Tribunal Advisory Committee, 05 September 2018

Review of Practice Notes

Executive Summary

Practice Notes exist to provide clear guidance to all parties with an interest or involvement in Fitness to Practise proceedings. All Practice Notes undergo regular review.

Summary of changes to Practice Notes for TAC approval

Proceeding in Absence

This practice note has been reviewed as part of the FTP improvement plan project. The Professional Standards Authority (PSA) have previously raised broad concerns that the practice note is unclear, and that it is insufficiently focused on public protection. A full review has been undertaken to include:

- Re-ordering of relevant sections to ensure clarity and a focus on public protection
- Changes to ensure a systematic approach by panels
- Additional case law has been added - *Kearsey v NMC [2016], Burrows v GMC [2016]* and *Hayat v GMC [2017]* to provide further examples and clarity.

Interim Orders

In light of the review of the Proceeding in Absence Practice Note, minimal changes have also been made to the Interim Orders Practice Note to include:

- Re-ordering and amendments for clarity to the section on proceeding in absence / right to be heard
- For clarity, interim orders made in the course of proceedings and interim orders made at final hearing after the imposition of sanction have been dealt with separately.

Health Allegations

In their 2016-17 Performance Review assessment against Standard 5, the PSA highlighted that HCPC had not always identified and sufficiently investigated where there may be an underlying health issue, which might impair a registrant's fitness to practise. A key strand of the FTP Improvement Plan has been the development of a policy statement on our approach to investigating health matters, and a review of our existing policies and guidance that relate to these cases.

At their Meeting in May 2018, Council approved the HCPC's Approach to Investigating Health Matters policy; this sets the context for the wider work being undertaken in developing the support and guidance we provide for HCPC decision makers.

We have now completed a review of the HCPTS Practice Note on Health Allegations. The Practice Note has been expanded to provide enhanced guidance for panel members when deciding:

- Whether a matter should be referred to a Health Committee;
- When allegations should be cross-referred between the Health and Conduct and Competence Committees.

Decision

The Tribunal Advisory Committee is asked to discuss and approve the proposed changes to the attached Practice Notes.

Appendices

Appendix One: Practice Note: Proceeding in Absence
Appendix Two: Practice Note: Interim Orders
Appendix Three: Practice Note: Health Allegations

Date of paper

22nd August 2018

Health and Care Professions Tribunal Service

PRACTICE NOTE

Proceeding in the Absence of the Registrant

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

Introduction

As a general principle, a registrant who is facing a fitness to practise allegation has the right to be present and represented at a hearing. However, the Panel rules[1] provide that, if a registrant is neither present nor represented at a hearing, the Panel has the discretion to proceed if it is satisfied that all reasonable steps have been taken to serve notice of the hearing on the registrant and that it is fair to do so in the circumstances of the case.

In exercising the discretion to proceed in absence, Panels must strike a balance between fairness to the registrant and fairness to the wider public interest, ensuring that there is adequate focus on public protection. Fairness to the registrant is of prime importance, but the overarching statutory objective of regulation is to protect the public.

Notice of proceedings

The first issue to be addressed is whether notice of the proceedings has been served on the registrant. The Panel rules require notice to be sent to the registrant's address "as it appears in the register". This is a point on which detailed inquiry by a Panel will rarely be necessary. Registrants have an obligation to keep their register entry up to date and, as the Court of Appeal stated in *GMC v Adeogba*:[2]

> *"there is a burden on…all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."*[3]

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[1] HCPC (Investigating Committee) (Procedure) Rules 2003, Rule 9; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, Rule 11; HCPC (Health Committee) (Procedure) Rules 2003, Rule 11.

[2] [2016] EWCA Civ 162

[3] paragraph 20

The decision in *Adeogba* makes clear that, in terms of service, the HCPC's only obligation is to communicate with the registrant at the address shown in the register.

Further, in *Jatta v NMC*[4] the court held that a Panel is entitled to proceed in absence where a registrant is no longer at his or her registered address and has failed to provide revised contact details, even though the only address that the regulator has is one at which the Panel knows the document would not have come to the registrant's attention.

Deciding whether to proceed in absence

If the Panel is satisfied on the issue of notice, it must then decide whether to proceed in the registrant's absence, having regard to all the circumstances of which the Panel is aware, and balancing fairness to the registrant with fairness to the HCPC and the interests of the public.

