

Tribunal Advisory Committee, 19 February 2018

Review of Practice Notes

Executive Summary and Recommendations

**1. Introduction**

1.1 Practice Notes exist to provide clear 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.

**2. Process of review**

2.1 There are currently 32 Practice Notes, covering both case management and adjudication functions. Following the establishment of the Health and Care Professions Tribunal Service (HCPTS) in April 2017, the Tribunal Advisory Committee now oversees the production of Practice Notes relating to tribunals. These documents are available on the HCPTS's website, and are referred to during the investigation and hearing processes.

2.2 The review of Practice Notes has three stages: firstly, the HCPTS and HCPC review any relevant case outcomes, complaints or learning points from bodies such as the Professional Standards Authority. At the second stage, HCPC's Special Counsel carried out a review, to ascertain if any legislative changes are required. The third and final stage is for the HCPC to review the readability of the document prior to consideration before the Committee.

2.3 The most recent 2016/17 Professional Standards Authority Performance Review prompts this review of the Practice Notes relating to the consent and discontinuance processes. Whilst HCPC carries out a range of research and piloting new approaches, the previously considered timetable for Practice Notes is redundant.

2.4 As all Practice Notes were reviewed and approved in March 2017, and there has not been significant change in case law or operational approach, the current versions capture our approach.

2.5 If individual cases indicate a change is necessary, or if TAC wish to consider a specific area, we will review any of the existing documents. The Fitness to Practise Improvement Plan will indicate the revised timetable for the remainder of the year, and an update will be made at the May meeting.

### **3. Summary of changes to Practice Notes for TAC approval**

- 3.1 The changes made to these Practice Notes follow a thorough review of the processes used to identify cases that are appropriate for discontinuance and consent. As described above, this review includes learning points and feedback provided by the Professional Standards Authority, and follows a plan of activity set out within the subsequent Fitness to Practise Improvement plan, discussed by Council.
- 3.2 As part of the Fitness to Practise improvement plan, the HCPC is reviewing its approach to discontinuance and consent. This includes reviewing the supporting guidance, decisions made and any previous learning to provide assurance that the approach taken is appropriate and reflected within decisions made by Practice Committees.
- 3.3 We intend to take the same approach in relation to both discontinuance and consent processes.
- 3.4 The main changes in the documentation relate to the addition of a skeleton argument in every case, setting out the reasons for the HCPC's application to discontinue an allegation or recommendation to dispose of a matter by consent. The revised versions of the Practice Notes clarify that Practice Committees need to be satisfied that the HCPC has proper grounds for seeking to dispose of an allegation by way of consent or discontinuance.
- 3.5 The revised discontinuance Practice Note provides a summary of the points expected to be included within the HCPC's skeleton argument. It is proposed that the skeleton will include details of the new evidence that has come to light since the case to answer decision, an explanation of what steps have been taken by the HCPC to resolve the situation and crucially, an assessment of the extent to which the allegation(s) engage the public components of impairment.
- 3.6 The proposed amendments to the Practice Note dealing with consent also clarify that a Panel of the relevant Practice Committee may conclude a case on an expedited basis, following a review of the terms of the draft Consent Order and supporting skeleton argument put before it by the HCPC. The skeleton argument is to address the appropriateness of concluding the allegation by way of consent, having regard to the public components of impairment (set out in *Cohen v GMC*).
- 3.7 The Practice Notes have both been reviewed by HCPC's Special Counsel, who has confirmed that the documents contain the required current legislative background to support these areas of work.
- 3.8 It is intended that supporting operational guidance for Fitness to Practise team members and Presenting Officers will be revised in line with the changes proposed in this paper.

### **Decision**

The Tribunal Advisory Committee is asked to discuss and approve the changes to the discontinuance and consent Practice Notes.

## **Appendices**

- Appendix One: Practice Note: Discontinuance
- Appendix Two: Practice Note: Disposal of Cases by Consent

## **Date of paper**

09 February 2018

# Health and Care Professions Tribunal Service

## PRACTICE NOTE

### Discontinuance of proceedings

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

#### Introduction

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

This may occur when new evidence becomes available **after the case to answer decision is made** or because, **as the HCPC prepares the case for hearing, of emerging concerns new and significant doubts arise about in relation to** the quality or viability of the evidence that was considered by the Investigating Panel.<sup>1</sup>

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. In that event, the HCPC may apply to discontinue the proceedings.<sup>2</sup>

