in any other case in England."*

Panels have a discretion as to exactly where a hearing is held within the home country of the registrant concerned and hearings do not need to be confined to Belfast, Cardiff, Edinburgh and London. The HPC adopts a flexible approach to hearing venues and, subject to the finite resources and funds available, seeks to accommodate the reasonable needs of all those who must attend hearings.

Procedure

Wherever possible, hearing venues will be dealt with as an operational matter and agreed with the registrant concerned by the Fitness to Practise Department following consultation with witnesses etc.

If agreement cannot be reached, the Panel may be asked to give directions as to the venue for the hearing and for this purpose may need to conduct a preliminary hearing.

In determining the venue for a hearing, Panels should take the following factors into account:

- the personal circumstances of the registrant concerned, for example, whether the registrant is the carer of elderly relatives or young children;
- the needs of witnesses, particularly where vulnerable witness orders have been made or witnesses are disabled or elderly;
- the effect that the location of the hearing may have on the quality of evidence given by witnesses at the hearing;

- the number of witnesses and their respective locations. Including the financial implications of witness travel and the impact the hearing may have on the services provided by witnesses from a single organisation;
- the financial implications for both the HPC and the registrant concerned, including whether, in the opinion of the Panel, a decision in favour of the HPC would cause undue hardship to the registrant concerned.

This is not intended to be an exhaustive list of the factors which need to be considered by Panels in reaching their decision.

October 2009

PRACTICE NOTE

Health Allegations

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

Introduction

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

> "(iv) his physical or mental health".

In turn, Article 26(6)(b)(ii) of the Order requires the Investigating Committee, where it concludes that there is a case to answer, to refer such health allegations to the Health Committee.

In addition, Rule 4(1) of the HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (referral to Health Committee) provides that:

> "Where it appears to the [Conduct and Competence] Committee that an allegation which it is considering would be better dealt with by the Health Committee, the [Conduct and Competence] Committee may refer the allegation to the Health Committee for consideration and shall suspend its consideration of the allegation"

The Health Committee can then either deal with the matter as a health allegation or refer the case back to the Conduct and Competence Committee.

What constitutes a health allegation?

In some instances the decision that an allegation is a "health allegation" will be straightforward. This is likely to occur in cases where fitness to practise concerns arise as a direct consequence of the registrant's a physical or mental condition and where there is no evidence to suggest that other factors are involved. However the decision is not so simple in cases where health is only one facet of broader or more serious concerns about the registrant's fitness to practise. ,

Equally, there are many cases where at the outset the evidence may not disclose an underlying health issue – for example, it would be wrong to assume in every allegation in which alcohol has played a part that the registrant has some form of alcohol dependency problem – but where such evidence comes to light as the case progresses.

Whether a matter should be referred to the Health Committee because it would be "better dealt with" by that Committee is a discretionary power intended to deal with cases of that kind.

In deciding whether a matters hould be treated as a health allegation, the factors which should be taken into account – even where health issues are the predominant cause of allegation – include the overall seriousness of the allegation and the sanctions which are available to the Health Committee in dealing with the case.

The HPC's Health Committee, like its GMC counterpart, does not have a direct striking off power. In *Crabbie v General Medical Council*[1] the registrant had been sent to prison for causing death by dangerous driving and driving with excess alcohol in the blood but had presented evidence to the effect that her fitness to practise was affected by alcohol dependency. Referral of her case to the Health Committee was refused on the basis that the nature and gravity of the offence were such that the public interest would not be adequately protected by the sanctions available to that Committee.

The Privy Council, in upholding that decision, stated that:

> *"The power to refer arises where the opinion has been formed that the [registrant's] fitness to practise may be seriously impaired by reason of a physical or mental condition. The forming of the requisite decision does not, however, require the case to be referred to the Health Committee. The power to refer is a discretionary one. … in considering whether or not to exercise the power, the [decision makers], 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, whether as an initial direction or as a direction consequent upon the practitioner's failure to comply with conditions. … if the case is one in which erasure is a serious possibility, neither [decision maker] should refer the case to the Health Committee notwithstanding that it may be one where the fitness to practise of the practitioner in question appears to be seriously impaired by reason of his or her physical or mental condition."*

Similarly, in *R (on the application of Toth) v GMC,*[2] a case which concerned the exercise of the power to 'cross refer' a case 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.*

[1] [2002] UKPC 45.

[2] (2003) EWHC 1675 (Admin)

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.".

Evidence as to health

In many cases where health issues arise or which are referred as health allegations to the Health Committee, Panels will be able to draw appropriate inferences and conclusions from evidence about a registrant's health without the need for input from medical or other experts. It is for the Panel to decide whether such evidence is required. As the court noted in the *R v Turner:*[3]:

"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."

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

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

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

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

[3] [1975] QB 834

Medical Assessors

In cases where Panels consider that they need the advice and assistance of an expert, they have the option of appointing a suitably qualified registered medical practitioner as a medical assessor.

The decision as to whether a medical assessor is required in a particular case is a matter for the Panel alone, in line with the principle set out in *R v Turner*, but it is open to the parties to request that such an assessor be appointed.

The procedure for appointing medical assessors is set out in more detail in the 'Assessors and Experts' Practice Note.

October 2009

PRACTICE NOTE

Interim Orders

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

Introduction

Article 31 of the Health Professions Order 2001[1] (the 2001 Order) sets out the procedure by which a Practice Committee Panel may make an interim order, to take effect either before a final decision is made in relation to an allegation or pending an appeal against such a final decision.

