

Fitness to Practise Forum 23 April 2008

Case to Answer Practice Note

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 test that should be applied by Investigating Committee panels at the case to answer stage and how the test should be applied. This will be accompanied by a revised decision template for panel to complete when considering cases at the Investigating Committee stage.

Updated operational guidance for case managers in relation to the investigation of their cases and drafting allegations is also being prepared. A draft version is attached to this paper, although the final version is not yet complete.

Decision

The Forum is asked to discuss the attached practice note and recommend that the Investigating Committee approve the practice note.

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.

Resource implications

None

Financial implications

None

Appendices

Practice Note - "Case to Answer" determinations by Investigating Committee Panels

Investigating Committee record of decision template

FTP Operational Guidance - Investigating and Drafting Allegations

Date of paper

7 April 2008

PRACTICE NOTE

“Case to Answer” determinations by Investigating Committee Panels

This Practice Note has been issued by the
HPC Investigating Committee for the guidance of Panels

Introduction

Article 26(3) of the Health Professions Order 2001¹ provides that, where an allegation is referred to the Investigating Committee, it shall consider, in the light of the information which it has been able to obtain and any representations or other observations made to it, whether in its opinion, there is a “case to answer”.

The “realistic prospect” test

In deciding whether there is a case to answer, the test to be applied by a Panel is whether, based upon the evidence before it, there is a “realistic prospect” that the Council will be able to establish at a hearing that the registrant’s fitness to practise is impaired.

That test (which is also known as the “real prospect” test) is used in other proceedings and is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman* [2001] 1 All ER 91, 92:

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success... or, as [Counsel] submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

Applying the test

In determining whether there is a case to answer, the Panel must decide whether, in its opinion, there is a “realistic prospect” that the Council (which has the burden of proof) will be able to establish that the registrant’s fitness to practise is impaired.

The test applies to the whole of the allegation, that is:

¹ SI 2002/254

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

In the majority of cases, the evidence will relate solely to the facts and, typically, this will be evidence that certain events involving the registrant occurred on the dates, and at the places and times alleged. It will be rare for separate evidence to be provided on the “ground” or the issue of impairment and these will largely be a matter of inference for the Panel, such as where the factual evidence suggests that the care provided by the registrant fell below the standard expected of a reasonably competent practitioner or that the registrant’s actions constitute misconduct when judged against the established norms of the profession. In reaching that decision the Panel may wish to have regard to the HPC Standards of Proficiency or Standards of Conduct, Performance and Ethics.

The test does not call for substantial inquiry or require the Panel to be satisfied on the balance of probabilities. The Panel only needs to be satisfied that there is a realistic or genuine possibility (as opposed to remote or fanciful one) that the Council will be able to establish its case.

In reaching its decision, the Panel:

- must recognise that it is conducting a limited, paper-based, exercise and should not seek to make findings of fact on the substantive issues;
- may assess the overall weight of the evidence but should not seek to resolve substantial conflicts in that evidence. The assessment of the relative strengths of the evidence can only be properly undertaken at a full hearing.

It is for the Council to prove its case. Registrants are not obliged to provide any evidence but many will do so voluntarily and any such evidence should be considered by the Panel. However, it will rarely resolve matters at this stage, as it will typically conflict or compete with the Council’s evidence and need to be tested at a hearing.

In applying the test the Panel need to take account of the wider public interest, including protection of the public and public confidence in the profession concerned and the regulatory process.

A decision that there is “no case to answer” should only be made if there is no realistic prospect of the Council proving its case, for example, because there is insufficient evidence to substantiate the allegation or the evidence is manifestly unreliable or discredited. At this stage, Panels should err on the side of caution and resolve cases where there is any element of doubt by deciding that there is a case to answer.

Health Professions Council
INVESTIGATING COMMITTEE

RECORD OF DECISION

Guidance for Panels

Article 26(2) of the Health Professions Order requires the Panel to determine whether, in respect of the allegation(s) set out below, there is a “case to answer” that the registrant’s fitness to practise is impaired.

That decision must be made on the evidence put before the Panel and, in reaching its decision, the test which it must apply is whether there is a “realistic prospect” that HPC will be able to establish that the registrant’s fitness to practise is impaired.

The test applies to the whole of the allegation, that is the facts set out in the allegation; whether those facts amount to the “ground” of the allegation (e.g. misconduct); and, in consequence, whether fitness to practise is impaired. The last two elements may be decided ‘in the round’ and may be based on inferences drawn from the factual evidence.

The test does not call for substantial inquiry. The Panel only needs to be satisfied that there is a realistic or genuine possibility (as opposed to remote or fanciful one) that the Council will be able to establish its case.

