

Council, 8 December 2016

Review of Practice Notes: Disposal by Consent and Discontinuance

Introduction

Practice Notes exist to provide guidance to all parties with an interest or involvement in a Fitness to Practise investigation or Hearing. As our processes change, or there are case law or learning issues, it is necessary to review these documents.

Process of review

There are currently 32 Practice Notes, covering both case management and adjudication functions. The Practice notes attached to this paper are the first to be reviewed in a review of all of the Practice notes. This wider review is prompted by the recent realignment of the Fitness to Practice Directorate as well as the establishment of the Health and Care Professionals Tribunal Service.

With this in mind, we are reviewing all of the existing Practice Notes by March 2017 to ensure changes to the system, teams and ways of working are reflected appropriately. The review has three stages: firstly, HCPC review any relevant case outcomes, complaints or learning points from bodies such as the Professional Standards Authority. Any changes to content or wording are then added. The second stage is for a review by HCPC's Special Counsel, to ascertain if any legislative changes are required. The third and final stage is to review the readability of the document prior to consideration at Council.

In most cases, there are little or no changes, or there is the requirement to edit the document to make it easier to understand or use.

The Practice Notes are not reviewed in isolation. Most relate to an element of an HCPC policy or operating guidance so the review cycle of the Practice Notes is linked to the review of policies, or any operational guidance for HCPC team members.

Summary of changes

The changes made to these Practice Note follow a thorough review of the processes used to identify cases that are appropriate for discontinuance and consent. This review is based on HCPC's experience of using the processes over the past few years, our own audit of the outcome of cases that went through the existing process, and also the identification of this as an area of interest in the most recent Professional Standards Authority Performance Review.

Over the past six months, we have publicised the review of these Practice Notes to a range of stakeholders, including the professional and representative bodies, and have taken input from the Professional Standards Authority, specifically on discontinuance.

Discontinuance

The main changes to this practice note relates to the clarification of when parts of, or the whole allegation can be discontinued. This includes the role of the panel in considering changes in evidence since the original Investigating Committee Panel decided a case to answer.

Consent

The change to the consent process references the requirement for the Registrant to admit to the substantive nature of the allegations (including impairment of fitness to practice), but not to every detail of the allegations. This change recognises that there may be minor disagreements on facts that do not alter the agreement, and should not hold up the process. These discrepancies will be reviewed on a case by case basis, as part of the approval process.

The Practice Notes have been reviewed by HCPC's Special Counsel. Supporting operational guidance and documentation for FTP team members and presenting officers has been revised in line with the changes proposed.

Decision

The Council is asked to discuss and approve the changes to the Practice Notes:

- Discontinuance
- Disposal by Consent

Resource implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Financial implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Appendices

Appendix One: Practice Note: Discontinuance

Appendix Two: Practice Note: Disposal by consent

Date of paper

16 November 2016

PRACTICE NOTE

Discontinuance 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

Occasionally, after **After** the Investigating Committee has determined that there is a 'case to answer' in respect of an allegation, objective appraisal of the detailed evidence which has been gathered since that decision was made may reveal that it is insufficient to sustain **there is no longer** a realistic prospect of **the HCPC being able to establish** proving the whole **all** or part of the allegation.

This may occur when new evidence becomes available or because of emerging concerns about the quality or viability of the evidence that was considered by the Investigating Committee.¹

As a public authority, the HCPC should not act in a partisan manner and seek to pursue an allegation which has no realistic prospect of success. ~~Where such a situation arises~~ **In that event**, the HCPC should **apply to** discontinue the proceedings.²

Discontinuance

Once a case has been referred to a Panel of the Conduct and Competence Committee or Health Committee, if it is intended to discontinue those proceedings in whole or part, then the appropriate method of **discontinuing those proceedings (in whole or part) before they reach a final hearing**³ doing so is to seek the leave of the **apply to a Panel of that Committee to that for** discontinuance.⁴

A Panel cannot simply agree to discontinuance without due inquiry, as it needs to be satisfied that the decision does not represent 'under-prosecution' **by on the part of**

¹ for example, the case to answer decision is a paper-based exercise and doubts about the credibility or reliability of a witness may only arise when the witness is interviewed after that decision has been made.

² discontinuance may also be appropriate where an overriding public interest consideration arises, such as a crucial witness being too ill to participate in the proceedings.

³ if the HCPC no longer intends to pursue all or part of an allegation at a final hearing, as the matter is already before a Panel, the appropriate course of action is for the HCPC to 'offer no evidence' at that hearing rather than make a separate discontinuance application.

