

PRACTICE NOTE

Drafting Fitness to Practise Decisions

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

Introduction

Practice Committee Panels have a legal duty to provide reasons for their decisions, both at common law and as a facet of the right to a fair hearing which is protected by Article 6 of the European Convention on Human Rights.

Beyond that legal duty, Panels have an obligation to explain the decisions they reach and the reasons for them, as part of the open and transparent processes which the HPC seeks to operate.

Background

The decision in *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin) identified that Practice Committees have a duty to provide adequate reasons for their decisions and that the duty arises:

- at common law; on the basis that a Panel must give adequate reasons for its decision in order to enable the registrant concerned to exercise the right of appeal. Without knowing the basis for the decision, that right of appeal may be rendered illusory and both the parties and the appellate court must be able to understand why the Committee reached its decision.
- as part of the Article 6 ECHR obligations to provide a fair hearing associated with the determination of civil rights and obligations. In deciding whether the requirements of Article 6 are met, the whole of the proceedings, including the availability of an appeal to the courts, must be considered. Inevitably, the effectiveness of the right of appeal may depend on the Panel providing adequate reasons.
- as a practical consideration, in that Panels should give adequate reasons for their decisions to enable CHRE to consider whether it wishes to challenge the decision using its powers under section 29 of the NHS Reform and Healthcare Professions Act 2002.

What should a decision include?

Whatever decision a Panel reaches, it should be recorded in a manner which explains what the Panel decided and, just as importantly why it did so. The decision should be written in a form that enables the reasonably intelligent reader to understand the issues before the Panel, its findings and decision and the reasons for them without the need to refer to any other materials.

The decision should include:

- the findings of fact made by the Panel. Allegations are based upon facts and the Panels should identify the facts which were undisputed, the facts in dispute and in relation to latter, the findings of fact which it made and why;
- the conclusions reached by the Panel on any submissions made by the parties;
- whether or not the facts amount to the ground(s) set out in the allegation and why. For example, why the findings amount to misconduct, lack of competence etc.;
- in consequence, whether or not fitness to practise is impaired and why;
- any advice that was received from the Legal Assessor and whether that advice was accepted. It is of particularly important for Panels to record in detail any decision to disregard the advice given by a Legal Assessor and the reasons for so doing;
- any evidence given by way of mitigation or aggravation and the findings that the Panel made on basis of that evidence;
- any sanction that was imposed, why it was appropriate and, if it does not accord with the HPC Indicative Sanctions Policy, the specific circumstances of the case which justify that deviation;
- any other procedural issues such as requests for adjournments or Human Rights Act challenges and how they were dealt with.

Drafting Style

The length and detail of decisions will vary according to nature and complexity of case before the Panel and the decision it has reached. However, Panels should seek to establish a consistent approach to drafting decisions and, so far as possible, they should be comprehensive and written in plain English.

Decisions should:

- be written in clear and unambiguous terms; avoiding jargon, technical or esoteric language or explaining any which must be used;

- be written using short sentences and short paragraphs;
- avoid complicated or unfamiliar words and use precise but everyday language (e.g. “start” instead of “commence”);
- be written for the target audience, so that the registrant concerned, any complainant and other interested parties can understand the decision reached and the reasons for it;
- be self contained, so that without any other materials the reasonably intelligent and literate reader is able to understand the case before the Panel, the decision it reached and why it did so;

Drafting Orders

Where a Panel finds a registrant’s fitness to practise is impaired and imposes a sanction upon the registrant, its decision must clearly set out the Order which it has made.

Caution Orders, Suspension Orders and Striking Off Orders should all be expressed in a form which is addressed to the Registrar who, in accordance with the Panel’s decision, must annotate or amend the Register from the date that the order takes effect (i.e. once any period for making an appeal has expired, or any such appeal has concluded or been withdrawn). For example:

Caution Order

ORDER: That the Registrar is directed to annotate the register entry of [name] with a caution which is to remain on the register for a period of [three] year(s) from the date this order comes into effect.

Suspension Order

ORDER: That the Registrar is directed to suspend the registration of [name] for a period of [x] year(s) from the date this order comes into effect.

Striking Off Order

ORDER: That the Registrar is directed to strike the name of [Registrant] from the Register on the date this order comes into effect.

The opening paragraph of any Conditions of Practice Orders should similarly be addressed to the Registrar, but making appropriate reference to the registrant, and the detailed conditions should be written in the second person so that they are clearly addressed to the registrant concerned. For example:

Conditions of Practice

ORDER: The Registrar is directed to annotate the Register to show that, [for a period of [time]] from the date that this Order comes into effect (“the Operative Date”), you, [name of registrant], must comply with the following conditions of practice:

1. Within [time period] of the Operative Date you must etc.....

Drafting Conditions of Practice

From the above examples it is clear that the drafting of Conditions of Practice Orders is the more difficult task. This is especially so given that Orders do not take effect on a fixed date, but only when the relevant appeal period has expired or any appeal has been disposed of or withdrawn.

