

Health and Care Professions Tribunal Service

PRACTICE NOTE

Health Concerns

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

Introduction

1. The Health Professions Order 2001 (the Order) provides 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 health¹.
2. 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 impairment by reason of physical or mental health?

3. 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 practise. Health concerns that require formal intervention by the HCPC arise where the registrant fails to demonstrate that they are managing their health issues in a way that avoids any detrimental impact to service users. As a result, there is a concern regarding their current fitness to practise.
4. Deciding that a health concern needs to be treated formally as an allegation will often be quite straightforward. This is likely to occur in cases where:

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.

- a. fitness to practise concerns arise as a direct consequence of the registrant's physical or mental health;
 - b. there is evidence to suggest that the registrant is not managing their health appropriately and lacks insight into its potential impact upon service users, the wider public or themselves; and
 - c. there is no evidence to suggest that other material factors relating to the registrant's conduct or competence are involved.
5. 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, which also relate to their conduct or competence. Equally, there may be cases where, at the outset, the evidence may not suggest that the registrant has an underlying health issue, but where a health issue becomes known as the case progresses.
6. In deciding whether to refer an allegation to the Health Committee, the factors which should be taken into account include:
- a. the extent to which the registrant's physical or mental health condition the primary cause of the alleged facts set out in the allegation;
 - b. the overall seriousness of the allegation; and
 - c. the sanctions which are available to the Health Committee, including, in particular, that striking off is not an option,⁴ unless the registrant has already been continuously suspended or subject to a conditions of practice order for at least 2 years.

Relevant case law

7. 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."

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.

8. 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."

Conducting hearings in private

9. Most fitness to practise hearings are held in public, but panels have the discretion to exclude the press or public from all or part of a hearing in appropriate cases. Health cases will usually require panels to consider personal and sensitive details of a registrant's physical or mental health condition. A panel is justified in hearing such cases in private in order to protect the registrant's privacy, unless there are compelling public interest grounds for not doing so. The decision to hear such a case in private is unlikely to be contentious but, nonetheless, is one which the Panel should make formally and after giving the parties the opportunity to make representations. The HCPTS Practice Note on [Conducting Hearings in Private](#) explains in more detail the issues that need to be considered when deciding whether a hearing should be held in private. It also reminds panels that they should consider whether it is feasible for only part of the hearing to be in private before concluding that all of the hearing should be.

Vulnerable registrants

10. The fitness to practise process can be a stressful and anxious time for all registrants, but this may be exacerbated for registrants who are particularly vulnerable due to their physical or mental health and especially if they are unrepresented. The HCPTS Practice Note on [Unrepresented Registrants](#) sets out how such registrants may be supported through the hearing process. The Health and Care Professions Tribunal Service website also provides guidance and assistance for vulnerable parties attending a hearing, including registrants.

Cross-referral

⁶ (2003) EWHC 1675 (Admin).

11. The Panel Rules⁷ 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.
12. Health Panels can only make findings on allegations of impairment of fitness to practise which are based upon the statutory ground of physical or mental health. Conduct and Competence Panels can only make findings on allegations of impairment of fitness to practise which are based upon one of the other statutory grounds.⁸
13. If the issue giving rise to a potential cross-referral was known at the time the Investigating Committee Panel considered the matter, the Investigating Committee Panel will have made findings about which factual particulars have a realistic prospect of being found proved, and which of the statutory grounds of impairment those factual particulars support. Where this has happened, the Panel considering cross-referral should have regard to the findings of the Investigating Committee Panel. Unless new evidence has arisen, the Panel considering cross-referral should only cross-refer those factual particulars on which the Investigating Committee found a case to answer.
14. If the issue giving rise to potential cross-referral was not known at the time the Investigating Committee Panel considered the matter, or if new evidence on the issue has arisen, the Panel considering cross-referral should take account of the different powers of further investigation set out within the Panel Rules. In particular, only the Health Committee has power to invite the registrant to undergo a medical examination by a registered medical practitioner nominated by the Committee⁹.
15. If the Panel is considering cross-referral of its own motion, it must give the parties an opportunity to comment, and take any comments received into account before making a decision.
16. 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. The Panel must take full account of the submissions from both parties before reaching a decision.
17. Where an allegation is cross-referred – whether of the Panel's own motion or at the request of one or both 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. It must also set out the particulars of the allegation that it is referring.

⁷ 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.

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

⁹ HCPC (Health Committee) (Procedure) Rules 2003, r.8(1)(d)

18. In respect of an allegation which is cross-referred, the receiving Panel's disposal options are to certify to the referring Panel that:
- a. the fitness to practise of the registrant is not impaired by reason of the substituted statutory ground (leaving the referring Panel to resume and conclude its consideration of the allegation); or
 - b. it has dealt with the allegation and that the referring Panel is not required to take any further action in relation to the allegation.
19. Where a receiving panel decides that a registrant is not impaired in relation to the allegation it has considered, the panel should refer the suspended allegations back to the original referring panel in order that they can be disposed of. For example, where a Conduct and Competence Committee has suspended their consideration of the allegations to refer a matter to the Health Committee, but the latter has found no impairment on the grounds of health, the Health Committee should refer the matter back to the Conduct and Competence Committee for consideration of the suspended allegations.
20. There may be instances when the Conduct and Competence Committee considers allegations that a registrant has committed misconduct, and that misconduct was a result of the registrant's health condition ([HCPTS Practice Note: Mixed Allegations](#)). In some cases, the misconduct may lead to strike off. However, where it becomes clear that a striking off order is not likely, the panel should ensure it addresses the concerns raised by the health condition before reaching a final decision on sanction, for example by referring the allegation to the Health Committee or seeking up to date information about the registrant's health. This is to ensure that there are no outstanding questions about the registrant's fitness to practise on any relevant grounds of impairment.

Expert evidence as to health

21. 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*¹⁰ 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.”

22. 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 their fitness to practise.

¹⁰ [1975] QB 834

23. 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:
- a. the expert's professional qualifications and area of specialisation;
 - b. 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 sustained period;
 - c. 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;
 - d. how closely in time the expert's report was prepared to the matters in issue.
24. Panels must also recognise that there can be 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 differ from the view of a specialist who may be more familiar with the condition and may generally see patients at a later stage when symptoms become acute. Where there is a conflict in the expert evidence, panels should ensure they provide clear reasons for why they have preferred the advice of one expert to that of another expert.

Medical Assessors

25. 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 of medical assessor is set out in detail in the [HCPTS Practice Note: Evidence](#). It is open to both 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*¹¹.

Reasonable adjustments

26. The Health and Care Professions Tribunal Service (HCPTS) will endeavour to accommodate any reasonable adjustments which registrants, or other parties attending proceedings, may require. The HCPC or HCPTS should be notified in advance to allow time for any such adjustments to be made.

¹¹ [1975] QB 834