

Tribunal Advisory Committee, 14th November 2018

Review of Practice Notes

Executive Summary

Practice Notes exist to provide clear guidance to all parties with an interest or involvement in Fitness to Practise proceedings. All Practice Notes undergo regular review.

Summary

In May 2018, the Professional Standards Authority (PSA) published a Lessons Learned Review of the Nursing and Midwifery Council's handling of concerns about midwives' fitness to practise at the Furness General Hospital.

The TAC considered this review at its meeting in May 2018 and as a result agreed to review any relevant practice notes in light of the conclusions of the review. The key discussion points of the TAC relating to the PSA's review focussed on the following:

- The HCPTS tribunal 'culture'
- The role of Panel Chairs, Panel Members and Legal Assessors in ensuring conduct towards witnesses is appropriate and challenged as necessary
- Distress for witnesses giving evidence is minimised and appropriate support is provided throughout the process
- Taking account of the 'voice' of the complainant/ patients/ families and their engagement throughout the process
- Understanding of the fitness to practise and hearings process

In September the Council considered a paper that provided a high-level review of the PSA's findings and recommendations, setting out HCPC's current approach and any opportunities for improvement. TAC provided a response as part of the report as follows:

<http://www.hcpc-uk.org/assets/documents/100058A8Enc13-ProfessionalStandardsAuthoritysLessonsLearnedReview.pdf>

The current set of practice notes have been reviewed for relevance to the Lessons Learned review. There are currently three practice notes relating to witnesses but these are specific to; children as witnesses, witness and production orders and competence and compellability of witnesses and therefore cover specific legal aspects relating to HCPC's fitness to practise proceedings. There are three practice notes relating to special measures which cover conducting hearings in private, cross-examination in cases of a sexual nature and specific special measures.

The most relevant practice note for the purposes of the review relates to the conduct of representatives which sets out the HCPC's expectations regarding the conduct of representatives at hearings (whether legally qualified or not).

The following three practice notes have been included for discussion:

- Conduct of representatives
- Conducting Hearings in Private
- Special Measures

Decision

The Tribunal Advisory Committee is asked to discuss any relevant changes to practice notes as a result of the PSA's Lessons Learned review.

Appendices

Appendix One: Practice Note: Conduct of representatives

Appendix Two: Practice Note: Conducting Hearings in Private

Appendix Three: Practice Note: Special Measures

Date of paper

7th November 2018

Health and Care Professions Tribunal Service

PRACTICE NOTE

Conduct of Representatives

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

Introduction

The Panel rules¹ allow registrants to be represented by any person², who may but does not need to be a legally qualified.

Registrants are often represented by someone who is not a qualified lawyer (a “lay representative”). Some lay representatives may be friends or colleagues who have never undertaken the task before, others will be union or professional body representatives with far greater experience.

All representatives, whether legally qualified or not, share the same responsibilities; to ensure that the rights of the registrant concerned are respected and to represent the interests of that registrant in the best manner possible by all proper and lawful means.

Panels are entitled to expect that anyone representing a party in proceedings before the Panel will conduct themselves appropriately and, in particular, that qualified lawyers³ will act in accordance with the professional conduct rules which apply to them.

Lay representatives are not subject to those professional conduct rules, but Panels are entitled to expect lay representatives to conform to the minimum standards of conduct set out below. Misconduct by representatives is rare but, where it does occur, Panels must take appropriate steps to address it. Behaviour of that kind is neither in the interests of justice or the interests of the party concerned.

Registrants have the right to be represented by a person of their choosing, but that right does not require Panels to tolerate unlawful, disruptive or other improper

¹ HCPC (Investigating Committee) (Procedure) Rules 2003, r.6(5); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.6(3); HCPC (Health Committee) (Procedure) Rules 2003, r.6(3).

² other than a member of the Council or one of its committees, or a Council employee.

³ solicitors, barristers, advocates, chartered legal executives and other lawyers qualified to practise as such in a UK jurisdiction.

behaviour by any representative. Panels should deal promptly and firmly with such behaviour.⁴

If a representative disregards the Panel's rulings and persists in their inappropriate behaviour then, as a last resort, the Panel may need to consider excluding that person from the proceedings. The Panel rules⁵ enable a Panel to "*exclude from the hearing any person whose conduct, in its opinion, is likely to disrupt the orderly conduct of the proceedings.*".

