

# PRACTICE NOTE

## Competence and Compellability of Witnesses

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

### Introduction

A person who can lawfully be called to give evidence is a "competent" witness and a competent witness is "compellable" if he or she can be required to give evidence when unwilling to do so.

### Background

Proceedings before Practice Committee Panels are civil in nature and the procedural rules<sup>1</sup> which apply to those proceedings provide Panels with the power 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, subject to that exception, once called, must co-operate fully in the proceedings.

In proceedings before Panels 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 the proceedings.

### Competence

Competence deals with the question of whether a witness may legally give evidence. In this context, 'competent' does not mean 'reliable'.

Questions of competence are a matter for the Panel. Most witnesses will give their evidence without any challenge to their competence. However, if the issue of competence 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 will lie upon the party seeking to call the witness.

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

<sup>2</sup> for example, refusing to disclose lawyer - client communications, 'without prejudice' correspondence or matters which are subject to public interest immunity.

Any necessary questioning of the witness by the Panel should take place in the presence of the parties and, if necessary, the Panel may hear expert evidence on the competence of a witness.

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 by Bridge LJ in *R v Hayes*<sup>3</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 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>4</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 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**

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

A witness may be prevented by incapacity, such as mental illness or drunkenness, from being competent but that lack of competence is only co-extensive with the incapacity. Thus a mentally ill person is competent during lucid intervals and 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 their 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.

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<sup>3</sup> [1977] 1 WLR 238

<sup>4</sup> for the purposes of section 96 a child is a person under the age of 18

## **Compellability**

Compellability deals with the question of 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 and, 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, Article 32(2)(m) of the Health Professions Order 2001 provides that 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.

A witness who, without reasonable excuse refuses to attend, or to answer admissible questions put to them in, Panel proceedings commits an offence and is liable on summary conviction to a fine of up to level 5 on the standard scale (£5,000).

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