

Fitness to Practise Forum: 12<sup>th</sup> September 2007

Paper title: Practice Notes

Executive summary and recommendations

### **Introduction**

The Executive has recently reviewed and updated the practice notes previously approved by the Fitness to Practise Committees. Those practice notes are now attached.

### **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. This applies to cases before the Conduct and Competence Committee, Health Committee and cases before the Investigating Committee concerning allegations of incorrect or fraudulent entry

### **Service of Documents**

This practice note provides guidance to the practice committee panels on:

- Methods of service;
- Service by electronic means;
- Address for service;
- Deemed service; and
- Proof of service.

It also provides a template for a certificate of service.

### **Welsh Language**

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.

### **Adjournments**

This note sets out what panels should take into account when determining whether to allow an adjournment.

### **Mediation**

This practice note sets out the principals of mediation and what issues panels should take into account when deciding whether mediation is an appropriate mechanism to adopt.

### **Interim Orders**

This practice note sets out the procedure to be followed in relation to interim orders.

### **Preliminary Hearings**

This practice note provides guidance on conducting preliminary meetings.

### **Disclosure and Witness Orders**

This practice note provides guidance on the disclosure of information and evidence and on summoning witnesses.

### **Decision**

The Forum is asked to discuss the attached practice notes and recommend that that the Practice Committees approve the attached practice notes.

### **Background information**

All practice notes will be placed on the HPC website and provided to stakeholders where required. Reference to the appropriate practice note will be provided in standard correspondence.

### **Resource implications**

None

### **Financial implications**

None

### **Appendices**

Practice Notes:

- Case Management and Directions;
- Service of Documents;
- Welsh Language;
- Adjournments;
- Mediation;
- Interim Orders;
- Preliminary Hearings; and
- Disclosure and Witness Orders.

### **Date of paper**

27<sup>th</sup> August 2007

# **PRACTICE NOTE**

## **Case Management and Directions**

### **Introduction**

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 Council to prove its case; and
- the health professional 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 Council to set out its case;
- the health professional to identify in advance those elements of the Council’s case which he or she disputes; and
- the parties to provide information to assist the Panel in the management of the case.

Expecting health professionals 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 2001 Order 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 each of the Practice Committees, using their powers under Article 32(3), has issued the following Standard Directions which will apply automatically as “default” directions in every case.

Panels should actively manage cases to ensure compliance with those Directions or, in cases where a Panel considers it appropriate, the Panel may (of its own volition 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 Council shall, no later than 42 days before the date fixed for the hearing of the case, serve on the health professional a copy of the documents which the Council intends to rely upon at that hearing.*
- (2) *The health professional shall, no later than 28 days before the date fixed for the hearing of the case, serve on the Council 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 him to admit the authenticity of a document or exhibit disclosed to him 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 him to admit a witness statement disclosed to him 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.*

**September 2007**

**Health Professions Council**

**[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 Health Professions Council or name of other party], for the purpose of those proceedings only, requires you to admit:

[the following fact(s):

- |    | <b>RESPONSE*</b> |
|----|------------------|
| 1. | Admit/Dispute    |
| 2. | Admit/Dispute    |
| 3. | Admit/Dispute]   |

[the authenticity of the following document(s):

- |    | <b>RESPONSE*</b> |
|----|------------------|
| 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:

- |    | <b>RESPONSE*</b> |
|----|------------------|
| 1. | Admit/Dispute    |
| 2. | Admit/Dispute    |
| 3. | Admit/Dispute]   |

**AND FURTHER TAKE NOTICE** that, if you do not within 14 days of the date of this notice serve a notice on [the Health Professions Council 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: \_\_\_\_\_

\_\_\_\_\_  
\* delete as appropriate

For [the Health Professions Council 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 below 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 Health Professions Council or name of other party] as I have indicated above.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

For [the Health Professions Council or name of other party]

[Address]



# PRACTICE NOTE

## Service of Documents

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

### Introduction

The Health Professions Order 2001<sup>1</sup> and the Procedural Rules for Panels<sup>2</sup> 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;

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<sup>1</sup> SI 2002/254

<sup>2</sup> Health Professions Council (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574); Health Professions Council (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575); Health Professions Council (Health Committee) (Procedure) Rules 2003 (SI 2003/1576).