The Panel should have regard to the factors which were identified as relevant to a decision to proceed in the absence of the defendant in criminal proceedings by the Court of Appeal in *R v Hayward*,[5] as qualified by the House of Lords in *R v Jones*.[6] The factors (modified to apply to fitness to practise proceedings) are as follows.

1. The general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates.

> Public protection through the effective regulation of registrants is the overriding objective against which all of the other factors have to be balanced. The fair, economical, expeditious and efficient disposal of allegations made against registrants is of key importance to that objective. Hearings should only be adjourned where there is a compelling reason to do so that overrides the key objective of public protection.

2. The nature and circumstances of the registrant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear.

> Registrants are required to engage with the regulatory process, and should not be able to deliberately frustrate it by choosing not to appear. Cases should only be adjourned where there is a good reason for the registrant's non-attendance, such as ill-health or an accident. If a registrant provides evidence that he or she is unable to attend due to ill health, Panels should be slow to reject it.[7]
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> In cases where there has been a lack of engagement by the registrant and nonattendance is anticipated by the HCPC, Panels are entitled to expect

[4] [2009] EWCA Civ 824

[5] [2001] EWCA Crim. 168

[6] [2002] UKHL 5

[7] Hayat v GMC [2017] EWHC 1899 (Admin)

HCPC Presenting Officers to assist them by providing a brief chronology of the registrant's interaction with the HCPC.

In cases where the registrant fails to appear at a hearing and there has been either a lack of engagement or a point at which a registrant has clearly chosen to disengage, Panels should resist the temptation to ask hearing officers to attempt to contact the registrant by telephone. A registrant who has decided, for whatever reason, not to attend a hearing is unlikely to be willing to provide a full and frank response when put on the spot in this manner.

3. Whether an adjournment is likely to result in the registrant attending the proceedings at a later date.

In many cases where the registrant fails to attend a hearing, there will be a history of failure to engage with the fitness to practise process and, in such cases, adjourning the proceedings to provide the registrant with a further opportunity to attend is likely to be a fruitless exercise.

Hayward and *Jones* concerned criminal proceedings and, as the court noted in *Adeogba*, "it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far",[8] particularly in relation to this factor. As the court pointed out in that case, where a criminal defendant fails to appear, proceedings can be adjourned so that he or she can be arrested and brought before the court. That remedy is not available in regulatory proceedings, so, unless there is clear evidence that the registrant would be willing to attend a future hearing, this is unlikely to be a compelling reason to adjourn.

4. The likely length of any such adjournment.

5. Whether the registrant, despite being absent, wished to be represented at the hearing or has waived that right.

6. The extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant.

7. The extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case.

Panels should bear in mind that not giving live evidence is likely to be a serious disadvantage for the registrant, particularly in terms of demonstrating insight. In Burrows v GMC[9] the Court held that failure to attend in cases relating to dishonesty amounts to courting removal from the register.

8. The effect of delay on the memories of witnesses.

9. Where allegations against more than one registrant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.

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[8] paragraph 18
[9] [2016] EWHC 1050 (Admin)

Procedure

If the Panel decides that a hearing should take place or continue in the absence of the registrant, the decision reached and the reasons for doing so should be clearly recorded as part of the record of the proceedings. The Panel must also ensure that the hearing is as fair as the circumstances permit. This includes taking reasonable steps during the giving of evidence to test the HCPC's case and to make such points on behalf of the registrant as the evidence permits.

The Panel must also avoid drawing any improper conclusion from the absence of the registrant. In particular, it must not treat the registrant's absence as an admission that an allegation is well founded, though in some cases where the registrant has deliberately failed to engage adverse inferences may be appropriate.[10]

This practice note applies to all final or review hearings for registrants who are subject to a fitness to practise allegation. Separate guidance is available specifically for interim order hearings.

[September 2018]

[10] Kearsey v Nursing and Midwifery Council [2016] EWHC 1603 (Admin)

Health and Care Professions Tribunal Service

PRACTICE NOTE

Interim orders

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

Introduction

Article 31 of the Health and Social Work Professions Order 2001 (the Order) sets out the procedure by which a Panel may impose an interim order.

An interim order is a temporary measure that will usually apply until a final decision is made in relation to an allegation (or pending an appeal against such a final decision) and may be either:

- an interim conditions of practice order, imposing conditions with which the registrant must comply for a specified time; or
- an interim suspension order, suspending the registrant for a specified time.