Standards of conduct

Panels are entitled to expect any representative appearing before the Panel to comply with the following minimum standards of conduct:

- to be punctual and adequately prepared for the proceedings;
- to be courteous and fair to everyone involved in the proceedings;
- to avoid undignified, disorderly or disruptive behaviour and to discourage similar behaviour by others;
- not to knowingly assist in any unlawful conduct or to condone the giving of perjured evidence;
- to test or challenge evidence by proper means and not to be abusive, offensive or unnecessarily confrontational when cross-examining witnesses;
- not to engage in unfounded personal attacks or in acrimonious, sarcastic, or intimidatory exchanges with anyone involved in the proceedings;
- not to waste time on irrelevant matters or make frivolous or vexatious objections;
- to comply with the Panel's ruling, and not attempt to re-open a matter which has been ruled upon or circumvent the ruling by other means;
- to comply with reasonable requests concerning hearing dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the registrant;
- not to seek to influence the proceedings by improper means, such as advising a witness not to attend or dissuading a witness from giving evidence;
- not to send abusive or offensive correspondence to, or otherwise communicate in a similar manner with, any person in connection with the proceedings.

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⁴ serious misconduct by qualified lawyers should be reported to the relevant regulatory body.

⁵ HCPC (Investigating Committee) (Procedure) Rules 2003, r.8(1)(g); HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10(1)(g); HCPC (Health Committee) (Procedure) Rules 2003, r.10(10)(g).

Health and Care Professions Tribunal Service

PRACTICE NOTE

Conducting Hearings in Private

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

Introduction

Most fitness to practise hearings are held in public, but Panels have the discretion to exclude the press or public from all or part of a hearing in appropriate cases.

Whether all or part of a hearing is held in private is a decision for the Panel concerned and must be consistent with Article 6(1) of the European Convention on Human Rights (ECHR), which provides limited exceptions to the requirement for hearings to be held in public.

Hearings in private

The “open justice principle” adopted in the United Kingdom means that, in general, justice should be administered in public and that:

- hearings should be held in public;
- evidence should be communicated publicly; and
- fair, accurate and contemporaneous media reporting of proceedings should not be prevented unless strictly necessary.

Historically, concerns about the conduct of hearings have been about the failure to sit in public and, for that reason, the common law has long required that quasi-judicial proceedings should be held openly and in public on the basis that:

“...publicity is the very sole of justice...and the surest of all guards against improbity. It keeps the judge..., while trying, under trial”¹.

Similarly, Article 6(1) ECHR is directed at preventing the administration of justice in secret. It guarantees the general right to a public hearing, for the purpose of protecting the parties from secret justice without public scrutiny and to maintain

¹ *Scott v Scott* 1913 AC 417

confidence in the courts.² However, there is no corresponding general right for a person to insist upon a private hearing.

The right to a public hearing is subject to the specific exceptions set out in Article 6(1). Consequently, there are circumstances in which proceedings can be heard in private but, unless one of those express exceptions applies, a decision to sit in private will be a violation of the ECHR.

The Panel rules³ reflect Article 6(1) ECHR and provide that:

“At any hearing... the proceedings shall be held in public unless the [Panel] is satisfied that, in the interests of justice or for the protection of the private life of the registrant, the complainant, any person giving evidence or of any patient or client, the public should be excluded from all or part of the hearing;...”

Thus, there are two broad circumstances in which all or part of a hearing may be held in private:

- where it is in the interests of justice to do so; or
- where it is done in order to protect the private life of:
 - the registrant who is the subject of the allegation;
 - the complainant;
 - a witness giving evidence; or
 - a service user.

Deciding to sit in private

The decision to sit in private may relate to all or part of a hearing. As conducting proceedings in private is regarded as the exception, Panels should always consider whether it would be feasible to conduct only part of a hearing in private before deciding to conduct the whole of a hearing in private.

In determining whether to hear a case in private, a Panel should also consider whether other, more proportionate, steps could be taken to achieve their aim, for example:

- anonymising information;
- redacting exhibited documents;
- concealing the identity of complainants, witnesses or service users (e.g. by referring to them as “Person A”, or “Service User B”, etc.).

Panels should also be aware that they do not have the ‘intermediate’ option which is available to the courts, of excluding the media from or imposing reporting restrictions on a hearing which is otherwise conducted in public.