⁴ a different process applies when an allegation is withdrawn to enable a registrant and the HCPC to enter into a voluntary removal agreement. This is set out in the Practice Note on disposal of cases by consent.

the HCPC. As the Court of Appeal made clear in *Ruscillo v CHRE and GMC*⁵, Panels conducting fitness to practise proceedings:

“should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.”

In order to be satisfied that discontinuance is appropriate, a Panel does not need to undertake a detailed inquiry ~~re-examination of or go behind the Investigating Committee’s decision~~ and must take care not to. The Panel’s task is **not to re-consider the decision reached by the Investigating Committee, but** to ensure that the HCPC has proper grounds for discontinuing the proceedings and has provided an objectively justified explanation for doing so **why there is no longer a realistic prospect of the HCPC establishing that the allegation is well founded.**

The nature and scope of the Panel’s inquiry will depend upon the explanation which the HCPC provides and HCPC Presenting Officers must assist Panels by setting out a clear, appropriately detailed and evidentially robust explanation of:

- **what has changed since the case to answer decision was made; and**
- **why that change means there is no longer a realistic prospect of the allegation being established.**

In particular, Presenting Officers must ensure that the explanation take proper account of the ‘public components’ of impairment⁶ - the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. Those components reflect the HCPC’s over-arching statutory objective of protection of the public.

Panels should also avoid straying too far in considering the evidence⁷, particularly if only partial of the allegation discontinuance is being discontinued sought. If evidence needs to be tested or material evidential conflicts need to be resolved, then discontinuance is unlikely to be appropriate. Those are matters which should take place at a substantive hearing.

Partial discontinuance

If a Panel is asked to discontinue only part of an allegation, it must consider whether what **those elements of the allegation** which it is being asked to leave in place amount to a viable allegation.

⁵ [2004] EWCA Civ 1356

⁶ derived from *Cohen v GMC* [2008] EWHC 581 (Admin) and more fully considered in the Practice Note on finding that fitness to practise is ‘impaired’

⁷ the issue before the Panel is the viability of the allegation so, for example, it should not be seeking to resolve conflicts in the evidence

This is particularly important where, for example, the original allegation is based upon a pattern or sequence of events. If ~~the effect of partial discontinuance is to remove~~ some of those events from the fact pattern, the Panel ~~would need to~~ **should** consider whether what remains would be sufficient to establish the statutory ground of the allegation or that fitness to practise is impaired.

If an allegation is partially discontinued, the Panel must also ensure that the revised allegation is coherently drafted and, in particular, that no essential background detail has been removed, as the Panel which hears the revised allegation will not be made aware of that partial discontinuance.⁸

~~To a large extent, the nature and scope of the Panel's inquiry will depend upon the explanation which has been provided by the HCPC for the discontinuance. In this regard, HCPC Presenting Officers are expected to assist Panels by providing a clear and evidentially robust explanation of why the decision not to proceed has been taken and why it is justified.~~

~~Presenting Officers are reminded that, in considering the prospects of proving an allegation, the HCPC is not required to establish that the allegation is capable of proof to the standard required by the Panel (the balance of probabilities) but must act fairly and justly. Consequently, the Panel will need to be satisfied that the decision not to proceed has been reached either because the HCPC has no realistic prospect of proving the allegation or because there is some other overriding public interest (for example, that a crucial witness or the registrant is seriously ill) which justifies discontinuance.~~

The effect of discontinuance Further proceedings

~~In determining an application for **granting** discontinuance **applications in respect of the whole of an allegation**, Panels should consider whether the more appropriate decision, as a matter of fairness to the registrant concerned, is to **make** record a formal finding that the allegation is not well founded.~~

~~Similarly, as a public authority the HCPC should not make repeated attempts to pursue the same allegation against a registrant. Although fitness to practise proceedings are not subject to a strict 'double jeopardy' rule, **as a public authority the HCPC should not make repeated attempts to pursue the same allegation against a registrant**, prohibiting an allegation from being pursued more than once, a decision to discontinue fitness to practise proceedings is one which a **A** registrant should be entitled to regard **the decision to discontinue fitness to practise proceedings as one which is** as final unless the contrary has been made clear to the registrant **by the HCPC in advance of the discontinuance application being made**.~~

From the Panel's perspective the decision is final. Whether ~~If the decision has been taken on the basis of insufficient evidence and there is the prospect that **of** further proceedings may take **taking** place (for example, if new and significant~~

⁸ **unless it is brought to the Panel's attention by the registrant**. The discontinued elements of an allegation would be part of the record that is shared with the Professional Standards Authority for audit purposes

evidence comes to light or circumstances arise that require action to be taken in order to protect the public) **is a matter for the HCPC, which would need to present an entirely new allegation to the Investigating Committee. However, in fairness to the registrant concerned, the Panel should satisfy itself that this issue has been** should be specifically **and properly** addressed **by the HCPC** in the **draft** Notice of Discontinuance.