The specified duration cannot exceed eighteen months. Panels should not regard eighteen months as the 'default' position, as an interim order should only be imposed for as long as the Panel considers it to be necessary.[1]

When orders may be made

A Panel of the Investigating Committee may make an interim order:

- when an allegation has been referred to that Committee, but it has not yet taken a final decision in relation to the allegation[2];
- when, having considered an allegation, it decides that there is a case to answer, and refers that case to another Practice Committee (but the interim order must be made before the case is referred);[3] or

[1] in reaching its decision a Panel should be aware that an interim order can be varied or revoked, but cannot be extended, by a reviewing Panel.

[2] separate proceedings at which the Panel will only consider whether an interim order should be imposed.

- when it makes an order that an entry in the register has been fraudulently procured or incorrectly made but the time for appealing against that order has not yet passed or an appeal is in progress.

A Panel of the Conduct and Competence Committee (CCC) or Health Committee (HC) may make an interim order:

- when an allegation has been referred to that Committee but it has not yet reached a decision on the matter;[4] or
- when, having decided that an allegation is well founded, the Panel makes a striking-off order, a suspension order or a conditions of practice order but the time for appealing against that order has not yet passed or an appeal is in progress.

Proceeding in the absence of the registrant

Interim orders made prior to decision on sanction

The purpose of interim order proceedings which take place prior to final hearing is to ensure that, where necessary, interim safeguards are put in place to ensure public protection whilst there is an ongoing fitness to practise investigation. Article 31 does not set out specific notice requirements for interim order hearings. As these are separate proceedings held solely to consider the risk presented by a registrant's practise, rather than make findings of fact in relation to a particular matter, the notice requirements in the Panel rules[5] for other types of hearing do not apply.

Normally, the registrant should be given seven days' notice of interim order proceedings. However, there may be exceptional circumstances, such as where the concerns are particularly serious or raise urgent public protection needs, which make it necessary for the Panel to hold a hearing at shorter notice.

Applications to adjourn will normally be considered by the Panel on the day. Due to the urgent nature of the risks, applications to adjourn should only be granted in the most compelling circumstances.

Article 31(15) of the Order provides that the registrant concerned must be afforded "an opportunity" to appear before, and be heard by, a Panel before it decides whether to make an interim order. The absence of the registrant does not preclude the proceedings from taking place, provided he or she has been offered that opportunity.

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[3] as case to answer decisions are made 'on the papers' and without the registrant present, the Panel would need to reach a 'minded to' decision and then adjourn without referring the case on, to give the registrant an opportunity to appear before the Panel and be heard on whether an interim order should be imposed. In practice, this power is rarely used.

[4] a separate hearing at which the Panel will only consider whether an interim order should be imposed.

[5] HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; and HCPC (Health Committee) (Procedure) Rules 2003.

The urgent nature of interim order applications means that they need to be considered promptly, and it will usually be appropriate for a panel to proceed with an interim order hearing in the registrant's absence if they fail to attend.

A registrant has the right to ask for a review of an interim order at any time, outside of the scheduled review cycle. Therefore, where an interim order has been imposed in the absence of a registrant, the registrant has recourse for the matter to be reconsidered should they wish later to appear before the panel. This will often be a significant factor in support of a decision to proceed with an interim order hearing in the registrant's absence.

Interim orders imposed at final hearings

When interim orders are imposed by the CCC or HC at a final hearing, after a sanction has been imposed, most registrants are present and can be given an opportunity to make representations in relation to any proposed interim order. In cases where a registrant is not present at the final hearing, it will usually be appropriate for panels to consider the imposition of an interim order in their absence for the same reasons that it was appropriate to deal with sanction in their absence – but only if the registrant was given advance notice that imposing an interim order might be considered at the final hearing.

When registrants are present, if they are taken by surprise by the application for an interim order they may be incapable of formulating any meaningful submissions on their feet, especially where they are not represented. This issue was considered in the case of *Gupta v GMC.*[6] The court held that, in view of the potentially severe consequences of interim orders for registrants, the common law principle of fairness requires panels to give registrants notice of any intention to consider an interim order so that they have an opportunity to make meaningful representations.

Panels should therefore specifically warn the registrant after the impairment stage that an interim order might be considered at the final hearing, and that they will be entitled to make representations in relation to it.

