

Council – 6 December 2011

Practice Note: Case to Answer

Executive summary and recommendations

### **Introduction**

As part of the work undertaken to review the number of not well founded decisions, it was identified that further guidance was required on the role of the Investigating Committee in drafting allegations and on the issue of evidence conflicts. At its meeting in October, the FTP Committee recommended that the Council should approve the attached Practice Note – Case to Answer.

### **Decision**

The Council is asked to approve the Practice Note – Case to Answer

### **Background information**

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

### **Resource implications**

None

### **Financial implications**

None

### **Appendices**

Practice Note- Case to Answer

### **Date of paper**

24 November 2011

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# Allegations: Standard of Acceptance

## Introduction

The Health Professions Order 2001 (the **Order**) provides that the HPC's primary function is to set and maintain standards for the professions it regulates with the objective of protecting the public. An important and visible part of that work is the investigation and adjudication of allegations which are made against registrants.

[To ensure that allegations are considered appropriately, this document sets out a modest and proportionate threshold which allegations must normally meet before they will be investigated by the HPC. That threshold is known as the "Standard of Acceptance".](#)

In relation to allegations, our primary concern is that registrants are 'fit to practise', in the sense that they have the knowledge, skills and character to practise their profession safely and effectively. However, fitness to practise is not just about professional performance. It also includes acts by a registrant which may have an impact on public protection or confidence in the profession or the regulatory process. This may include matters not directly related to professional practice.

Our proceedings are designed to protect the public from those whose fitness to practise is "impaired". They are not a general complaints resolution process, nor are they designed to resolve disputes between registrants and service users or to punish registrants for past mistakes.

Although allegations are only made against a small minority of HPC registrants, investigating them properly is a resource-intensive process. Therefore, it is important to ensure that the available resources are used effectively to protect the public and are not diverted into investigating matters which do not raise cause for concern. Importantly, we recognise that registrants do make mistakes or have lapses in behaviour and we will not pursue every minor error or lapse.

~~[To ensure that allegations are considered appropriately, this document sets out a modest and proportionate threshold which allegations must normally meet before they will be investigated by the HPC. That threshold is known as the "Standard of Acceptance".](#)~~

The Standard of Acceptance is an important safeguard against the diversion of resources but, as the HPC's primary concern is public protection, it is not a rigid and unbending rule. Under Article 22(6) of the Order, the HPC has a discretion (which has been delegated to the Registrar) to investigate relevant information even when it does not meet the formal requirements for an allegation.

## Allegations

Part V of the Order enables the HPC to consider:

***fitness to practise allegations:*** to the effect that a registrant's fitness to practise is impaired by reason of:

- misconduct;
- lack of competence;
- conviction or caution for a criminal offence;
- physical or mental health;
- a fitness to practise or similar determination by another health or social care regulatory or licensing body; or
- being included in a 'barring' list under the Safeguarding Vulnerable Groups Act 2006, the Safeguarding Vulnerable groups (Northern Ireland) Order 2007) or the Protection of Vulnerable Groups (Scotland) Act 2007);

***register entry allegations:*** to the effect that an entry in the HPC register relating to a registrant has been fraudulently procured or incorrectly made.

Fitness to practise allegations are comprised of three elements:

- the facts upon which the allegation based;
- the 'statutory ground' (e.g. misconduct, lack of competence, etc.) which it is alleged those facts constitute; and
- the proposition that, based upon that statutory ground, the registrant's fitness to practise is impaired.

If the allegation proceeds to a final hearing, it will be for the HPC to prove the facts to the civil standard of proof (the balance of probabilities). The other two elements, the statutory ground and impairment, do not require specific proof but are matters for the judgement of the Panel hearing the case, based on the proven facts.

Importantly, the applicable test is that fitness to practise is impaired. The fitness to practise process is not about punishing registrants for past acts but is about public protection going forward. The need to establish impairment at the time a case is heard is often an important factor in deciding whether to pursue fitness to practise allegations.

Register entry allegations are relatively rare. They are not fitness to practise allegations, in the sense that as they are simply concerned with whether an entry was made in error or obtained by fraudulent means. They are subject to simpler investigative and adjudicative processes and are only subject to limited further consideration in this policy document.

## Standard of Acceptance

A fitness to practise allegation meets the Standard of Acceptance if:

- it is made in the appropriate form; and
- in respect of the registrant against whom it is made, it provides credible evidence which suggests that the registrant's fitness to practise is impaired.

A register entry allegation meets the Standard of Acceptance if:

- it is made in the appropriate form; and
- in respect of the registrant against whom it is made, it provides credible evidence which suggests that an entry in the HPC register was incorrectly made or fraudulently procured.

