

**Council, 11 February 2015**

## **Review of Practice Notes**

### **Introduction**

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. The following provides an update about the ongoing programme of review of these key Council.

### **Process of review**

There are currently 33 Practice Notes. These documents are available on HCPC's website, and are actively referred to during the investigation and hearing processes.

We aim to review each Practice Note on an annual basis. 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, so the review cycle of the Practice Notes is linked to the review of policies, or any operational guidance for HCPC team members.

The review cycle and number of documents is such that we envisage approximately three revised Practice Notes per Council meeting. We have prioritised the review based on operational impact on Fitness to Practise case activity, time elapsed since the previous review, and the volume of review time by Council.

### **Summary of changes to Practice Notes for Council approval**

Six Practice Notes have been reviewed and have minor changes. In most cases only minor typographical changes have been made, although the Health Allegations Practice Note has been edited to improve readability. In addition, the Practice Note previously entitled "Disclosure" has been renamed "Disclosure of Unused Material" to more accurately reflect that it is about disclosure by HCPC of unused material not disclosure powers more generally. However, the actual content is substantially unchanged from the previous version.

The Practice Notes have been reviewed by HCPC's Special Counsel, who has confirmed that there are no legislative changes that affect these documents.

### **Decision**

The Council is asked to discuss and approve the minor changes to the six Practice Notes.

### **Resource implications**

Accounted for in the 2014-15 Fitness to Practise Directorate Budget

### **Financial implications**

Accounted for in the 2014-15 Fitness to Practise Directorate Budget

### **Appendices**

Appendix One: Practice Note: Assessors and expert witnesses

Appendix Two: Practice Note: Case management and directions

Appendix Three: Practice Note: Cross examination in sexual cases

Appendix Four: Practice Note: Disclosure of unused material

Appendix Five: Practice Note: Health allegations

Appendix Six: Practice Note: Production and witness orders

### **Date of paper**

29 January 2015

---

# 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 where 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 and Social Work Professions Order 2001<sup>1</sup> (the **Order**) enable the Health and Care Professions Council to appoint medical assessors<sup>2</sup> to give advice on matters within their professional competence and registrant assessors<sup>3</sup> to give advice on matters of professional practice arising in connection with cases being considered by Panels at final hearing

The role of those assessors is set out in the Health and Care Professions Council (Functions of Assessors) Rules 2003<sup>4</sup>. 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'<sup>5</sup>. 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.

---

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

<sup>2</sup> medical assessors are appointed from among suitably qualified registered medical practitioners

<sup>3</sup> registrant assessors are appointed from among suitably qualified members of the HCPC professions

<sup>4</sup> SI 2003/1577

<sup>5</sup> 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 notify the parties in writing of the name of the proposed assessor; of the matter(s) 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 must do so in writing. 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)<sup>6</sup> 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 and Care 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 consider 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 are 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.

---

<sup>6</sup> and should also include the statement of truth

An expert should make it clear:

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

### **Experts' reports**

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

- set out details of the expert's qualifications;
- provide details of any literature or other material which the expert has relied upon 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 any written question(s) directly to an expert, a copy of the question(s) should, at the same time, be sent to the other parties and the Panel. The party instructing the expert is responsible for paying any fees charged by that expert in answering those questions.

**January 2015**

## **ANNEX**

### **Declaration and Statement of Truth**

I [insert full name of expert ] DECLARE THAT:

1. I understand that my duty in providing written reports and giving evidence is to help the Panel, and that this duty overrides any obligation to the party by whom I am engaged or the person who has paid or is liable to pay me. I confirm that I have complied and will continue to comply with my duty.
2. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.
3. I know of no conflict of interest of any kind, other than any which I have disclosed in my report.
4. I do not consider that any interest which I have disclosed affects my suitability as an expert witness on any issues on which I have given evidence.
5. I will advise the party by whom I am instructed if, between the date of my report and the hearing, there is any change in circumstances which affect my answers to points 3 and 4 above.
6. I have shown the sources of all information I have used.
7. I have exercised reasonable care and skill in order to be accurate and complete in preparing this report.
8. I have endeavoured to include in my report those matters, of which I have knowledge or of which I have been made aware, that might adversely affect the validity of my opinion. I have clearly stated any qualifications to my opinion.
9. I have not, without forming an independent view, included or excluded anything which has been suggested to me by others, including those instructing me.
10. I will notify those instructing me immediately and confirm in writing if, for any reason, my existing report requires any correction or qualification.
11. I understand that:
  - (1) my report will form the evidence to be given under oath or affirmation;
  - (2) questions may be put to me in writing for the purposes of clarifying my report and that my answers shall be treated as part of my report and covered by my statement of truth;