Imposing an order

A Panel may impose an interim order only if it is satisfied that in doing so:

- is necessary for the protection of members of the public;
- is in the interests of the registrant concerned; or
- is otherwise in the public interest.

The appropriate place to consider and weigh all of the evidence in relation to an allegation is when that allegation is being considered at a fitness to practise hearing.

[6] [2001] EWHC Admin 631

Therefore, in determining whether to impose an interim order before a final hearing has taken place, a Panel will rarely be in a position to consider and weigh all of the relevant evidence but must act on the information that is available.

At this stage the Panel is not determining the allegation. In essence, the Panel's task is to consider whether the nature and severity of the allegation is such that:

- the registrant, if permitted to remain in unrestricted practice, may pose a risk to the public or to himself or herself; or
- for wider public interest reasons the registrant's freedom to practise should be curtailed.

In doing so the Panel may have regard to the overall strength of the evidence, whether the allegation is serious and credible and the likelihood of harm or further harm occurring if an interim order is not made.

The decision to issue an interim order is not one that should be taken lightly and will depend upon the circumstances in each case. Although this list is not exhaustive, the types of case in which an interim order is likely to be made are those where:

- there may be an ongoing risk to service users from the registrant's serious or persistent competence failures or serious lack or professional knowledge or skills;
- the registrant may pose an ongoing risk to service users, such as allegations involving violence, sexual abuse or other serious misconduct;
- a registrant with apparent serious health problems is practising whilst unfit to do so and may pose a serious risk to service users or others, or be at risk of self-harm;
- although there may be no evidence of a direct link to professional practice, the allegation is so serious that public confidence in the profession and the regulatory process would be seriously harmed if the registrant was allowed to remain in unrestricted practice (for example, allegations of murder, rape, the sexual abuse of children or other very serious offences);
- the registrant has breached an existing suspension or conditions of practice order.

The Panel must balance the need for an interim order against the consequences for the registrant and ensure that they are not disproportionate to the risk from which the Panel is seeking to protect the public. This includes the financial and other impacts which an interim order may have on a registrant.

In making an interim order application, the HCPC may ask for an interim suspension order to be imposed. However, regardless of the terms of an application, a Panel should always consider whether an interim conditions of practice order would be the more proportionate means of securing a degree of protection which the Panel considers necessary. An interim suspension order should only be imposed if the Panel considers that a conditions of practice order would be inadequate for that purpose.

In imposing an interim conditions of practice order, a Panel must take account of the fact that it is doing so on an interim basis and has not heard all of the evidence in the case. Normally, it should not impose conditions of the kind which may be appropriate after an allegation has been determined to be well founded at a final hearing, such as conditions requiring the registrant to undertake additional training.

Consequently, interim conditions of practice are likely to be limited to specific restrictions on practice, for example, not to provide services to children, not to act as an expert witness or not to undertake unsupervised home visits. An interim conditions of practice order may also specify supervision requirements, including a requirement to provide regular supervisory reports to any Panel reviewing the order.[7]

Orders in the public interest

Careful consideration must be given to the imposition of an interim order solely on public interest grounds, and striking the appropriate balance may not always be straightforward.

In *Christou v NMC*[8] the court discharged an interim order imposed on a registrant who had accepted a caution for assault and failed to report it to the NMC, on the basis that it was difficult to identify why the Panel thought an order was needed to reflect public concern, given that this could be done appropriately when the case was finally heard.

In contrast, in *NH v GMC*[9] the court upheld a decision to impose an interim order on a registrant who was awaiting trial for allegedly assaulting and falsefully imprisoning his younger sister for bringing 'dishonour' on their family.[10] In that case, the court said that the question to be answered is:

> *"would an average member of the public be shocked or troubled to learn, if there is a conviction in this case, that the [registrant] had continued to practise whilst on bail awaiting trial?"*

Reasons

[7] If conditions of this kind would be appropriate for a practising registrant, being unemployed should not be regarded as an obstacle to their imposition (*Perry v NMC* [2012] EWHC 2275 (Admin)).

[8] [2016] EWHC 1947 (Admin)

[9] [2016] EWHC 2348 (Admin)

[10] NH was also alleged to have given his sister emergency contraception without prescription.

The draconian nature of an interim order means that a Panel must be very clear in its decision as to why an interim order is necessary and, if applicable, why an interim suspension order has been imposed rather than interim conditions of practice.