² *Diennet v France* (1995) 21 EHRR 554

³ Rule 10(1) of the HCPC (Conduct and Competence) (Procedure) Rules 2003 and HCPC (Health Committee) (Procedure) Rules 2003; Rule 8(1) of the HCPC (Investigating Committee) (Procedure) Rules 2003

A decision on whether to sit in private may be taken by the Panel on its own motion or following a request by one of the parties. Regardless of how the issue arises and no matter how briefly it can be dealt with, the Panel should provide the parties with an opportunity to address the Panel on the issue before a decision is made and provide reasons for its decision.

For example, most health allegations⁴ will require Panels to consider intimate details of a registrant's physical or mental condition. A Panel is justified in hearing such a case in private in order to protect the registrant's privacy, unless there are compelling public interest grounds for not doing so; a situation which is highly unlikely to arise. The decision to hear such a case in private is unlikely to be contentious but, nonetheless, is one which the Panel should make formally and after giving the parties the opportunity to make representations.

The interests of justice

In construing its statutory powers, a Panel must take account of its obligation under the Human Rights Act 1998, to read and give effect to legislation in a manner which is, so far as possible, compatible with the ECHR.

On that basis, the provision in the Panel rules which permits a Panel to conduct proceedings in private where doing so "is in the interests of justice" must be construed in line with the narrower test set out in Article 6 ECHR, which provides that proceedings may be held in private:

"to the extent strictly necessary in the opinion of the [Panel] in special circumstances where publicity would prejudice the interests of justice."

The narrow scope of that Article means that the exercise of the "interests of justice" exception should be confined to situations where it is strictly necessary to exclude the press and public and where doing otherwise would genuinely frustrate the administration of justice, such as cases involving:

- public interest immunity applications;
- national security issues;
- witnesses whose identity needs to be protected; or
- a risk of public disorder.

In deciding whether to conduct proceedings in private in "the interests of justice" Panels need to have regard to broad considerations of proportionality, but a fairly pragmatic approach can be adopted. For example, it has been held that prison disciplinary proceedings may be conducted in private in the interests of justice because requiring such proceedings to be held in public would impose a disproportionate burden on the State.⁵

⁴ an allegation made under Article 22(1)(a)(iv) of the Health and Social Work Professions Order 2001 that fitness to practise is impaired by reason of the registrant's physical or mental health

⁵ *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165

To protect private life

A decision to hear all or part of a case in private may be taken in order to protect the private life of:

- the registrant concerned;
- the complainant;
- a witness giving evidence; or
- a service user.

The protection of a person's private life is not subject to the 'strict necessity' test under Article 6(1), but nonetheless Panels do need to establish a compelling reason for deciding that a hearing should be held in private.

Doing so is not justified merely to save the registrant or others from embarrassment or to conceal facts which, on general grounds, it might be desirable to keep secret. The risk that a person's reputation may be damaged because of a public hearing is not, of itself, sufficient reason to hear all or part of a case in private unless the Panel is satisfied that the person would suffer disproportionate damage.

For example, in *L v. Law Society*⁶ refusing to hear proceedings in private to prevent the appellant's 'spent' criminal convictions from being made public was held not to be a breach of Article 6. The court found that the convictions were relevant to being a member of the regulated profession and that conducting the proceedings in public was part of ensuring that public confidence is maintained.

Children

Although not expressly mentioned in the Panel rules, Article 6(1) ECHR provides a broad protection for children, enabling all or part of a hearing to be held in private "where the interests of juveniles... so require". The protection of 'juveniles' is not limited to protecting their "private life" and it will rarely be appropriate for Panels to require a child to be identified or participate in public proceedings.

There is no single law in the United Kingdom which defines the age of a child. Different ages are set for different purposes and varying provision is made by the laws of England & Wales, Scotland and Northern Ireland.

The UN Convention on the Rights of the Child, which has been ratified by the United Kingdom, defines a child as a person under the age of 18. Child protection agencies across the UK all work on the basis that a child is anyone who has not yet reached their 18th birthday. Panels should regard anyone under the age of 18 as being subject to the protection for 'juveniles' afforded by Article 6(1) ECHR unless they are advised that doing so would conflict with a specific legal provision which applies in the UK jurisdiction in which they are sitting and to the proceedings before them.