#### Discontinuance

The appropriate method of discontinuing a case (in whole or part) which has been referred for hearing but has not yet begun to be heard<sup>3</sup> by a Conduct and Competence Panel or Health Panel is **for the HCPC** to apply to a Panel **in open hearing** for discontinuance.<sup>4</sup>

A Panel cannot simply agree to discontinuance without due inquiry. It needs to be satisfied that the **HCPC's rationale for seeking discontinuance is sound and, in particular,** decision does not represent **amount to** 'under-prosecution' by ~~the HCPC~~. As the Court of Appeal made clear in *Ruscillo v CHRE and GMC*<sup>5</sup>, Panels conducting fitness to practise proceedings:

---

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> if the HCPC no longer intends to pursue all or part of an allegation at a substantive 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.

<sup>4</sup> 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.

<sup>5</sup> [2004] EWCA Civ 1356

*“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 examination of or~~ ‘go behind’ the Investigating Panel’s decision. The Panel’s task is not to re-consider the decision reached by the Investigating Panel, but to ensure that the HCPC has proper grounds for discontinuing the proceedings. ~~and has provided an objectively justified explanation for 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 Panels are entitled to expect HCPC Presenting Officers to assist them in this regard **by setting out a clear, appropriately detailed and objectively justified explanation of why there is no longer a realistic prospect of the HCPC establishing that the allegation is well founded.**

**The HCPC is expected to provide the Panel with a skeleton argument, in advance of the hearing, setting out:**

- **a summary of the case, including a brief chronology and a general description of the allegations and the events giving rise to them;**
- **details of the new evidence that has come to light, or the evidential concerns that have arisen, since the case to answer decision was made;**
- **an explanation of why that new evidence or those concerns mean there is no longer a realistic prospect of the allegation being established;**
- **an explanation of what steps, if any, the HCPC has taken to resolve the situation (for example, by seeking other witnesses or compelling the production of documents) or why such steps are unavailable or inappropriate;**
- **an assessment of the extent to which the allegations engage the ‘public components’ of impairment<sup>6</sup> and, in consequence, whether discontinuance would be consistent with the HCPC’s over-arching statutory objective of public protection.**

~~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, any such explanation should take proper account of the ‘public components’ of impairment<sup>7</sup> – the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession.~~

<sup>6</sup> **derived from *Cohen v GMC* [2008] EWHC 581 (Admin) - the need to protect service users, declare and uphold proper standards of behaviour and maintain public confidence in the profession. These are more fully considered in the Practice Note on finding that fitness to practise is ‘impaired’**

<sup>7</sup> ~~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’~~

Those components reflect the HCPC's over-arching statutory objective of protection of the public.

**In most cases where discontinuance is appropriate, the arguments for doing so should be clear and straightforward.** Panels should **not need to conduct a detailed examination of the evidence and, in particular, should avoid doing so where** also avoid straying too far in considering the evidence, particularly if only partial discontinuance is being 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 **that** should take place at a **full** substantive hearing. **Discontinuance is unlikely to be appropriate in cases of that kind.**

### **Partial discontinuance**

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

This is particularly important where, for example, the original allegation is based upon a pattern or sequence of events. If partial discontinuance removes some of those events from the fact pattern, the Panel 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.<sup>8</sup>

### **The effect of discontinuance**

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. In granting discontinuance applications in respect of the whole of an allegation, Panels should make a formal finding that the allegation is not well founded.

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

**22nd March 2017**

---

<sup>8</sup> 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

Annex

**Health and Care Professions Tribunal Service  
[Conduct and Competence] [Health] Panel**

**NOTICE OF DISCONTINUANCE**

**TAKE NOTICE** that:

1. On [date] an Investigating Panel referred the [following] [annexed] allegation(s) (the **Allegation(s)**) against [name] (the **Registrant**) for hearing by a [Conduct and Competence] [Health] Panel:

[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].

