

Health and Care Professions Tribunal Service

PRACTICE NOTE

Witness and Production Orders

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

Introduction

Panels may require any person (other than the registrant concerned) to attend a hearing and give evidence or produce documents. Failure to comply with a requirement imposed by a Panel is a criminal offence.

The powers of Panels

The Panel rules¹ 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

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).

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.

A party should not apply for an Order unless that party has first asked the witness to attend and the witness has:

- refused to attend or confirm that they will do so;
- agreed to attend, but the applicant has reasonable grounds for believing that the witness will not do so; or

¹ HCPC (Investigating Committee) (Procedure) Rules 2003, r. 6(8); 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).

- 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.

A party seeking to have an Order issued to any person must apply to the Panel in writing setting out:

- the name and address of the person concerned;
- the terms of the Order sought;
- details of any information being sought;
- the steps which the applicant has taken to secure the attendance of, or production by, that person on a voluntary basis; and
- evidence to show why attendance or production by that person is likely to support the case of the applicant.

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

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.

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.

Compliance with Orders

A person should not be required to attend in response to a Witness Order unless it has been served at least seven days before the hearing or, if served within that period, the person has informed the Panel that he or she is willing to attend.

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:

- produce a photographic or other facsimile copy of the document or the relevant parts of it; and
- make them available for inspection by the Panel.

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.

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

A Panel cannot exercise its powers in order to obtain:

- information which a person is prohibited from disclosing by or under any other enactment²; or
- information or documents which a person could not be compelled to supply or produce in civil proceedings³.

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

- subject to legal professional privilege:
 - communications between lawyer and client for the purposes of giving or receiving legal advice, or
 - communications whose dominant purpose relates to pending or contemplated litigation;
- correspondence which is 'without prejudice' between parties seeking to settle a matter which will otherwise be the subject of civil proceedings; or
- subject to Public Interest Immunity, for example on the grounds of national security.

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

Registrants and others who are responsible for health and care records sometimes mistakenly assume that the Data Protection Act 1998 prevents them from disclosing information about service users to a Panel. That is not the case, as section 35(1) of that Act exempts personal data from the non-disclosure provisions where disclosure is required by or under any enactment, such as the Health Professions Order 2001.

Equally, extra-statutory data protection measures (such as the Caldicott Guardian arrangements) do not prevent disclosure to the HCPC under the Order.

² 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.

³ i.e. proceedings before the court to which any appeal would be made against the decision of the Panel.

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.

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.

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

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

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, i

Offences are punishable on summary conviction by a fine not exceeding level 5 on the standard scale (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: _____

IGNORING THIS ORDER IS A CRIME

If you fail, without reasonable excuse, as required by this order to:

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

you will be committing an offence under the Health Professions Order 2001. On conviction, you will be liable to a fine of up to **£5000**.