A Panel may only make an interim order if it is satisfied that:

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

for that person's registration to be suspended or to be made subject to conditions.

Types of order

An interim order may be either:

- an interim **conditions of practice** order - which imposes conditions with which the registrant must comply for a particular period of time; or
- an interim **suspension** order - which directs the Registrar to suspend the registrant's registration for a particular period of time.

An interim order has effect immediately and its duration should be set out in the order but cannot be for more than eighteen months.

When orders may be made

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

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

[1] SI 2002/254

[2] these proceedings take the form of a separate hearing which will only consider whether an interim order should be imposed. The panel concerned does not take any other action at that hearing.

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

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

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

Procedure

Before a Panel decides that it is appropriate to make an interim order, Article 31(15) of the 2001 Order provides that it must give the registrant concerned the opportunity to appear before it and allow him or her the right to be heard.

In relation to interim orders made whilst an allegation is still pending this will take the form of a separate hearing held solely to consider whether an interim order should be made and, if so, its terms.

Article 31 does not specify any detailed procedural requirements for such hearings but, normally, the registrant should be given seven day's notice of such a hearing unless there are exceptional circumstances which make it necessary for the Panel to hold a hearing at shorter notice.

The appropriate place to consider and weigh all of the evidence in relation to an allegation is when that allegation is being considered at a fitness to practise hearing. Therefore, in determining whether to make an interim order, a Panel will not be in a position to weigh all of the evidence but must act on the information that is available.

In essence, its task is to consider whether the nature and severity of the allegation is such that the registrant, if he or she remains free to practise without restraint, may pose a risk to the public or to himself or herself or that, for wider public interest reasons, freedom to practise should be restrained.

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

[3] as case to answer decisions are made 'on the papers' and without the registrant being present, this would require the Panel to adjourn without referring the case on, in order to give the registrant an opportunity to appear before the Panel and be heard on whether an interim order should be imposed. In practice this power is not used.

[4] these proceedings take the form of a separate hearing which will only consider whether an interim order should be imposed. The panel concerned does not take any other action at that hearing.

The decision to issue an interim order is not one that should be taken lightly and will depend upon the circumstances in each case. However, cases in which restraining freedom to practise may be appropriate include those involving serious or persistent competence failures; cases involving violence, sexual abuse or serious misconduct; cases where it appears that the registrant's health means he or she may pose a risk to others or be capable of self harm; and cases where the broader public interest, such as public confidence in the regulatory process or the profession concerned, may be at risk.

Although this list is not exhaustive, the types of case in which an interim order is likely to be made are:

- cases where, if the allegation is well founded, there is an ongoing risk to service users from the registrant's serious lack of professional knowledge or skills;
- cases which may not be directly related to practice but where, if the allegation is well founded, the registrant may pose a risk to service users; for example allegations of indecent assault or where it appears that a registrant with serious health problems is practising whilst unfit to do so;
- cases where, although the there may be no evidence of a direct link to practice, the allegation is so serious that public confidence in the regulatory process would be seriously harmed if the registrant was allowed to remain in practice on an unrestricted basis; for example, allegations of murder, rape, the sexual abuse of children or other very serious offences;
- cases where the registrant has breached a conditions of practice order or suspension order previously imposed by a Panel.

A Panel may be asked to impose one or other kind of interim order in a particular case, but will in every case need to consider whether, if it is necessary to impose an order to protect the public, the registrant or the public interest, an interim conditions of practice order will secure the necessary degree of protection. An interim suspension order should only be imposed if the Panel regards conditions of practice as being an insufficient safeguard.

In imposing an interim conditions of practice order a Panel must take account of the fact that it has not heard all of the evidence in the case. Therefore it should not impose the kind of conditions which may be appropriate after a case has been heard and the allegation has been determined to be well founded; for example, conditions requiring the registrant to undertake additional training. Consequently, interim conditions of practice are likely to be limited to specific restrictions on practice, for example, not to provide services to children or not to undertake unsupervised home visits.

Where the Panel is considering the imposition of an interim order at the conclusion of proceedings in relation to an allegation (in order to restrain the registrant's freedom to practise during the appeal period) the decision will be made as part of the main hearing and not in separate proceedings.

However, such orders should not be regarded as an automatic outcome to such proceedings and, before imposing an interim order at the end of such

proceedings, the Panel should give the registrant an opportunity to address it specifically on the issue of whether or not an interim order should be made.

All hearings must take place in the UK home country in which the registrant has his registered address and the registrant may be represented at any hearing, whether by a legally qualified person or otherwise.

Review, variation, revocation and replacement

Interim orders must be reviewed on a regular basis; as a minimum within six months of the date on which the order was made and then every three months from the date of the preceding review until the interim order ceases to have effect. A review must also be made if new evidence becomes available after the order is made.

If before the first review the interim order is replaced by another interim order or extended by the court, the first review need not be until six months after the replacement or extension. If such replacement or extension takes place after the first review, then the next review must take place within three months after the replacement or extension.

Orders may be varied or revoked at any time and the person who is subject to the order may also apply to the appropriate court for the order to be varied or revoked. On application by HPC, an interim order may be extended for up to 12 months by the appropriate court. If one type of interim order is replaced by another, the replacement order may only have effect up to the date on which the original order would have expired. (including any time by which the order was extended by a court). The 'appropriate court' is, in England and Wales or Northern Ireland, the relevant High Court and in Scotland, the Court of Session.