- (3) the Panel may at any stage direct a discussion to take place between experts for the purpose of identifying and discussing the expert issues in the case, where possible reaching an agreed opinion on those issues and identifying what action, if any, may be taken to resolve any of the outstanding issues between the parties;
- (4) the Panel may direct that following a discussion between the experts that a statement should be prepared showing those issues which are agreed, and those issues which are not agreed, together with a summary of the reasons for disagreeing;
- (5) I may be required to attend the hearing to be cross-examined on my report by a cross-examiner assisted by an expert;
- (6) I am likely to be the subject of public adverse criticism by the Panel if it concludes that I have not taken reasonable care in trying to meet the standards set out above.

#### STATEMENT OF TRUTH

I confirm that, insofar as the facts stated in my report are within my own knowledge, I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.

---

# PRACTICE NOTE

## Case Management and Directions

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

### Introduction

Practice Committee Panels determine whether an allegation is well founded by means of an adversarial process which is civil in nature and 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 HCPC to prove the facts alleged.<sup>1</sup>

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

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

### Case management

Effective case management is a process which enables:

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

---

<sup>1</sup> The burden of proof only applies to findings of fact. Whether those facts amount to the ‘statutory ground’ of the allegation (e.g. misconduct) and constitute impairment is a matter of judgement for the Panel conducting the final hearing: *CRHP v. GMC and Biswas* [2006] EWHC 464 (Admin).



Article 32(3) of the Health and Social Work Professions Order 2001 requires fitness to practise proceedings to be conducted expeditiously. Panels should meet that obligation by using their case management powers to ensure that cases are dealt with fairly and justly. This includes dealing with cases in a manner which:

- is proportionate to its importance and complexity, the resources of the parties and the anticipated costs;
- encourages the engagement of and co-operation among the parties;
- avoids inflexibility or unnecessary formality in the proceedings;
- ensures, so far as practicable, that the parties are able to participate fully in the proceedings;
- makes effective use of the Panel's expertise; and
- avoids undue delay.

### **Directions**

Article 32(3) enables Panels to give directions for the conduct of cases and for the consequences of failure to comply with such directions.

Where appropriate, Panels should use their powers to give directions to ensure that, at an early stage, the parties:

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

### **Standard Directions**

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

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

***Standard Direction 1. Exchange of Documents***

- (1) The HCPC shall, no later than 42 days before the date fixed for the hearing of the case, serve on the registrant a copy of the documents which the HCPC intends to rely upon at that hearing.
- (2) The registrant shall, no later than 28 days before the date fixed for the hearing of the case, serve on the HCPC a copy of the documents which he or she intends to rely upon at the hearing.
- (3) The parties shall, at the same time as they serve documents in accordance with this Direction, provide the Panel with five copies of those documents.

***Standard Direction 2. Notice to admit facts***

- (1) A party may serve notice on another party requiring that party to admit the facts, or part of the case of the serving party, specified in the notice.
- (2) A notice to admit facts must be served no later than 21 days before the date fixed for the hearing of the case.
- (3) If the other party does not, within 14 days, serve a notice on the first party disputing the fact or part of the case, the other party is taken to admit the specified fact or part of the case.

***Standard Direction 3. Notice to admit documents***

- (1) A party may serve notice on another party requiring that party to admit the authenticity of a document or exhibit disclosed to that party and specified in the notice.
- (2) A notice to admit documents (together with those documents unless they have already been provided to the other party) must be served no later than 21 days before the date fixed for the hearing of the case.
- (3) If the other party does not, within 14 days, serve a notice on the first party disputing the authenticity of the documents or exhibits, the other party is taken to accept their authenticity and the serving party shall not be required to call witnesses to prove those documents or exhibits at the hearing.

