

Fitness to Practise Forum 23 April 2008

Equal Treatment Practice Note

Executive summary and recommendations

Introduction

The Executive has undertaken a review of the equal treatment practice note. That practice note is attached to this paper as an appendix.

Decision

The forum is asked to approve the attached practice note and recommend that the committee do the same.

Background information

The Council approved HPC's Equality and Diversity Scheme in December 2007. The scheme is now published on the HPC website.

Resource implications

None

Financial implications

Taken into consideration in the fitness to practise budget for 2008-2009

Appendices

Equal Treatment Practice Note

Date of paper

10 April 2008

PRACTICE NOTE

Equal Treatment

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

Introduction

Many people will find appearing before a Panel to be a daunting experience and it is vital that Panels, whilst remaining fair, independent and impartial, are aware of and responsive to the differing needs of those who appear before them.

Social diversity includes not only race and ethnicity but also differences in linguistic, religious and cultural backgrounds, as well as issues of gender, sexuality and disability. Unless everyone involved in proceedings before a Panel can understand the process, the material put before them and the meaning of the questions asked and answers given in the course of the proceedings, the process is at best impeded and, at worst, justice may be denied.

In a modern and diverse society, equal treatment does not simply mean treating everybody in exactly the same way, it is about ensuring fairness. In some cases it means providing special or different treatment, in order that justice is both done and seen to be done.

By its very nature, this Practice Note can only deal briefly with a broad and complex area or practice. For further and more detailed guidance Panels are advised to consult the *Equal Treatment Benchbook* published by the Judicial Studies Board.

Effective communication

People with personal impairments or who are disadvantaged in society are entitled to a fair hearing, as are those who may have difficulty coping with the language, procedures or facilities of Panel proceedings.

Panels should make effective use of communication and recognise that, for example, just because someone remains silent does not mean that they necessarily understand or feel that they have been adequately understood. They may simply feel too intimidated or too inarticulate to speak up.

All of us view the world from our own perspective, based on our own knowledge, understanding and cultural conditioning. There is a fine line between Panel members relying on this and resorting to stereotypes which can lead to injustice.

SOME BASIC DOS AND DON'TS

DO:

- ascertain how parties wish to be addressed;
- obtain advance information about any disability or medical problem which a person who is appearing before you may have;
- allow more time for special arrangements, breaks etc. to accommodate special needs at hearings;
- be understanding of people's difficulties and needs;
- try to put yourself in their position – the stress of attending a hearing should not be made worse unnecessarily, through a failure to anticipate foreseeable problems;
- bear in mind the problems facing unrepresented parties;
- ensure that appropriate measures are taken to protect vulnerable witnesses.

DON'T

- underestimate the stress and worry faced by those appearing before you;
- overlook the use – unconscious or otherwise – of gender-based, racist or other stereotyping as an evidential short-cut;
- allow over rigorous cross-examination of vulnerable witnesses;
- allow anyone to be put in a position where they face hostility or ridicule;
- use inappropriate “value laden” language, for example, ‘girl’ other than when speaking to a child or ‘British’ as a synonym for White, English or Christian.

PEOPLE WITH DISABILITIES

The Disability Discrimination Act 1995 (DDA) defines a disabled person as “someone with a physical or mental impairment that has a substantial, adverse, long-term effect on their ability to carry out normal day-to-day activities”. For the purpose of the DDA “long term” means as lasting for more than 12 months.

Disability may, for example, relate to mobility, manual dexterity, physical co-ordination, incontinence, speech, hearing or sight, memory, or ability to concentrate, learn or understand. It is estimated that at least 8.5 million people in the UK currently meet the definition of disabled person under the DDA.

Panels have a duty under the DDA to take account of disabilities and, therefore, steps must be taken to accommodate the special needs of parties, witnesses or advocates appearing before the Panel. It is important that Panels identify such needs as early as possible, so that appropriate steps can then be taken such as arranging for hearings to take place in accessible rooms or for suitable facilities to be made available. Wherever possible, hearings should take place at venues which are accessible and fitted with a hearing induction loop.