Terminating an interim order

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

- by the court, on the application of the person who is subject to the order;
- by the Practice Committee currently dealing with the allegation; or
- automatically, when the circumstances under which the order was made no longer exist, namely:
    - if the order was made before a final decision is made in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
    - if an order was made after a final decision, 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.

October 2009

PRACTICE NOTE

Joinder

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

Introduction

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

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

Joining allegations against one 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 in considering the joinder of allegations is whether it would be just to do so.

Joinder

Joining allegations is a discretionary power, the exercise of which must be carefully considered by Panels. In exercising that discretion, the principles to be applied are largely derived from practice in the criminal courts, most notably the decision in *R v Assim,*[2] as follows:

- 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 the interests of the registrant(s) concerned;
- as a general rule, it would be inappropriate for a Panel to join together several, unconnected, allegations against one registrant or to join unconnected allegations against several registrants;

[1] HPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), r.4(8) and r. 6(7); HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), r.5(4); HPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), r.5(4).

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

- joining allegations against a single registrant will only be appropriate where the allegations are linked in nature, time or by other factors, for example where the registrant faces several allegations:

    - of the same or similar character;
    - based on the same acts, events or course of dealing; or
    - based on connected or related acts, events or courses of dealing.

- joining allegations against more than one registrant will only be appropriate where they are subject to the same allegation, where there is evidence that they acted in concert or the allegations against them are linked in time or by other factors, for example where:

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

- even if, based on the nature of the allegations, joinder would be appropriate, 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.

Evidence

If allegations against more than one registrant are joined, it will not necessarily be the case that all of the evidence can be considered against all of the registrants. Each registrant is entitled to have their case decided solely on the evidence against them and Panels must take care to consider evidence only in relation to the allegation and registrant to which it relates.

Severance

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

October 2009

PRACTICE NOTE

Mediation

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

Introduction

The Health Professions Order 2001[1] provides that, in relation to a fitness to practise allegation, if:

- an Investigating Committee Panel concludes that there is a case to answer, it may undertake mediation instead of referring the allegation to another Practice Committee;[2]

- a Panel of the Conduct and Competence Committee or Health Committee finds that the allegation is well founded, it may undertake mediation if it satisfied that it does not need to impose any further sanction on the registrant.[3]

The HPC, like other statutory regulators, exists to protect the public. In considering the use of mediation - which is essentially a means of resolving private disputes - care must be taken to ensure that HPC always acts, and is seen to act, in the public interest and avoids creating any confusion about its role as a regulator.

In cases involving conflict between a registrant and a service user, the latter may prefer not to take matters further and be satisfied to resolve matters by mediation. However, if the complaint involves matters which HPC needs to pursue further in the public interest then it has an obligation to do so, even if the complainant would prefer that it did not do so.

If mediation is to be used by HPC, it should be on the basis of:

- clear, fair and transparent processes;
- criteria which are consistently applied and prevent its overuse;
- maintaining confidentiality during the mediation processes but enabling the outcome to be reported to the relevant Practice Committee.

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

Clearly, there can be no guarantee that mediation will always achieve a mutually acceptable resolution and therefore, before determining that mediation may be

[1] SI 2002/254
[2] Article 26(6)
[3] Article 29(4)

appropriate, the Panel must be satisfied that, irrespective of the outcome of the mediation, it does not need to take any further steps to protect the public.

The Health Professions Order 2001 only provides for mediation 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 will form part of the information which HPC makes available to the public.

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

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

What is mediation?

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

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

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

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

What is the role of the mediator?

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

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

How is mediation conducted?

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

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

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

Referral criteria

Panels need to recognise that certain disputes should never be referred to mediation. As mediation is a closed and confidential process, its use in cases where there are issues of wider public interest – such as serious misconduct, criminal acts, serious or persistent lapses in competence, or abuse or manipulation of service users – where its use would fail to provide necessary public safeguards and seriously undermine confidence in the regulatory process.

Mediation will also be inappropriate in situations where there is a power imbalance which cannot be addressed, with the result that one party may dominate the outcome to the extent that the needs and interests of the other are not met.

Suitable cases

Mediation may (but will not always) be appropriate in minor cases that have not resulted in harm, which are not indicative of more serious or continuing concerns about a registrant's fitness to practice and, for example:

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

Unsuitable Cases

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

- serious misconduct;
- abuse of trust; boundary violations, predatory or manipulative behaviour;
- serious or persistent lapses in professional competence;
- criminal acts, dishonesty or fraud;
- serious concerns arising from the health of the registrant;
- substance abuse;
- where the registrant has frequently been the subject of allegations; or
- where mediation would be impossible because the registrant is recalcitrant or the complainant does not want to face the registrant again.

October 2009

Health Professions Council

[PRACTICE] COMMITTEE

ORDER OF REFERRAL TO MEDIATION

The decision of the Committee 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 Committee is satisfied, for the following reasons, that it would not be appropriate to [refer this matter to the Conduct and Competence Committee or the Health Committee] [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 by the Committee 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 Committee of the outcome of the mediation.

THE COMMITTEE ORDERS that:

1. the matter set out above be referred to mediation;

2. the mediation be conducted on its behalf by [name of mediator or description of how the mediator is to be appointed];

3. the mediator inform the Committee of the outcome of the mediation.

