

Health and Care Professions Tribunal Service

PRACTICE NOTE

Securing Witness Engagement: Competence, compellability, and Orders to attend / produce documents

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

Introduction

1. 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.
2. Fitness to practise proceedings are civil in nature and the Panel rules¹ enable Panels to compel witnesses to attend and give evidence.
3. 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 privilege² not to answer certain questions but otherwise, once called, must co-operate fully in the proceedings.
4. 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

¹ HCPC (Investigating Committee) (Procedure) Rules 2003, r 8(3); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r 10(3) and 13(6); HCPC (Health Committee) (Procedure) Rules 2003, r 10(3) and 13(6).

² for example: the privilege against self-incrimination (giving evidence that might expose the witness to criminal prosecution), legal professional privilege (giving evidence about the confidential communications between a lawyer and their client) and ‘without prejudice’ communications (in regulatory proceedings, this will usually relate to communications between the parties in attempting to bring the proceedings to end with a consensual disposal).

5. 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.
6. 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.
7. 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.
8. Any necessary questioning of a witness by the Panel, to establish competence, 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*³:

“...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.”

9. 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*⁴ 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

10. 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 child⁵ does not meet that test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

³ [2010] EWCA Crim 4

⁴ [1977] 1 WLR 234

⁵ For the purposes of section 96 a child is a person under the age of 18.

- a. understands that it is his or her duty to speak the truth; and
 - b. has sufficient understanding to justify his or her evidence being heard.
11. 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. Further considerations about children giving evidence in these proceedings are contained in the HCPTS Practice Note titled *Children as Witnesses*⁶.

Intellectual capacity

12. The competence of a witness whose intellectual capacity is impaired will also be governed by the *Hayes* test.
13. 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.
14. 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.
15. 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

16. 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.
17. 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.
18. 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.

⁶ <https://www.hcpts-uk.org/aboutus/publications/child-witnesses/>

Witness and Production Orders

19. The Panel rules⁷ enable Panels to require a person to attend and give evidence at a hearing or to produce documents. Those powers are set out in similar form, as follows:

“... The [Panel] may require any person (other than the registrant) to attend a hearing and give evidence or produce documents.”

The exercise of the Panel’s powers

20. The power to require a person to attend a hearing and give evidence or to produce certain documents should be exercised by means of a Witness Order or Production Order (a template for which is annexed to this Practice Note).
21. A Panel may decide on its own motion to issue an Order and any party to the proceedings may also request the issue of such an Order.
22. A party should not apply for an Order unless that party has first asked the witness to attend and the witness has:
- a. refused to attend or confirm that they will do so;
 - b. agreed to attend, but the applicant has reasonable grounds for believing that the witness will not do so; or
 - c. agreed to attend, but only if ordered to do so. This may arise, for example, where a witness is concerned that confidentiality obligations prevent the witness from giving evidence voluntarily.
23. A party seeking to have an Order issued to any person must apply to the Panel in writing setting out:
- a. the name and address of the person concerned;
 - b. the terms of the Order sought;
 - c. details of any information being sought;
 - d. the steps which the applicant has taken to secure the attendance of, or production by, that person on a voluntary basis; and
 - e. evidence to show why attendance or production by that person is likely to support the case of the applicant.
24. Unless a Panel directs otherwise, a copy of the application and any evidence in support of it must be sent to the person concerned. A Panel may deal with

⁷ HCPC (Investigating Committee) (Procedure) Rules 2003, r 8(3); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r 10(3) and 13(6); HCPC (Health Committee) (Procedure) Rules 2003, r 10(3) and 13(6).

the application without holding a hearing if the parties consent or if the Panel considers that a hearing is unnecessary.

25. An Order which requires the production of documents should either identify the documents individually or by reference to a class of documents or some other criteria which are sufficient for the recipient of the Order to understand the obligation which has been imposed by the Panel.
26. Normally, the party seeking to compel a person to attend a hearing must meet their reasonable costs of doing so and the Panel may require an undertaking to that effect before an Order is granted.
27. The party calling the witness, and the Tribunal Service, must take steps to ensure that any reasonable adjustments that the witness needs in order to comply with the Order are put in place.

Compliance with Orders

28. There is no statutory requirement as to how far in advance of a hearing an Order must be made or served. However, reasonable notice should be given to the witness, ensuring that it would not be unfair to the person and is in the interest of justice.. This is to allow the person to make the practical arrangements for attending the hearing, to produce the documents or to make representations to the Panel to set aside an Order. The amount of time that may be reasonable will depend on the circumstances of the case, but when considering that question, Panels may wish to note that in other jurisdictions, 7 days' notice is likely to be reasonable⁸.
29. A copy of the completed and signed Order, along with guidance on how to apply to set the Order aside, should be provided to the person as soon as is reasonably practicable by the party who applied for the Order. Consideration should be given to the HCPTS Practice Note titled the 'Service of Documents'⁹ on how the Order should be communicated to the person.
30. Where, in the case of any document, a person could comply with an Order by delivering a copy of all or part of the document or by making it available for inspection, he or she should not be compelled to do more than:
 - a. produce a photographic or other facsimile copy of the document or the relevant parts of it; and
 - b. make them available for inspection by the Panel.
31. The power to require a witness to attend a hearing and give evidence does not extend to compelling the witness to prepare and provide a witness statement in advance of the hearing.