### The “appropriate form”

Article 22(5) of the Order requires allegations against registrants to be received “in the form required by the Council” (the **appropriate form**). A fitness to practise allegation or register entry allegation is in the appropriate form (and thus meets the first requirement of the Standard of Acceptance) if it:

1. is received by the HPC in writing;
2. sufficiently identifies the registrant against whom the allegation is made; and
3. set outs:
  - (a) the nature of the allegation; and
  - (b) the events and circumstances giving rise to it;in sufficient detail for that registrant to be able to understand and respond to that allegation.

Where a registrant has been convicted of, or received a caution for, a criminal offence or has been the subject of a determination by another regulatory or licensing body, a certificate of conviction, notice of caution or notice of determination issued by a court, the police or any other law enforcement, regulatory or licensing body is also regarded as being in the appropriate form.

### ***“in writing”***

The requirement that allegations must be made in writing is intended to assist in obtaining all relevant information from complainants, not to act as an obstacle to the making of allegations.

If a complainant's initial contact with the HPC is by other means, the complainant should be advised about the Standard of Acceptance and assisted to submit any allegation in writing. This may be achieved by:

- giving the complainant advice on how to put the allegation in writing;
- sending the complainant a copy of the HPC brochure *How to raise a concern* and a complaint form to complete (which may be partly completed using the information already provided); or
- taking a statement of complaint and sending it to the complainant or their representative for verification and signing.

### ***“sufficiently identifies”***

The requirement that an allegation “sufficiently identifies” a registrant recognises that, for good reason, complainants may not always be able to provide a registrant’s full name . This is particularly so for service users, who may encounter registrants in circumstances where they may not be given the registrant’s name.

In such cases, if the complainant is able to provide information which is sufficient to enable the HPC by reasonable efforts to trace the registrant concerned (for example, a first name and the date and professional setting in which the events took place) then this requirement should be regarded as met.

If an allegation is found not to relate to a current HPC registrant but the person concerned may be registered with another regulator, the complainant should be given appropriate advice and, with their consent, any relevant documents should be passed to that regulator.

Similarly, where a complaint does not raise concerns about the fitness to practise of a registrant but where the complainant has raised issues which should be investigated by another body (e.g. a facility regulator or ombudsman). The complainant should be provided with appropriate ‘signposting and other advice to assist them to pursue the matter.

### ***“the nature of the allegation”***

It would be unreasonable for the HPC to assume that complainants, particularly service users, are familiar with the technical detail of its fitness to practise process.

The requirement to set out “the nature of the allegation” is about substance and not form. It does not require complainants to specify the statutory ground of an allegation or to state that a registrant’s fitness to practise is impaired.

### **Credible evidence**

The second requirement of the Standard of Acceptance - that an allegation provides “credible evidence” which suggests that fitness to practise is impaired or a register entry was fraudulent or incorrect - deliberately imposes a relatively low threshold.

The Standard of Acceptance is not intended to act as a barrier to the making of allegations, but simply to act as a filter to ensure that resources are not expended on pursuing matters which do not raise a credible cause for concern.

The requirement that evidence is “credible” does not require a complainant to prove at the outset that it is true. The test is that the information provided needs to be sufficient to cause a reasonable person to consider that it is worthy of belief.

### ***“fitness to practise”***

Fitness to practise is not just about professional performance. It also encompasses acts by registrants in both their professional and personal life which may have an impact upon public protection, the reputation of the profession concerned or confidence in the regulatory process.

An over-strict interpretation should not be adopted, as there will often be circumstances in which matters seemingly unconnected with professional practice may nonetheless have a bearing on fitness to practise. Any doubts on this point can usually be resolved by allowing the allegation to proceed and to be investigated further.

### **Case closure**

Every allegation received by the HPC must be considered on its merits and, as HPC’s main objective is public protection, there is a presumption in favour of making further inquiries about an allegation unless it clearly does not meet the Standard of Acceptance.

A decision not to proceed with an allegation on the basis that it does not meet the Standard of Acceptance should only be taken after consideration of all the available information. At this stage in the process, any doubts should be resolved in favour of public protection, by allowing the allegation to proceed.

If an allegation is found not to meet the Standard of Acceptance and the case is closed, it is important that clear reasons for the decision are recorded.

Where an allegation is closed at this stage, although it does not form part of a registrant’s formal HPC record, it is intelligence which may be taken into account if a further allegation is made against that registrant.

### **Time limit**

Article 22(3) of the Order allows the HPC to investigate allegations relating to events which occurred at any time, even at a point before the person concerned was a registrant.