***Standard Direction 4. Notice to admit witness statements***

- (1) A party may serve notice on another party requiring that party to admit a witness statement disclosed to that party and specified in the notice.
- (2) A notice to admit a witness statement (together with that statement unless it has already been provided to the other party) must be served no later than 21 days before the date fixed for the hearing of the case.
- (3) If the other party does not, within 14 days, serve a notice on the first party requiring the witness to attend the hearing and give oral evidence (and thus be available for cross examination), the other party is taken to accept the veracity of the statement and the serving party shall not be required to call the witness to give evidence at the hearing.

***Standard Direction 5. Withdrawal of admissions***

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

**January 2015**

**[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 HCPC 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]   |

\* delete as appropriate

**AND FURTHER TAKE NOTICE** that, if you do not within 14 days of the date of this notice serve a notice on [the HCPC or name of other party] disputing [any of those facts] [the authenticity of any of those documents] [any of those witness statements], they shall be admitted by you for the purpose of those proceedings.

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

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

**DO NOT IGNORE THIS NOTICE**

If you dispute [any of the facts][the authenticity of any of those documents][any of those witness statements] set out above you should respond to this Notice (by striking out “Admit” or “Dispute” as appropriate) and returning a copy of it to the address shown above by no later than [date].

If you fail to respond to this Notice in the time allowed, you will only be able to [dispute those facts][dispute the authenticity of those documents][ask for the witnesses who made those statements to attend and give oral evidence] with the leave of the Panel.

**RESPONSE**

The [facts] [authenticity of the documents][witness statements] set out above are admitted or disputed by [the HCPC or name of other party] as I have indicated above.

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

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

## PRACTICE NOTE

### Cross-Examination in Cases of a Sexual Nature

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

#### Introduction

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

#### Background

The procedural rules<sup>1</sup> for fitness to practise proceedings provide that:

*“(4) Where—*

- (a) the allegation against a registrant is based on facts which are sexual in nature;*
- (b) a witness is an alleged victim; and*
- (c) the registrant is acting in person,*

*the registrant shall only be allowed to cross-examine the witness in person with the written consent of the witness.*

*(5) If, in the circumstances set out in paragraph (4) a witness does not provide written consent, the registrant shall, not less than seven days before the hearing, appoint a legally qualified person to cross-examine the witness on his [or her] behalf and, in default, the Council shall appoint such a person on behalf of the registrant.”*

---

<sup>1</sup> HCPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), r. 8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), r. 10A; HCPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), r. 10A.

## **The appointment of legal representatives**

The decision to appoint a legal representative will be dictated by the nature of the allegation and willingness or otherwise of complainants to be questioned by the registrant concerned. The procedural rules provide that, in cases involving allegations of a sexual nature, it is for the witness to decide whether he or she is willing to be cross examined by the registrant. Consequently, Panels should not draw prejudicial inferences from the fact that a registrant is not cross-examining witnesses or that the HCPC has appointed someone to do so on his or her behalf.

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

## **The role of the legal representative**

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

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

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

## **Procedure**

Panels have the power to hold preliminary hearings for the purpose of case management and are encouraged to do so in cases of this nature, in order to resolve as many evidential or procedural issues as possible before the hearing takes place.

**January 2015**

---

<sup>2</sup> It is, of course, open to the registrant at his or her own expense to ‘adopt’ the appointed representative at this stage for the remainder of the proceedings.

---

# PRACTICE NOTE

## Disclosure of Unused Material

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

### Introduction

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

For this purpose, “prosecution authorities” include regulators<sup>2</sup> and that disclosure obligation requires the Health and Care Professions Council to disclose to the registrant concerned any evidence which the HCPC holds but which it will not rely on as a part of its case and which weakens its case or strengthens that of the registrant.

### Background

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

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

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

---

<sup>1</sup> *Edwards v UK* (1992) 15 EHRR 417

<sup>2</sup> *Feldbrugge v Netherlands* (1986) 8 EHRR 425



## **Disclosure Schedule**

In any case where unused material exists, the registrant concerned will receive a Disclosure Schedule<sup>3</sup> at the same time as they receive the evidence upon which the HCPC proposes to rely at the final hearing.

