

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Conducting Hearings in Private

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

### Introduction

1. 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.
2. Whether all or part of a hearing is held in private is a decision for the Panel concerned and must be consistent with any procedural rules which apply to that hearing and 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

3. The “open justice principle” adopted in the United Kingdom means that, in general, justice should be administered in public and that:
  - a. hearings should be held in public;
  - b. evidence should be communicated publicly; and
  - c. fair, accurate and contemporaneous media reporting of proceedings should not be prevented unless strictly necessary.
4. One of the objectives of regulation is to ensure public confidence in the professions the HCPC regulates. Open justice where hearings are in public promotes transparency and complies with Human Rights Act protections and Convention rights.
5. The Panel rules<sup>1</sup> reflect Article 6(1) ECHR and provide that, in hearings to which they apply:

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<sup>1</sup> Rule 10(1) of the HCPC (Conduct and Competence) (Procedure) Rules 2003 and HCPC (Health Committee)

*“... 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;...”*

6. , Therefore, there are two broad circumstances in which all or part of a hearing may be held in private:
  - a. where it is in the interests of justice to do so; or
  - b. where it is done in order to protect the private life of:
    - i. the registrant who is the subject of the allegation;
    - ii. the complainant;
    - iii. a witness giving evidence; or
    - iv. a service user.

### **Deciding to sit in private**

7. 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.
8. 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:
  - a. anonymising information;
  - b. redacting exhibited documents;
  - c. concealing the identity of complainants, witnesses or service users (e.g. by referring to them as “Person A”, or “Service User B”, etc.).
9. 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.
10. 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.
11. For example, most health allegations<sup>2</sup> will require Panels to consider details of a registrant’s physical or mental condition. A Panel is likely to be justified in hearing

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(Procedure) Rules 2003; Rule 8(1) of the HCPC (Investigating Committee) (Procedure) Rules 2003  
<sup>2</sup> 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

such a case in private in order to protect the registrant's privacy, but even in such cases the panel should consider whether any part of the hearing can be in public. The decision to hear such a case in private is unlikely to be contentious but, nonetheless, is one which the Panel should make formally, setting out the reasons for their decision and after giving the parties the opportunity to make representations.

### **The interests of justice**

12. 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.

13. 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."*

14. 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:

- a. criminal proceedings which would be frustrated if all or part of the HCPTS hearing was held in public;
- b. national security issues;
- c. witnesses whose identity needs to be protected; or
- d. a risk of public disorder.

15. 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.<sup>3</sup>

### **To protect private life**

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

- a. the registrant concerned;
- b. the complainant;

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<sup>3</sup> *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165

- c. a witness giving evidence; or
- d. a service user.

17. 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.
18. Doing so is not justified merely to save the registrant 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.
19. For example, in *L v. Law Society*<sup>4</sup> 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

20. It is rare for children to give evidence in HCPC proceedings; where this is proposed, panels need to be aware of the particular approach that must be taken and the factors to consider as set out in the HCPTS Practice Note [Children as Witnesses](#).

## Interim Order Hearings

21. The provisions of the 2003 Procedure Rules<sup>5</sup> relating to public and private hearings do not apply to interim order hearings, so when considering whether all or part of an interim order hearing should be in private, the Panel should consider Article 6(1) of the ECHR.
22. This says that everyone is entitled to a fair and public hearing, and that judgment shall be pronounced publicly, but the press and public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. This means that the hearing may be held in private in the interests of justice or for the protection of private life.

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<sup>4</sup> [2008] EWCA Civ 811

<sup>5</sup> Rule 8 of the HCPC (Investigating Committee) (Procedure) Rules 2003; Rule 6 of the HCPC (Conduct and Competence) (Procedure) Rules 2003 and HCPC (Health Committee) (Procedure) Rules 2003

## Public pronouncement of decisions

23. Article 6(1) of the ECHR requires that panel decisions are pronounced publicly. In cases where a panel has decided to hear a case wholly or partially in private, the panel will need carefully to consider what parts of their decision can be announced in public and published and which parts need to be redacted. This will ensure that the purpose behind the application is not frustrated by 'private' details referred to in the application and decision being made public.
24. Panels should note the guidance set out in the [HCPC's Publication Policy: Fitness to Practise Proceedings](#) and in particular from paragraph 25 which sets out the appropriate approach in cases which involve hearings held wholly or partly in private.