Signed: _____ Panel Chair

Date: _____

PRACTICE NOTE

Postponement and Adjournment of Proceedings

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

Introduction

Article 32(3) of the Health Professions Order 2001[1] requires Panels to conduct fitness to practise proceedings expeditiously 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.

Panels proceedings should not be postponed or adjourned unless it is shown that failing to do so will create a potential injustice. Requests for postponements or adjournment made without sufficient and demonstrated reasons to justify them should not be granted.

Postponements and adjournments

In relation to HPC fitness to practice proceedings, a distinction is made between a postponement and an adjournment in that:

- **postponement** is an administrative action which may be taken on behalf of a Practice Committee by HPC's Head of Adjudication[2] at any time up to 14 days before the date on which a hearing is due to begin; and

- **adjournment** is a decision for the Panel or the Panel Chair, taken at any time after that 14 day limit has passed or once the proceedings have begun or are part heard.

Postponements

An application for a postponement should be made in writing (letter, email or fax) to the Head of Adjudication at the HPC at least days 14 before the hearing date. The application should set out the background to and reasons for the request and be supported by relevant evidence.

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

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

[1] SI 2002/254

[2] or in the Head of Adjudication's absence, any person nominated by the Head of Adjudication (other than a person who has been involved in the investigation of the case)

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

If a postponement application is refused, the Head of Adjudication will advise the applicant to attend the hearing. The applicant and any representative must do so ready to proceed, but subject to the right to apply to the Panel for an adjournment.

Where a postponement is granted, the Head of Adjudication will seek to agree with the parties suitable alternative dates for the hearing or, where that is not possible, to agree the arrangements which need to be put in place in order for the case to be re-listed for hearing.

Adjournments

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

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

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* (2006) EWHC 1108:

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

The factors to be considered cannot be comprehensively stated but will depend upon the particular circumstances of each case, and they will often overlap. The crucial factor is that the registrant is entitled to a fair hearing.

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

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

Communication

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

Supporting evidence

Applications for postponements or adjournments must be supported by proper evidence and both the Head of Adjudication and Panels should adopt a strict approach to evaluating such evidence.

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

October 2009

PRACTICE NOTE

Preliminary Hearings

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

Introduction

Panels have the power to hold preliminary hearings in private with the parties for the purpose of case management. In most fitness to practise cases such a hearing will not be required, but they are of assistance in the small number of cases where substantial evidential or procedural issues need to be resolved prior to a full hearing taking place.

Background

The procedural rules[1] for fitness to practise proceedings provide that, for the purpose of assisting them in carrying out their functions, Panels may hold a preliminary hearing[2] in private with the parties, their representatives and any other person it considers appropriate if, in the Panel's opinion, such a meeting would assist it to perform its functions.

A hearing may be held by the Panel Chair alone, acting on behalf of the Panel, and that is the procedure which should normally be adopted. As the primary purpose of a preliminary hearing is to assist the Panel in regulating the proceedings at a subsequent hearing, substantive decisions about the disposal of cases should not be dealt with by the Panel (or Panel Chair alone) at a preliminary hearing.

Procedure

The Panel may decide to hold a preliminary hearing of its own motion or at the request of one of the parties. Where a party requests that a preliminary hearing is held, before arranging to do so the Panel should ask that party to outline the reasons for the request and the issues which will be raised if the hearing is held.

As many preliminary issues can be resolved by correspondence, a Panel should normally only agree to a preliminary hearing being held where it is satisfied that there are substantial procedural or evidential issues which need to be resolved.

Normally the parties should be given at least fourteen days notice of a preliminary hearing and, in setting the time and place for that hearing, Panels must take account of Article 22(7) of the Health Professions Order 2001[3], which

[1] HPC (Investigating Committee) (Procedure) Rules 2003, r.7; HPC (Conduct and Competence Committee) (Procedure) Rules 2003, r. 7; HPC (Health Committee) (Procedure) Rules 2003, r.7.

[2] 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

[3] SI 2002/254

requires preliminary hearings to be held in the UK country in which the registrant concerned is registered.

At a preliminary hearing the Panel should verify compliance to date with all requirements relating to the proceedings, including any standard directions which apply to those proceedings and may;

- consider issues relating to the hearing of the case including:
    - the extent to which any evidence is agreed,
    - the need for Witness Orders,
    - whether any party is seeking to introduce expert evidence,
    - the needs of vulnerable witnesses,
    - whether any facilities are required for particular evidence, such as videos or other exhibits, and
    - any special requirements for the hearing (e.g. interpreters);
- make arrangements for any further investigation which the Panel has agreed to have conducted and which the registrant has requested or consented to (e.g. a medical examination or test of competence);
- set a date for (or the arrangements for setting the date for) the hearing or, if it is considered more appropriate, a further preliminary hearing; and
- give any special directions for the exchange of documents prior to the hearing.

However, Panels should not agree to hold a preliminary hearing simply because a party is asking the Panel to deal with one or more of the matters listed above if those matters can be adequately resolved by correspondence.

October 2009

PRACTICE NOTE

Proceeding in the Absence of the Registrant

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

Introduction

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

The decision to proceed with a hearing in the absence of the registrant is a matter within the discretion of the Panel. However, that discretion is one which has been described by the courts as "severely constrained"[2]. As the House of Lords held in *R v Jones*,[3] the discretion to commence and conduct proceedings in the absence of the registrant "should be exercised with the utmost care and caution."