A template Notice of Discontinuance is annexed to this Practice Note.

[PRACTICE] COMMITTEE
NOTICE OF DISCONTINUANCE

TAKE NOTICE that:

1. On [date] the Investigating Committee, referred the [following] [annexed] allegation(s) (the **Allegation(s)**) against [name] (the **Registrant**) for hearing by the [Practice] Committee:

[set out allegation(s) or, if lengthy, add as Annex]

2. On [date] the Health and Care Professions Council (**HCPC**) determined that:

- A. all proceedings in relation to [paragraph(s) XXX of] the Allegation(s) should be discontinued; and
- B. no further proceedings would be commenced in relation to [those paragraphs of] the Allegation(s) or the events giving rise to [it][them] [unless]

3. The HCPC made that determination on the basis that:

[set out explanation]

AND FURTHER TAKE NOTICE that the [Practice] Committee, being satisfied upon due inquiry that it is appropriate to do so, consents to the HCPC discontinuing the Allegations, [on the basis that they are not well founded.]

Signed: _____ Panel Chair

Date: _____

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 and Social Work Professions Order 2001 (the **Order**) imposes broad public protection obligations upon the Health and Care Professions Council, neither the HCPC 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 HCPC 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 HCPC 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 both the substance of the allegation¹ in full and that his or her fitness to practise is impaired. 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 those failings; 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.

¹ a registrant should not be prevented from resolving a case by consent simply because he or she disputes a minor aspect of the allegation

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 HCPC may propose an appropriate outcome to the case and ask the Panel, assuming 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 HCPC 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 the substance of the allegation in order for the process to proceed, in the event that the proposal is rejected by the Panel, that admission will be treated as a “without prejudice” settlement offer. The full hearing will take place before a different Panel which will not be made aware of the proposal unless the registrant chooses to bring it to their attention.

A Consent Order template is set out in Annex 1 to this Practice Note.²

Voluntary Removal

Article 11(3) of the Order and Rule 12(3) of the Health and Care Professions Council (Registration and Fees) Rules 2003 prevent a registrant from 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 HCPC is satisfied that it would be adequately protecting the public if the registrant was permitted to resign from the Register, it may enter into a Voluntary Removal Agreement allowing the registrant to do so, but on similar terms to those which would apply if the registrant had been struck off.

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

² In any case where the HCPC is seeking disposal by consent it should present a draft Consent Order to the Panel. As a Consent Order is a public document, it should not contain detailed information (such as a registrant's home address) of the kind which may be included in a Voluntary Removal Agreement.

| A ~~Discontinuance-Withdrawal~~ Notice template is set out in Annex 2 to this Practice Note.

| ~~December 2015~~ December 2016

[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] (the **Registrant**):

1. the 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:

[for example:

(a) the Registrant has admitted the allegation in full and did so at an early stage in the fitness to practise process;

(b) the Registrant has demonstrated insight by recognising the serious nature of the allegation;

(c) given the low risk of repetition, the public will be adequately protected by such an Order which is proportionate in the circumstances.]

AND FURTHER TAKE NOTICE that the Panel, with the consent of the parties and, upon due inquiry being satisfied that it is appropriate to do so, now makes the following Order:

[for example:

That the Registrar is directed to annotate the register entry of [name of registrant] to show that, with effect from [date of hearing], [set out Order]

Signed: _____ Panel Chair

Date: _____

[PRACTICE] COMMITTEE

NOTICE OF WITHDRAWAL

TAKE NOTICE that:

On [date] the Investigating Committee referred the [following] [annexed] allegation (the **Allegation**) against [name] (the **Registrant**) for hearing by the [Practice] Committee:

[set out allegation or, if lengthy, include as an Annex]

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

1. the HCPC agreed to withdraw all proceedings in relation to the Allegation; and
2. the Registrant, in consideration of that withdrawal, agreed:
 - a. to resign from the HCPC register;
 - b. to cease to practise as a [profession] or use any title associated with that profession; and
 - c. that, if the Registrant at any time seeks to be readmitted to the HCPC Register, in considering any such application the HCPC shall act as if the Registrant had been struck 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 HCPC withdrawing those proceedings.

Signed: _____ Panel Chair

Date: _____