However, significant practical difficulties may arise when allegations are not reported to the HPC in a timely manner. These include the destruction or loss of records and other physical evidence and witnesses having a poor recollection of events or being untraceable.

Normally, allegations will not be regarded as meeting the Standard of Acceptance if they are made more than five years after the events giving rise to them.

That time limit does not apply to:

- an allegation based upon a criminal conviction or caution or regulatory determination (which does not present the same potential evidential difficulties, as there is no need to 'go behind' the decision of the court or tribunal which imposed the conviction etc.);
- an allegation which, in the opinion of the Director of Fitness to Practise, appears to be serious and in respect of which the time limit should be waived in the public interest or in order to protect the public or the registrant concerned.

### **Anonymous allegations**

Anonymous allegations may take two forms:

- an allegation made by a person whose identity is unknown to the HPC; and
- an allegation made by a person whose identity is known but who has asked the HPC not to disclose his or her identity.

The procedures set out in the Order and the rules made under it require the HPC to provide registrants with details of any allegations made against them, to allow the registrant to comment and then enable the HPC to seek any necessary clarification from the complainant before proceeding further.

It is extremely difficult to operate such a process in a fair and transparent manner if the complainant is unknown or refuses to be identified. Generally, the HPC will not take action in respect of anonymous allegations and complainants need to be made aware that a request for anonymity may prevent the case from progressing further.

This policy should not be applied in an over-rigid manner. The primary function of the HPC is to protect the public and there may be circumstances in which an anonymous allegation raises concerns which are so serious that action should be taken. In such circumstances the Director of Fitness to Practise (or a person authorised by the Director) has the discretion to authorise further investigation.

## **Matters resolved locally**

Often, issues may have been resolved satisfactorily at a local level before they are brought to attention of the HPC. In such cases it is unlikely that there will be evidence to suggest that the fitness to practise of the registrant concerned is impaired and, therefore, the Standard of acceptance will not be met.

~~Although registrants and employers should inform the HPC of potential fitness to practise concerns, in many cases local resolution will prove to be an entirely satisfactory outcome.~~ Credible evidence of current impairment is unlikely to be found in cases:

- relating to relatively minor conduct, competence or health issues;
- where the registrant has acknowledged, and has insight into, any failings;
- where appropriate remedial action has been taken; and
- which do not raise any wider public protection issues, such as confidence in the profession or regulatory process or the deterrence of other registrants.

## **Minor employment issues**

In most cases, complaints involving minor employment issues which do not compromise the safety or well-being of service users will not meet the Standard of Acceptance. Typical examples are:

- lateness or poor time keeping, (but not if it has a direct impact on service users, such as delaying handovers or leaving service users at risk );
- personality conflicts, provided that there is no evidence of bullying or harassment;
- sickness or other absence from work, provided that there is no misconduct (e.g. fraudulent claims) and the registrant is managing his or her fitness to practise.

## **Consumer complaints and business disputes**

Where the substance of a complaint involves consumer related issues or a business dispute, and there is no evidence of misconduct or risk to public protection, it is unlikely that the matter will satisfy the requirement that the allegation relates to fitness to practise. Such cases will include:

- complaints about minor differences in the pricing of goods or services;
- disputes about business or personal debts;
- complaints which have no public protection implications but are simply made on the basis that the complainant is aware that the other party to a dispute is a registrant (e.g. boundary disputes between neighbours).

If there is any evidence of abuse of a registrant-service user relationship, the matter should be treated as a potential fitness to practise issue.

### Internet social networks

Allegations which relate to a registrants' participation in internet social networks (e.g. Facebook, Myspace, Bebo) should be treated in a similar manner to any other allegation but, in considering whether such allegations meet the Standard of Acceptance, the following should be taken into account:

- in many cases there may be insufficient evidence to identify with any certainty the registrant concerned;
- the allegation may relate to comments which are taken out of context ( for example, which were jocular, qualified in some way or withdrawn) and may not be a balanced reflection of the views expressed by the person concerned;
- ~~the nature and extent of the complainant's own participation in the network may also be relevant factor.~~

### Motoring offences etc

Other than in exceptional circumstances (for example, where there is associated evidence that the safety of the public or service users has been compromised), the following should not be regarded as the basis of a fitness to practise allegation:

- parking and other penalty charge notice contraventions;
- fixed penalty (and conditional offer fixed penalty) motoring offences; and
- penalty fares imposed under a public transport penalty fare scheme.

In respect of other motoring offences, the information received should be assessed on a case by case basis. Other than in cases involving serious offences or where there is evidence of the public or service users being put at risk (for example, failing to stop at, or leaving the scene of, a road traffic collision), it is unlikely that an offence will meet the final element of the standard of acceptance; that the allegation relates to fitness to practise.