In exercising that discretion, Panels must strike a careful balance between fairness to the registrant and the wider public interest.

Exercise of discretion

In deciding whether to proceed in the absence of the registrant, Panels must consider all of the circumstances of the case, including whether the registrant's actions amount to a waiver of the right to be present or represented.

In reaching a decision, Panels should take account of the factors identified by the Court of Appeal in *R v Jones*.[4] That case concerned the absence of a criminal defendant, but the factors identified in that case (appropriately modified as set out below) are relevant to fitness to practice proceedings:

- the nature and circumstances of the registrant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;
- whether an adjournment might result in the registrant attending the proceedings at a later date;
- the likely length of any such adjournment;

1 HPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), Rule 9; HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), Rule 11; HPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), Rule 11.

2 *Tait v The Royal College of Veterinary Surgeons* [2003] UKPC 34

3 [2002] UKHL 5

4 [2001] EWCA Crim. 168

- whether the registrant, despite being absent, wished to be represented at the hearing or has waived that right;
- the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant;
- the extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case;
- the seriousness of the allegation;
- 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;
- the effect of delay on the memories of witnesses;
- where allegations against more than one registrant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.

Procedure

If a Registrant fails to attend a hearing and has not provided any explanation for being absent, the Panel will need to determine whether it is appropriate to proceed in the registrant's absence.

The Panel should first seek clarification of whether notice of the hearing was correctly sent to the registrant. If it is satisfied that notice was properly given (but not otherwise) the Panel should then consider the factors set out above to determine whether, in all the circumstances, it is appropriate to proceed with the hearing in the absence of the registrant. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.

If the Panel decides that a hearing should take place or continue in the absence of the registrant, they must ensure that the hearing is as fair as the circumstances permit. In particular, reasonable steps must be taken during the giving of evidence to test the HPC's case and to make such points on behalf of the registrant as the evidence permits.

The Panel must also avoid reaching any improper conclusion about the absence of the registrant and, in particular, must not treat the registrant's absence as an admission of guilt.

October 2009

PRACTICE NOTE

Requiring the Production of Information and Documents and Summoning Witnesses

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

Introduction

In the course of investigating an allegation against a registrant, HPC Investigators have the power to require any person, other than the registrant concerned, to provide information or produce documents relevant to that investigation.

Further, Panels of the HPC Practice Committee Panels have the power to require any person, other than the registrant concerned, to attend a hearing and give evidence or produce documents.

Failure to comply with a requirement imposed by an Investigator or a Panel is a criminal offence.

Investigators' powers

Article 25(1) of the Health Professions Order 2001[1] (the Order) enables HPC Investigators, for the purpose of assisting Practice Committees to carry out their functions in respect of fitness to practise, to require any person to supply information or produce any document which appears to be relevant to the discharge of those functions.

This power may not be exercised against the registrant who is the subject of the proceedings, but Article 25(2) of the Order does enable HPC to require the registrant concerned to provide details of:

- his or her employer;
- any person with whom he or she has an arrangement to provide services; and
- any other health or social care regulator by which he or she is authorised to practise.

[1] SI 2002/254

The exercise of Investigators' powers

Before requiring a person to supply information or produce a document, an Investigator must reasonably believe that the information or document appears to be relevant and that the person is able to supply it.

In exercising the power under Article 25(1) of the Order an Investigator:

- must act in a manner which is consistent with the overriding principle of proportionality;
- must act in good faith and in the reasonable belief that what is being sought will be relevant to the investigation;
- must not ask for more information or documents than are reasonably necessary for the purpose of assisting the investigation; and
- taking account of the nature and complexity of the case, should have regard to the time and expense which may be involved in identifying, retrieving and providing the information.

Many potential difficulties can be overcome by a common sense application of these powers. For example, asking an organisation to provide "any information that you hold about Mr. X" is likely to be disproportionate given that a more narrowly drawn request will invariably be possible. If an allegation relates to a specific event or period of time then the logical starting point is only to ask for information relating to that event or period of time. Similarly, in identifying any documents to be produced, it should be possible to require production of a specific document or class of documents, or to specify some other criteria which will enable the relevant documents to be identified.

Investigators' powers to require persons to supply information or produce documents will normally be exercised by means of a Requirement Notice (a template for which is annexed to this Practice Note).

The powers of Panels

Article 32(2)(m) of the Order provides that the Practice Committees' rules may empower Panels to require persons to attend and give evidence at hearings or to produce documents at hearings. The procedural rules for each Practice Committee[2] contain such powers which are expressed in similar form as follows:

> *"… The [Panel] may require any person (other than the health professional) to attend a hearing and give evidence or produce documents."*

The exercise of the Panel's powers

The Panel may decide on its own motion to issue a Witness Order and any party to the proceedings may also request the issue of such an Order.

[2] Rule 6(8), Health Professions Council (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574); Rules 10(3) and 13(6), Health Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575); Rules 10(3) and 13(6), Health Professions Council (Health Committee) (Procedure) Rules 2003 (SI 2003/1576).

The power of Panels to require persons to attend and give evidence or produce documents at hearings will be exercised by means of a Witness Order (a template for which is annexed to this Practice Note) which may require a person to attend a hearing and give evidence or provide certain documents.