In reaching its decision, the Panel may assess the overall weight of the evidence but as it is conducting a limited, paper-based exercise should not seek to resolve substantial conflicts in that evidence or make findings of fact.

A decision that there is “no case to answer” should only be made if there is no realistic prospect that HPC, which has the burden of proof, will prove its case, for example, because there is insufficient evidence to substantiate the allegation or the evidence is manifestly unreliable or discredited.

In applying the test the Panel need to take account of the wider public interest, including protection of the public and public confidence in the profession concerned and the regulatory process. If there is any element of doubt, the Panel should adopt a cautious approach and deciding that there is a case to answer.

The Panel **MUST** provide clear and detailed reasons for its decision, particularly if it decides that there is no case to answer. Those reasons must explain the Panel’s rationale for its findings and **MUST NOT** simply be a repetition of the evidence comments to the effect that the Panel has considered all the evidence.

**Health Professions Council
Investigating Committee
RECORD OF DECISION**

Date of Decision:	
Name of Registrant:	
Registration No:	

Panel:	Name 1 (Chair)
	Name 2 (Registrant Member)
	Name 3 (Lay Member)

Allegation(s)		Realistic prospect test met?
1.		YES/NO
2.		YES/NO
3.		YES/NO
4.	The matters set out in [1], [2] and [3] constitute [misconduct].	YES/NO
5.	By reason of that [misconduct], your fitness to practise is impaired.	YES/NO

REASONS:

[Reasons as to facts

e.g. there is evidence to support the facts set out in 1 and 2, in the form of a witness statements from two witnesses. The evidence is disputed by the registrant but it is not for this Panel to seek to resolve conflicting evidence. Overall we are satisfied that the realistic prospect test is met in respect of that evidence.]

There is no evidence to support the allegation of dishonesty set out in 3 and we therefore find that there is no case to answer in respect of that element of the allegation.]

[Reasons as to “ground” and impairment

e.g. the facts alleged at 1 and 2 suggest conduct towards a patient which falls far below the standards expected of a registered health professional, potentially in breach of Standard X of the SCPE. On that basis, the Panel considers that there is a realistic prospect of establishing misconduct and that the registrant’s fitness to practise is impaired.

Conclusions:

For the reasons set out above the Panel finds that:

there is a case to answer in respect of [the] allegation(s) set out in [numbers].

there is no case to answer in respect of [the] allegation(s) set out in [numbers].

Signed: _____ **(Panel Chair)**

Date:

FTP OPERATIONAL GUIDANCE

Investigating and Drafting Allegations

Introduction

The Health Professions Order 2001 provides that overall responsibility for the investigation of allegations rests with the Investigating Committee, which has the responsibility for determining whether HPC has established a “case to answer” against a registrant in respect of any allegation.

The Investigating Committee is not involved in the day to day work of conducting investigations and that function is delegated to HPC Investigators acting under the direction and control of the Director of Fitness to Practise.

Where an allegation is received by HPC, the Investigating Committee is obliged by Article 26 of the Order to:

- give prompt notice of the allegation to the registrant concerned and invite him or her to submit written representations;
- if appropriate, invite the complainant to deal with any points raised by those representations; and
- obtain as much other information as possible about the case;

so that adequate information is available to the Investigating Committee Panel which will decide whether there is a “case to answer”.

The “case to answer” stage is intended to ensure that only allegations which are of substance proceed to a full hearing. This not only helps to ensure that the resources of HPC and others are not wasted in the pursuit of an allegation which is unlikely to be proved at hearing, but also helps to avoid needlessly harming the reputations of registrants.

Dealing with complaints

The investigative process commences with the initial contact between HPC and the complainant. A person’s first contact with HPC will have a significant impact on their confidence in the regulatory process and, accordingly, Investigators involved in that initial contact should:

- act in a professional and courteous manner;
- obtain and accurately record all relevant information;
- provide appropriate advice, guidance and reassurance.

HPC Investigators should investigate and manage allegations in an effective and professional manner, in accordance with the following guiding principles:

- acting proportionately and courteously, recognising that both complainants and registrants are entitled to expect that allegations will be dealt with expeditiously and in accordance with the law;
- upholding HPC's commitment to promoting equality and valuing diversity by acting in a fair, impartial and non-discriminatory manner;
- being objective 'finders of fact', not simply seeking evidence to prove an allegation, but gathering all relevant evidence in a fair and balanced manner; and
- supporting HPC in its obligations as a public authority under the Human Rights Act 1998 to act in accordance with the European Convention on Human Rights.

Obtaining relevant information

Many complaints will be received in writing and in a form which provides sufficient detail to identify the registrant concerned and the nature and circumstances of the complaint to meet HPC's standard of acceptance.