⁶ [2008] EWCA Civ 811

Public pronouncement of decisions

Article 6(1) ECHR provides for all judgments “to be pronounced publicly”, but the relevant case law, notably *B v United Kingdom*⁷ makes clear that, in this regard, Article 6(1) should not be interpreted literally. The Strasbourg Court has held, in the following terms, that doing so in cases where evidence has been heard in private may frustrate the primary aim of that Article:

“Having regard to the nature of the proceedings and the form of publicity applied by the national law, the Court considers that a literal interpretation of the terms of Article 6(1) concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6(1), which is to secure a fair hearing.”

At the conclusion of any case which has been heard wholly or partly in private, the Panel will need to consider what, if any, ‘public pronouncement’ it will make. In doing so Panels should adopt the following approach:

1. Where a Panel has proper grounds under Article 6(1) ECHR for hearing all or part of a case in private, it is not obliged to deliver its full decision in public if doing so would frustrate a purpose of hearing that case in private.
2. In such cases a Panel must consider the extent to which the evidence heard, its decision and the reasons for it can and should be made public. In doing so the Panel should take account of:
 - (1) the nature of the case and reasons why it was heard in private;
 - (2) the ‘fair administration of justice’ objective of Article 6(1) ECHR; and
 - (3) the HCPC’s overarching objective under Article 3(4) the Health and Social Work Professions Order 2001 to protect the public.
3. Where a reason for hearing proceedings in private was to protect the identity of, or sensitive information relating to, particular individuals and that protection can be maintained by doing so, the Panel should deliver its decision in the normal manner but in an appropriately anonymised or redacted form.
4. Where delivery or publication of an anonymised or redacted decision may frustrate a purpose of hearing the proceedings in private, as a minimum the Panel should deliver a brief decision:
 - (1) stating whether or not any allegation was well founded and the sanction (if any) it has imposed; and
 - (2) recording that the Panel’s decision will be provided in writing to the Registrar who may make it available (in an appropriately anonymised or redacted form) to any person who has good grounds for seeking the information.

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⁷ (2002) 34 EHRR 19

Health and Care Professions Tribunal Service

PRACTICE NOTE

Special Measures

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

Introduction

The Panel rules¹ allow certain categories of witness to be treated as a 'vulnerable witness' who may give evidence subject one or more special measures. Special measures are the arrangements that a Panel may use to help ensure that vulnerable witnesses give their best evidence. They can also reduce some of the stress associated with giving evidence.

Eligibility for special measures

The Panel rules provide that the following categories of witness, if the quality of their evidence is likely to be adversely affected, may be treated as a vulnerable witness who is eligible for special measures:

- a witness who is under the age of 17 at the time of the hearing;
- a witness who has a mental disorder (within the meaning of the Mental Health Act 1983);
- a witness who is significantly impaired in relation to intelligence and social functioning;
- a witness with physical disabilities who requires assistance to give evidence;
- a witness who, in a case involving an allegation of a sexual nature, was the alleged victim; and
- a witness who complains of intimidation.

Special measures

A Panel may adopt any measures it considers desirable to enable it to receive evidence from a vulnerable witness. They include, but are not limited to:

- use of video links;

¹ HCPC (Investigating Committee) (Procedure) Rules 2003, r.8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10A; HCPC (Health Committee) (Procedure) Rules 2003, r.10A.

- use of pre-recorded evidence as the witness's evidence-in-chief, provided that the witness is available at the hearing for cross-examination and questioning by the Panel;
- use of interpreters (including signers and translators) or intermediaries²;
- use of screens or such other measures as the Panel consider necessary in the circumstances, in order to prevent:
 - the identity of the witness being revealed to the press or public; or
 - access to the witness by the registrant; and
- the hearing of evidence by the Panel in private.

Panels are not limited to those special measures which are specified in the rules and can consider other arrangements that would help to ensure that the quality of a vulnerable witness's evidence is not diminished.

In considering the use of special measures, Panels should also have regard to whether a vulnerable witness may benefit from other, less formal, arrangements which may help them to give their evidence. For example, it may be appropriate for a vulnerable witness to make a familiarisation visit to the hearing venue ahead of the proceedings or for their evidence to be given based upon a timetable that allows for regular breaks. A Panel may need to give directions to ensure that such arrangements are put in place.

Special measures applications

The fact that a witness is eligible to be regarded as a vulnerable witness does not mean that special measures should automatically be put in place. Their use is at the discretion of the Panel.