A party seeking to have a Witness Order made against any person must apply to the Panel in writing setting out:

- the name and address of the person concerned;
- the terms of the Witness Order sought;
- details of any information being sought;
- the steps which the applicant has taken to secure the attendance of (and production by) that person on a voluntary basis; and
- evidence to show why the attendance of (and production by) that person is likely to support the case of the applicant.

Unless the Panel directs otherwise, a copy of the application and any evidence in support of it must be sent to the person concerned. The Panel may deal with the application without holding a hearing if the parties consent or if the Panel considers that a hearing is unnecessary.

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. A Witness 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 person who is subject to the Order to understand the obligation which has been imposed by the Panel.

Compliance with Witness Orders

A person should not be required to attend in response to a Witness Order unless it has been served at least seven days before the hearing or, if it has been served within that period, that person has informed the Panel that he or she is willing to attend.

Where, in the case of any document, a person could comply with a Witness 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:

1. produce a photographic or other facsimile copy of the document or the relevant parts of it, and
2. make them available for inspection by the Panel.

A person who, in response to a Witness Order, attends the hearing of any proceedings and gives evidence is a witness of the party who asked for the Order to be issued and, as such, may not be cross-examined by that party without the leave of the Panel. Normally this should only be given if the Panel decides that the witness may be treated as a hostile witness.

Limits of the powers of Investigators and Panels

Neither an Investigator or a Panel can exercise their powers in order to obtain:

- information which a person is prohibited from disclosing by or under any other enactment[3]; or
- information or documents which a person could not be compelled to supply or produce in civil proceedings[4].

Material which a person could not be compelled to supply or produce in civil proceedings will generally be material which is:

- subject to Public Interest Immunity, for example on the grounds of national security;
- subject to legal professional privilege:
    - communications between lawyer and client for the purposes of giving or receiving legal advice, or
    - communications whose dominant purpose relates to pending or contemplated litigation; and
- correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings.

Investigators and Panels must take appropriate steps to avoid exercising their powers in a manner which breaches those limitations. However, if a Requirement Notice or Witness Order is made and the person against whom it was made believes that one of those limitations should apply, he or she may apply to a Panel to have the Requirement Notice or Witness Order set aside (see below).

Service user confidentiality

Registrants and others who are responsible for health and similar records sometimes mistakenly assume that the Data Protection Act 1998 prevents them from disclosing information about patients to HPC. That is not the case, as section 35(1) of that Act exempts personal data from the non-disclosure provisions where disclosure is required by or under any enactment, such as the Health Professions Order 2001.

Equally, the Caldicott Guardian arrangements for data protection adopted within the NHS are extra-statutory arrangements which do not prevent disclosure to HPC under the Order.

The concept of patient/client confidentiality does not, of itself, confer any evidential privilege as, in general, the majority of personal, commercial and professional confidences (other than those covered by legal professional privilege) may be subject to compelled production.

[3] 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.

[4] i.e. proceedings before the court to which any appeal would be made against the decision of the Panel.

Registrants do owe a duty of confidentiality to their service users, who rightly expect that information which they entrust to registrants will be held in confidence and not shared with others. That duty is derived from the common law and is an essential part of health or social care practice, which helps to ensure that service users provide full and frank information.

Investigators and 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 an Investigator or Panel is satisfied that access to those records is needed then the person holding them should be compelled to the produce those records.

Setting aside

A person who has received a Requirement Notice or Witness Order may apply in writing to a Panel to have it set aside in whole or in part. In the case of a Witness Order issued at the request of a party to the proceedings, that party shall have a right to be heard on such an application.

Failure to comply

Article 39(5) of the Order makes it a criminal offence for a person, without reasonable excuse, to fail to comply with any requirement imposed by

- an HPC Investigator under Article 25(1) or (2), or
- by a Panel under rules made by virtue of Article 32(2)(m) (or any corresponding rule).

Offences are punishable on summary conviction by a fine not exceeding level 5 on the standard scale (currently £5,000).

October 2009

[INVESTIGATING] COMMITTEE

REQUIREMENT TO PROVIDE INFORMATION OR PRODUCE DOCUMENTS

TO: [name and address]

The [Investigating] Committee of the Health Professions Council is considering an allegation relating to the fitness to practise of [name of registrant]

Article 25(1) of the Health Professions Order 2001 enables an Investigator appointed by the HPC to require any person to supply information or produce documents which appear to the Investigator to be relevant to the discharge of the Committee's fitness to practice functions.

In accordance with that Article, **YOU ARE REQUIRED TO:**

[provide][produce]

The [information] [documents] identified above should be sent to the following address by not later than [date]:

[Name]
Health Professions Council
Park House
184 Kennington Park Road
London SE11 4BU

Signed: _____ Date: _____

(HPC Investigator)

IGNORING THIS NOTICE IS A CRIME: If you fail, without reasonable excuse, to provide any information or produce any documents as required by this Notice you will be committing an offence under the Health Professions Order 2001. On conviction, you will be liable to a fine of up to **£5000**.

[PRACTICE] COMMITTEE

WITNESS ORDER

TO: [name and address]

The [Practice] Committee of the Health Professions Council is considering an allegation relating to the fitness to practise of [name of registrant]

A hearing in respect of that allegation will take place at:

[date, time and venue]

In accordance with the Health Professions Council ([Practice] Committee) (Procedure) Rules 2003, **YOU ARE ORDERED TO:**

[attend that hearing to give evidence][and to produce the following documents:]

Signed: _____ Panel Chair

Date: _____

IGNORING THIS ORDER IS A CRIME

If you fail, without reasonable excuse, as required by this order to:

- produce any documents; or
- attend a hearing and give evidence or produce any documents;

you will be committing an offence under the Health Professions Order 2001. On conviction, you will be liable to a fine of up to **£5000**.