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 and are as follows:

in the case of the Council, its committees or the Registrar:	the offices of the Council;
in the case of a health professional:	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:

in the case of an individual:	his or her usual or last known residence or usual or last known place of business;
in the case of the owner(s) of a business:	his or her usual or last known place of business or usual or last known residence;
in the case of 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 service**

The Procedural Rules provide that documents sent by post are to be treated as having been sent on the day of posting, but documents should be deemed to have been served on the recipient as follows:

First class post (or an alternative service which provides for delivery on the next working day)	the second day after it was posted.
Delivering the document to or leaving it at a relevant address:	the day after it was delivered to or left at the permitted 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 5pm on a business day; after 5pm or at any time on a Saturday, Sunday or Bank Holiday;	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.

**September 2007**

**Health Professions Council**

**[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:

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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 service is deemed to be: [date]**

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

Signed:

Date

Name and position:

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# PRACTICE NOTE

## Use of the Welsh language in fitness to practise proceedings

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

### Introduction

This Practice Note reflects 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<sup>1</sup> (the 2001 Order) provides that fitness to practise proceedings must take place in the UK country in which the registered address of the relevant health professional is situated. Consequently, if a person's registered address is in Wales, then the proceedings must take place in Wales.

The relatively small size of many of the professions which HPC regulates and the need for Panels to be appointed having regard to the profession and matters in issue means that only a limited number of Welsh-speaking Panel members are available to the Committees. That fact, plus HPC's limited caseload in Wales, mean that it is not feasible for Panels to be appointed which are able to conduct proceedings in Welsh without notice.

Consequently, 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.

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<sup>1</sup> 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.

**September 2007**

# PRACTICE NOTE

## Adjournment of Proceedings

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

### Introduction

Article 32(3) of the Health Professions Order 2001<sup>1</sup> 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. Consequently, where a time and venue for a hearing have been set, Panels should always aim to proceed as scheduled and, accordingly, the parties and their representatives should also be ready to proceed.

Panels should not adjourn proceedings unless it is demonstrated that a potential injustice will arise if they do not do so and, for that purpose, the Panel should control and decide all requests for adjournments. Requests for adjournment made without sufficient and demonstrated reasons to justify an adjournment should not be granted.

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 reason why the adjournment is sought and be accompanied by supporting documents, such as medical certificates. The convenience of the parties or their representatives is not a sufficient reason for an adjournment.

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

Unless advised by the Panel that an adjournment has been granted, the parties and their representatives must attend the Panel ready, in the event that the request is not granted, to proceed.

**September 2007**

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<sup>1</sup> SI 2002/254

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# PRACTICE NOTE

## Mediation

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

### Introduction

Article 26(6) of the Health Professions Order 2001<sup>1</sup> provides that, where an Investigating Committee Panel concludes that there is a case to answer in relation to a fitness to practise allegation it may, instead of referring the matter to another Practice Committee, undertake mediation.

Similarly, Article 29(4) of that Order provides that, where a Conduct and Competence Committee or Health Committee Panel finds that an allegation is well founded but does not consider that it is not appropriate to take any further action by way of sanction, it may undertake mediation.

Those powers provide a mechanism by which Panels, if they are satisfied that no further steps need to be taken in order to protect the public, can resolve outstanding issues between the health professional concerned and any complainant or other third party.

As mediation is essentially a consensual process, any decision to mediate will fail unless it is supported by both the health professional 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 appropriate, the Panel must be satisfied that it does not need to take any further steps to protect the public, irrespective of the outcome of the mediation.

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

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

### What is mediation?

Mediation is a process for resolving disagreements in which a neutral and independent mediator helps the parties to explore options and find a mutually acceptable resolution. It involves use of a common-sense approach which:

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<sup>1</sup> SI 2002/254



- 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.

### **What is the role of the mediator?**

Whatever the context, 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. Mediators do not advise those in dispute, but help them to communicate with one another.

### **How is mediation conducted?**

First, 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 attend a joint meeting, 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 him or her. 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. However, it is not legally binding unless the parties decide to make it a legal contract.

