PRACTICE NOTE

Conducting Hearings in Private

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

Although most fitness to practice proceedings are normally held in public, in appropriate cases, Panels have the discretion to exclude the press or public from all or part of a hearing.

The decision to hold all or part of a hearing in private is a matter 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 need 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:

- proceedings 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 proceedings have been about the failure to sit in public and, for that reason, the common law has long required that 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) of the European Convention on Human Rights 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 confidence in the courts.[2] However, there is no corresponding general entitlement for a person to insist upon a private hearing.

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1 *Scott v Scott* 1913 AC 417

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

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.

In line with Article 6(1) ECHR, the procedural rules for each of the HPC Practice Committees provide[3] that:

> *"At any hearing... the proceedings shall be held in public unless the Committee is satisfied that, in the interests of justice or for the protection of the private life of the health professional, 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 person who is the subject of the allegation;
    - the complainant;
    - a witness giving evidence; or
    - a patient or client.

Deciding to sit in private

It should be noted that the decision to sit in private may relate to all or part of a hearing. Given that conducting proceedings in private is regarded as the exception, a Panel should consider whether it would be feasible to conduct only part of the proceedings in private before taking the decision to conduct all of the proceedings in private.

In determining whether to hear all or part of 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 a witnesses (by referring to them by initials or as "Person A" etc.).

Panels should also take into account that, unlike many courts, they do not have the 'intermediate' option of excluding the media from and imposing reporting restrictions on, an otherwise public hearing.

[3] Rule 10(1) of the HPC (Conduct and Competence) (Procedure) Rules 2003 and HPC (Health Committee) (Procedure) Rules 2003; Rule 8(1) of the HPC (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 matter 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.

For example, most health allegations[4] 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, so far as it is possible to do so, to read and give effect to legislation in a manner which is compatible with ECHR.

On that basis, the provision in the procedural rules that 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, for example, 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] i.e. an allegation made under Article 22(1)(a)(iv) of the Health 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

In order to protect the private life

As noted above, a decision to hear all or part of a case in private may be taken in order to protect the private life of:

- the person who is the subject of the allegation;
- the complainant;
- a witness giving evidence; or
- a patient or client.

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. It is not justified merely to save parties, witnesses or others from embarrassment or to conceal facts which it might, on general grounds, 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.

Children

Although not expressly mentioned in the procedural 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 there are also variations between England & Wales, Scotland and Northern Ireland.

The UN Convention on the Rights of the Child, which has been ratified by the UK defines a child as a person under the age of 18 and 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 any person 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 jurisdiction in which they are sitting and to the proceedings before them.

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