

Agenda Item 8

Enclosure 6

**Health and Care Professions Council
22 September 2016**

Proceeding in Absence Practice Note

For discussion and approval

**From Jason Rowbottom, Adjudication
Manager - Hearings**

Council, 22 September 2016

Review of Practice Notes

Executive summary and recommendations

Introduction

Practice Notes exist to provide clear guidance to all parties with an interest or involvement in a Fitness to Practise investigation or Hearing. As our processes change, or there are case law or learning issues, it is necessary to review these documents. The following provides an update about the ongoing programme of review of these key documents.

Process of review

There are currently 32 Practice Notes. These documents are available on HCPC's website, and are actively referred to during the investigation and hearing processes.

We aim to review each Practice Note on an annual basis. The review has three stages: firstly, HCPC review any relevant case outcomes, complaints or learning points from bodies such as the Professional Standards Authority. Any changes to content or wording are then added. The second stage is for a review by HCPC's Special Counsel, to ascertain if any legislative changes are required. The third and final stage is to review the readability of the document prior to consideration at Council.

In most cases, there are little or no changes, or there is the requirement to edit the document to make it easier to understand or use.

The Practice Notes are not reviewed in isolation. Most relate to an element of an HCPC policy, so the review cycle of the Practice Notes is linked to the review of policies, or any operational guidance for HCPC team members.

The review cycle and number of documents is such that we envisage approximately three revised Practice Notes per Council meeting. We have prioritised the review based on operational impact on Fitness to Practise case activity, time elapsed since the previous review, and the volume of review time by Council.

Summary of changes to Practice Notes for Council approval

One Practice note has been reviewed in relation to Proceeding in Absence and has had substantial updates to take account of updated case law. The updated Practice Note places greater emphasis on the Panel's discretion to proceed in the absence of a registrant as well outlining the responsibilities of the HCPC and the Panel to ensure that

where a registrant is absent that the hearing is conducted fairly and progressed expeditiously.

The Practice Notes have been reviewed by HCPC's Special Counsel, who has confirmed that the documents contain the required current legislative background to support these areas of work.

Decision

The Council is asked to discuss and approve the changes to the Practice Note

Resource implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Financial implications

Accounted for in the 2016-17 Fitness to Practise Directorate Budget

Appendices

Appendix One: Practice Note: Proceeding in Absence

Date of paper

7 September 2016

PRACTICE NOTE

Proceeding in the absence of the Registrant

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

Introduction

As a general principle, a registrant who is facing a fitness to practise allegation has the right to be present and represented at a hearing. However, the procedural rules¹ ~~for hearings~~ provide that, if a registrant is neither present nor represented at a hearing, the Panel ~~may nevertheless~~ has the discretion to proceed if it is satisfied that all reasonable steps have been taken to serve notice of the hearing on the registrant.

~~The decision to proceed with a hearing in the absence of the registrant is a matter within the discretion of the Panel. However, that discretion is one which has been described by the courts as “severely constrained”². As the House of Lords held in *R v Jones*,³ the discretion to commence and conduct proceedings in the absence of the registrant “should be exercised with the utmost care and caution.”~~

In exercising ~~that the~~ discretion to proceed in absence, Panels must strike a ~~careful~~ balance between fairness to the registrant and fairness to the wider public interest. Fairness to the registrant is of prime importance but, given the HCPC’s statutory objective of protecting the public, as the Court of Appeal has made clear, the fair, economical, expeditious and efficient disposal of allegations made against registrants is of very real importance.⁴

Exercise of discretion

In deciding whether to proceed in the absence of the registrant, Panels must consider all of the circumstances of the case, ~~including and, in particular,~~ whether the ~~registrant’s actions amount to a waiver of the right~~ registrant has chosen not to be present or represented.

The first issue to be addressed is whether notice of the proceedings has been served on the registrant.

¹ HCPC (Investigating Committee) (Procedure) Rules 2003 (SI 2003/1574), Rule 9; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 (SI 2003/1575), Rule 11; HCPC (Health Committee) (Procedure) Rules 2003 (SI 2003/1576), Rule 11.

