

Tribunal Advisory Committee, 12 November 2019

Review of Practice Notes

Executive Summary

Practice Notes exist to provide guidance to Panels of the Practice Committees as well as to parties with an interest or involvement in fitness to practise proceedings. All Practice Notes undergo regular review.

Following advice and discussion from TAC in September 2019, further suggested amendments have been made to the following Practice Notes:

- Finding Fitness to Practise Impaired
- Drafting Decisions

These have been suggested as interim changes while a wider review of the content and purpose of the Practice Notes is undertaken.

Decision

The Tribunal Advisory Committee is asked to discuss and advise whether they agree to the relevant changes to the attached Practice Notes.

PRACTICE NOTE

Finding that Fitness to Practise is “Impaired”

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

1. Introduction

This note provides guidance on how Panels approach decisions on whether a Registrant’s fitness to practise is impaired.

Fitness to practise allegations comprise three elements which Panels must consider sequentially:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to one or more of the the ‘statutory grounds’ of the alleged ation (e.g. misconduct or lack of competence); and
3. in consequence, whether the registrant’s fitness to practise is impaired.

The sequential approach to considering allegations means that a finding that the proven facts amount to a lack of competence, misconduct, etc. will not automatically result in the Panel concluding that fitness to practise is impaired. A Panel may properly conclude that fitness to practise is not impaired where, for example, it is satisfied that the act or omission in question was an isolated error which has been remedied by the registrant and which is highly unlikely to be repeated.

3. —

The HCPC has to provide sufficient evidence to persuade the Panel that the facts alleged are proved, the burden of persuasion in relation to the facts alleged. Whether those facts amount to the statutory ground and fitness to practise is impaired are matters of judgement for the Panel. If any of the facts alleged are proved the Panel then has to decide whether they amount to one or more of the statutory grounds.

2. Impairment of Fitness to Practise

Commented [ZM1]: Comment from Catherine as to whether the title should be amended to something like: ‘Approaching decisions on whether a Registrant’s fitness to practise is impaired. Current wording seems to suggest that Panels are just there to find impairment.’

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Commented [ZM2]: Catherine’s comment – ‘I don’t think the sequential approach means that. It is more about a Panel not leaping to a decision about FTP before considering everything in the proper way.’

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The test of impairment is expressed in the present tense; that fitness to practise “is impaired.”

~~The Panel's task is, to form a view about the registrant's current fitness to practise by taking account of the way in which the registrant has acted or failed to act in the past and looking forwards whether they consider that the registrant's ability to practise safely is compromised.~~

The HCPC's overarching objective is protection of the public and, ~~consistent with that objective~~, the purpose of fitness to practise proceedings is not to punish registrants for their past acts and omissions, but to protect the public from those who are not fit to practise.

~~The Panel's task is forward looking, to form a view about the registrant's current fitness to practise by taking account of, among other things, the way in which the registrant has acted or failed to act in the past.~~

~~The sequential approach to considering allegations means that a finding that the proven facts amount to a lack of competence, misconduct, etc. will not automatically result in the Panel concluding that fitness to practise is impaired. A Panel may properly conclude that fitness to practise is not impaired where, for example, it is satisfied that the act or omission in question was an isolated error which has been remedied by the registrant and which is highly unlikely to be repeated.~~

3. Protecting the public

As fitness to practise is about public protection, in considering allegations Panels need to address what the case law describes as the 'critically important public policy issues' of:

- protecting service users;
- declaring and upholding proper standards of behaviour; and
- maintaining public confidence in the profession concerned.

Thus, in determining fitness to practise allegations, Panels must take account of two broad components:

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|---------------------------|---|
| the 'personal' component: | the current competence, behaviour etc. of the registrant concerned; and |
| the 'public' component: | those critically important public policy issues outlined above. |

3.1 Personal component

The personal component must be considered first and the Panel's task is to form a view about the registrant's current fitness to practise based on, among other things, the registrant's past acts or omissions. The key questions which need to be answered are:

- are the acts or omissions which led to the allegation remediable?
- has the registrant taken remedial action?
- are those acts or omissions likely to be repeated?

An important factor will be the registrant's insight into those acts or omissions, the extent to which the registrant:

- accepts that ~~their his or her~~ behaviour fell below professional standards, how and why that occurred and its consequences for those affected; and
- has taken action to address that failure in a manner which remedies any past harm (where that is possible) and avoids any future repetition.

It is unlikely that a registrant who lacks insight and thus has not accepted ~~his or her~~their failure or taken remedial steps would be regarded as being at a low risk of repetition.