Often simple solutions will help. Short breaks in the proceedings may help those whose concentration is impaired or who need to eat or drink more frequently, take medication or go to the lavatory at frequent intervals. A pre-arranged signal for an urgent trip to the lavatory may be appropriate. The presence of a carer or helper may be necessary. It may help to re-arrange the order in which evidence is heard so that witnesses are not kept waiting.

Panels also need to consider how to overcome difficulties which may arise in the course of the proceedings, for example:

- by adopting a different approach to questioning where a witness has difficulties with memory or comprehension; or
- by using visual aids or providing sign language or speech interpreters to overcome communication difficulties.

In many instances the best solution will simply be for the Panel to find out what the best method of communicating should be, ahead of the hearing, from the person concerned.

The obligation imposed on Panels extend not only to the conduct of the proceedings but also to the decisions they reach. Panels must take care to ensure that decisions do not unfairly discriminate against disabled people.

This is best achieved by Panels dealing with every case on its merits and avoiding stereotypes or judgements about what disabled people can or cannot do. By considering each case individually, Panels will avoid making assumptions about disabled people or disability and instead make an informed decision based on the individual case.

THOSE APPEARING WITHOUT LEGAL REPRESENTATION

There are various reasons why people choose to represent themselves and, for many, it is simply an issue of cost. However, whatever the reason, unrepresented parties are likely to be stressed and worried. Their professional reputation or livelihood may be at stake and yet they may be unaware of basic legal principles and procedures. It is to be expected that they will be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage.

Those who appear without legal representation may not misunderstand the purpose of a hearing or the true issues in the case. They will often lack objectivity, find it difficult to marshal facts and may not appreciate the importance of evidence,. They are unlikely to have the skills of an advocate or be familiar with cross-examination or the testing of evidence.

Panels must try to maintain a balance between assisting the unrepresented party and ensuring that the proceedings are not hindered by problems arising from the unrepresented party's lack of legal knowledge.

At the start of the hearing, the Chair should introduce the Panel and explain how its members should be addressed and introduce the legal assessor and allow them to explain their role. The Chair should then explain the purpose of the hearing, the issues to be decided and the procedure to be followed. The Chair should also explain to the unrepresented party that:

- only one person at a time may speak but that each side will have a full opportunity to present its case;
- if he or she does not understand something, to say so;
- if he or she would like a short break in the proceedings, he or she has only to ask;
- that the issue is decided on the evidence before the Panel and nothing else.

The Chair should be ready to assist an unrepresented registrant in the conduct of his or her case, particularly when they are examining or cross-examining witnesses and giving evidence. The Chair should always ask whether they wish to call any witnesses.

The Chair should be ready to restrain any unnecessary, intimidating or humiliating cross-examination of witnesses – particularly a complainant - by an unrepresented party.

After the hearing, unrepresented parties often do not fully understand the outcome of the case or the reasons for it. The Chair should always set out clearly the reasons for the decision and explain the right of appeal.

RACE AND RELIGIOUS BELIEF

Many of the steps which Panels need to take to address issues of race or religious belief are about differences, such as different naming systems or different forms of oath. Understanding those differences is important, but it is not an end in itself. The true purpose is to assist Panels to ensure that they treat everyone who comes before them equally and with dignity and respect.

Panel members should remember:

- fair treatment involves taking account of difference, treating everyone in the same way is not the same thing as treating everyone fairly;
- everyone has prejudices, so recognise and guard against your own;
- do not make assumptions: all white people are not the same, or are all black, or Asian, or Chinese or Middle Eastern people;
- do not project cultural stereotypes, for example that “all Asian people” avoid eye contact;
- when in doubt, to ask. A polite question about how to pronounce a name or about a particular religious belief or a language requirement will not be offensive when prompted by a genuine desire to get it right.

However committed Panel members may be to fairness and equality, they may still give the opposite impression by using inappropriate, dated or offensive words. There is no fixed code, language and ideas are living and developing all the time. Panel members need to be aware that acceptable language changes and seek to keep abreast of such change. For example, “black”, once regarded as too direct is now acceptable to people of African or Caribbean origin whereas “coloured” is now an offensive term that should not be used.

