

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Competence and Compellability of Witnesses

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

### Introduction

A person who can lawfully be called to give evidence is a “competent” witness. A competent witness is “compellable” if he or she can be required by a Panel to give evidence when otherwise unwilling to do so.

Fitness to practise proceedings are civil in nature and the Panel rules<sup>1</sup> enable Panels to compel witnesses to attend and give evidence.

As a general principle, in civil proceedings all persons are competent to give evidence and all competent persons are also compellable. A witness may claim privilege<sup>2</sup> not to answer certain questions but otherwise, once called, must co-operate fully in the proceedings.

In Panel proceedings that general principle is subject to one important exception. Article 32(2)(m) of the Health Professions Order 2001 provides that a Panel's power to compel a person to attend a hearing and give evidence or to produce documents does not extend to “the person concerned” (the registrant who is the subject of those proceedings).

### Competence

Competence is about whether a witness may legally give evidence and most witnesses will give their evidence without any challenge to their competence. In this context, “competent” does not mean reliable or credible, as they are about the weight to be attached to a witness’s evidence rather than their competence to give it.

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<sup>1</sup> HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; HCPC (Health Committee) (Procedure) Rules 2003.

<sup>2</sup> for example, refusing to disclose lawyer - client communications..

Questions of competence are a matter for the Panel. If the issue is raised, either by a party to the proceedings or the Panel of its own motion, the burden of proving that a witness is competent falls upon the party seeking to call the witness.

Ideally, competence issues should be resolved long before a witness is called to give evidence, but may only become apparent after the witness has begun to do so.

Any necessary questioning of a witness by the Panel should take place in the presence of the parties. A Panel may also hear expert evidence on the competence of a witness and any competence assessment should take account of measures which could be used to assist the witness to give evidence. As the court said in *R v B*<sup>3</sup>:

*“...the competency test is not failed because the forensic techniques of the advocate... or the processes of the court... have to be adapted to enable the witness to give the best evidence of which he or she is capable.”*

In Panel proceedings, the basic test of competence is whether the witness is capable of understanding the nature of an oath and of giving rational testimony. That test was articulated in *R v Hayes*<sup>4</sup> in the following terms:

*“It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a [tribunal] has to decide whether a [witness] should properly be sworn, is whether the [witness] has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct”.*

## **Children**

There is no fixed age below which children are regarded as incompetent to give evidence and a child is clearly competent if the Panel is of the opinion that he or she meets the *Hayes* test. However, by virtue of section 96 of the Children Act 1989, even if a child<sup>5</sup> does not meet that test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

1. understands that it is his or her duty to speak the truth; and
2. has sufficient understanding to justify his or her evidence being heard.

Whether a child or young person is competent to give evidence is a matter for the Panel but it is not an issue which a Panel is obliged to investigate merely because of the age of a witness.

## **Intellectual capacity**

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<sup>3</sup> [2010] EWCA Crim 4

<sup>4</sup> [1977] 1 WLR 238

<sup>5</sup> for the purposes of section 96 a child is a person under the age of 18

The competence of a witness whose intellectual capacity is impaired will also be governed by the *Hayes* test.

Competence and capacity are distinct issues. For example, the Mental Capacity Act 2005 is concerned with a person's capacity to make decisions rather than to give evidence. Capacity is only relevant to competence in terms of assessing the witness's ability to understand questions and to provide replies that can be understood.

A witness may be prevented by incapacity, such as mental disorder or the effect of alcohol or medication, from being competent but that lack of competence is only co-extensive with the incapacity. Thus, a person who is drunk will be competent once sober. Where incapacity is only temporary, Panels have the discretion to postpone the proceedings until that incapacity has ended.

A person who has a mental illness may still be a competent witness if that illness only affects an aspect of the person's character which does not diminish his or her capacity to recall information on matters relevant to the proceedings or to appreciate the nature of the oath. Equally, the clarity of their evidence may be affected by factors such as distress, anxiety or panic which are not relevant to the question of capacity.

### **Compellability**

Compellability is about whether, as a matter of law, a witness can be required to give evidence when they do not wish to do so.

Generally, in civil proceedings all witnesses that are competent to give evidence may also be compelled to do so. In particular, section 1 of the Evidence Amendment Act 1853 makes the spouse of a party to the proceedings both competent and compellable.

As noted above, a Panel's power to compel witnesses to attend and give evidence or to produce documents does not extend to the registrant who is the subject of the proceedings.

It is a criminal offence for a person, without reasonable excuse, to refuse to attend, or to answer admissible questions put to them in, Panel proceedings. The penalty, on summary conviction, is a fine of up to level 5 on the standard scale (£5,000).