That will not be the case where initial contact is by telephone and, in such cases, Investigators must:

- obtain the name, address and telephone number of the complainant;
- obtain details of the registrant who is the subject of the allegation;
- ascertain what has happened and where and when it occurred;
- provide guidance on HPC's standard of acceptance for allegations and:
 - advise the complainant to put the allegation in writing;
 - send a complaint form to the complainant, or
 - complete a statement of complaint for the complainant.

Ensure that records are legible, accurate and contain all necessary information. In doing so, remember that the details of the initial contact or initial lines of inquiry will be obvious to the person who had that initial contact but will not be so obvious to someone who assumes responsibility for the case unless clear and detailed records have been maintained.

Case handling

After initial receipt, appropriate steps should be taken to establish that the allegation is within HPC's remit, by confirming that:

- the person who is the subject of the allegation is a registrant; and
- the subject matter is such that fitness to practise may be impaired.

Other than in exceptional circumstances, a copy of any complaint which forms the basis of an allegation will be sent to the health professional concerned. This needs to be made clear to any complainant who asks for the information to be treated “in confidence”, who also need to be advised that failure to agree to disclosure of the complaint may prevent the case progressing further.

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 documentation passed to that regulator.¹

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 clinical performance but also encompasses acts by a registrant which may have an impact upon public protection, the reputation of profession concerned or confidence in the regulatory process.

There will often be circumstances in which matters seemingly unconnected with professional practice may nonetheless having a bearing on fitness to practise. For example, an allegation arising from the sale of a car by a registrant to a patient may involve issues about abuse of the clinician-patient relationship. Any doubts on this point can usually be resolved by further investigation of the allegation.

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 not within HPC’s jurisdiction, frivolous or vexatious. If an administrative decision is taken not to pursue an allegation further, it is important that the reasons for doing so are recorded.

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 in a form which will assist an Investigating Committee Panel to reach a decision.

Case Investigation

In many cases it will be possible to formulate an allegation solely on the basis of the initial information received from a complainant. However, in some cases a more detailed investigation will need to be carried out before an allegation can be prepared.

In gathering further information for this purpose, HPC Investigators may exercise the powers under Article 25(1) of the Health Professions Order 2001 to compel disclosure compel, but It should be noted that the registrant concerned cannot be compelled to provide any information or required to take part in an interview.

¹ It is also possible that the allegation has arisen because a person is falsely claiming to be HPC registered or misusing a protected title. Such cases should be referred to the HPC case team responsible for offences under Article 39 of the 2001 Order.

Investigations which extend beyond gathering documents and materials, such as interviews, must be recorded in a form which enables the registrant to comment upon them and to be included in the case documents and materials.

Once any investigation has been completed, an investigation report should be prepared in the standard format which:

- summarises the background to, and source of, the allegation;
- sets out the allegation in the form it was provided to the registrant;
- provides a synopsis of the investigation which has been carried out; and
- identifies all of the documents and other materials received by HPC relating to the allegation, full copies of which must be attached to the report.

Allegations

In essence, the fitness to practise process consists of three stages:

1. an early opportunity for the registrant to be informed of and, if he or she so chooses to comment on, the allegation;
2. an Investigating Committee Panel deciding, in respect of that allegation, whether there is a case to answer; and
3. if that question is answered in the affirmative, a Panel of another Practice Committee determining whether that allegation is well founded.

Throughout that process the allegation which the registrant faces must be materially the same. The allegation which is first put to the registrant must also be the allegation on which the Investigating Committee Panel is asked to reach a case to answer decision and, assuming there is a case to answer, must be the allegation which is considered at the subsequent hearing.

Whilst it is permissible to amend the detail of an allegation, in the sense of providing more detail to help the parties understand or answer points raised by that allegation, it cannot be extended or varied to any material agree without either the consent of the registrant or, if that consent is not forthcoming, the additional elements being subjected to the investigative process outlined above, so that the registrant has the opportunity to make representations which can be considered by an Investigating Committee Panel. Consequently, careful consideration needs to be given to the formulation of allegations at the very outset of an investigation.

The requirement not to vary an allegation during the fitness to practise process is a facet of the common law rules of natural justice, which set the minimum standards of fair decision-making. An implied obligation to observe the principles of natural justice – essentially the right to a fair hearing free of bias - arises in respect of any body determining questions of law or fact in circumstances where its decisions will have a direct impact on someone's rights or legitimate expectations.

The right to a fair hearing requires that a person is given adequate prior notice of the allegations against him or her, and of the procedure for determining those allegations, so that he or she has a fair opportunity to:

- answer the case against him; and
- present his or her own case, including;
 - presenting his or her version of the facts;
 - making submissions on principles of law or any applicable legislation, guidance or codes of conduct etc.