3.2 Public Component

Next, Panels must consider the three elements of the public component. The first element of the public component - the need to protect service users - overlaps with the personal component. A registrant who has insight and is unlikely to repeat past acts or omissions is unlikely to present an ongoing/ future risk to service users.

The other two elements of the public component—~~maintaining~~ are maintaining professional standards and public confidence in the profession concerned—~~are intertwined~~. The professional standards expected of registrants are those which the public expects of them. Panels should consider the need for the public to have confidence in the registrants they are treated by. The public is entitled to ~~expect~~ engage with registrants who are professionally competent and act with decency, honesty and integrity. ~~Panels should consider the need for the public to have confidence in the registrants they are treated by and in the regulatory process. The public should also be able to rely on the regulatory process to be robust, fair and transparent.~~

The key question to be answered here is, given the nature of the allegation and the facts found proved, would public confidence in the profession be undermined if there were to be no finding of impairment?

4. Risk of harm

In assessing the likelihood of a registrant causing similar harm in the future, Panels should take account of:

- the degree of harm caused by the registrant; and
- the registrant's culpability for that harm.

The degree of harm cannot be considered in isolation, as even death or serious injury may result from an unintentional act which is unlikely to be repeated or, conversely, the harm suffered may be less than that which was intended or reasonably foreseeable.

In assessing culpability, Panels should recognise that deliberate and intentional harm is more serious than harm arising from a registrant's reckless disregard of risk which, in turn, is more serious than that arising from a negligent act where the harm may not have been foreseen by the registrant.

5. Character evidence

In fitness to practise proceedings Panels may need to consider 'character evidence' of a kind which, in other proceedings, is only heard as personal mitigation in relation to sanction.

In admitting character evidence for the purpose of determining impairment, Panels must exercise caution but should not adopt an over-strict approach. It is important that all evidence which is relevant to the question of impairment is considered. For example, when considering impairment, Panels may properly take account of evidence as to the registrant's general competence in relation to the subject matter of an allegation; the registrant's actions since the events giving rise to the allegation; or the absence of similar events.

In deciding whether to admit character evidence, Panels must draw a distinction between evidence which has a direct bearing on the findings it must make and evidence which is simply about the registrant's general character. That distinction is not always clear. Expressions of regret or remorse will usually fall within the latter category but, where there is evidence that, by reason of insight, that regret or remorse has been reflected in modifications to the registrant's practice, then it may be relevant to the question of impairment. Panels must be careful not to refuse to hear evidence at the impairment phase about, for example, a registrant's general professional conduct which, when heard at the sanction phase, may raise doubts about the conclusion that the registrant's fitness to practise is impaired.

6. The sequential approach

In determining whether fitness to practise is impaired, Panels should act in a manner which makes it clear that they are applying the sequential approach by:

- first determining whether the facts as alleged are proved;

Commented [ZM3]: Catherine's comment: ' I don't think this whole section is not useful for a registrant.'

- if so, then determining whether the proven facts amount to the statutory ground (e.g. misconduct) of the allegation;
- if so, hearing further argument on the issue of impairment and determining whether the registrant's fitness to practise is impaired; and
- if so, hearing submissions on the question of sanction and then determining what, if any, sanction to impose.

It is important that these four steps should be and be seen to be separate but this does not mean that, for example, Panels must retire four times in every case. They are 'steps' rather than formal stages and their management will depend upon the nature and complexity of the case.

September 2019

PRACTICE NOTE

Drafting Fitness to Practise Decisions

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

1. Introduction

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This practice note provides guidance on the drafting of fitness to practise decisions by HCPC's Practice Committees.

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Panels need to explain their decisions also called determinations and provide adequate reasons for them: ~~for the following:~~

- so that everyone involved in a case as well as members of the public understands the decision and the registrant concerned is able to decide whether to exercise the right of appeal; ;
- as part of the obligation to provide a fair hearing under Article 6 of the European Convention on Human Rights; and
- in order to enable the Professional Standards Authority to consider whether to exercise its statutory powers to challenge the decision.

2. What a 'reasoned' decision should include

Every A decision needs to explain what the Panel decided and, just as importantly, why it did so. It should enable readers, without the need to refer to any other materials, to understand the nature and seriousness of the issues before the Panel, its findings and decision and the reasons for them.

The reasons should provide a logical explanation of how and why the Panel decision was reached.

The detail required will depend upon the nature and complexity of the case, but decisions should include:

- any relevant procedural issues

A decision should record any significant procedural steps and how they were dealt with, such as adjournment requests, proceeding in absence, Human Rights Act

and other legal challenges and any advice given by the Legal Assessor. Any decision by a Panel to disregard the Legal Assessor's advice must be recorded in detail.