~~In relation to drink-driving offences, a conviction for driving (or being in charge of) a motor vehicle after having consumed alcohol in excess of the prescribed limit should not lead to an automatic assumption that the registrant has alcohol dependency issues. However, such Drink-driving offences should be regarded as meeting the standard of acceptance if:~~

- the offence occurred in the course of a registrant's professional duties, en-route to or directly from such duties or when the registrant was subject to any on-call or standby arrangements;
- there are aggravating circumstances connected with the offence (including but not limited to failure to stop or only doing so following a police pursuit, failure to provide a specimen, obstructing police, etc.);

- the penalty imposed exceeds the minimum mandatory disqualification from driving (12 months, with or without a fine); or
- it is a repeat offence.

### **Complaints against registrants acting as expert witnesses**

In acting as expert witnesses, registrants do not enjoy any general immunity from fitness to practise proceedings. However, in dealing with allegations against such registrants, the HPC must be careful not to interfere in matters which are properly for another court or tribunal to determine.

As a general principle, the admission of expert evidence is a matter for the court or tribunal in question. It is for that body to decide what expert evidence (if any) it needs and to control experts, their reports and evidence. Consequently, complaints about a registrant who is acting as an expert witness should, in the first instance, be raised with the court or tribunal concerned and not the HPC.

HPC fitness to practise proceedings should not be used as a forum for re-trying cases heard elsewhere, nor for settling differences of professional opinion which are often a reality of legal proceedings and, of themselves, will rarely be sufficient to sustain a fitness to practise allegation.

The requirement that an allegation must include credible evidence which suggests that fitness to practise is impaired is unlikely to be met unless it can be shown that, in acting as an expert witness, the registrant departed from the professional obligations imposed upon experts, such as:

- making false claims of expertise or giving evidence outside of the registrant's expertise;
- breaching the expert's paramount duty to assist the court or tribunal; or
- breaching the obligation to produce an objective, unbiased, independent report based upon all material facts.

### **Drafting formal allegations**

Practical guidance on the drafting of fitness to practise allegations, for HPC Case Managers and Investigating Committee Panels, is set out as an annex to this policy document.

[December 2011](#)

## Drafting Fitness to Practise Allegations

### Introduction

The right to a fair hearing requires registrants to be given adequate prior notice of any allegation against them, so that they have a fair opportunity to:

- understand the allegation, including the material facts upon which it is based;
- properly consider whether to admit or deny the allegation and, at the appropriate stage in the proceedings, if they so choose,
  - to make representations;
  - to prepare any defence or mitigation;
  - to answer the case against them by presenting evidence and making submissions on the applicable law and standards, etc.

That right is protected by Article 6 of the European Convention on Human Rights and reflects the common law principles of natural justice.

### HPC's approach

The approach adopted by the HPC is that a formal allegation should be drafted and put to the registrant concerned as early as possible in the process, so that the registrant understands what is being alleged and has the opportunity to submit representations on that allegation when a Panel of the Investigating Committee considers whether, in respect of that allegation, the registrant has a 'case to answer'.

In reaching its decision, the Investigating Committee Panel is expected to consider each element of the allegation, to see whether there is evidence to support the facts alleged and whether those facts would amount to the statutory ground and establish that fitness to practise is impaired. Panels should also consider allegations 'in the round' to ensure that they strike the right balance in terms of the case which the registrant must answer.

As part of that process the Panel may amend or omit elements of an allegation. As allegations are drafted at an early stage, whilst information is still being gathered in a dynamic investigative process, it is important that Panels give critical scrutiny to the drafting of allegations put before them. Investigating Committee Panels must ensure that any allegation which proceeds further is a fair and proper representation of the HPC's case and is fit for purpose.

If an Investigating Committee Panel allegation varies or extends an allegation to a material degree, the registrant concerned should be given a further opportunity to make observations on the revised allegation to the Investigating Committee before a final case to answer decision is made.

## Drafting allegations

Every fitness to practise allegation must be drafted so it alleges that, based upon one or more of the statutory grounds set out in Article 22(1) of the Order, the registrant's fitness to practise is impaired.

Allegations must be drafted in clear and unambiguous language which enables the registrant concerned and anyone else reading them to understand what is being alleged. So far as possible, the elements of the allegation should be set out:

- briefly, concisely and in ordinary language which avoids the unnecessary use of technical terms or jargon;
- in separate paragraphs, each dealing with a single element of the allegation;
- with the facts in chronological order (unless there is good reason to do otherwise),
- in the logical decision-making sequence of facts, statutory ground and, impairment.