⁸ Rule 34 of the Civil Procedure Rules requires the consent of the Court when an application for a witness summons is made with fewer than seven days' notice

⁹ <https://www.hcpts-uk.org/aboutus/publications/service-of-documents/>

32. A person who, in response to an Order, attends a hearing and gives evidence is a witness of the party who asked for the Order to be issued. The witness should not be cross-examined by that party without leave of the Panel. Normally, this should only be permitted if the Panel decides that the witness is to be treated as a hostile witness.

Limits of the Panel's powers

33. A Panel cannot exercise its powers in order to obtain:

- a. information which a person is prohibited from disclosing by or under any other enactment¹⁰; or
- b. information or documents which a person could not be compelled to supply or produce in civil proceedings¹¹.

34. Material which a person could not be compelled to supply or produce in civil proceedings will generally be material which is:

- a. subject to legal professional privilege:
 - i. communications between lawyer and client for the purposes of giving or receiving legal advice, or
 - ii. communications whose dominant purpose relates to pending or contemplated litigation;
- b. correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings; or
- c. subject to Public Interest Immunity, for example on the grounds of national security.
- d. Panels must take appropriate steps to avoid exercising their powers in a manner which breaches those limitations. However, if an Order is issued and the recipient believes one of those limitations apply, he or she may apply for the Order to be set aside (see below).

Service user confidentiality

35. Registrants and others who are responsible for health and care records sometimes mistakenly assume that the Data Protection Act 2018 and UK General Data Protection Regulations (GDPR) prevents them from disclosing information about service users to a Panel. That is not the case. Legislation sets out a lawful basis for such processing in connection with the investigation including disclosures as a witness under:

¹⁰ if the prohibition operates because the information is capable of identifying an individual, an Order can be made which allows for the information to be provided in a form which is not capable of identifying that individual.

¹¹ i.e. proceedings before the appropriate court to which any appeal would be made against the decision of the Panel, as defined in Article 38(4) of the Health Professions Order 2001.

- a. GDPR Article 6(1)(c) where processing is required to comply with an enactment such as the Health Professions Order 2001;
 - b. GDPR Article 6(1)(e), where processing is necessary to carry out the tasks of the Panel in the interests of the public;
 - c. In the case of special category data:
 - i. GPDR Article 9(2)(f), where the processing and disclosure is necessary to enable the Panel to act in its judicial capacity;
 - ii. GDPR Article 9(2)(g), where there is a substantial public interest in the disclosure, such as where it is required by or under any enactment.
36. Schedule 2 of the DPA 2018 also includes an exemption from various rights of the data subjects where disclosures are required by order of the Panel.
37. Equally, extra-statutory data protection measures (such as the Caldicott Guardian arrangements) do not prevent disclosure to the HCPC under the Order.
38. Registrants owe a duty of confidentiality to service users, who rightly expect that information which they entrust to registrants will be held in confidence and not shared with others. That common law duty is an essential part of health or social care practice, which helps to ensure that service users provide full and frank information.
39. However, that duty of confidentiality does not, of itself, confer any evidential privilege. In general, the majority of personal, commercial and professional confidences (other than those covered by legal professional privilege) may be subject to compelled production.
40. Panels should seek to uphold the principle of service user confidentiality and, wherever possible, records should be obtained on the basis of consent from the service user concerned. However, whilst service users' rights to privacy are important they are not absolute and in situations where consent cannot be obtained but Panel is satisfied that access to those records is needed then the person holding them should be compelled to produce those records.

Setting aside

41. A person who has received a Witness or Production Order may apply to have it set aside (in whole or in part). An application must be made to the Panel in writing and, in the case of an Order issued at the request of a party to the proceedings, that party has a right to be heard on such an application.

Failure to comply

42. It is a criminal offence for a person, without reasonable excuse, to fail to comply with any requirement imposed by a Panel under Article 25(2) or rules made by virtue of Article 32(2)(m) (or any corresponding rule). Under Article 39(5) of the Order, offences are punishable on summary conviction by an unlimited fine in England and Wales or not exceeding level 5 on the standard scale in Scotland and Northern Ireland. (currently £5,000).

Annex

[PRACTICE] COMMITTEE

[WITNESS] [PRODUCTION] ORDER

TO: [name and address]

An allegation relating to the fitness to practise of [name of registrant] has been made by the Health and Care Professions Council and a hearing in respect of that allegation will take place before a Panel of the Committee at:

[date, time and venue]

In accordance with the Health and Care Professions Council ([Practice] Committee) (Procedure) Rules 2003, **YOU ARE ORDERED TO:**

[attend that hearing to give evidence][and][produce the following documents:]

Signed: _____ Panel Chair

Date: _____

Important Notice – please read

It's important for us to tell you that, if you fail, without reasonable excuse, as required by this order to:

- produce any documents; and/or
- attend a hearing and give evidence;

Ignoring this order is a crime

You will be committing an offence under the Health Professions Order 2001. On conviction, you will be liable to an **unlimited fine** in England and Wales or a fine of up to **£5000** in Scotland and Northern Ireland.