

Council, 27 March 2014

Practice Notes

Executive summary and recommendations

Introduction

A number of practice notes have been produced to aid panels that make decisions relating to fitness to practise cases. Their purpose is also to assist those who appear before them on matters of law and procedure. They do not override the provisions sets out with HCPC's legislation. However, the Executive do keep the practice notes under regular review and ensure that they are updated to take into account relevant case law, legislation and good practice. We have identified the need for two new practice notes which are attached to this paper as appendices.

Child Witnesses

This practice note provides more guidance for panels on the steps that they should take to ensure that, when children appear as witnesses in fitness to practise proceedings, they are able to participate without distress or intimidation and thus give their evidence effectively.

Special Measures

This practice note provides more guidance for Panels on the series of provisions that may be used to help ensure that vulnerable witnesses give their best evidence.

Decision

The Council is asked to

(a) discuss and approve the Practice Notes:

- Child Witnesses
- Special Measures

Background information

None

Resource implications

None

Financial implications

None

Appendices

Practice Note – Child Witnesses
Practice Note – Special Measures

Date of paper

14 March 2014

PRACTICE NOTE

Children as Witnesses

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

Introduction

Panels should take steps to ensure that, when children appear as witnesses in fitness to practise proceedings, they are able to participate without distress or intimidation and thus to give their evidence effectively.

Background

The legal definition of the age of a child varies according to context but, for the purpose of civil proceedings throughout the UK, may be regarded as a person under the age of 18.¹ This is consistent with definition in the UN Convention on the Rights of the Child, to which the UK is a signatory, Article 3.1 of which requires that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The procedural rules² for HCPC fitness to practise proceedings provide that a witness under the age of 17³ (at the time of the hearing), if the quality of their evidence is likely to be adversely affected as a result of their age, may be treated as a vulnerable witness and subject to the ‘special measures’ set out in those rules. Those special measures include but are not limited to:

- use of video links;
- use of pre-recorded evidence as the child’s evidence-in-chief;
- use of interpreters or intermediaries;
- use of screens or other measures to prevent the identity of the witness being revealed or access to the witness by the registrant; and
- the hearing of evidence in private.

¹ s.105 Children Act 1989, s.15 Children (Scotland) Act 1995, Art. 2 Children (Northern Ireland) Order 1995.

² 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.

³ it is anticipated that this will be increased to 18 when a suitable legislative opportunity arises

Childhood spans a broad age range and, in determining how to support and protect a child witness, Panels should take account of the child's wishes and their level of cognitive, social and emotional development. The child's age and circumstances will often dictate what special measures are appropriate.

Competence of child witnesses

There is no specific age below which children are regarded as incompetent to give evidence. In Panel proceedings, the basic test of competence is whether the witness is capable of giving rational testimony (in essence, being able to understand the questions put to them and to give answers capable of being understood) and understands the nature of an oath. The relevant test was articulated by Bridge LJ in the following terms in *R v Hayes*:⁴

“The important consideration, we think, when a [tribunal] has to decide whether a [witness] should properly be sworn, is whether the [witness] has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct”.

However, by virtue of section 96 of the Children Act 1989, even if a child does not meet the *Hayes* test, the child may give unsworn evidence if, in the opinion of the Panel, the child:

- understands that it is his or her duty to speak the truth; and
- has sufficient understanding to justify his or her evidence being heard.

Whether a child is competent to give evidence is a matter for the Panel, but it is not an issue which a Panel must investigate merely because of the age of a witness.

Case management

Panels should always consider holding a preliminary hearing for the purpose of active case management in any case that involves a child witness. In doing so, the Panel should have regard to the full range of special measures which are available, taking account of the child's wishes and needs.

In any case where a child is to be called as a witness by the HCPC,⁵ an early meeting will have taken place between the child (supported as necessary by a parent, guardian or other appropriate adult), a HCPC case manager who has been trained in assessing vulnerable witnesses and the solicitor who will conduct the case on the HCPC's behalf. This enables the case manager and solicitor to build a rapport with the witness and to provide support and reassurance at an early stage in the process.

⁴ [1977] 1 WLR 238

⁵ Special measures may apply to a child called by any party. If the HCPC becomes aware that a registrant proposes to call a child as a witness, the registrant will be advised to submit relevant information to the Panel

Normally, in the course of that meeting the case manager will conduct a vulnerable witness assessment and identify any special measures that would assist the child witness in giving their evidence. That information will form part of the submissions put to the Panel by the HCPC at any preliminary meeting.

Although the adoption of special measures is subject to any representations made by the parties (and any advice provided by the Legal Assessor), there should be a presumption that all child witnesses will give their evidence-in-chief by video-recorded interview and any further evidence by live video link unless the Panel considers that this will not improve the quality of the child's evidence.

Older children may prefer to give live evidence and, if that is the case, there should be a presumption that they will do so from behind a screen. A child witness who does not wish to use a screen should be permitted that choice if the Panel is satisfied that the quality of the child's evidence will not be diminished.

At any preliminary hearing the Panel should seek to fix an early date for the hearing of the case and agree a timetable that avoids adjournments. The timetable needs to take account of the child's intellectual capacity, ability to communicate and concentration span and the length of any recorded evidence-in-chief. Generally, if a child's evidence is taken early in the day it reduces the time that the child must spend at the hearing and also minimises the risk of delay caused by procedural or other matters that may arise as the day progresses.

Panels should also seek to limit the issues on which evidence needs to be given by a child witness, by having as much of the child's evidence as possible accepted in advance as admitted fact. For example, where abuse is alleged, the fact that some form of encounter with the child in question took place at a particular time and location may not be disputed.