**September 2007**

**Health Professions Council**

**[PRACTICE] COMMITTEE**

**ORDER OF REFERRAL TO MEDIATION**

The Decision of the Panel in respect of the allegation made on [date] against [name of registrant] is that [there is a case to answer in respect of the allegation] [the allegation is well founded] for the following reasons:

[set out reasons]

Having considered all of the options open to it the Panel is satisfied, for the following reasons, that it would not be appropriate to [refer this matter to the Conduct and Competence Committee or the Health Committee] [take any further action]:

[set out reasons]

The following matter remains unresolved between [name of registrant] and [name of other party]:

[set out matter]

and they have consented to that matter being referred to mediation by the Panel 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 Panel of the outcome of the mediation.

**THE PANEL 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 Panel of the outcome of the mediation.

Signed: \_\_\_\_\_ Chairman

Date: \_\_\_\_\_

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# PRACTICE NOTE

## Interim Orders

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

### Introduction

Article 31 of the Health Professions Order 2001<sup>1</sup> (the 2001 Order) sets out the procedure by which a 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 Practice Committee 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 health professional concerned;

for the registration of that health professional 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 health professional must comply for a particular period of time; or
- an interim suspension order which directs the Registrar to suspend the health professional's registration for a particular period of time.

An interim order has effect immediately but may last no more than eighteen months. The time period for which it has effect must be stated in the interim order.

### When orders may be made

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

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<sup>1</sup> SI 2002/254

- when an allegation has been referred to that Committee, but it has not yet taken a final decision in relation to the allegation<sup>2</sup>;
- when, having considered an allegation, it decides that there is a case to answer, and it refers that case to one of the other Practice Committees (but the interim order must be made before the case is referred)<sup>3</sup>; or
- 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<sup>4</sup>; 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 health professional 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 proceedings but, normally, the health professional should be given seven day's notice of such a hearing unless there are circumstances which make it appropriate 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 health professional, if he or she remains free to

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<sup>2</sup> 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.

<sup>3</sup> as decisions on whether there is a case to answer 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.

<sup>4</sup> 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.

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.

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 failure in clinical care; cases involving violence, sexual abuse or serious misconduct; cases where it appears that the health professional's own 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 patients, clients or users from the health professional'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 health professional may pose a risk to patients; for example allegations of indecent assault or where it appears that a health professional with serious health problems is practising whilst unfit to do so;
- cases where, although 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 health professional 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 health professional 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 health professional 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 health professional to undertake additional education or training.

Consequently, interim conditions of practice are likely to be limited to specific restrictions on practice, for example, not to treat 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 health professional'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 health professional 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 health professional has his registered address and the health professional 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.

In 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 Panel which made the order or to which the matter has been transferred; or
- automatically, when the circumstances under which the order was made no longer exist, namely:

- in respect of an order which was made before a final decision is reached in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
- in respect of an order made after a final decision was reached and which has effect during the 'appeal period', either when the period for appealing expires or, if an appeal is made, when the appeal is concluded or withdrawn.

**September 2007**

# PRACTICE NOTE

## Preliminary Hearings

This Practice Note has been issued jointly by the HPC Practice Committees for the guidance of 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<sup>1</sup> for fitness to practise proceedings provide that, for the purpose of assisting them in carrying out their functions, Panels may hold a preliminary hearing<sup>2</sup> 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 Chairman alone, acting on behalf of the Panel, and this is the procedure that is usually 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 cannot be dealt with by the Panel (or Chairman 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 must 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.

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<sup>1</sup> HPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), r.7; HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), r. 7; HPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), r.7.

<sup>2</sup> 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



Normally the parties should be given at least fourteen days notice of a preliminary hearing and, in setting the time and place for that meeting, Panels must take account of Article 22(7) of the Health Professions Order 2001<sup>3</sup>, which requires preliminary hearings to be held in the UK home country in which the health professional 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 or disclosure 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 health professional 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 date for 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.

**September 2007**

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<sup>3</sup> SI 2002/254

# PRACTICE NOTE

## Powers to Require the Disclosure of Information and to Summon Witnesses

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

### Introduction

Panels have the power to order persons to provide information, produce documents and to appear at hearings. Failure to comply with such an order is a criminal offence.

### Background

Article 25(1) of the Health Professions Order 2001<sup>1</sup> (the 2001 Order) enables HPC Investigators, for the purpose of assisting the Practice Committees in carrying out their functions in respect of fitness to practise, to require any person who is able to supply information or produce any document which appears relevant to the discharge of those functions to do so

In addition, Article 32(2)(m) of the 2001 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. Each of the Committees' Rules<sup>2</sup> contain such powers which are 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.”