Interim orders during appeal periods

Where the Panel is considering imposing an interim order at the conclusion of a final hearing (in order to restrict or remove the registrant's right to practise during the appeal period) the decision will be made as part of that hearing and not in separate proceedings.

Imposing an interim order should not be regarded as an automatic and inevitable step at the end of a final hearing just because a relevant sanction was imposed. If a Panel is considering imposing an interim order, it should give the registrant an opportunity to address the Panel on whether doing so is necessary.

Review, variation, revocation and replacement

Interim orders must be reviewed on a regular basis; within six months of the date when it was made and then every three months from the date of the preceding review until the interim order ceases to have effect. A registrant may also ask for an interim order to be reviewed at any time if new information becomes available or circumstances change.

If an interim order is replaced by another interim order or extended by the court before it is first reviewed, that first review does need not to take place until six months after the order was replaced or extended. If replacement or extension occurs after the first review, then the next review must take place within three months of the order being replaced or extended.

Orders may be varied or revoked at any time and the person who is subject to the order may also apply to the appropriate court for the order to be varied or revoked.

If one type of interim order is replaced by another, the replacement order may only have effect up to the date on which the original order would have expired (including any time by which the order was extended by a court).

The HCPC may apply to the appropriate court [11] to extend an interim order for up to twelve months.

[11] The High Court in England and Wales or Northern Ireland or, in Scotland, the Court of Session.

Terminating an interim order

Interim orders can be brought to an end in three ways:

- by the court, on the application of the person who is subject to the order;
- by the Practice Committee currently dealing with the allegation to which the interim order relates; or
- automatically, when it lapses or the circumstances under which the order was made no longer exist:
  - if the order was made before a final decision is reached in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
  - if an order was made after a final decision was reached, to have effect during the 'appeal period', either when that period expires or, if an appeal is made, when the appeal is concluded or withdrawn.

Consideration of whether an interim order is required to cover the appeal period of a final hearing:

It is not sufficient for Panels to grant an interim order to cover the appeal period without giving any reasoning beyond reciting the statutory ground and to simply refer back to the reasons given for the substantive decision to suspend or strike off the registrant.

The statutory scheme

The starting point is to remember that under article 29(11), any sanction will not take effect until the period for bringing an appeal has elapsed or, if an appeal has been brought, it has been finally disposed of. It follows that, unless an interim suspension is imposed under article 31(1)(c), a registrant can continue to practise pending appeal. Thus, the statutory scheme does not envisage that an interim order will be made in every case; on the contrary, in the normal course a registrant can continue to practise until the conclusion of any appeal – although the circumstances of some cases (notably if a registrant presents an immediate risk to service users) may mean that an immediate suspension is appropriate, hence the power to suspend contained in article 31(1)(c). In a case where the sanction has been suspension rather than strike off, the detriment to the registrant of an interim order is especially acute since it will mean that exercising their right of appeal against sanction has the effect of extending the duration of any suspension.

If a panel is considering making an interim order there are two particular points that they must have regard to: (1) notice must be given that an interim order is being considered and (2) the panel must give reasons why they have concluded that an interim order is necessary, and not simply state the conclusion they have reached.

Giving Reasons

Article 31(2) provides that an interim order may be made if the panel "is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of the person concerned". That is the conclusion that the panel must reach in order to have the jurisdiction to make an interim order, but it is not sufficient to merely recite these words as the reasons for reaching that conclusion. In the Gupta case, the Divisional Court said: "It is the underlying basis for that conclusion of fact which matters, and it is that conclusion for which adequate reasons must be given. The reasons may, of course, be briefly expressed".

Panels need to conduct a balancing exercise, balancing the need for protecting the public (or registrant) or the public interest generally against the other consequences that an interim order would have on a registrant, and to consider whether the consequences of making the order are proportionate to the risk from which they are seeking to protect the public (or registrant). The need to consider the specific consequences for the registrant of an interim order illustrates why it is necessary to ensure that the registrant has had a fair opportunity to make representations as to why an interim order should not be made.

The question for the panel when considering an interim order is distinct from the question before it when considering sanction, hence it will not be correct for the panel to adopt the reasons for sanction as the reasons for making an interim order. The reasons for sanction will only be one side of the balancing exercise that the panel needs to conduct.

