

Fitness to Practise Forum 17 September 2008

Practice Note – Cross-Examination in Cases of a Sexual Nature

Executive summary and recommendations

### **Introduction**

A number of practice notes exist to provide guidance to panels and those involved in fitness to practise proceedings.

The attached practice note sets out the procedure for cross examination in cases of a sexual nature.

### **Decision**

The forum is asked to discuss the practice note and recommend it for approval to the Health, Investigating and Conduct and Competence Committee.

### **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.

The Director of Fitness to Practise is currently applying for licensed access to the bar. This is a licensing system whereby organisations or individuals who are suitable to instruct barristers because they have expertise in particular areas of law can apply to the Bar Standards Board to be licensed to instruct barristers in those areas.

### **Resource implications**

None

### **Financial implications**

Date	Ver.	Dept/Cmte	Doc Type	Title	Status	Int. Aud.
2008-08-18	a	F2P	AGD	Front Sheet -PN Cross Examination in Cases of a Sexual Nature	Final DD: None	Public RD: None

HPC will incur the costs of the initial brief, conference with counsel and counsel being in attendance for the opening of the Council's cases and the examination of its witnesses and the cross examination on behalf of the registrant concerned.

## **Appendices**

Practice Note – Cross Examination in Cases of a Sexual Nature

### **Date of paper**

18 August 2008

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# PRACTICE NOTE

## Cross-Examination in Cases of a Sexual Nature

This Practice Note has been issued jointly by the HPC Practice Committees for the guidance of 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 HPC must appoint a legally qualified person to conduct the cross-examination on the registrant's behalf and meet the cost of doing so.

### Background

The procedural rules<sup>1</sup> for fitness to practise proceedings (as amended by the Health Professions Council (Practice Committees and Registration) (Amendment) Rules 2005) provide that:

*“(4) Where—*

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

*the health professional 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 health professional shall, not less than seven days before the hearing, appoint a legally qualified person to cross-examine the witness on his behalf and, in default, the Council shall appoint such a person on behalf of the health professional.”*

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<sup>1</sup> HPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), r. 8A; HPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), r. 10A; HPC (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, in appropriate cases, for the choice to be made by the witness and Panels should not draw prejudicial inferences from the fact that a registrant is not cross-examining witnesses or that the Council 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 and, 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.

In cases where the registrant does not make their own arrangements for representation, the Fitness to Practise department will arrange for the appointment of a legal representative. If the registrant has previously had legal representation but cannot afford to continue this representation, HPC may be willing for the same legal representative to be instructed but subject to prior approval of the fees and subject to the instructions being limited to the legal representative;

- taking initial instruction;
- preparing the cross examination; and
- being in attendance for the opening of the Council's case and the examination of its witnesses and to conduct cross-examination on the registrant's behalf.

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

The appointment of a legal representative in one which is made in the interests of justice, to ensure that the registrant is able to "test the evidence" as part of receiving 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>.

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

## **Procedure**

Panels have the power to hold preliminary hearings for the purpose of case management and are strongly recommended 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.