Similarly, broad descriptors such as “Asian” should be used with care. People may prefer to identify themselves by reference to a specific country, region or religion and younger people of Asian origin born in Britain may refer to themselves as British or British Asians.

Names and naming systems vary considerably between minority groups and some are complex. It is more important for panel members to treat people with courtesy and address them properly than to try to learn all the different naming systems. Ask people how they would like to be addressed, how to pronounce their name and how to spell it. Ask for their full name or first, middle and last names. Do not ask for their “Christian name” or “surname”.

Religious Diversity in the UK

Christianity has not only played a major part in the evolution of society among the white population in the UK, but has also attracted a significant number of adherents within minority groups. There are a number of Asian and Chinese Christian churches, and black churches are currently the fastest growing within the Christian communion. However, Panels will undoubtedly encounter people with a variety of different religious beliefs - or none. There are, in addition, many degrees of devotion within the practice of any faith.

Oath-taking

The Oaths Act 1978 provides for the forms in which oaths may be administered and that a solemn affirmation is of the same force and effect as an oath.

In today's multicultural society everyone should be treated sensitively when making affirmations or swearing oaths. The question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice between two procedures, which are equally valid in legal terms. The primary consideration should be what binds the conscience of the individual and Panels should not assume that an individual belonging to a minority community will automatically prefer to swear an oath rather than affirm.

As a matter of good practice and to confirm the importance of giving truthful evidence, Panel members should sit quietly and pay attention to a person whilst they are swearing an oath or affirming.

All faiths have differing practices with regard to court proceedings and these should be handled by Panels sensitively, with respect, and not as though they are a nuisance. Some witnesses may wish to perform some form of ritual washing, to remove shoes or cover their heads or bow with folded hands whilst taking an oath on their holy scripture. Panels should treat such requests sympathetically, especially as in some faiths the holy scripture is believed to contain the actual presence of Divinity and the request is being made in order to manifest respect to the presence of the Divine.

Jewish, Hindu, Muslim and Sikh women may prefer to affirm if having to give evidence during menstruation or shortly after childbirth.

Panels should ensure that holy books of are available at hearings. It is likely that most demand will be for:

- Bible (Old and New Testaments);
- Hebrew Bible;
- Qur'an (Muslim);
- Gita (Hindu); and
- Sunder Gutka (Sikh).

Holy books should be covered at all times when not in use in cloth or velvet bags. When uncovered, they should only be touched by the person taking the oath, not by Panel members or staff.

CHILDREN

Children rarely appear before Panels but, when they do, case should be expedited as far as possible.

In legal terms a child is a person under the age of 18. Therefore the way in which Panels deal with children who appear as witnesses will to some extent depend upon the age of the child. However, research has shown that children's fears about going to court do not decrease with age, and adolescent witnesses are more likely to exhibit adverse psychological reactions than younger ones.

Panels need to be aware of the sort of stresses and worries going through a child's mind when involved in legal proceedings. This can relate to a fear of the unknown, pressure to withdraw the complaint, fear of retaliation or of publicity, having to relate intimate personal details in front of strangers, and insensitive questioning. Children may worry about having to repeat bad language, being shouted at, not being believed, having to give their address, being sent away or being sent to prison. Perhaps the greatest problem that a child might have to cope with is a feeling of guilt

Panels should never underestimate how little of the proceedings a child understands. A child may not admit to the fact that they do not understand something, so vigilance and some second-guessing are vital.

The Civil Procedure Rules (which are applied by Panels) allow a broad discretion as to how evidence is given in the proceedings, and may allow a child witness to give evidence through a video link or by any other means such as the video tape of a memorandum interview conducted in the context of a criminal investigation.

This power is particularly important where children are concerned in terms of achieving the overriding objective of dealing with cases justly, including ensuring that the parties are on an equal footing. What a child has said on a previous occasion can also be put before the Panel in the form of hearsay evidence.