If the party calling a witness considers that special measures are needed, they must make an application to the Panel for directions to that effect (a Special Measures Application template is set out in the Annex to this Practice Note).

Many applications are unlikely to be contested, such as where a witness has a disability and the measures sought are clearly necessary to avoid the quality of the witness's evidence from being diminished. In less straightforward cases the Panel may need to hold a preliminary hearing in order to consider an application.

A special measures application should be made as soon as reasonably practicable. Other than in urgent cases, Panels should expect the parties to reach agreement on the need for, and extent of, any special measures or, if agreement cannot be reached, to identify the issues in dispute which need to be determined by the Panel.

In order to ensure that the Panel has sufficient information to make a decision, a special measures application must:

² Intermediaries facilitate communication between a witness and the Panel and others at a hearing. They are independent of the parties and owe their duty to the Panel. They may explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence

- explain how the witness is eligible to be classified as vulnerable;
- explain why special measures are likely to improve the quality of the witness's evidence;
- propose the measure(s) that would be likely to do so; and
- set out any views on the proposed measures expressed by the witness (or those acting on behalf of the witness).

A special measures application should also be supported by information about the practical implementation of the measures proposed. For example, the location and arrangements for a live video link or when, where and in whose presence a witness's evidence-in-chief would be video recorded.

In dealing with applications, Panels should make full use of their case management powers. For example, Panels should seek to limit the issues on which a vulnerable witness needs to give evidence by exploring the extent to which facts are admitted. Panels should also set a timetable that enables familiarisation visits, etc. to take place ahead of the hearing so that the witness has time to provide an informed view about any special measures and, if necessary, for an application to be made to vary them.

Where evidence is to be video-recorded, Panels should seek to ensure that any viewing of the video by the witness for the purpose of refreshing their memory does not take place on the day of the hearing. This avoids the need for the witness to have to view twice in the same day a recording of their account of what may have been an unpleasant or harrowing event.

Intimidation

Under the Panel rules a witness may be regarded as vulnerable if the witness "complains of intimidation". Panels should not interpret that phrase literally (merely complaining of intimidation is insufficient) but, equally, they should not engage in a degree of inquiry that amounts to pre-judging issues which are properly a matter for the later substantive hearing of the case. A witness may have justified feelings of intimidation due to circumstances, even if no one intends to intimidate them. Accordingly, the test to be applied is whether the complaint of intimidation is 'genuine', having regard to the particular circumstances of the witness and the case.³

Explaining the use of special measures

If a witness is permitted to give evidence from behind a screen or by video link, the registrant concerned may feel that the Panel has pre-judged the witness's evidence or will draw adverse inferences from the use of that special measure. Panels should allay unfounded concerns of that kind and explain that the measure has been adopted simply to put the witness at ease and ensure that they give their best evidence.

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³ *R (Levett) v Health and Care Professions Council* [2013] EWHC 3330 (Admin)

Annex

SPECIAL MEASURES APPLICATION

| | |
|-------------------------|--|
| Case Reference: | |
| Name of Witness: | |

| | | | | |
|--|------------|--|-----------|--|
| Is a preliminary hearing likely to be needed to determine this application? | YES | | NO | |
|--|------------|--|-----------|--|

If YES, please explain why:

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| Why is the witness vulnerable? | |
|--|--|
| child or young person under 17: | |
| witness with a mental disorder: | |
| witness with impaired intelligence and social functioning: | |
| witness with a physical disability: | |
| alleged victim in respect of an allegation of a sexual nature: | |
| witness complaining of intimidation: | |

Explain the nature of the vulnerability and how it is likely to affect the quality of the witness's evidence:

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| |
|--|

Which special measures are likely to improve the witness's ability to give evidence?

video link:

pre-recorded evidence in chief:

interpreter or intermediary:

use of screens:

hearing evidence in private:

other measures (specify below):

Explain why these special measures are likely to improve the witness's ability to give evidence and provide supporting detail about their practical implementation:

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Please give details of any view expressed by the witness (or any person acting on behalf of the witness) about the special measures proposed:

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|---|------------|--|-----------|--|
| Is any supporting material provided with this application? | YES | | NO | |
|---|------------|--|-----------|--|

If YES, please list the supporting material provided:

Signed: _____ Date: _____