

Fitness to Practise Committee 21 October 2010

Practice Note: Assessors and Expert Witnesses

Executive summary and recommendations

Introduction

The Executive has reviewed and updated the Practice Note – Assessors and Expert Witnesses following a change to the rules which came into effect in April 2009 which changed the way panels must be constituted. Prior to April 2009, Article 19(6) of Schedule 1 of the Health Professions Order 2001 provided that:

(6) The panel of a Practice Committee considering an allegation or taking any other action under Part V shall comprise at least three members who shall be selected with due regard to the former, current or proposed professional field of the person concerned as the case may be and to the nature of the matters in issue, provided that—

(a) at least one member is registered in that part of the register in which, as the case may be, the person under consideration is or was registered or in respect of which he has made an application to be registered;

(b) there is at least one lay member, who shall not be a registered medical practitioner;

(c) where the health of the person is relevant to the case, there is at least one registered medical practitioner”

In April 2009, the Health Professions Council (Practice Committees and Miscellaneous Amendments) Rules 2009, removed the requirement to have a medical practitioner on panels where health was relevant to the case. The requirement is now as follows.

“(6) The quorum for a Practice Committee (that is, for a panel of members invited in accordance with paragraph (2)) is 3, of whom at least one must be—

(a) a registrant from the same part of the register as any registrant who is the subject of the proceedings;

(b) a lay member; and

(c) a panel chair (who may also count as the registrant or lay member mentioned in subparagraphs (a) and (b)).”

Following the removal of medical practitioners from panels, medical assessors will be used in cases where health is a factor in a case. As a result of the changes outlined above, it has been necessary to review the practice note. The revisions make the approach to the appointment of registrant and medical assessors more flexible whilst maintaining fairness and transparency.

Decision

The Committee is asked to discuss the practice note and recommend that the Council approve the Practice Note – Assessors and Expert Witnesses.

Background information

All practice notes are placed on the HPC website and provided to stakeholders where required. Reference to the appropriate practice notes is provided in standard correspondence. A policy for the appointment of registrant assessors was approved by Council in May 2010.

Resource implications

None

Financial implications

None

Appendices

Practice Note- Assessors and Expert Witnesses

Date of paper

4 October 2010

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 conducting a hearing. 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 2001¹ (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 2003⁴. 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 which *has been referred to it for hearing following a decision that there is a 'case to answer'*⁵ ~~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 be made in writing to the Panel setting out the issues on which the party concerned believes the Panel will need the assistance of an assessor.

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

⁵ Assessors are sometimes asked to give advice to the Investigating Committee at the 'case to answer' stage. In that event the registrant concerned is provided with, and given an opportunity to comment upon, the advice before it is considered by the Investigating Committee.

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.

Assessors' reports should be prepared in a similar format to an Experts' report (see below)⁶ 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 them 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:

⁶ and should also include the statement of truth

- 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;
- 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.

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.