



A guide to providing evidence at fitness to practise hearings

Mr Liam Heffernan, Legal Counsel at Medisec, outlines what doctors need to be aware of when providing records and giving evidence at Medical Council fitness to practise inquiries

When a doctor is subject to an inquiry before the fitness to practise committee (FTPC) of the Medical Council, other doctors who may have been involved in the patient's care may be asked to provide medical records, provide a witness statement and also give evidence at the inquiry.

We appreciate that it can be stressful to give evidence in a disciplinary hearing concerning a colleague, and accordingly, we have set out a summary of the issues that might arise, including what to expect if you are asked to provide evidence at an inquiry.

Patient confidentiality

It is understandable that a doctor may have concerns regarding patient confidentiality when requested to provide information or hand over patient records. However, there are certain legislative provisions dealing with disclosure of patient information in this context. The key provision is that under the Medical Practitioners Act 2007, for the purposes of an inquiry, the FTPC has all the powers of the High Court, including the power to compel witnesses to attend and give evidence as well as the power to compel the production of documents/records.

In addition, the Medical Council's *Guide to Professional Conduct and Ethics* ('the Guide') provides that you must disclose information where it is required by law, for example "when ordered by a judge in a court of law, or by a tribunal or body established by an Act of the Oireachtas". The Data Protection Acts also permit disclosure of personal information if "required by or under any enactment or by a rule of law or order of a court".

Production summons

The FTPC can issue a 'production summons' compelling the production of records or documents. A doctor must comply with the summons within the time specified, as if it were a High Court Order. If it is not feasible to comply with the summons within the timeframe provided, we recommend that a doctor contact the solicitor for the Medical Council and ask for an extension of time, setting out the reasons for the request.

When a production summons is issued, patient consent is not required to release the records or documents specified. However, in terms of informing a patient, the Guide provides that: "When you disclose information as required by law or in the public interest, you should inform patients of the disclosure, unless this would cause them serious harm, or would undermine the purpose of the disclosure."

Therefore, even if you believe that the patient is aware of the investigation, you can let the patient know that the production summons has been received and the documents disclosed, unless you believe this would cause the patient serious harm. In the usual course of events, copies of any documents



you send to the solicitors for the Medical Council will be disclosed to the doctor who is the subject of the complaint and/or their legal representatives.

It is important to remember that a doctor should never amend or alter any contemporaneous records after the fact. If you notice an error or inaccuracy in the notes prior to sending them to the solicitors for the Medical Council, you should consult with your indemnifier before adding any retrospective entries to correct any error or inaccuracy or to include information not recorded at the time. Any such retrospective entry must include the date/time of entry and the name of

paring a witness statement, you should review the patient's medical records in advance and have a copy to hand during the meeting/call. The Medical Council's solicitors will prepare a draft witness statement on foot of your answers which will be sent to you for review.

► Carefully review the draft statement sent to you and make any changes you deem necessary in order to accurately reflect your evidence. You should be fully satisfied about the accuracy of its content as you may be examined on its content later. Your statement should be limited to the factual narrative of the incident or your involvement with the patient or doctor the subject of the complaint.

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the person who made it. The original entry or entries should not be deleted.

Witness statement

A doctor may also be asked to provide a witness statement to the solicitors for the Medical Council. This is a regular occurrence in the context of information gathering for an inquiry, and a doctor should not be alarmed if they receive this request. Some key points to be aware of are:

► Although the solicitors for the Medical Council can meet with you to gather your evidence and prepare your witness statement, it may be preferable for the doctor to work with their indemnifier to prepare a written witness statement in a format agreeable to solicitors for the Medical Council.

► If you are meeting with the solicitors for the Medical Council for the purpose of pre-

► A copy of the draft and signed statement will usually be sent to the doctor who is the subject of the inquiry and/or their representatives.

► It is possible that you will be called to give evidence at the inquiry as a factual witness in relation to your witness statement. However, on some occasions, facts or statements can be agreed in advance and admitted into evidence without the necessity for you to attend and give evidence.

► You are not obliged to give a witness statement; however, you can be compelled to attend the inquiry to give evidence as a factual witness in any event. This is done by issuing and serving a witness summons. Even if you are agreeable to attending voluntarily, you may ask for a copy of a witness summons to provide to your employer if necessary.

Attending a fitness to practise inquiry to give evidence

Inquiries are usually held at the Medical Council, Kingram House, Kingram Place, Dublin 2 (they have been held virtually throughout the Covid-19 pandemic). The solicitors for the Medical Council should inform you of the day(s) on which you will be required to give evidence. They may ask you to attend the Medical Council at a certain time in order to meet with the solicitor and/or barrister for the CEO of the Medical Council. Unfortunately, if your evidence is not reached on the day of your attendance you may be required to attend on another day. We would suggest that you liaise closely with the Medical Council to agree a realistic timeframe to cause as little disruption as possible to your practice. When in-person inquiries resume, if it is very difficult for you to attend the inquiry, it may be possible to give evidence by way of video link or phone.

All necessary expenses including travel and food should be reimbursed by the Medical Council after the inquiry. In circumstances where it is necessary for you to arrange for another doctor to provide cover, you should inform the solicitor for the Medical Council in advance and ask in writing if any relevant fees will be reimbursed.

Public v private

Inquiries are usually held in public, meaning members of the public can attend and the media can report on the proceedings, including any evidence you may give. As a witness, you can apply to the FTPC in advance to have your evidence or the inquiry heard "otherwise than in public". This includes applying for your name to be anonymised. The FTPC must be satisfied that there is "reasonable and sufficient cause" to depart from the default position.

In terms of providing evidence, you will be called into the inquiry room when it is your time to give evidence. You will not be allowed to bring a copy of your witness statement with you, but you can review this beforehand.

At the inquiry, the parties present will be the three person FTPC, a legal assessor for the FTPC and the doctor who is subject to the inquiry together with their legal team if they are represented. The solicitors and barrister for the CEO of the Medical Council, who present the case against the doctor, are also in attendance along with a stenographer.

You will be asked to swear an oath or to make a statement about the truth of your evidence. A barrister for the CEO will initially ask you questions based on your witness statement. Following this, the doctor's legal team and/or the FTPC may have their own questions to ask. Doctors should not feel pressurised or rushed, and if you are unsure of a question asked, you can ask for it to be repeated.

Receiving a request to provide a witness statement or attend an inquiry to provide factual evidence can understandably be a daunting experience for a doctor. If you receive any such correspondence you should contact your indemnifier for assistance or guidance.