PRACTICE NOTE

Fitness to Practise Impairment

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

1. Introduction

This note provides guidance on how Panels approach decisions on whether a Registrant’s fitness to practise is impaired.

The HCPC’s overarching objective is protection of the public and, the purpose of fitness to practise proceedings is not to punish registrants for their past acts and omissions, but to protect the public from those who are not fit to practise.

2. The sequential approach

Fitness to practise allegations comprise three steps which Panels must consider sequentially:

1. whether the facts set out in the allegation are proved;
2. whether those facts amount to one or more of the 'statutory grounds' alleged (e.g. misconduct or lack of competence);
3. if so, hearing further argument on the issue of impairment and determining whether the registrant's fitness to practise is impaired.

If a finding of impairment is made, Panels will then hear submissions on the question of sanction and determine what, if any, sanction to impose.

It is important that these steps should be and be seen to be separate but this does not mean that, for example, Panels must retire to consider each individual step separately in every case. They are 'steps' rather than formal stages and their management will depend upon the nature and complexity of the case. However, the determination should reflect the Panel's decision relating to each step.

The HCPC has to provide sufficient evidence to persuade the Panel that the facts alleged are proved. Whether those facts amount to the statutory ground and whether fitness to
practise is impaired is not automatic and are matters of judgement for the Panel. If any of
the facts alleged are proved the Panel then has to decide whether they amount to one or
more of the statutory grounds. A Panel may properly conclude that fitness to practise is
not impaired where, for example, it is satisfied that the act or omission in question was an
isolated error which has been remedied by the registrant and which is highly unlikely to
be repeated

3. Fitness to Practise Impairment

The test of impairment is expressed in the present tense; that fitness to practise “is
impaired.”

A Registrant may have been impaired at the time of the failing identified in the allegation,
however the Panel’s task is to form a view about the registrant’s current fitness to practise
by taking account of the way in which the registrant has acted or failed to act in the past
and, looking forwards whether they consider that the registrant’s ability to practise safely
is compromised.

4. Character evidence

When considering impairment, Panels may properly take account of evidence as to the
registrant's general competence in relation to the subject matter of an allegation; the
registrant's actions since the events giving rise to the allegation; or the absence of similar
events.

In fitness to practise proceedings Panels may need to consider 'character evidence' of a
kind which, in other proceedings, is only heard as personal mitigation in relation to
sanction.

In admitting character evidence for the purpose of determining impairment, Panels must
exercise caution but should not adopt an over-strict approach. It is important that all
evidence which is relevant to the question of impairment is considered. Panels must be
careful not to refuse to hear evidence at the impairment phase about, for example, a
registrant’s general professional conduct which, when heard at the sanction phase, may
raise doubts about the conclusion that the registrant’s fitness to practise is impaired.

In deciding whether to admit character evidence, Panels must draw a distinction between
evidence which has a direct bearing on the findings it must make and evidence which is
simply about the registrant's general character. That distinction is not always clear.
Expressions of regret or remorse will usually fall within the latter category but, character
evidence may be helpful in supporting a registrant’s submissions that insight, regret or
remorse has been reflected in modifications to the registrant’s practice, and therefore may
be relevant to the question of current impairment.
5. Protecting the public

As fitness to practise is about public protection, in considering allegations Panels need to address what the case law describes as the ‘critically important public policy issues’ of:

- protecting service users;
- declaring and upholding proper standards of behaviour; and
- maintaining public confidence in the profession concerned.

Thus, in determining fitness to practise allegations, Panels must take account of two broad components:

- **the ‘personal’ component:** the current competence, behaviour etc. of the registrant concerned; and
- **the ‘public’ component:** those critically important public policy issues outlined above.

### 5.1 Personal component

The personal component must be considered first, and the Panel’s task is to form a view about the registrant’s current fitness to practise based on, among other things, the registrant’s past acts or omissions. The key questions which need to be answered are:

- are the acts or omissions which led to the allegation remediable?
- has the registrant taken remedial action?
- are those acts or omissions likely to be repeated?

An important factor will be the registrant’s insight into those acts or omissions, the extent to which the registrant:

- accepts that their behaviour fell below professional standards, understand how and why it occurred and its consequences for those affected; and
- can demonstrate they have taken action to address that failure in a manner which remedies any past harm (where that is possible) and avoids any future repetition.

It is unlikely that a registrant who lacks insight and thus has not accepted their failure or taken remedial steps would be regarded as being at a low risk of repetition.

### 5.2 Public Component

Next, Panels must consider the three elements of the public component. The first element of the public component - the need to protect service users - overlaps with the personal
component. A registrant who has insight and is unlikely to repeat past acts or omissions is unlikely to present an ongoing/future risk to service users.

The other two elements of the public component are maintaining professional standards and public confidence in the profession concerned. The professional standards expected of registrants are what the public expects of them. Panels should consider the need for the public to have confidence in the registrants they are treated by. The public is entitled to expect registrants who are professionally competent and act with decency, honesty and integrity. The public should also be able to rely on the regulatory process to be robust, fair and transparent.

The key question to be answered here is, given the nature of the allegation and the facts found proved, would public confidence in the profession be undermined if there were to be no finding of impairment?

6. Risk of harm

In assessing the likelihood of a registrant causing similar harm in the future, Panels should take account of:

- the degree of harm caused by the registrant; and
- the registrant’s culpability for that harm.

The degree of harm cannot be considered in isolation, as even death or serious injury may result from an unintentional act which is unlikely to be repeated or, conversely, the harm suffered may be less than that which was intended or reasonably foreseeable.

In assessing culpability, Panels should take into account that deliberate and intentional harm is more serious than harm arising from a registrant’s reckless disregard of risk which, in turn, is more serious than that arising from a negligent act where the harm may not have been foreseen by the registrant.

December 2019