For the other forms of Order, which simply run for a fixed period of years, this does not cause much difficulty. However, conditions of practice inevitably involve periodic compliance arrangements. If conditions of practice are to work, then the dates on which evidence of compliance is to be sent to the HPC must be clear and certain, so that appropriate follow up action can be taken in respect of those who fail to comply. The simplest means of overcoming this difficulty is to define the date on which the Order finally takes effect as its “Operative Date” and then to relate all other dates and time limits to that Operative Date.

In drafting Conditions Of Practice Orders, Panels also needs to consider the following three issues:

- **are the conditions realistic?**

Will the registrant be able to comply with these conditions; are they proportionate; do they provide the necessary level of public protection; and will they work if the registrant changes jobs?

For example, if the conditions require the registrant to improve treatment premises, facilities or equipment, they should only be set at the standard reasonably required of a typical practitioner from the profession or specialism concerned. In setting conditions of this kind, Panels should take account of any relevant guidance issued by professional bodies or similar organisations.

Equally, if conditions have been prepared with the support of the registrant’s employer and are thus job-related, it may be necessary to include a condition requiring the registrant to inform HPC if the registrant changes jobs.

- **are the conditions verifiable?**

Do they impose obligations that require straightforward 'yes' or 'no' compliance decisions; do they simply require the registrant to do something or must they also prove it has been done; can the due dates be clearly determined?

For example, conditions requiring a registrant not to deal with certain types of case or service user may not need ongoing proof of compliance but many other conditions will need to be supported by evidence, such as periodic written confirmation that the registrant is continuing to undergo alcohol dependency treatment. Where evidence is required it should be in a form which allows 'yes' or 'no' decisions to be made. Conditions requiring registrants to submit documents or records to the HPC for assessment or audit will not meet this requirement.

In cases where compliance with conditions may need to be verified by HPC by means of inspection - for example, conditions to improve premises or facilities, record keeping systems or chaperoning arrangements - the Panel's order should include a specific requirement that the registrant must allow and co-operate with inspection by HPC upon reasonable notice.

- **are the conditions directed at the right person?**

Do the conditions clearly impose obligations on the registrant; are any conditions mistakenly directed at someone else?

It is for the registrant to comply with the conditions which have been imposed and, in drafting orders, care must be taken not to inadvertently impose a condition on a third party, such as an employer or GP. There is a significant difference between "you must submit to the Committee evidence from the doctor treating you that..." and "your GP must submit to the Committee evidence that..."

Conditions Bank

Example conditions of practice are provided in the 'Conditions Bank' set out in the Annex to this Practice Note. Those conditions are not intended to be either prescriptive or definitive but are intended to assist Panels in the drafting of Conditions of Practice Orders.

Advice from the Legal Assessor

Panel members are reminded that Article 34(3) of the Order allows Legal Assessors to assist the Panel in drafting their decisions. Panels should take advantage of the expertise Legal Assessors can offer in helping them drafting their decisions, especially in relation to decisions which include conditions of practice orders.

The Legal Assessor's role is to assist in the drafting of the decision, not in the making of that decision. Panels should have established a clear outline of their decision, including their findings they have made in relation to the evidence and on the issue impairment, before asking the Legal Assessor to join them to assist in drafting their decision.

It is important for Panels to ensure that no confusion arises on the part of the registrant or any other party about role the Legal Assessor in that part of the process. Before retiring to make their decision, Panels should invite the Legal Assessor to explain this aspect of their role to the parties. Alternatively, the Panel should return from its deliberations and explain to the parties that it has reached a decision and that the Legal Assessor is now being asked to assist the Panel in the drafting of that decision.

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ANNEX

CONDITIONS BANK

A. INTRODUCTORY PARAGRAPH

ORDER: The Registrar is directed to annotate the HPC Register to show that, [for a period of [time]] from the date that this Order takes effect (“the Operative Date”), you, [name of registrant], must comply with the following conditions of practice:

1. [set out conditions as numbered paragraphs]

B. EDUCATION AND TRAINING REQUIREMENTS

1. Within [time period] of the Operative Date you must (1) satisfactorily complete [name of course etc] and (2) forward a copy of your results to the HPC.
2. Within [time period] of the Operative Date you must (1) take and pass [name of examination etc.] and (2) forward a copy of your results to the HPC.
3. Before undertaking [type of practice, work or procedure] you must (1) satisfactorily complete [a period of supervised practice/refresher training/examination etc.] and (2) forward a copy of your results to the HPC.