In cases where an interim suspension had been in place prior to the final hearing, it will be highly likely that the same considerations will apply post-sanction such that an interim suspension order should be made again.

By contrast, where an interim suspension was not imposed pending the final hearing, the panel will need to give adequate reasoning as to why the outcome of the final hearing has tipped the balance in favour of immediate suspension – whether that be because of a different judgement as to the risk to the public/registrant (in view of what was found at the final hearing) or a different assessment of the public interest in view of the changed circumstances.

September 2018

Health and Care Professions Tribunal Service

PRACTICE NOTE

Health Allegations

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

Introduction

The Health and Social Work Professions Order 2001 (the Order) provides[1] that one of the statutory grounds upon which an allegation may be made is that a registrant's fitness to practise is impaired by reason of his or her "physical or mental health".

If an Investigating Panel concludes that there is a 'case to answer' in respect of a health allegation, it may refer that allegation to the Health Committee.[2] In addition, if the Conduct and Competence Committee is considering an allegation based upon another statutory ground (e.g. misconduct) but considers that the matter would be "*better dealt with by the Health Committee*", it may suspend its consideration of that allegation and cross-refer it to the Health Committee.[3]

What constitutes a health allegation?

Health allegations are rare, as they are principal concerned with unmanaged ill health. Most registrants whose health may impair their ability to practise understand the situation, seek appropriate advice and treatment and, where necessary, modify or restrict their practice.

Deciding that an allegation is a health allegation will often be quite straightforward. This is likely to occur in cases where:

- fitness to practise concerns arise as a direct consequence of the registrant's physical or mental health;
- there is evidence to suggest that the registrant is not managing his or her health appropriately and lacks insight into its potential impact upon service users or the wider public; and
- there is no evidence to suggest that other material factors are involved.

The decision is less straightforward in cases where health is only one facet of broader or more serious concerns about the registrant's fitness to practise. Equally, there will be cases where, at the outset, the evidence may not disclose an underlying health

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[1] Article 22(1)(a)(iv)

[2] Art. 26(6)(b)(ii) of the Order

[3] HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.4(1). The Health Committee has a corresponding power under the HCPC (Health Committee) (Procedure) Rules 2003 to cross-refer an allegation to the Conduct and Competence Committee.

issue but where such an issue comes to light as the case progresses. For example, it would be wrong to assume the registrant has some form of alcohol dependency in respect of every allegation where alcohol has played a part.

In deciding whether to refer an allegation to the Health Committee, the factors which should be taken into account include:

- the extent to which health issues are the cause of allegation;
- the overall seriousness of the allegation; and
- the sanctions which are available to the Health Committee, including, in particular, that striking off is not an option.[4]

In *Crabbie v GMC*[5] the Privy Council held that:

> *"The power to refer [to the Health Committee] is a discretionary one… in considering whether or not to exercise the power, the [decision maker], should take into account all the circumstances of the case including the scope of the powers available to the Health Committee.*
>
> *…the Health Committee has no power to direct erasure… if the case is one in which erasure is a serious possibility, neither [decision maker] should refer the case to the Health Committee notwithstanding that it may be one where the fitness to practise of the practitioner in question appears to be seriously impaired by reason of his or her physical or mental condition."*

Similarly, in *R (Toth) v GMC*[6], a case which concerned the cross referral of an allegation to the Health Committee, the court held that:

> *"whilst the possibility of erasure remains, the [Committee] cannot lawfully refer the case to the Health Committee. That Committee cannot impose a sanction of erasure and it is one that the [Committee] may have to impose in the public interest. Whilst that remains a possibility, [it] should retain jurisdiction."*
>
> *I would only add that even where the [Committee] does conclude that erasure is not a possible sanction, it may still be inappropriate to refer a case to the Health Committee because the public interest in complaints being determined in public and the need to maintain professional standards may outweigh the advantages of referring the matter to the Health Committee. However, once erasure has been discounted as a possible sanction, the power to transfer arises and it is for the [Committee] to weigh the considerations for and against exercising that power."*

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4 By Art. 29(6) of the Order the Health Committee may only impose a striking off order where the registrant concerned has been continuously suspended or subject to a conditions of practice order for at least two years

5 [2002] UKPC 45. In that case a registrant imprisoned for causing death by dangerous driving argued that, because of her alcohol dependency, the case should have been heard by the GMC's Health Committee.

6 (2003) EWHC 1675 (Admin).