The right to a fair hearing is also protected by the Human Rights Act 1998 in consequence of Article 6 of the European Convention on Human Rights. In Convention jurisprudence, the concept of what amounts to a fair hearing is a flexible one and the essential requirements reflect the common law duty to apply the principles of natural justice and otherwise to act fairly.

Formulating allegations

Allegations should be drafted in clear and unambiguous language which enables any person reading them to understand what is being alleged.

An allegation should contain sufficient detail to enable the registrant to understand what it is he or she is accused of, including the material facts upon which the allegation is based, so that the registrant is able to respond to make representations if he or she so chooses, can properly consider whether to admit or deny the allegation and, if appropriate, commence the preparation of any defence or mitigation.

Whilst the nature of many HPC cases will be such that much of the available evidence will be provided to the registrant with the allegation, it is important to note that there is no requirement for an allegation to include the evidence on which it is based and, if such an obligation did exist, it would severely hamper the process of informing registrants of allegations.

So, for example, in a case where a registrant is accused of inappropriate physical contact with a patient, it is sufficient for the allegation to be based upon the initial complaint (assuming it provides sufficient detail of date, place, people and events etc.) without the need to first obtain and provide other supporting evidence, such as witness statements. Of course, the registrant will be entitled to see any evidence which the Investigating Committee is later asked to consider in reaching a case to answer decision.

Every allegation must be based upon impairment of the registrant's fitness to practice, founded upon one of the grounds set out in Article 22(1) of the 2001 Order and supported by the facts on which that ground is alleged to arise.

The allegation should, so far as possible, be described in ordinary language and in sufficient detail to provide the essential facts which constitute the allegation. So far as possible, the elements of the allegation should be set out:

- briefly and concisely;
- in separate, consecutively numbered, paragraphs, each dealing with a single element of the allegation;
- giving precise dates (or a range of dates), locations and, where relevant, identifying individuals;
- with the facts and other matters in chronological order,
- dealing with the allegation on a point by point basis, to allow a point by point response and adjudication.

So, for example:

Allegation

1. *In the course of your employment as a [profession] by Toytown NHS Trust you were provided with access to a computer belonging to the Trust.*
2. *Between [dates], you used that computer to*
 - (A) *access websites containing pornographic material,*
 - (B) *to download pornographic images from such websites, which were stored in the files on the computer identified in Appendix 1;*
3. *Between [dates], you used that computer to search for the terms of a sexual nature identified in Appendix 2.*
4. *Your use of that computer for those purposes was contrary to the Trust's Internet Access Policy.*
5. *The matters set out in paragraphs 2(A) [or] (B), 3 [and] 4 constitute misconduct.*
5. *By reason of that misconduct, your fitness to practise is impaired.*

Note: In drafting allegations it is important to be very clear and precise about whether HPC is alleging that all of the facts or only one or some of them need to be established in order to prove the allegation. This can usually be resolved by careful use of “and” and “or” in the penultimate paragraph.

The “case to answer” test

In deciding whether there is a case to answer, the test to be applied by a Panel is whether, based upon the evidence before it, there is a “realistic prospect” that the Council will be able to establish that the registrant’s fitness to practise is impaired.

That test (which is also known as the “real prospect” test) is used in other proceedings and is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman* [2001] 1 All ER 91, 92:

“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success... or, as [Counsel] submits, they direct the court to the need to see whether there is a “realistic” as opposed to a “fanciful” prospect of success.”

The test applies to the whole of the allegation, that is:

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

For most allegations the evidence will relate solely to the facts and it would be unusual to provide separate evidence on the “ground” or the issue of impairment as these are a matter of inference for the Panel. For example, the Panel can infer from the facts that the registrant’s actions fell below the standard expected of a reasonably competent practitioner. In reaching that decision the Panel may have regard to the HPC Standards of Proficiency or Standards of Conduct, Performance and Ethics.

The test does not call for substantial inquiry or require the Panel to be satisfied on the balance of probabilities, it only needs to be satisfied that there is a realistic possibility (as opposed to remote or fanciful one) that the Council will be able to establish its case.

A decision that there is “no case to answer” should only be made if there is no realistic prospect of the Council proving its case, for example, because there is insufficient evidence to substantiate the allegation or the evidence is manifestly unreliable or discredited.

The Panel only conducts a limited, paper-based, exercise and whilst it may assess the overall weight of the evidence, should not seek to make findings of fact on the substantive issues or seek to resolve substantial conflicts in the evidence.

In applying the test the Panel needs to take account of the wider public interest, including protection of the public and public confidence in the profession concerned and the regulatory process. Panels are expected to adopt a cautious approach and resolve cases where there is any element of doubt by deciding that there is a case to answer.