PRACTICE NOTE

Restoration to the Register

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

Introduction

Article 33(1) of the Health Professions Order 2001 (the Order) provides that a person who has been struck off[1] the HPC Register by a Practice Committee or the court and who wishes to be restored to the Register must make an application for restoration.

Applications for restoration are 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, in most cases the Conduct and Competence Committee.

When a restoration application can be made

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

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

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

[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 an application for restoration.

Procedure

Article 33 of the Order and the relevant Practice Committee procedural rules[2] provide for restoration applications to be considered at a hearing before a Panel. Subject to one significant modification, the procedure to be followed will generally be the same as for other to fitness to practise proceedings and, for example, Panels may hold preliminary hearings, order the production of documents or the attendance of witnesses, etc. as they consider appropriate.

The significant modification is that, although any hearing should be conducted in the normal manner, Rule 13(10) of the procedural rules requires the Panel to adopt an order of proceedings which provides for the applicant to present his or her case first and for the HPC Presenting Officer to speak after that.

This modification reflects the fact that, in applying for restoration, the burden of proof is upon the applicant. Panels should always make it clear to applicants that this burden means it is for the applicant to prove that he or she should be restored to the Register and not for the HPC to prove the contrary.

Although the procedural rules require the applicant to present his or her case first, it will often be helpful at the beginning of a hearing for the HPC Presenting Officer to set out the history of the case and the circumstances which led to a striking off order being made. Allowing Presenting Officers to do so will not be contrary to Rule 13(10) provided that their comments are limited to background information of the kind described and do not include any substantive arguments which the HPC wishes to put to the Panel in relation to the restoration application.

Issues for the Panel

Article 33(5) of the Order requires that a Panel must not grant an application for restoration unless it is satisfied,[3] on such evidence as it may require, that the applicant:

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

Striking off is a sanction of last resort, which should only be used in cases involving serious, deliberate or reckless acts and where there may be a lack of insight, continuing problems or denial or where public protection in its widest sense[4] cannot be secured by any lesser means.

[2] the Health Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 and the Health Professions Council (Health Committee) (Procedure) Rules 2003.

[3] as these are civil proceedings, “satisfied” in this context means satisfied on the balance of probabilities

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

The reasons why a person seeking restoration was originally struck off the register will invariably be highly relevant to the Panel 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.

An application for restoration is not an appeal from, or review of, the original decision and Panels should avoid being drawn into 'going behind' the findings of the original Panel or the sanction it imposed. However, in determining applications for restoration, the issues which a Panel should consider include:

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

Conditional restoration

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

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

The only "applicable education and training requirements" would be the requirements for 'returners to practice', which are generic requirements primarily designed for registrants who have taken a career break and which are likely to be of only limited use in dealing with restoration cases.

The other option, of replacing a striking off order with a conditions of practice order, provides a better and more flexible alternative in cases where Panels wish to impose specific requirements on a registrant who is being restored to the register. A conditions of practice order can be tailored to meet the specific needs of a particular case, can be reviewed and, if necessary, 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 of practice.

October 2009

PRACTICE NOTE

Service of Documents

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

Introduction

The Health Professions Order 2001 and the procedural rules for Panels[1] made under it contain provisions about the documents to be served in fitness to practise proceedings, the time limits for doing so and the addresses at which service is to be effected.

Those statutory requirements must be followed strictly and this Practice Note is only intended to supplement and cannot replace any of those requirements.

Methods of service

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

In addition, documents may be served:

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

Service by electronic means

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

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

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

Address for service

The relevant addresses for service are set out in the procedural rules, as follows:

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

for the HPC, its committees or the Registrar:	the offices of the HPC;
for a registrant:	his or her address in the HPC register

For any other person, the procedural rules provide that it is the last known address of that person. This 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.

Deemed receipt

In order to establish that a person has been given notice, the procedural rules merely require proof of posting and provide that documents sent by post are to be treated as having been sent on the day of posting. Normally, documents relating to Panel proceedings will be posted many days or even weeks in advance of the relevant proceedings. However, if any question arises as to when documents should be deemed to have been received by the recipient, unless evidence to the contrary is available, Panels should regard documents to have been received as follows:

First class post (or an alternative service which provides for delivery on the next business day)	the second business day after it was posted.
Delivering the document to or leaving it at a relevant address:	the next business day after it was delivered to or left at the relevant address.
By fax, transmitted: before 4pm on a business day; in any other case;	 that day. the next business day.
Personal service, if served: before 4pm on a business day; in any other case;	 that day. the next business day.

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

Proof of service

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 a similar manner to any other witness statement. A template for such a certificate is set out in the annex to this Practice Note.

October 2009

[PRACTICE] COMMITTEE

Certificate of Service

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

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

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

being [his][her]:

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

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

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

Signed: Date

Name and position:

PRACTICE NOTE

Unrepresented Parties

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

Introduction

Although the procedures for Practice Committees Panels have been deliberately designed to enable registrants to represent themselves, for many registrants the prospect of having to appear before a Panel will nonetheless be a daunting experience.

