Fitness to Practise Committee – 3 June 2010

Practice Note – Hearings in Private

Executive summary and recommendations

Introduction

The Practice Note 'Hearings in Private' sets out the issues panels should consider when deciding whether all or part of a fitness to practise proceeding should be held in private. In accordance with the work plan the document has been reviewed to ensure that it remains fit for purpose.

This review recognised that Panels hearing cases needed some practical and general principles to apply to the interpretation of the 'public pronouncement' requirement in Article 6(1) ECHR. Panels were sometimes uncertain about what should be pronounced when proceedings, or part of them, have not been heard in public. As a result the practice note has been amended to include guidance on announcing panel decisions.

Decision

The Committee is asked to discuss the practice note and recommend that the Council approve the Practice Note – Hearings in Private

Resource implications

None

Financial implications

None

Appendices

Practice Note – Hearings in Private

Date of paper

20 May 2010

PRACTICE NOTE

Conducting Hearings in Private

This Practice Note has been issued by the Council for the guidance of Practice Committee 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 conduct all or part of a hearing in private is a matter for the Panel concerned and that decision 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 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 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 service user.

Deciding to sit in private

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, Panels should always consider whether it would be feasible to conduct only part of the proceedings in private before deciding 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, witnesses or service users (e.g. by referring to them by initials or as "Person A" etc.).

Panels should also be aware that, unlike many courts, they do not have the 'intermediate' option of excluding the media from or imposing reporting restrictions on a hearing conducted in public.

[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 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.

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, 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 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, 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] 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 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. It is not justified merely to save parties, witnesses 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.

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 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 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 UK jurisdiction in which they are sitting and to the proceedings before them.

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*[6] 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:

[6] (2002) 34 EHRR 19

"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. The obligation under Article 6(1) ECHR for Panel decisions to be pronounced publicly should not be interpreted literally. Where a Panel has proper grounds for hearing all or part of a case in private, it is not obliged to follow the usual practice of delivering its full decision in public if doing so would negate or frustrate a purpose of hearing that case in private.

2. Whilst, in such cases, a Panel does not have to pronounce its full decision in public, it must consider the extent to which the evidence it has heard, its decision and the reasons for that decision can and should be made public. In doing so the Panel should take account of:

   (a) the nature of the case and reasons why it was heard in private;

   (b) the 'fair administration of justice' objective of Article 6(1) ECHR; and

   (c) the HPC's objective under Article 3(4) the Health 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. In cases where delivery or publication of even an anonymised or redacted decision may negate or frustrate a purpose of hearing the proceedings in private, as a minimum the Panel should deliver a brief decision:

   (a) stating whether or not any allegation was well founded and the sanction (if any) it has imposed (and directing the Registrar to amend the HPC register accordingly); and

   (b) 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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