- **the allegations or a description of them**

Where the allegations are lengthy, complex or of a technical nature, an overview may be helpful (“this case concerns the registrant’s conduct towards service users [A and B] who were receiving [service C] at [facility D] between [dates E and F]”);

- **the Panel’s findings on ~~material~~ questions of fact**

The Panel should set out the undisputed facts, facts alleged, the facts in dispute and, in relation to the latter, the findings of fact which it made and why. Where the credibility of witnesses is in issue, any factors which led to the evidence of one witness being preferred should be included. An assessment of any witnesses should be provided. This will help readers understand why a Panel has preferred the evidence of a particular witness where there is a conflict in their evidence;

- **whether the facts found proved amount to one or more of the statutory ground(s) of the allegation and why**

The Panel’s judgement on this issue must be recorded in sufficient detail for readers to understand why the facts do or do not amount to the ground(s) alleged.

- **whether or not fitness to practise is impaired and why**

Readers may struggle to understand why, if facts were found proved that amount to the statutory ground(s), a finding of impairment did not follow. This aspect of a decision should address the forward-looking nature of the impairment test, any mitigating or aggravating features evidence and consideration of the wider public interest. See Finding FTP Impaired Practice Note.

- **any sanction that was imposed and why it was appropriate**

The Panel must explain what sanction was imposed and why, and how the sanction will protect the public. If the sanction imposed deviates from the HCPC’s Sanctions Policy, this should be explained to avoid any suggestion that the Panel ignored the policy.

- ~~any relevant procedural issues~~

~~A decision should record any significant procedural steps and how they were dealt with, such as adjournment requests, proceeding in absence, Human Rights Act and other legal challenges and any advice given by the Legal Assessor. Any decision by a Panel to disregard the Legal Assessor’s advice must be recorded in detail.~~

3. Drafting Style

Determinations should be written in plain English and should be concise yet comprehensive. Each determination should be a standalone document so that anyone

~~present at the hearing or reading it having not attended can understand the Panel's reasons. Panels should also bear in mind that their decisions may be reviewed by bodies such as the High Court or Professional Standards Authority (PSA). Decisions should be written for the target audience, enabling the registrant concerned, the complainant and other interested parties to understand the decision reached and the reasons for it. So far as possible, they should be concise yet comprehensive and written in plain English:~~

- using clear and unambiguous terms, short sentences and short paragraphs;
- avoiding complicated or unfamiliar words and using precise but everyday language (e.g. "start" instead of "commence"); and
- avoiding jargon, technical or esoteric language (or explaining any that must be used).

4. Sanctions

~~Panels must refer to the HCPC's Sanction policy.~~ Any sanction imposed by a Panel must be set out in the form of an order which is addressed to HCPC's Registrar. The Registrar will then annotate or amend the registrant's entry in the HCPC Register, in accordance with the Panel's decision, from the date that the order takes effect.

Caution Orders and Suspension Orders need to direct the Registrar to annotate or suspend a register entry for a specified period and a Striking Off Order needs to direct the Registrar the strike the registrant from the register.

Conditions of Practice Orders should:

- ~~direct are a little more complex to draft as, in addition to directing~~ the Registrar to annotate the register (to show that the registrant is subject to the conditions);^{1,7}
- ~~the Order must also~~ set out the conditions with which the registrant must comply;^{1,7}
- specify the length of the Order;
- specify any review periods required.

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Those detailed conditions should be written in the second person ("you", "your") so that they are clearly addressed to the registrant concerned.

~~In drafting Conditions of Practice Orders, Panels also needs to consider the following three issues:~~

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- **are the conditions realistic?**
Will the registrant be able to comply with these conditions; are they proportionate; do they provide the necessary level of public protection; and will they work if the registrant changes jobs?
- **are the conditions verifiable?**

Do they impose obligations that require straightforward 'yes' or 'no' compliance decisions; do they simply require the registrant to do something or must they also prove it has been done; can the due dates be clearly determined?

- **are the conditions directed at the right person?**

Do the conditions clearly impose obligations on the registrant; are any conditions mistakenly directed at someone else (such as an employer)?

A set of sample conditions can be found in the Conditions Bank document.

5. Advice from the Legal Assessor

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Panels are reminded that Legal Assessors will may usually assist a Panel in the drafting of its decision. ~~Panels should take advantage of the expertise Legal Assessors can offer, especially in relation to decisions which include conditions of practice orders.~~