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

[set out explanation]

**AND FURTHER TAKE NOTICE** that the Panel, being satisfied upon due inquiry that it is appropriate to do so, consents to the HCPC discontinuing **[paragraphs XXX of the Allegation(s) [and makes a formal determination that the Allegation[s] [is][are] not well founded] for the following reasons:**

[set out reasons]

~~[on the basis that they are not well founded.]~~

Signed: \_\_\_\_\_ Panel Chair

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

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Disposal of Cases by Consent

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

### Introduction

Disposing of cases by consent is an effective case management tool. It reduces the time taken to deal with allegations and the number of contested hearings that need to be held. However, as the HCPC's overarching statutory objective is the protection of the public<sup>1</sup>, a Panel should not agree to a case being resolved by consent unless it is 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

If the HCPC and the registrant concerned wish to conclude a case without the need for a contested hearing, they may seek to do so by putting before a Panel an order of the kind which they consider the Panel would make if the case had proceeded to a full substantive hearing. The process may also be used where a Panel is due to review an existing conditions of practice order or suspension order, to enable the order to be varied, replaced or revoked without the need for a contested hearing.<sup>2</sup>

Disposal by consent does not affect a Panel's powers or the range of sanctions available. It is merely a process by which the HCPC and the registrant concerned may propose what they regard as an appropriate outcome to the case. If a Panel is content to do so, it may conclude the case on an expedited basis, upon the terms of the draft Consent Order **and supporting skeleton argument**<sup>3</sup> put before it **by the HCPC**. Equally, it may reject that proposal and set the case down for a full substantive hearing.

Panels must retain the option of rejecting a proposal for disposal by consent. Consequently, before considering a draft Consent Order, a Panel should satisfy itself that the HCPC:

---

<sup>1</sup> Article 3(4), Health and Social Work Profession Order 2001.

<sup>2</sup> HCPC policy in respect of the use of disposal by consent is reproduced in Annex A.

<sup>3</sup> the HCPC is expected to present a draft Consent Order **and supporting skeleton argument** to the Panel **in advance of** any consent **application hearing** ~~case~~. **In particular, the skeleton argument must address the appropriateness of concluding the allegations without a full hearing, having regard to the extent to which they engage the 'public components' of impairment identified in *Cohen v GMC [2008] EWHC 581 (Admin)*. (More fully considered in the Practice Note on finding that fitness to practise is 'impaired')**



- **has provided a clear, appropriately detailed and objectively justified explanation of why the matter is suitable for disposal by consent on the terms set out in the draft Consent Order; and**
- has made clear to the registrant concerned that co-operation and participation in the consent process will not automatically lead to a Consent Order being approved.

If a Panel rejects a proposed consensual disposal, it should direct the HCPC to treat any admissions made by the registrant as part of that process as a “without prejudice” settlement offer.

Doing so will mean that, when a substantive hearing takes place before a different Panel, it will not be made aware of those admissions or the attempt to resolve the matter by consent unless the registrant chooses to bring those matters to the Panel’s attention.

### **Voluntary Removal**

The HCPC’s governing legislation<sup>4</sup> prevents a registrant from resigning from the HCPC register whilst the subject of an allegation or a conditions of practice order or suspension order.

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

As with consensual disposal, a Panel should only agree to revoke an existing order where it is satisfied that voluntary removal would secure an appropriate level of public protection and would not be detrimental to the wider public interest.

Templates for Consent Orders and Withdrawal Notices are set out in Annex B and Annex C respectively.

**[Date]**

---

<sup>4</sup> Article 11(3) of the Order and Rule 12(3) of the Health and Care Professions Council (Registration and Fees) Rules 2003

## Annex A

### HCPC Policy on Consensual Disposal

The Health and Care Professions Council (HCPC) will 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 allegation and that his or her fitness to practise is impaired. A registrant should not be prevented from resolving a case by consent simply because he or she disputes a minor aspect of the allegation. However, 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 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.

As the Panel which considers any proposal for consensual disposal must retain the option of rejecting the proposal, the HCPC should 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 a registrant is required to admit the substance of the allegation in order for the process to proceed, if a proposal is rejected by the Panel, that admission will be treated as a "without prejudice" settlement offer. A 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 the Panel's attention.

## Annex B

### Health and Care Professions Tribunal Service [Conduct and Competence] [Health] Panel

#### CONSENT ORDER

**TAKE NOTICE** that, in respect of the [allegation made] [review of the order made by the Tribunal] on [date] against [name] (the **Registrant**):

1. the Registrant consents to the Panel [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: \_\_\_\_\_

## Annex C

### Health and Care Professions Tribunal Service [Conduct and Competence] [Health] Panel

#### NOTICE OF WITHDRAWAL

**TAKE NOTICE** that:

On [date] an Investigating Panel referred the [following] [annexed] allegation (the **Allegation**) against [name] (the **Registrant**) for hearing by a Panel of the [Conduct and Competence][Health] Panel:

[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 Panel, being satisfied upon due inquiry that it is appropriate to do so, consents to the HCPC withdrawing those proceedings.

Signed: \_\_\_\_\_ Panel Chair

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