C. PRACTICE RESTRICTIONS

4. You must confine your professional practice to [set out restriction]
5. You must not carry out [type of work or procedure][unless directly supervised by a [type of person]].
6. You must maintain a record of every case where you have undertaken [type of work or procedure] [which must be signed by [supervisor]] and you must:
 - A. provide a copy of these records to the HPC on a [monthly etc.] basis, the first report to be provided within [time] of the Operative Date, or confirm that there have been no such cases during that period; and
 - B. make those records available for inspection at all reasonable times by any person authorised to act on behalf of the HPC.
7. You must not undertake [work/consultations] with [type(s) of service user]

8. You must not undertake intimate examinations of service users.
9. You must not undertake any out-of-hours work or on-call duties [other than at [location]][without the prior approval of the HPC].
10. You must not [prescribe][administer][supply][possess][any or type of prescription medicines]
11. You must not prescribe [any or type of prescription medicines] for [yourself/a member of your family/etc.].
12. You must not act as a supplementary prescriber.

D CHAPERONES

13. Except in life threatening emergencies, you must not be involved in the direct provision of services to [female service users/male services users/service users under the age of X etc.] without a chaperone being present.
14. You must maintain a record of:
 - A. every case where you have be involved in the direct provision of services to [female service users etc.], in each case signed by the chaperone; and
 - B. every case where you have be involved in the direct provision of services to such service users in a life-threatening emergency and without a chaperone being present.
15. You must provide a copy of these records to the HPC on a [monthly etc.] basis, the first report to be provided within [time] of the Operative Date or, alternatively, confirm that there have been no such cases during that period and must make those records available for inspection at all reasonable times by any person authorised to act on behalf of the HPC.

E. SUPERVISION REQUIREMENTS

16. You must place yourself and remain under the supervision of [workplace supervisor, medical supervisor etc.] approved by the HPC, attend upon that supervisor as required and follow their advice and recommendations.

F. TREATMENT REQUIREMENTS

17. You must register with and remain under the care of a [general practitioner/occupational health specialist etc] and inform him or her that you are subject to these conditions.
18. You must inform your [general practitioner/occupational health specialist etc] about these conditions of practice and authorise that person to provide the HPC with information about your health and any treatment you are receiving.
19. You must keep your professional commitments under review and limit your professional practice in accordance with the advice of your [general practitioner/occupational health specialist/therapist].
20. You must cease practising immediately if you are advised to do so by your [general practitioner/occupational health specialist/therapist].

G SUBSTANCE DEPENDENCY

21. You must comply with arrangements made on behalf of the HPC for the testing [including unannounced testing], of your [breath, blood, urine, saliva, hair] for the [recent and/or long-term] ingestion of alcohol and other drugs.
22. You must attend regularly meetings of [Alcoholics Anonymous/Narcotics Anonymous] or any other support group approved by the HPC and must provide the HPC with evidence of your attendance at such meetings
23. You must [limit your][abstain absolutely from the] consumption of alcohol.
24. You must refrain from self-medication [, [including][apart from] over the counter medicines [containing [active ingredient] and] which do not require a prescription,] and only take medicines as prescribed for you by a healthcare practitioner who is responsible for your care.

H. INFORMING HPC AND OTHERS

25. You must promptly inform the HPC if you cease to be employed by your current employer or take up any other or further employment.
26. You must promptly inform the HPC of any disciplinary proceedings taken against you by your employer.

27. You must inform the following parties that your registration is subject to these conditions:
- A. any organisation or person employing or contracting with you to undertake professional work;
 - B. any agency you are registered with or apply to be registered with (at the time of application); and
 - C. any prospective employer (at the time of your application).

I. PERSONAL DEVELOPMENT

28. You must work with [supervisor etc.] to formulate a Personal Development Plan designed to address the deficiencies in the following areas of your practice:

[List areas found to be unacceptable or a cause for concern, or which the Panel have determined to be of concern]

29. Within three months of the Operative Date you must forward a copy of your Personal Development Plan to the HPC.
30. You must meet with [supervisor etc.] on a [monthly etc.] basis to consider your progress towards achieving the aims set out in your Personal Development Plan.
31. You must allow [supervisor etc.] to provide information to the HPC about your progress towards achieving the aims set out in your Personal Development Plan.
32. You must maintain a reflective practice profile detailing every occasion when you [specify activity etc.] and must provide a copy of that profile to the HPC on a [monthly etc.] basis or confirm that there have been no such occasions in that period, the first profile or confirmation to be provided within [time] of the Operative Date.

J. COSTS, APPROVALS ETC.

33. You will be responsible for meeting any and all costs associated with complying with these conditions.
34. Any condition requiring you to [provide any information to] [obtain the approval of] the HPC is to be met by you [sending the information to the offices of the HPC, marked for the attention of] [obtaining written approval from] the Director of Fitness to Practise.

