

Fitness to Practise Forum: 12th September 2007

Executive summary and recommendations

Introduction

At their meetings in April 2007, the Health and Conduct and Competence Committee(s) agreed in principal to the disposal of cases via consent and that an appropriate practice note and procedural forms be prepared for consideration.

Decision

The Forum is asked to discuss the attached practice note and forms and recommend that the Health and Conduct and Competence Committee approve the practice note and forms.

Background information

Please see paper previously provided to the Health and Conduct and Competence Committee in April 2007.

Resource implications

Please see previous paper.

Financial implications

Please see previous paper.

Appendices

Practice note and forms.
Disposal of cases via consent April 2007

Date of paper

27th August 2007

PRACTICE NOTE

Disposal of Cases by Consent

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

The use of procedures for disposing of cases by consent is an effective case management tool which reduces the number of contested hearings which need to be held. However, the Health Professions Order 2001 imposes broad public protection obligations on HPC which mean that neither the Council nor a Panel can simply agree to resolve a case by consent without having regard to those wider statutory obligations.

In considering proposals for disposal of a case by consent both the Council and the Panel must be satisfied that:

- the appropriate level of public protection is being secured in the case before it; and
- there is no detriment to the wider public interest, for example, by undermining the deterrent effect which might arise from pursuing the case.

Disposal by consent

The consent process is a means by which HPC and the registrant concerned can seek conclude of a case without the need for a full contested hearing by negotiating and then putting before a Panel an order of the kind which the Panel would have been likely to make in any event.

HPC will only consider resolving a case by consent:

- after an Investigating Committee Panel has found that there is a “case to answer”, so that an proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full. A registrant’s insight into, and willingness to address, failings are key elements in the FTP process and it would be inappropriate to determine a case by consent where the registrant denied liability; and
- where the remedial action proposed by the registrant and to be embodied in the consent order is consistent with the expected outcome if the case was to proceed to a contested hearing.

Procedure

Disposal by consent does not affect the range of sanctions available to a Panel, it is merely a process by which both the registrant and HPC can, propose an appropriate outcome to the case and ask the Panel, assuming that it is content with that outcome, to conclude the case on that basis.

The task for the Panel is to determine, on the basis of the evidence before it, whether to:

- deal with the case in an expedited manner by approving the proposal set out in the draft Consent Order put before it; or
- reject that proposal and set the case down for a full contested hearing.

As the Panel must retain the option of rejecting a proposed determination by consent, HPC has an obligation to make it clear to registrants that co-operation with the process will not automatically lead to a Consent Order being approved.

Equally, as the registrant is required to admit liability in order for the process to proceed, in the event that the proposal is rejected by the Panel, that admission will be treated in the same way as a “without prejudice” settlement and the full hearing will take place before an entirely different Panel which will not be made aware of the proposal unless registrant chose to bring it to their attention.

A template Consent Order is set out in the annex to this Practice Note.

September 2007

Health Professions Council

[PRACTICE] COMMITTEE

CONSENT ORDER

TAKE NOTICE that, in respect of the [allegation made] [review of the order made by the Committee] on [date] against [name]:

1. [name of registrant] consents to the Committee [making] [revoking][varying] [a][the] [type] Order against [him][her] in respect of that matter on the terms set out below; and
2. the Council consents to the making of an Order on those terms, being satisfied that doing so would in all the circumstances be appropriate for the following reasons:

[set out reasons]

AND FURTHER TAKE NOTICE that the Panel, with the consent of the parties and, upon due inquiry being satisfied that it is appropriate to do so, now makes the following Order:

[set out Order]

Signed: _____ Chairman

Date: _____

Signed: _____ Signed: _____

Date: _____ Date: _____

Note: the parties may consent to the Order by all signing one copy of this form or each signing separate copies.

Health Professions Council

Health and Conduct and Competence Committees – April 2007

Disposal of Cases by Consent

Introduction

At present, HPC does not resolve any fitness to practise cases by means of consent procedures and, in respect of allegations where it is determined that there is a case to answer, takes all cases to a potentially contested hearing.

That approach is entirely consistent with the operation of a relatively new fitness to practise (FTP) adjudication process but, with the benefit of the experience which has been gained from operating the FTP process for several years, it is now possible to identify two kinds of case where it may be appropriate to establish procedures which enable HPC and the registrant, with the agreement of the Practice Committee Panel hearing the case, to resolve the matter by consent.