Panels should permit a child witness to see their statement ahead of the hearing for the purpose of refreshing their memory. This is particularly important where evidence is video-recorded. A child may be uncomfortable seeing themselves on video and it is better if this does not occur for the first time at the hearing.

Panels should also direct that any familiarisation visit to the hearing venue take place before the day of the hearing. This provides time for the child to consider and provide an informed view about any special measures and, if necessary, for an application to be made to the Panel to vary those special measures.

At the hearing

Although HCPC's adjudication team are responsible for the logistical arrangements for hearings, Panels must satisfy themselves that the relevant equipment is functioning properly before a child witness is called to give evidence. Malfunctions, delays or the need to run equipment checks whilst a child witness is in the room will not help that child to achieve best evidence.

As a minimum it is necessary to ensure that:

- the child's pre-recorded evidence-in-chief can be played;
- the child will be able to see the face of any person asking questions;
- if relevant, that the child cannot see the registrant.⁶

Before the proceedings begin the Panel should check (via the Hearings Officer) whether the child would like to meet the Panel. This helps the Panel to establish rapport with the witness and allows them to encourage the witness to let the Panel know if they have a problem, such as not understanding a question or needing to take a break.

The Panel (or Hearings Officer) should also explain that the Panel will be able to see the witness over the live link even if the witness cannot see them and that everyone else at the hearing (including the registrant, if relevant) will also be able to see them.

Questioning

Child witnesses of all ages may experience difficulties in giving evidence when they are asked questions at too fast a pace or which are too complex or developmentally inappropriate.

To ensure that they achieve best evidence, Panels need to recognise that children need more time to process questions than adults, particularly as children who are distressed may function at a lower level than normal. Paradoxically, it is adolescents who are at greater risk here, as unrealistic assumptions may be made about their ability to cope with what is taking place.

Although it is good practice for Panels to begin by asking children to say when they do not understand a question, they may be reluctant to do so and will often try to answer questions they do not fully understand. Panels need to be vigilant in this regard. Asking a child whether they understood the question is not always a reliable indicator of comprehension and probing question along the lines of "what do you mean when you say..." may be helpful.

Advocates should not be permitted to behave in an aggressive or intimidating manner towards any child witness and Panels should always challenge and prevent such conduct.

Complex questions may confuse children. Panels should encourage advocates to use language that is appropriate to the age and abilities of the witness and to allow adequate time for the witness to process and answer questions.

Advocates also need to be encouraged to:

- speak slowly and pause after each question, to give children enough time to process and answer it;
- ask short and simple questions which address one point at a time;

⁶ For example, where the witness is the victim of alleged abuse by the registrant

- use simple, common language and avoid idiomatic phrases;
- avoid questions which are complex or 'front-loaded' and require the child to remember too much detail in order to answer them;
- avoid questions which assert facts or contain other suggestive forms of speech, which children struggle to answer when asked by an adult in a position of authority;
- adopt a structured approach which 'signposts' the subject and warns when the subject is about to change.

Panels should not permit a child witness to be asked questions concerning intimate touching by being asked to point to parts of their own body. If such questions need to be asked, the Panel should direct that the witness be asked to point to a body diagram.

Further information about good practice when questioning children in legal proceedings can be found in the NSPCC publication *Measuring up? Good practice guidance in managing young witness cases and questioning children.*⁷

[date] 2014

⁷ http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf

PRACTICE NOTE

Special Measures

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

Introduction

"Special Measures" are a series of provisions that may be used by Panels to help ensure that vulnerable witnesses give their best evidence.

Background

The procedural rules¹ for HCPC fitness to practise proceedings provide that certain categories of witness, if the quality of their evidence is likely to be adversely affected, may be treated as a 'vulnerable witness'.

A vulnerable witness may give their evidence subject one or more of the 'special measures' set out in those rules, such as via video link or with the help of an interpreter or intermediary. Special measures can help to ensure that the quality of a witness's evidence is not diminished and to reduce some of the stress associated with giving evidence.

Eligibility for special measures

Under the procedural rules, the following 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.

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.

Special measures

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

- use of video links (enabling the witness to give evidence via a televised link to the hearing room);
- 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 (communication specialists who facilitate communication between a witness and the Panel and others at a hearing);
- 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 the special measures specified in the rules and can give consideration to other, similar, arrangements that would help to ensure that the quality of the evidence it receives from a vulnerable witness 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 use of special measures is at the discretion of the Panel. Consequently, the fact that a witness may be eligible to be regarded as a vulnerable witness does not mean that special measures will automatically be put in place.

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

² intermediaries are independent of the parties and owe their duty to the Panel. They are allowed to 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

A special measures application should be made as soon as reasonably practicable and, other than in urgent cases, the parties are expected to seek 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 in order to make a decision, a special measures application must:

- explain how the witness is eligible to be classified as vulnerable;
- explain why special measures would be likely to improve the quality of the witness' 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 special measures 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 there are admitted facts. Similar, Panels should set a timetable that enables any 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

A witness may be regarded as vulnerable is that 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

[date] 2014

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

SPECIAL MEASURES APPLICATION

Case Reference:	
Name of Witness:	

Is a preliminary hearing required to determine this application?	YES		NO	
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If YES, please explain why:

Why is the witness vulnerable?	
child 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:

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:

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

Is any supporting material provided with this application?	YES		NO	
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If YES, please list the supporting material provided:

Signed: _____ Date: _____