If a child does have to give evidence in person then the Panel should:

- make appropriate arrangements to avoid any confrontation between the child and any party to the proceedings. This includes welfare provision during breaks and after the evidence is concluded.
- adopt procedures to ensure that the child's testimony may be adduced effectively and fairly.
- permit a third party, such as a parent, to sit near to the child provided that they do not disrupt the child's testimony;
- admit the child's evidence unless the child is incapable of giving intelligible testimony. The Panel must form a view on the child's competence at the earliest possible moment;
- ensure that advocates do not attempt over-rigorous cross-examination and that they use language that is free of jargon and appropriate to the age of the child.

GENDER

There have been many positive changes in society regarding gender roles but, even though women comprise more than half of the adult population, they remain disadvantaged in many areas of life. The disadvantages that women can suffer range from inadequate recognition of their contribution to the home or society to an underestimation of the problems women face as a result of gender bias.

Stereotypes and assumptions about women's lives can unfairly impede them and frequently undermine equality. Panels members must take care to ensure that their own experiences and aspirations, as women or of women they know, are not taken as representative of the experiences of all women. Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject.

In legal proceedings, women often feel humiliated, patronised and disbelieved and this is likely to be particularly true when any intimate medical issue or issue of sexuality arises.

Panels need to be aware that it is a common misconception that a witness's demeanour, when giving evidence, will reflect the truthfulness of their account. This is not necessarily so. Victims of sexual or indecent acts often exhibit a controlled response and in fact mask their feelings, appearing calm and composed. A woman may appear to minimise the impact of sexual harassment or sexual assault out of embarrassment and a wish to end the ordeal.

Sexual complainants, including those complaining of sexual harassment, can suffer when there is unnecessarily over-rigorous cross-examination regarding their previous sexual history or where the assailant is known to them. In cases involving allegations of a sexual nature, the Procedural Rules enable Panels to prevent a witness from being cross-examined by their alleged assailant but skilful and remorseless questioning by a detached advocate can be an equally demeaning experience. Panels should intervene to restrain insulting or offensive questions or humiliation of a witness. The Human Rights Act also has implications for the amount of permissible infringement of a witness's right to respect for her private and family life.

SEXUAL ORIENTATION

There is a historical background of widespread discrimination against homosexuals. Sexual orientation is just one of the many facets of a person's identity. Being a lesbian or a gay man is sometimes described as being as much an emotional orientation as a sexual one.

There is no evidence that being gay implies a propensity to commit any particular type of offence. A common, and extremely offensive stereotype, links homosexuality with a paedophile orientation. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is no evidence that gay men are more likely to abuse children than heterosexual men. Panels need to be aware of the harm caused by such stereotypical assumptions.

It is misguided to:

- attribute feminine characteristics to gay men, or masculine characteristics to lesbians. Such attributions are not only offensive but can lead to dangerous assumptions, for example, that a lesbian may be more resilient to harassment than her heterosexual counterpart.
- assume that AIDS and HIV positive status are necessarily indicative of homosexual activity. HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging.
- make any assumptions as to the sexual orientation of transvestites or transsexuals. Where there is a question relating to a person's gender, the person should be asked what gender they consider themselves to be, and what gender they would prefer to be treated as.

Many transsexual and transvestite people would not consider themselves gay or lesbian and their sexuality as closer to that of heterosexuals. They should not be considered as merely a dimension or extension of gay and lesbian culture.

Additionally, there are basic differences within and between the transsexual and transvestite experiences. For many transvestites, cross-dressing is not a fetish, but an inescapable emotional need, which, particularly in public places, generates risk of conflict or ridicule. It is unlikely that a transvestite who cross-dresses in private and sometimes in public, will cross dress when appearing before a Panel. However, this may not always be the case, and a desire or need to cross-dress may still be a relevant and important issue.

The process of gender reassignment is extremely complex, requiring great personal determination, with emotional and psychological factors playing a large role. Not all transsexual people undergo surgery, but for those that do, it is just part of a wider sequence of events and processes that are intended to help the physical identity match the person's inner sense of gender identity. Panels need to be aware that these events and processes are likely to involve great strain, and bring the transsexual person into situations of unwanted tension.