So, for example:

### ***Allegation***

1. *In the course of your employment as a [profession] by [Employer] (XYZ) you were provided with access to a computer at [place of work] belonging to XYZ.*
2. *Between [dates], contrary to XYZ's Internet Access Policy, you used that computer to:*
  - A. *search for the terms of a sexual nature identified in Schedule 1;*
  - B. *access websites containing pornographic material;*
  - C. *download pornographic images from such websites and store them in the files on the computer identified in Schedule 2.*
3. *Each of the matters set out in paragraphs 2A, B and C constitutes misconduct.*
4. *By reason of that misconduct, your fitness to practise is impaired.*

## Practical drafting points

### ***An allegation is not a case summary***

Formal allegations should not be a simple repetition or paraphrasing of the allegation as it was received from the complainant. The information provided is likely to include statements of opinion, details of minor employment issues and other material which is not relevant to the fitness to practice process.

An allegation does not need to contain every last detail provided to the HPC but should be limited to material which is or may be relevant to the issue of impaired fitness to practise and any sanction which may be imposed.

A well-structured allegation will help the Panel to identify the salient facts, to reach determinations and to provide reasons for them. If an allegation is written in a narrative style or contains unnecessary detail, the Panel will have to engage in needless fact-finding and reasoning.

If an allegation is indirectly based upon a large number of events over an extended period of time, there is no need to set out every event unless a Panel needs to make a finding of fact in respect of each event. For example, where an allegation is based upon the outcome of a workplace capability process, the Panel's focus is likely to be on the overall findings and outcomes from that process, rather than the detail of each of the events that led to it. In such cases, the detailed information can be set out in a schedule to the allegation.

### ***Organise, logically and chronologically***

Panels must reach decisions in a logical sequence; are the facts proved, do they amount to the statutory ground and, if so, is fitness to practise impaired? Consequently, it will rarely be appropriate to deviate from setting out an allegation in that sequence.

Where an allegation contains more than one statutory ground, the facts should still be set out first and the grounds then set out after all of the facts, but identifying which facts are alleged to meet which ground ( for example "The matters set out in paragraphs 1-4 constitute misconduct. The matters set out in paragraphs 5 to 9 constitute a lack of competence").

It is important to be clear about whether the HPC is alleging that all the facts cumulatively need to be proved in order to amount to the statutory ground. This can usually be resolved by using the phrases "the matters set out" or "each of the matters set out" and careful use of "and" and "or" in the paragraph which contains the statutory ground.

Unless there is good reason to do otherwise, facts should be set out in chronological order, so that events can be understood in the time sequence in which they occurred.

### ***Strike the right balance***

Allegations needs to be a balanced and proportionate reflection of the case against a registrant, so that Panels do not have to engage in pointless fact-finding and reasoning. That balance will not be achieved by including every last detail known to the HPC or by adopting a superficial approach which leaves out salient facts. A common sense balance must be struck.

Allegations must also reflect the appropriate level of seriousness, so that the registrant understands the case they must answer. If the registrant's action can be interpreted in more than one way, then those interpretations may need to be alleged 'in the alternative'. For example, it would be unfair to allege that certain facts amounted to misconduct but then to find that they amounted to a lack of competence when the latter option had not been put to the registrant.

***Take care with adjectives.***

Except where specific findings of fact need to be made on professional performance, terms suggesting that a registrant's actions were, for example, "inappropriate", "inadequate" or "not of the standard expected" are rarely necessary. The appropriateness or adequacy of a registrant's action is not a question of fact but a matter for the judgement of the Panel based upon the facts found proved.

The same is not true of allegations that a registrant's actions were, for example, "dishonest" or "sexually motivated". These are questions of fact on which the Panel will need to make specific findings, as they go to the registrant's state of mind at the time of the allegation.

Dishonesty and other 'state of mind issues' must be specifically alleged unless they are already clearly encompassed within the words of the allegation, for example "you stole X" or "you sexually assaulted Y".

***Be as specific as possible***

Allegations should not be overloaded with detail, but important detail – dates, locations, words said, etc. - should be included and be as specific as possible. If there is any uncertainty then this should be made clear (for example, "on or around [date]", "at or near to", "...or words to that effect").

Care should be taken not to confuse "failed" for "did not". The former requires a finding that a registrant should have done something as well as not doing it, the latter only that a registrant did not do something.

***Refer indirectly to sensitive information***

Service users should not be identified by their names or their initials, but simply as Client A etc. Similarly, in health allegations, the details of a registrant's health should not appear in the allegation but should be specified in a confidential schedule to the allegation.