² ~~*Tait v The Royal College of Veterinary Surgeons* [2003] UKPC 34~~

³ ~~[2002] UKHL 5~~

⁴ *GMC v Adeogba* [2016] EWCA Civ 162

The procedural rules require the HCPC to send notice to the registrant's address "as it appears in the register". This is a point on which detailed inquiry by a Panel will rarely be necessary. Registrants have an obligation to keep their register entry up to date and, as the Court of Appeal stated in *Adeogba*:

*"there is a burden on...all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."*⁵

The HCPC will take all reasonable steps to communicate with a registrant where alternative contact details are available (such as an email address), but as the decision in *Adeogba* makes clear, the HCPC's only obligation in terms of service is to communicate with the registrant at the address shown in the register and nothing more.

Further, in *Jatta v NMC*⁶ the court held that a Panel is entitled to proceed in absence where a registrant is no longer at his or her registered address and has failed to provide revised contact details, even though the only address that the regulator has is one at which the Panel knows the document would not have come to the registrant's attention.

If the Panel is satisfied on the issue of notice, it must then decide whether to proceed in the registrant's absence, having regard to all the circumstances of which the Panel is aware and balancing fairness to the registrant with fairness to the HCPC and the interests of the public.

In reaching a-its decision, the Panels should ~~take account of~~have regard to the factors identified by the Court of Appeal in *R v Hayward*⁷ and approved by the House of Lords in *R v Jones*.⁸ ~~That~~However, those cases concerned the absence of a-criminal defendants and, as the court noted in *Adeogba* "it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far."⁹ As the court pointed out in that case, where criminal proceedings are adjourned because of the defendant's absence, the defendant can be arrested and brought before the court. That remedy is not available in regulatory proceedings.

but tThe factors identified in ~~that case~~*Hayward* (appropriately modified as set out below) are ~~relevant to fitness to practice proceedings~~:

- the nature and circumstances of the registrant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;

⁵ paragraph 20

⁶ 2009] EWCA Civ 824

⁷ [2001] EWCA Crim. 168

⁸ [2002] UKHL 5

⁹ paragraph 18

- whether an adjournment might is likely to result in the registrant attending the proceedings at a later date;
- the likely length of any such adjournment;
- whether the registrant, despite being absent, wished to be represented at the hearing or has waived that right;
- the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant;
- the extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case;
- the general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates;
- the effect of delay on the memories of witnesses;
- where allegations against more than one registrant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.

Procedure

In deciding whether to proceed in absence, the key issue for the Panel is whether the registrant had deliberately chosen not to engage in the process.

In many cases where f a Registrant the registrant fails to attend a hearing, there will be a history of failure to engage with the fitness to practise process and, in such cases, adjourning the proceedings to provide the registrant with a further opportunity to attend is likely to be a fruitless exercise.

HCPC presenting officers should assist Panels in this regard by ensuring that, in cases where there has been a lack of engagement by the registrant and non-attendance is anticipated, a chronology of the registrant's interaction with the HCPC is made available to the Panel.

In cases where the registrant fails to appear at a hearing and there has been either a lack of engagement or a point at which a registrant has clearly chosen to disengage, Panels should resist the temptation to ask hearing officers to attempt to contact the registrant by telephone. A registrant who has decided, for whatever reason, not to attend a hearing is unlikely to be willing to provide a full and frank response when put on the spot in this manner.

~~and has not provided any explanation for being absent, the Panel will need to determine whether it is appropriate to proceed in the registrant's absence.~~

~~The Panel should first seek clarification of whether notice of the hearing was correctly sent to the registrant. If it is satisfied that notice was properly given (but not otherwise) the Panel should then consider the factors set out above to determine whether, in all the circumstances, it is appropriate to proceed with the hearing in the absence of the registrant. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.~~

If the Panel decides that a hearing should take place or continue in the absence of the registrant, ~~The~~the decision reached and the reasons for doing so should be clearly recorded as part of the record of the proceedings. The Panel must also, they must ensure that the hearing is as fair as the circumstances permit. ~~In particular,~~ This includes taking reasonable steps ~~must be taken~~ during the giving of evidence to test the HCPC's case and to make such points on behalf of the registrant as the evidence permits.

The Panel must also avoid reaching any improper conclusion about the absence of the registrant, ~~and,~~ in particular, it must not treat the registrant's absence as an admission that any allegation is well founded.

August 2012