The use of consent orders – where the outcome and disposal of a case are mutually agreed by the parties to that case and sanctioned by the court or tribunal – are a common feature of many forms of civil and regulatory proceedings and would be appropriate in two kinds of FTP cases:

- where the registrant admits an allegation and proposes remedial action which accords with HPC's expected outcome in that case. For example, a registrant who offers to be placed under a conditions of practice order requiring him or her to undergo specific refresher training or to be subject to workplace supervision; and
- where the registrant is subject to a suspension order or a long-term conditions of practice order and wishes to be removed from the register but cannot be because of the existence of that order.

Legal background

Article 11(3) of the Health Professions Order 2001 (the Order) prevents a registrant from allowing his or her registration to lapse where the registrant is the subject of:

- an allegation, investigation or proceedings under Parts V or VI of the Order; or
- a suspension order, conditions of practice order or interim order.

The intention of Article 11(3) is to “lock in” registrants so that they cannot remove themselves from the register in order to avoid the regulatory process. It means that registrants cannot allow their registration to lapse or volunteer to be removed from the HPC

register if they are subject to any form of FTP process or certain orders made under that process.

Furthermore, suspension and conditions of practice orders are subject to a mandatory “rolling review” process under which hearings must be held at regular intervals and at which the order may be varied, replaced or revoked. This is an extremely valuable public protection mechanism but, is of limited value in cases where registrants want to be removed from the register and, therefore, do not wish to engage with the review process.

The matter is compounded by the fact that, if the allegation which led to the suspension or conditions of practice order being made was one relating to health or lack of competence, Article 30(4)(d) of the Order prevents the existing order from being replaced with a striking off order as that is not an order which the Panel “could have made at the time it made the order being reviewed when the case was first heard” in a health or competence case.

Registrants in such cases do often ask if they can be removed from the register, usually because the original allegation has arisen in circumstances of failing health or diminishing skills and the registrant has already retired from the profession, will be doing so shortly or has no plans to practice again in the future.

In most instances, registrants who have asked for their name to be removed from the register disengage from the order review process and, in the absence of new evidence from the registrant, Panels have little choice other than to extend the existing suspension or conditions of practice order for a further year and repeat that process annually.

HPC statutory duty

The use of consent procedures would resolve these two issues, reduce the length of time that cases are in the system and number of hearings need to be held and reduce costs. However, unlike a private party to litigation, HPC cannot simply agree to resolve cases by consent without having regard to its wider statutory obligations.

The Order imposes broad public protection obligations on HPC and, therefore, any arrangements for disposing of cases by consent would need to ensure that:

- an appropriate level of public protection was being secured in individual cases; and
- collectively the arrangements were not detrimental to the wider public interest, for example, reducing the number of cases going to full hearings to the point that the wider deterrent effect of pursuing cases was being undermined.

Consequently, the details of any consent regime should include the following elements:

1. resolving a case by consent should only be considered by HPC once:

- (a) the allegation has passed beyond the “case to answer” stage, so that a proper assessment has been made by the investigating committee of the of nature and extent of the allegation; and

- (b) the registrant has indicated his or her willingness to admit the allegation.

It would be inappropriate to determine a case by consent where the registrant denied liability, as registrants' insight and willingness to address failings are key elements in the FTP process. These requirements are consistent with the police powers to administer a caution in place of prosecution, where the necessary precursors are that (1) there must be sufficient evidence to justify prosecution and (2) the offender must make an informed admission of guilt.

2. the FTP team would need to undertake an objective assessment of the evidence and be satisfied that the terms of any proposed Consent Order were consistent with the expected outcome if the case proceeded to a contested hearing.

Resolving cases by consent is not meant to create a "plea bargaining" arrangement under which registrants can accept a lesser sanction in return for admitting an allegation. HPC would need to have regard to the Council's Sanctions Policy in reaching a conclusion and take account of CHRE's ability to challenge decisions on the ground of undue leniency.

3. the Practice Committee Panel appointed to hear the case would not be presented with a *fait accompli* but would need to consider HPC proposals for determining the case by consent and decide, on the basis of the evidence before it, whether to endorse those proposals or to require a full hearing.

The use of Consent Orders is not a mechanism for by-passing Panels as it requires not only the consent of the registrant and HPC but, most importantly, the consent of the Panel, which has the last word. The Panel would be presented with HPC's proposals in the absence of the registrant and can either (1) deal with the case in an expedited manner by approving the proposal or (2) reject it and set the case down for full hearing. As the proposals would include an admission of liability by the registrant, in the event that the proposal was rejected, the full hearing would take place before a different Panel who would not be made aware of the consent proposal.

