

## Fitness to Practise Committee – 25 February 2010

### Sifting tools and revised allegations practice note

#### **Executive summary and recommendations**

The 2009-2010 Fitness to Practise Department work plan set out a number of areas of work that would be considered over the course of the year. One area of work was to look into introducing sifting tools to identify cases where there is a low incidence of case to answer or impairment being found and to ask the Committee to recommend to the Council a process for dealing with such cases.

#### **Case review**

A review of a sample of no case to answer decisions made by the Investigating Committee, and self referral cases that were not referred to the fitness to practise process by a Registration Panel, was undertaken to establish whether there were patterns in decisions being made.

From this review two particular themes were apparent in the cases that did not progress to a final hearing:

1. complaints arising from consumer issues and business disputes; and
2. minor employment issues.

#### **Revised practice note**

The practice note “Standard of acceptance for allegations“approved by the Council in October 2009, already contains sections on anonymous complaints and complaints against registrants acting as expert witnesses. Therefore, this would seem an appropriate place to detail how the HPC might approach the types of cases identified above.

Further detail has been added to a revised practice note attached to this paper, incorporating information in the way in which HPC might deal with allegations relating to consumer issues and business disputes and minor employment issues for the Committee to consider.

#### **Social networking sites**

A number of questions have arisen over the course of recent years following the growth in the use of social networking sites. In April 2008, the Fitness to Practise Committees considered a paper on how HPC should deal with allegations arising from the use of such sites. It would seem appropriate to also incorporate this into the revised practice note. This is particularly important given the growth in social networking sites such as Facebook, Myspace and Bebo.

By including the information in the practice note this would ensure that HPC's process of dealing with allegations remains clear and transparent. The document is also available to the public, registrants and other stakeholders on the HPC's website.

### **Management of cases**

In all cases some initial investigation is required to ensure that all relevant material has been sought for a fully informed decision to be taken. Once relevant information has been gathered, the Case Manger will consider whether the case meets the standard of acceptance for the allegations, and in doing so will take account of the Council's guidance contained in the practice note.

To ensure that only appropriate cases are closed prior to an Investigating Committee, a case closure form is in operation. This ensures that agreement has been sought from a Lead Case Manager, appropriate legal and clinical advice is considered and reasons for the closure are provided.

### **Decision**

The Committee is asked to:

- a) recommend to the Council that the revised Standard of acceptance for allegations practice note is approved
- b) agree that as and when further trends emerge, the Executive will revise the practice note accordingly for approval by the Council

### **Background information**

As part of the ongoing review process the Fitness to Practise Department regularly reviews the practice notes in operation to ensure they remain up to date and fit for purpose.

### **Resource implications**

The guidance contained in the revised practice note will ensure that only relevant cases are considered by the Investigating Committee, therefore ensuring best use of resources.

### **Financial implications**

As above

### **Appendices**

Draft amended Practice Note – Standard of acceptance for allegations

### **Date of paper**

10 February 2010

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# PRACTICE NOTE

## The Standard of Acceptance for Allegations

### Introduction

An allegation should be regarded as meeting the HPC's "Standard of Acceptance" if it.

- is made in the form required by the Council;
- concerns a current HPC registrant;<sup>1</sup> and
- relates to the fitness to practise of that registrant.

### Form of allegation

Article 22(5) of the Health Professions Order 2001 (the **Order**) requires allegations against registrants to be received "in the form required by the Council".

For the purposes of that Article, the Council has determined that an allegation is to be treated as being in the form required by the Council if it is received in writing and:

- (1) sufficiently identifies the registrant against whom the allegation is made; and
- (2) set outs:
  - (a) the nature of the impairment of that registrant's fitness to practise which the complainant alleges to exist; and
  - (b) the events and circumstances giving rise to the allegation;

in sufficient detail for that registrant to be able to understand and respond to that allegation.

An allegation is also to be treated as being in the specified form if it constitutes:

- (1) a statement of complaint prepared on behalf of the complainant by a person authorised to do so by the Director of Fitness to Practise which:
  - (a) contains the information set out above; and
  - (b) has been verified and signed by the complainant; or

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<sup>1</sup> this includes a registrant who is subject to a suspension order as, by virtue of Article 22(8) of the Order, a registrant who is suspended may be the subject of a fitness to practise allegation.

- (2) a certificate of conviction, notice of caution or notice of any other determination provided by a court, the police or any other law enforcement or regulatory body.

The Council has agreed that, in circumstances where a complaint is received by the Council which does not contain the information set out above, the Director of Fitness to Practise may authorise an investigation to be carried out with a view to obtaining that information if, based upon the information provided in that complaint, it appears to the Director that it is necessary to do so in order to protect the public or the registrant concerned or is otherwise in the public interest.

### **Telephone complaints**

Although the Standard of Acceptance requires allegations to be in writing, where a complainant's initial contact with the HPC is by telephone, HPC case managers should assist the complainant to submit any allegation in writing by:

- obtaining the complainant's name and contact details;
- obtaining details of the registrant who is the subject of the allegation;
- ascertaining what has happened and where and when it occurred;
- advising the complainant about the HPC's standard of acceptance and:
  - sending a complaint form to the complainant (which may be partly completed using the information provided);
  - taking a statement of complaint over the telephone and sending it to the complainant for verification and signing; or
  - giving the complainant advice on putting the allegation in writing.

### **Case handling**

When a complaint is received in the appropriate form, steps should be taken to establish that the allegation meets the other requirements of the Standard of Acceptance, by confirming that the complaint relates to:

- a current HPC registrant; and
- the fitness to practise of that registrant.