The unrepresented registrant may be apprehensive or nervous about having to present a case before a Panel and this may manifest itself in apparently hostile, belligerent or even rude behaviour. Panels need to be aware of this and should take all reasonable steps to put unrepresented registrants at ease, including:

- being patient at all times and making appropriate use of adjournments;
- explaining what will happen in straightforward terms, avoiding legal jargon or, where it is necessary, explaining it;
- explaining what the registrant may or may not do, why and when;
- trying to get the registrant to identify the issues in dispute and ensuring that the registrant has said what he or she needs to say;
- giving clear reasons for any rulings or decisions that are made.

Maintaining a fair balance

Unrepresented registrants are unlikely to be familiar with law or procedure and, in particular, the presentation of evidence by the examination and cross-examination of witnesses. They should be allowed some latitude in the presentation of their case, in order to ensure that they receive a fair hearing, but this does not mean that they should be allowed to exploit or abuse their lack of representation.

Panels should ensure that an unrepresented registrant has every reasonable opportunity to make his or her case. For example, it may be necessary for the Panel to help the registrant to put a point to a witness in the form of a question. However, Panels must be careful not to interfere in matters which must be decided by the registrant alone, such as whether or not to give evidence.

Panels are expected to give clear procedural guidance in every case before them, but it is especially important to do so in cases where a registrant is unrepresented. As a minimum the following should be explained:

- who the members of the Panel are and how they should be addressed;
- who the other people present are and their respective functions;

- the procedure which the Panel will follow, including:
    - that the HPC will open and then call witnesses to give evidence;
    - an explanation of the normal order of examining witnesses (examination in chief, cross-examination and re-examination);
    - that the registrant may raise objections to the admission of evidence;
    - that, once the HPC has put its case, the registrant may give evidence personally (and may be cross-examined) and may call and question witnesses; and
    - that when all the evidence has been heard, the registrant may address the Panel and thus will have the 'last word';
- that everyone will have the opportunity to present their case, and that the registrant should not interrupt when someone else is speaking;
- that the registrant may make notes, and may have a friend or colleague sitting alongside to make notes or help to present the case;
- that, if the registrant would like a short break in the proceedings at any time, that is likely to be granted;
- that, if the registrant does not understand something or has a problem about the case, the Panel should be told so that it can be addressed.

Protecting witnesses

A person who is unfamiliar with the presentation of evidence by means of examination and cross-examination is likely to make statements to, rather than asking questions of, witnesses and may adopt an aggressive, offensive or unnecessarily confrontational approach to the questioning of witnesses.

Although such behaviour is likely to arise inadvertently, Panels should protect witnesses from questioning by an unrepresented registrant which goes beyond the acceptable limits of testing or challenging their evidence by means of cross-examination. Striking the right balance on this issue will often be difficult, but Panels must intervene as necessary in order to protect both the interests of witness and the registrant's right to a fair hearing.

October 2009

PRACTICE NOTE

Use of Welsh in Fitness to Practise Proceedings

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

Introduction

This Practice Note reflects the HPC's support for the principle set out in the Welsh Language Act 1993 that, in the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.

Background

Article 22(7) of the Health Professions Order 2001[1] (the Order) provides that fitness to practise proceedings must take place in the UK country of the registrant. Thus, if a person's address on the HPC register is in Wales, then the proceedings must takes place in Wales.

The relatively small size of many of the professions which HPC regulates 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 HPC. Given that fact, and the limited caseload which HPC has in Wales, it is not feasible for Panels to be appointed which are able to conduct proceedings in Welsh without prior notice.

This Practice Note sets out the arrangements which have been established to ensure that the principle enshrined in the Welsh Language Act 1993 is honoured and proceedings in Welsh are conducted fairly and effectively.

For the avoidance of doubt, it should be noted that these arrangements only apply to proceedings which take place in Wales.

Case management

Whilst Panels will provide appropriate support for the conduct of proceedings in Welsh, the primary responsibility for informing a Panel that the Welsh language may be used in proceedings before it must rest with the parties to the case or those representing them.

[1] SI 2002/254

In every case in which it is possible that Welsh may be used by any party or witness or in any document which may be placed before the Panel, the parties or their representatives must inform the Panel of that fact as soon as possible so that appropriate arrangements can be made for the management of the case.

The provision of this information should not be delayed because a party does not have definitive information or details about the use of Welsh in the proceedings.

An indication at the earliest stage that Welsh may be used in the proceedings will help in managing the case more effectively. However, once more detailed information becomes available it should be passed on to the Panel. This includes details of:

- any person wishing to give oral evidence in Welsh; and
- any documents or records in Welsh which that party expects to use.

Preliminary Hearings

At any preliminary hearing which it holds, a Panel will take the opportunity to consider whether it should give directions for the management of the case.

To assist the Panel, the parties or their representatives should draw attention to the possibility of Welsh being used in the proceedings, even where this information has already been provided.

In any case where a party has already intimated that Welsh may be used in the proceedings, wherever possible, this should be confirmed or not (as the case may be) at the preliminary hearing.

Interpreters

If an interpreter is needed to translate evidence from English to Welsh or from Welsh to English, the Panel will appoint an interpreter. Wherever possible, and unless the nature of the case calls for some special linguistic expertise, interpreters will be drawn from the list of those approved by the Courts.

Oaths and affirmations

When witnesses are called during hearings, the hearing officer administering the oath or affirmation will inform them that they may choose to be sworn or affirm in Welsh or English.

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