Cross-referral

The Panel rules[7] enable allegations to be cross-referred between the Health Committee and the Conduct and Competence Committee where the Panel considering an allegation on behalf of one of those committees considers that it would be "better dealt with" by the other committee.

Health Panels can only consider allegations which are based upon the statutory ground of "physical or mental health" and Conduct and Competence Panels can only consider allegations which are based upon one of the other statutory grounds.[8] Consequently, in any cross-referral, the first issue which must be addressed is how the allegation is to be re-drafted so that it can be considered on the basis of the correct statutory ground.

Doing so will require the consent of the registrant concerned who, unless the amendments are minor, may argue that the revised allegation is one in respect of which he or she did not have the opportunity to submit representations to an Investigating Panel and upon which such a Panel never decided that the registrant had a 'case to answer'. The views of the HCPC must also be taken into account, not least to identify any concerns which the HCPC may have about the revised allegation amounting to under-prosecution.

If cross-referral is being considered at the request of the registrant or the HCPC, the Panel is entitled to expect the requesting party to set out a clear and cogent case as to why cross-referral is appropriate and must take full account of the submissions from both parties before reaching a decision.

Where an allegation is cross-referred – whether of the Panel's own motion or at the request of one of the parties – the Panel must provide clear reasons for its decision, in sufficient detail to enable the receiving Panel to understand the rationale for the decision, to issue directions and to consider the revised allegation.

In respect of an ~~Where a case~~allegation which is cross cross-referred, ~~from a Conduct and Competence Panel to a Health Panel,~~ the ~~Health~~ receiving Panel's disposal options are to ~~may~~ certify to the ~~Conduct and Competence~~referring Panel that:

- the fitness to practise of the registrant is not impaired by reason of ~~physical or mental health~~the substituted statutory ground (leaving the ~~Conduct and Competence~~referring Panel to resume and conclude its consideration of the allegation); or
- it has dealt with the allegation and that the ~~Conduct and Competence~~referring Panel is not required to take any further action in relation to the allegation.

~~When an allegation is cross-referred from a Conduct and Competence Panel, it will be formulated on the basis of a statutory ground other than impairment by reason of the registrant's "physical or mental health". As a preliminary issue, the Health Panel will need to consider how it will treat the allegation as if it was a health allegation and, if~~

[7] see footnote 3

[8] misconduct, lack of competence, criminal conviction or caution or a determination by another regulatory body.

~~possible, seek to agree any necessary modifications to the allegation with the registrant concerned.~~

Expert evidence as to health

In cases where health issues arise, Panels will often be able to draw appropriate inferences and conclusions from the evidence about a registrant's health without the need for expert evidence. Whether evidence from medical or other experts is required is a matter for the Panel, based upon the well-established principle in *R v Turner*[9] that:

> *"an expert's opinion is admissible to furnish information which is likely to be outside the [Panel's] experience and knowledge. If on the proven facts the [Panel] can form their own conclusions without help, then the opinion of an expert is unnecessary."*

Panels should not go beyond the bounds of their own expertise, for example by seeking to make diagnoses. However, in many cases Panels will be able to understand and assess the available evidence and reach conclusions as to how the registrant's health is affecting his or her fitness to practise.

In considering medical or other expert reports which form part of the evidence, to the extent that it is relevant to do so, Panels should take account of:

- the expert's professional qualifications and area of specialisation;
- the extent of the expert's knowledge of the case, for example whether the expert has been involved in the registrant's care over a lengthy period of time;
- the nature of any assessment undertaken by the expert, such as whether a report is based on a recent physical examination or simply a review of notes made by others;
- how closely in time the expert's report was prepared to the matters in issue.

Panels should also recognise that there are often logical reasons for seemingly conflicting expert evidence. For example, a GP's view of a relatively rare condition, based on symptoms present at its onset may understandably differ from the view of a consultant who is more familiar with the condition and generally sees patients at a later stage and when the symptoms are distinct.

Medical Assessors

In cases where Panels need the assistance of an expert, they have the option of seeking the advice of a suitably qualified medical assessor. The role medical assessors is set out in more detail in the Practice Note on opinion evidence, experts and assessors. It is also open to the parties to request that a medical assessor be appointed, but the decision as to whether a medical assessor is required is a matter for the Panel, in line with the principle set out in *R v Turner*.

[9] [1975] QB 834

[Date]