Procedure

In relation to ongoing allegations, the consent process would simply be a means by which HPC and the registrant concerned could discuss the possible conclusion of the case without the need for a full hearing and then put to the Panel a draft Order of the kind that the Panel could make in any event.

The process does not change the range of sanctions available to the Panel, it is merely a process by which both the registrant and HPC can, in effect, put before the Panel what they regard as being the appropriate outcome to the case and ask the Panel, assuming that it is content with that outcome, to conclude the case on that basis.

As the Panel must retain the option of rejecting a proposed determination by consent, HPC would have an obligation to make it clear to registrants that co-operation with HPC would not automatically lead to a Consent Order being approved.

In practice, Panels could be convened to consider a number of consent applications at a single sitting or a panel convened for the full hearing of another case might be asked to deal with one or two consent orders after their main case has concluded.

For registrants whose case has been determined and who are the subject of a suspension order or long-term conditions of practice order, the process would be slightly more complex and limited to enabling them to be removed from the HPC register by means of a voluntary removal agreement.

As a person cannot be removed from the register if they are the subject of a suspension or conditions of practice order, a procedure is needed by which the Panel can be asked to revoke that order to enable the person to resign. However, for a Panel to be able to do so in a manner which provides adequate public protection, an agreement would need to be reached between HPC and the registrant under which HPC would agree to apply to the Panel asking for the order to be revoked and in return the registrant would agree:

- to resign from the register;
- to cease practising the relevant profession and using any related protected title;
- not to seek to be re-admitted to the register and, if in breach of that commitment an application was received, to agree that it would be assessed as if the registrant had been struck off.

The aim of the agreement would be to treat the registrant as if they had been struck off the register and, therefore, it would also provide for HPC to be able to inform others of the terms of the agreement and would include an agreed statement about how the registrant came to be removed from the register. The allegation which led to the making of the order would be set out in the agreement and the registrant would need to admit to the allegation.

Decision

The Committee is asked to agree that:

1. a process be developed for disposing of cases brought before it, in appropriate circumstances, by consent; and
2. an appropriate practice note and procedural forms be prepared for consideration by the Committee prior to the implementation of that process.

Background information

A draft Consent Order and voluntary removal agreement have been prepared by the Solicitor to the Council for consideration by the Committee and copies are attached as appendices to this report.

Discussions are taking place with CHRE about the application to decisions reached by consent of Section 29 of the National Health Service Reform and Health Care Professions Act 2002 (the power to refer unduly lenient fitness to practise decisions to the High Court). An oral report on those discussions will be provided to the Committee at its meeting.

Resource implications

None.

Financial implications

It is likely that, once a system of concluding appropriate cases by consent is well established, savings can be made by reducing the overall number of hearings held. At present, the cost of hearings is approximately £2,500 to £3,500 per sitting day, depending upon location.

Appendices

Draft Consent Order
Draft Voluntary Removal Agreement

Date of paper

9th March 2007

Health Professions Council

[CONDUCT AND COMPETENCE] COMMITTEE

CONSENT ORDER

TAKE NOTICE that, in respect of the [allegation made on [date] against] [review of the order made by the Committee on [date] against] [application for restoration to the Register made on [date] by] [name of registrant]:

1. [name of registrant] consents to the Committee [making a [Caution] [Conditions of Practice] [Suspension] [Striking Off] [Restoration] Order] [revoking the order] against [him][her] in respect of that matter on the terms set out below; and
2. the Council, being satisfied upon due inquiry that doing so would in all the circumstances be appropriate, also consents to the making of an Order on those terms.

AND FURTHER TAKE NOTICE that the Committee, upon due inquiry, now makes the following Order:

[set out Order]

Signed: _____ Chairman

Date: _____

Signed: _____ Signed: _____

Date: _____ Date: _____

Note: the parties may consent to the Order by all signing one copy of this form or each signing separate copies.

Voluntary Removal Agreement

DATE:

PARTIES:

1. [Name and address] ('the Registrant')

2. Health Professions Council
Park House
184 Kennington Park Road
London SE11 4BU ('HPC')

BACKGROUND:

- A. The Registrant is registered by HPC as a [profession] under the registration number [number] in the register maintained by HPC ('the Register') under the Health Professions Order 2001;
- B. the Registrant [is][was] the subject of the allegation set out in Schedule A ('the Allegation') which [is currently before the][which on [date] was held to be well founded by] HPC's [name] Committee [and that Committee made the order set out in Schedule B ('the Order')];
- C. the Registrant [admits][admitted][now admits] the Allegation;
- D. the Registrant wishes to apply to be removed from the Register but, by virtue of Article 11(3) of the Health Professions Order 2001 and Rule 12(3) of the Health Professions Council (Registration and Fees) Rules 2003, cannot do so for so long as the Registrant is the subject of [the Allegation][the Order] or any other matter which could give rise to another allegation against the Registrant;
- E. HPC is satisfied that it would be meeting its statutory objective of protecting the public if the Registrant was permitted to be removed from the Register, but on similar terms to those which would apply if the Registrant had been struck off the Register by an order made under Article 29(5)(a) of the Health Professions Order 2001;
- F. the parties have entered into this Agreement to enable the [Allegation to be withdrawn][Order to be revoked] and the Registrant to be removed from the Register as if a striking off order had been made against the Registrant.