Where the person concerned is not registered with HPC but may be registered with another regulator, appropriate advice and contact information should be given to the complainant and, with their consent, any relevant documents passed to that regulator.<sup>2</sup>

Although allegations must relate to impairment of fitness to practise, an over-strict interpretation of that term should not be adopted. Fitness to practise is not just about professional performance but also encompasses acts by a registrant

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<sup>2</sup> the allegation may also have arisen because a person is falsely claiming to be HPC registered or misusing a protected title. In that event the matter should be referred to the appropriate HPC case team.

which may have an impact upon public protection, the reputation of the profession concerned or confidence in the regulatory process.

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 further investigation of the allegation. If a decision is taken not to pursue an allegation further, it is important that the reasons for doing so are recorded.

Every allegation received by 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 is clearly frivolous or vexatious or not within HPC's jurisdiction. However, that presumption should not lead to the adoption of a one-sided approach to the investigation of allegations. All relevant lines of inquiry should be pursued, with the evidence being gathered in a fair and balanced manner and presented by the Case Manager in a form which will assist an Investigating Committee Panel to reach a decision.

Where a decision is taken not to proceed with a case on the basis that it does not meet the Standard of Acceptance, this should be taken only following consideration of all the available facts.

### **Anonymous complaints**

Generally, the HPC will not take action in respect of anonymous allegations. In this context, anonymous means either an allegation made by a person whose identity is unknown to the HPC or an allegation made by a person who has asked the HPC not to disclose his or her identity. It is extremely difficult to operate a fair and transparent process if the complainant is unknown or refuses to be identified.

The procedures set out in the Order and the rules made under it require the HPC to provide registrants with a copy of any complaint 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. Other than in exceptional circumstances, a copy of any complaint which forms the basis of an allegation should be sent to the registrant and this should be made clear to any complainant who asks for their identity to be withheld. Complainants should be made aware that failure to agree to disclosure of the complaint may prevent the case progressing further.

The policy of generally not accepting anonymous allegations 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 relates to credible concerns about a registrant's fitness to practise which are so serious that action should be taken. In such circumstances the Council should consider exercising its power under Article 22(6)<sup>3</sup> of the Order to investigate the matter.

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<sup>3</sup> Where an allegation is not made in the usual way but there appears to be a fitness to practise concern, the Council may investigate the matter as if it were an allegation

## Complaints against registrants acting as expert witnesses

The decision of the Court of Appeal in *GMC v Meadows*<sup>4</sup> clarified that, in acting as expert witnesses, registrants do not enjoy any general immunity from fitness to practise proceedings. However, in dealing with complaints made against registrants who are acting or have acted as an expert witness in other proceedings, the HPC must be careful not to interfere in matters within the jurisdiction of that other body.

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 to hear and to control experts, their reports and the evidence they give. As the leading case of *R v Turner*<sup>5</sup> notes:

*“An expert’s opinion is admissible to furnish the court with... information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.”*

Consequently, where a complaint is made about a registrant who is acting as an expert witness in proceedings which have not concluded, in the first instance, the complainant should be advised to raise their complaint with the court or tribunal concerned.

If a complaint is made after the relevant proceedings have concluded, then it should be treated in a similar manner to any other complaint, provided that:

- any relevant rights of appeal or challenge have been exhausted or are unlikely to be exercised; and
- the complaint includes evidence which is sufficient to indicate that there may be a realistic prospect of establishing impaired fitness to practise, for example, that the registrant, in acting as an expert witness:
  - made false claims of expertise or gave evidence outside of the registrant’s expertise;
  - breached the expert’s paramount duty to assist the court or tribunal; or
  - breached the obligation to produce an objective, unbiased, independent report based upon all material facts.

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 a reality of legal proceedings and, of themselves, will rarely be sufficient to sustain a fitness to practise allegation.

If a complaint appears to be an attempt to raise issues which should have been pursued before the original court or tribunal, to re-try a case which has already been heard elsewhere or to settle differences of professional opinion, the

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<sup>4</sup> [2006] EWCA Civ 1390

<sup>5</sup> [1975] QB 834, 841

complainant should be asked to clarify the situation before further action is taken by the HPC.

### **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 final element of the standard of acceptance, that the allegation relates to fitness to practise.

The types of issues falling within this area are:

- 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).

However, if there is any evidence of abuse of a registrant-service user relationship, the matter should be considered to be a potential fitness to practise issue.

### **Minor employment issues**

In most cases, complaints involving minor employment issues which do not compromise the safety or well being of service users should not be considered as fitness to practise allegations. Typical examples are:

- lateness or poor time keeping, (but not if it has a direct impact on service users, such as delaying patient handovers);
- 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.

### **Internet social networks**

In dealing with complaints which relate to a registrants' activities outside of work on internet social networks (e.g. Facebook, Myspace, Bebo) the following should be taken into account:

- in many cases it may not be possible to identify the person concerned with any certainty. However, where the registrant can be identified and the activity in question, if conducted by other means, would amount to misconduct, the matter should be dealt with in a similar manner to any other allegation;
- the complaint may relate to selected or isolated comments which are taken out of context and may not represent the properly balanced views of the person concerned. The comments may amount to little more than

“letting off steam” or be the internet equivalent of “coffee room banter” and the HPC may not have access to the relevant ‘string’ of comments which provides that context, for example, by showing that the comments were jocular, qualified in some way or the person concerned has withdrawn and/or apologised for them;

- consideration needs to be given to the extent to which a complainant may be regarded as having consented to whatever has taken place by participating in the network in question, having regard to the overt nature of that network and the active steps required (e.g. registration) in order to participate.

**March 2010**