PRACTICE NOTE

Finding that Fitness to Practise is "Impaired"

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

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Introduction

In determining whether allegations are "well founded", Panels of the Conduct and Competence Committee and the Health Committee are required to decide whether the HPC, which has the burden of proof, has discharged that burden and proved[1] that the registrant's fitness to practise is impaired.

Impairment

An allegation is comprised of three elements, which Panels are required to consider sequentially:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to the 'ground' set out in the allegation (e.g. misconduct or lack of competence); and
3. in consequence, whether the registrant's fitness to practise is impaired.

It is important for Panels to note that the test of impairment is expressed in the present tense; that fitness to practice "is impaired". As the Court of Appeal noted in *GMC v Meadow*:[2]

> *"…the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past".*

Thus, although the Panel's task is not to "punish for past misdoings", it does need to take account of past acts or omissions in determining whether a registrant's present fitness to practice is impaired.

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1 to the civil standard of proof, the balance of probabilities

2 (2006) EWCA Civ 1319

Factors to be taken into account

In *Cohen v GMC*[3] the High Court stated that it was "critically important" to appreciate the different tasks which Panels undertake at each of step in the adjudicative process.

The initial task for the Panel is:

> *"to consider the charges and decide on the evidence whether the charges are proved in a way in which a jury… has to decide whether the defendant is guilty of each count in the indictment. At this stage, the Panel is not considering any other aspect of the case, such as whether the [health professional] has a good record or… performed any other aspect of the work… with the required level of skill".*

Subsequently, the Panel is:

> *"concerned with the issue of whether in the light of any misconduct [etc.] proved, the fitness of the [health professional] to practice has been impaired taking account of the critically important public policy issues".*

Those "critically important public policy issues" which must be taken into account by Panels were described by the court as:

> *"the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect… and that public interest includes amongst other things the protection of patients and maintenance of public confidence in the profession".*

Thus, in determining whether fitness to practise is impaired, Panels must take account of a range of issues which, in essence, comprise two components:

1. the 'personal' component:	the current competence, behaviour etc. of the individual practitioner; and
2. the 'public' component:	the need to protect patients, declare and uphold proper standards of behaviour and maintain public confidence in the profession.

As the court noted in *Cohen*, the sequential approach to considering allegations means that not every finding of misconduct etc. will automatically result in a Panel finding that fitness to practice is impaired as:

> *"There must always be situations in which a Panel can properly conclude that the act… was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired…It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated".*

[3] EWHC 581 (Admin

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It is important for Panels to recognise that the need to address the "critically important public policy issues" identified in *Cohen* - to protect patients, declare and uphold proper standards of behaviour and maintain public confidence in the profession - means that they cannot adopt a simplistic view and conclude that fitness to practise is not impaired simply on the basis that, since the allegation arose, the registrant has corrected matters or "learned his or her lesson".

Character evidence

In deciding whether conduct "is easily remediable, has been remedied and is highly unlikely to be repeated", Panels may need to consider 'character evidence' of a kind which, in other proceedings, might only be heard as mitigation as to sanction after a finding had been made.

Whilst it is appropriate for Panels to do so, in admitting character evidence for the purpose of determining impairment, they must exercise caution. As the Court of Appeal noted in *The Queen (Campbell) v General Medical Council,*[4] issues of culpability and mitigation are distinct and need to be decided sequentially and:

> *"The fact that in some cases there will be an overlap, or that the same material may be relevant to both issues, if they arise, does not justify treating evidence which is exclusively relevant to personal mitigation as relevant to the prior question, whether [the allegation] has been established."*

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. The latter will only be relevant if the Panel needs to hear mitigation against sanction.

At the impairment stage, Panels may properly take account of evidence such as the registrant's competence in relation to the subject matter of the allegation; the registrant's actions since the events giving rise to the allegation; or the existence or absence of similar events. Character evidence of a more general nature which has no direct bearing on the findings to be made by the Panel, such as the registrant's standing in the community, should not be admitted at this stage. Expressions of regret or remorse will usually fall within the latter category. However, 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.

In deciding whether to admit character evidence at the impairment rather than the sanction stage, Panels need to consider whether the evidence may assist them to determine whether fitness to practise is impaired. Whilst caution needs to be exercised, an over-strict approach should not be adopted as, it is important that all evidence which is relevant to the question of impairment is considered, such as evidence as to the registrant's general competence in relation to a competence allegation.

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[4] [2005] EWCA Civ 250

In considering evidence at the impairment stage, Panel's will readily recognise and be able to disregard character evidence of a general nature which is unlikely to be relevant to the issue of impairment. As the decision in *Cheatle v GMC*[5] highlights, Panels must be careful not to refuse to hear evidence at the impairment stage about a registrant's general professional conduct which, when heard at the sanction stage, raises doubts about the conclusion that the registrant's fitness to practise is impaired.

The sequential approach

As noted above, Panels must adopt a sequential approach to determining whether fitness to practise is impaired. In reaching their decision, other than in the simplest of cases Panels should act in a manner which makes it clear that they are applying the sequential approach by:

- first retiring to determine whether the facts as alleged are proved and, if so, amount to the 'ground' (e.g. misconduct) of the allegation;
- if that question is answered in the affirmative, hearing further argument on the issue of impairment and then retiring for a second time to determine whether the registrant's fitness to practise is impaired; and
- if that question is answered in the affirmative, hearing submissions on the question of sanction and then retiring for a third time to determine what, if any, sanction to impose.

Whilst there is no general obligation in law to give separate decisions on finding of fact, in more complex cases may be necessary to do so. As the Court of Appeal stated in *Phipps v General Medical Council*:[6]

> *"every Tribunal ... needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?*
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> *If in asking itself those questions the Tribunal comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents ... are entitled to know in clear terms why such findings have been made."*

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5 [2009] EWHC 645 (Admin)

6 [2006] EWCA Civ 397