OPERATIVE PROVISIONS

1. Operative Date

The operative date of this Agreement shall be [date] ('the Operative Date')

2. Obligations of HPC

HPC shall:

- 2.1 [withdraw the Allegation on] [apply to the [name] Committee, asking it to revoke the Order from] the Operative Date; and
- 2.2 from that date, desist from taking any further action against the Registrant in respect of the Allegation.

3. Obligations of the Registrant

The Registrant shall:

- 3.1 on or before the Operative Date, execute a letter in the form set out in Schedule C to this Agreement, to take effect upon the Operative Date;
- 3.2 from the Operative Date:
 - 3.2.1 cease and desist from practise as a [profession];
 - 3.2.2 cease and desist from the use of the title(s) ["designated title"] or any other title which implies that [the registrant is registered in the Register as a [profession]; and
 - 3.2.3 not at any time on or after the Operative Date to seek re-admission to the Register.

4. Admission to Register

In the event that, at any time on or after the Operative Date, the Registrant makes an application to be admitted to the Register (whether or not in contravention of Clause 3 and notwithstanding any other legal remedy which may be available to HPC), the Registrant agrees that:

- 4.1 HPC's Education and Training Committee shall be entitled to deal with that application as if it was made by a person who had been removed from the Register on the Operative Date by means of an order made under Article 29(5)(a) of the Health Professions Order 2001; and
- 4.2 HPC shall be entitled to provide the Committee with such information relating to the [Allegation]{Order} as it sees fit, including but not limited to a copy of this Agreement, in order to assist the Committee to determine that application.

5. Publicity

The Registrant agrees that

- 5.1 HPC shall be under no obligation to keep the existence or terms of this Agreement confidential; and
- 5.2 in the event that any person makes any inquiry of HPC concerning the registration status of the Registrant, HPC shall be entitled to disclose such information concerning the Registrant as it sees fit and, in particular (but without any limitation), shall be entitled to make a statement in the form set out in Schedule D to this Agreement.

6. Whole Agreement etc.

The parties agree that:

Schedule A

The Allegation

That your fitness to practise is impaired by reason of [ground] in that:

[set out allegation in full]

Schedule B

The Order

[set out Order]

Schedule C

Letter to be executed by the Registrant

To: The Registrar
Health Professions Council

Dear Sir,

Registration [number]

With effect from [Operative Date] please remove my name from the HPC Register.

Prior to that date I was the subject of [an allegation under Article 22 of the Health Professions Order 2001 which I admitted and which was withdrawn by HPC on that date] [an order made by the [name] Committee on [date] in respect of an allegation which I have admitted and that order was revoked by the committee on [date]] in order to enable me to remove myself from the HPC Register.

I declare that, other than the circumstances giving rise to that allegation, I am not aware of any matter which could give rise to any other allegation against me under the Health Professions Order 2001.

Yours faithfully,

Schedule D

Agreed Statement

[name of the Registrant] was the subject of an allegation to the effect that [describe or state the allegation as set out in Schedule A of this Agreement]. That allegation was withdrawn by HPC on the basis that [name] wished to be removed from the HPC Register voluntarily. [Name] admitted the allegation and has undertaken not to practise as a [profession] or use any title associated with that profession. If [he/she] seeks to return to the HPC Register at any time the application would be treated as if [he/she] had been struck off as a result of that allegation.

OR

[name of the Registrant] was the subject of an allegation to the effect that [describe or state the allegation as set out in Schedule A of this Agreement]. That allegation was held to be well founded by HPC's [name] Committee on [date] and a [type] Order was made against the registrant. The Committee revoked that Order on [date] on the basis that [name] wished to be removed from the HPC Register voluntarily. [Name] admitted the allegation and has undertaken not to practise as a [profession] or use any title associated with that profession. If [he/she] seeks to return to the HPC Register at any time the application would be treated as if [he/she] had been struck off as a result of that allegation.