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

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

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

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

## **Applications for Disclosure**

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

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

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

## **Limits on the duty to disclose**

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

---

<sup>3</sup> and, if in the view of the HCPC any document is disclosable, a copy of that document

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

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

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

### **Challenging the HCPC's decision**

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

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

- the name, address and registration number of the registrant;
- details of the documents or evidence sought; and
- an explanation of why it is considered that disclosure will assist the defence.<sup>4</sup>

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

In order to make a determination, the Panel will need to be provided with a copy of the material in question<sup>5</sup> and any written submissions which the applicant and the HCPC wish to make. In deciding whether a document is to be disclosed the fundamental question which the Panel must consider is whether a document which the HCPC has in its possession but does not seek to rely upon would assist the registrant in preparing his or her case? (the Disclosure Test).

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

---

<sup>4</sup> as noted above, this is not mandatory but will assist the Panel in determining the application

<sup>5</sup> unless it is subject to legal privilege

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

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

### **Registrants' obligations with respect to disclosed material**

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

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

In line with the decision in *Taylor v Director of Serious Fraud Office*,<sup>6</sup> material will only be disclosed if the registrant concerned provides an undertaking not to use the material for any purpose other than the proper conduct of the particular case.

**January 2015**

---

<sup>6</sup> [1999] 2 AC 177

# PRACTICE NOTE

## Health Allegations

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

### Introduction

Article 22(1)(a)(iv) of the Health and Social Work Professions Order 2001 (the Order) provides that one of the statutory grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of his or her "physical or mental health".

If the Investigating Committee concludes that there is a 'case to answer' in respect of an health allegation it may refer that allegation to the Health Committee.<sup>1</sup> In addition, if the Conduct and Competence Committee is considering an allegation based upon another statutory ground (e.g. misconduct) but considers that it would be "better dealt with by the Health Committee", it may suspend its consideration of that allegation and refer it to the Health Committee.<sup>2</sup>

### What constitutes a health allegation?

In many cases deciding that an allegation is a health allegation will be straightforward. This is likely to occur in cases where fitness to practise concerns arise as a direct consequence of the registrant's physical or mental condition and where there is no evidence to suggest that other factors are involved. However, the decision is less straightforward in cases where health is only one facet of broader or more serious concerns about the registrant's fitness to practise.

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

In deciding whether an allegation should be referred to the Health Committee, the factors which should be taken into account include:

---

<sup>1</sup> Art. 26(6)(b)(ii) of the Order

<sup>2</sup> HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.4(1)

- the extent to which health issues are the cause of allegation;
- the overall seriousness of the allegation; and
- the sanctions which are available to the Health Committee, in particular, that striking off is not an option.<sup>3</sup>

In *Crabbie v GMC*<sup>4</sup> (in which the registrant, who was imprisoned for causing death by dangerous driving, argued that her alcohol dependency meant that the case should have been heard by the GMC's Health Committee), the Privy Council held that:

*"The power to refer [to the Health Committee] is a discretionary one... in considering whether or not to exercise the power, the [decision maker], should take into account all the circumstances of the case including the scope of the powers available to the Health Committee.*

*...the Health Committee has no power to direct erasure... if the case is one in which erasure is a serious possibility, neither [decision maker] should refer the case to the Health Committee notwithstanding that it may be one where the fitness to practise of the practitioner in question appears to be seriously impaired by reason of his or her physical or mental condition."*

Similarly, in *R (on the application of Toth) v GMC*,<sup>5</sup> a case which concerned the 'cross referral' of an allegation to the Health Committee, the court held that:

*"whilst the possibility of erasure remains, the [Committee] cannot lawfully refer the case to the Health Committee. That Committee cannot impose a sanction of erasure and it is one that the [Committee] may have to impose in the public interest. Whilst that remains a possibility, [it] should retain jurisdiction."*

*I would only add that even where the [Committee] does conclude that erasure is not a possible sanction, it may still be inappropriate to refer a case to the Health Committee because the public interest in complaints being determined in public and the need to maintain professional standards may outweigh the advantages of referring the matter to the Health Committee. However, once erasure has been discounted as a possible sanction, the power to transfer arises and it is for the [Committee] to weigh the considerations for and against exercising that power."*

## **Evidence as to health**

In cases where health issues arise, Panels will often be able to draw appropriate inferences and conclusions from evidence about a registrant's health without the need for expert evidence.