### Failure to comply

Article 39(5) of the 2001 Order makes it an 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).

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<sup>1</sup> SI 2002/254

<sup>2</sup> 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).

## Limits of the power

Powers of compulsion may not be used against the health professional who is the subject of the proceedings but subject to Article 25(2) of the 2001 Order which does enable HPC to require that person to provide details of his or her employer or any person with whom he or she has an arrangement to provide services and of any other health or social care regulator by which he or she is authorised to practise.

The disclosure powers cannot be exercised to obtain:

- information whose disclosure is prohibited by or under any other enactment<sup>3</sup> (which is defined as including enactments comprised in, or in an instrument made under, an Act of the Scottish Parliament).
- information or documents which a person could not be compelled to supply or produce in civil proceedings in any court to which an appeal from a decision of the Panel would lie.

Material whose disclosure cannot be compelled 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;
- correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings.

Panels must take appropriate steps to avoid issuing orders which breach these limitations. However, if an order is made and the person against whom it was made believes that either of these limitations would apply, he or she may apply to have the order set aside (see below).

## Patient confidentiality

Health professionals and others who are responsible for health records sometimes 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 2001 Order.

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

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<sup>3</sup> 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.

The concept of patient confidentiality itself also does not 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 disclosure.

Health professionals do owe a duty of confidentiality to patients and patients rightly expect that information which they entrust to health professionals 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 care practice which helps to ensure that patients provide all of the information they need in order to receive effective care.

Panels should seek to uphold the principle of patient confidentiality and, wherever possible, health records should be obtained on the basis of consent from the patient concerned. However, whilst patients' rights to privacy are important they are not absolute and in situations where consent cannot be obtained but a Panel is satisfied that access to health records is needed then it should order the disclosure of those records.

### **Exercise of powers**

The power of Panels to require persons to attend and give evidence or to produce documents at hearings will be exercised by means of two forms of order (a template for which is set out in the annex to this Practice Note):

Disclosure Orders requiring a person to provide certain documents

Witness Orders requiring a person to attend a hearing and, if appropriate, to provide certain documents.

The Panel may decide on its own motion to issue an order and any party to the proceedings may also request that a Disclosure Order or Witness Order be issued to a person.

An order to produce 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 to whom the order is addressed to understand the obligation which has been imposed by the Panel.

### **Applications**

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

- the name and address of the person concerned;
- whether a Disclosure or Witness Order is sought;
- details of any information being sought;
- the steps which the applicant has taken to secure the disclosure by, or attendance of, that person on a voluntary basis; and

- evidence to show why:
  - the disclosure by, or attendance of, that person are likely to support the case of the applicant or adversely affect the case of one of the other parties; and
  - disclosure is necessary in order to dispose fairly of the case or to avoid undue expense on the part of applicant.

Unless the Panel directs otherwise, a copy of the application notice 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 with the consent of the parties if it does not consider that a hearing would be appropriate.

If an Order is made without the application notice being sent to the person concerned, that person may apply in writing to have the Order set aside (see below).

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 issued.

### **Compliance with 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 an Order by delivering a copy of parts of the document and making those parts available for inspection, he or she should not be compelled by an Order to do more than:

1. produce a photographic or other facsimile copy of those parts of the document, and
2. make those parts of the document 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 on whose application the Order was issued and as such may not be cross-examined by that party without the leave of the Panel. Normally this will only be given if the Panel decides that the witness may be treated as a hostile witness.

### **Setting aside**

A person on whom an Order has been served may apply in writing to have it set aside in whole or in part. If the Order was issued at the request of a party to the proceedings, that party shall have a right to be heard on such an application.

**September 2007**

**Health Professions Council**

**[PRACTICE] COMMITTEE**

**[DISCLOSURE][WITNESS] ORDER**

**TO:** [name and address of witness]

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

[name of health professional]

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

[date, time and venue]

**YOU ARE ORDERED TO:**

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

in accordance with Rule [number] of the Health Professions Council [(rules)] Rules 2003

[The documents identified above should be sent to [name] at [address] not later than [date]].

Signed: \_\_\_\_\_ Chairman

Date: \_\_\_\_\_

**IGNORING THIS ORDER IS A CRIME**

If you fail, without reasonable excuse, to:

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

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