---

<sup>3</sup> By Art. 29(6) of the Order the Health Committee may only impose a striking off order where the registrant concerned has been continuously suspended or subject to a conditions of practice order for at least two years

<sup>4</sup> [2002] UKPC 45.

<sup>5</sup> (2003) EWHC 1675 (Admin)

Whether evidence from medical or other experts is required is a matter for the Panel:

*“an expert’s opinion is admissible to furnish information which is likely to be outside the [Panel’s] experience and knowledge. If on the proven facts the [Panel] can form their own conclusions without help, then the opinion of an expert is unnecessary.”<sup>6</sup>*

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

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

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

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

### **Medical Assessors**

In cases where Panels need the assistance of an expert, they have the option of seeking the advice of a suitably qualified medical assessor. The procedure for appointing medical assessors is set out in more detail in the “Assessors and Expert Witnesses” Practice Note.

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

**January 2015**

---

<sup>6</sup> *R v Turner* [1975] QB 834

# PRACTICE NOTE

## Requiring the Production of Information and Documents and Summoning Witnesses

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

### Introduction

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

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

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

### Investigators' powers

Article 25(1) of the Health and Social Work Professions Order 2001<sup>1</sup> (the Order) enables HCPC Investigators, for the purpose of assisting the HCPC or any of its Practice Committees to carry out their functions in respect of fitness to practise, to require any person to supply information or produce any document which appears to be relevant to the discharge of those functions.

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

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

---

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

## The exercise of Investigators' powers

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

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

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

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

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

## The powers of Panels

In accordance with Article 32(2)(m) of the Order, the procedural rules for each Practice Committee empower Panels to require persons to attend and give evidence at hearings or to produce documents at hearings. That power is set out in those rules<sup>2</sup> in similar form, as follows:

*“... The [Panel] may require any person (other than the registrant) to attend a hearing and give evidence or produce documents.”*

---

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



## **The exercise of the Panel's powers**

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

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

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

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

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

Normally, the party seeking to compel a person to attend a hearing must meet their reasonable costs of doing so and the Panel may require an undertaking to that effect before an Order is granted. A Witness Order which requires the production of documents should either identify the documents individually or by reference to a class of documents or some other criteria which are sufficient for the person who is subject to the Order to understand the obligation which has been imposed by the Panel.

## **Compliance with Witness Orders**

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

Where, in the case of any document, a person could comply with a Witness Order by delivering a copy of all or part of the document or by making it available for inspection, he or she should not be compelled to do more than:

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

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

### **Limits of the powers of Investigators and Panels**

Neither an Investigator nor a Panel may exercise their powers in order to obtain:

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

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

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

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

### **Service user confidentiality**

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

---

<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.

<sup>4</sup> i.e. proceedings before the court to which any appeal would be made against the decision of the Panel.

Equally, extra-statutory data protection measures (such as the Caldicott Guardian arrangements adopted by NHS organisations and local authorities in England) do not prevent disclosure to the HCPC under the Order.

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

However, that duty of confidentiality does not, of itself, confer any evidential privilege. In general, the majority of personal, commercial and professional confidences (other than those covered by legal professional privilege) may be subject to compelled production.

Investigators and Panels should seek to uphold the principle of service user confidentiality and, wherever possible, records should be obtained on the basis of consent from the service user concerned. However, whilst service users' rights to privacy are important they are not absolute and in situations where consent cannot be obtained but an Investigator or Panel is satisfied that access to those records is needed then the person holding them should be compelled to produce those records.

### **Setting aside**

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

### **Failure to comply**

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

- an HCPC Investigator under Article 25(1); or
- by a Panel under Article 25(2) or 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).

**January 2015**

**[INVESTIGATING] COMMITTEE**

**REQUIREMENT TO PROVIDE INFORMATION  
OR PRODUCE DOCUMENTS**

**TO:** [name and address]

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

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

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

[provide][produce]

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

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

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

(HCPC Investigator)

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

**[PRACTICE] COMMITTEE**

**[WITNESS] [PRODUCTION] ORDER**

**TO:** [name and address]

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

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

[date, time and venue]

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

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

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

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

**IGNORING THIS ORDER IS A CRIME**

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

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

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