Complementary & Natural Healthcare Council

Training Notes for CNHC Panel Members

Structured Decision Making, Note Taking, Engagement Skills

&

Practice Notes for the Guidance of Case Examiners, Investigating Committee and Panels

(to be read in conjunction with CNHC Detailed Procedures for Dealing with Complaints)

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TRAINING NOTES

Structured Decision Making

Introduction

Fitness to practise panels should adopt a structured approach to decision making which provides robust decisions supported by cogent reasons for those decisions. Such an approach will help panels to identify the elements of the allegation; weigh the admissible evidence, giving equal consideration to all witnesses; and determine whether the Council has proved the case on the balance of probabilities.

Evidence

The Panel must consider and weigh all of the admissible evidence arising from witnesses, statements, agreed facts and documents and other exhibits. The Panel must exclude from consideration:

- anything heard which is not admissible;
- personal views, opinions or prejudices;
- any inferences from the registrant deciding not to give evidence;
- the peripheral consequences of its decision.

The Facts

To help sift the facts and link them to the elements of the allegation, the Panel should identify:

- the facts that are not in dispute;
- the facts that are in dispute;
- what the panel has been found to be fact based upon the evidence;
- the reasons for those findings.

Is there a case to answer?

At the end of the Council's case the panel should consider whether there is a case to answer if the registrant makes a submission to that effect, the registrant is not present or represented or if the panel feels that there may not be a case to answer.

No case to answer will usually be found where;

- the Council has not provided evidence on a relevant element of the allegation; or
- the relevant evidence is so unreliable or discredited that it cannot be relied upon.

The Human Rights Act

Consider whether any issues have arisen which engage a Convention right and, if so, record the decision that the panel reached.

The Decision

The decision which the panel has to reach is whether the allegation is well founded. The allegation will always be that the registrant's fitness to practise is impaired by reason of one of the broad grounds (eg misconduct) and on the basis of facts as alleged. The decision should be reached by addressing these elements in reverse order, that is:

- Are the facts as alleged true?
- Do they amount to the broad ground set out in the allegation?
- Is the registrant's fitness to practise impaired as a consequence?

This can only be decided at the very end of all the evidence. The Council must have proved all elements of the allegation on the balance of probabilities.

The decision is a collective, majority decision. Dissenting opinions cannot be given and, in the event of a tie, the chairman's casting vote must be exercised in favour of the registrant.

The decision must be supported by reasons, whether or not the panel has decided that the allegation is well founded and those reasons should include:

- Findings of fact;
    - a statement of what evidence was not disputed,
    - a statement of what evidence was disputed,
    - what facts the panel found from the evidence including reasons why one version was preferred to another.
- Findings of law;
    - a statement of the legal submissions made and how the panel dealt with them.

Announcing the Decision

The panel should explain what factors it has taken into account in reaching its decision, including any aggravating or mitigating factors of the case, and give reasons for any sanction it has imposed.

NOTE TAKING

Introduction

Taking accurate notes during hearings is a key skill for Panel members. Noting the evidence in a logical fashion as a case progresses will help you to resolve the issues in dispute and assist you to focus on the question which always needs to be answered; "does this evidence advance or weaken the Council's case? Effective note taking makes the writing of the Panel's decision so much easier.

In noting the evidence, Panel members need to strike a balance which ensures that they:

- concentrate on the hearing;
- take notes briefly and selectively; and
- organise their notes in a consistent and logical form.

Concentrate on the hearing

Panels need to focus upon the case unfolding before them. The proceedings will potentially have serious consequences for the registrant and other participants, who are entitled to appear before a Panel which seems to appreciate that fact. Three people who have their heads down and are scribbling furiously are likely to give the impression that their only involvement in the process is the clerical task of recording the evidence. At the same time, not taking any notes leaves an impression of disinterest so a careful balance must be struck.

The proceedings will be recorded and if appropriate will be transcribed.

Note-taking is not about recording the evidence but noting it; using those notes as part of an analytical process to sort out what is important and what is not, and to sift and connect elements of the case as part of a continuous process towards a decision. Noting rather than recording allows time to add marginal remarks, evaluate the evidence and assists in arriving at a coherent decision.

Be brief and selective

Panel members should not try to write down every word given in evidence. The average person speaks at a rate of about 125 words per minute and the average note-taker writes about 25 words per minute. At the risk of repetition, the point is to make an accurate note of the evidence, not to record it word for word.
The only exception to that rule is when a witness testifies about the exact words which a person used.

Do not try to write down every word, or make so many notes that you will not know what they mean or what to do with them when the time comes to write the decision. Be selective in what you record, but also ensure that your notes are a fair and balanced reflection of the evidence given.

Make the task simple by being brief. Do not attempt to write continuous prose. Full grammatical sentences are not necessary and it is perfectly acceptable for notes to be compressed. Make the fullest possible use of abbreviations, initials and shortened forms of commonly used terms.

Logical and consistent organisation

The more you can do to organise the evidence as the case progresses, the easier it will be to reach and write the decision. In Panel proceedings, as in most other most adjudicative proceedings, the sequence is likely to be:

- introduction
- issues
- facts
- application of the law to the facts where appropriate; and
- conclusion.

Although your notes will only be for your own use, they will be more effective if they are recorded clearly and neatly. A good layout will help you to absorb, recall and assess the information more readily. It will usually help if you:

- develop a logical and a memorable layout for your notes and stick to it;

- record the basic, background, facts (dates, places etc.) at the beginning so that the information is readily available when you come to write your decision;

- use headings, sub-headings, numbering, indentation or some other some other system to keep items distinct and separate from each other. Laying out information in this way will help you to assess the importance of each detail;

- write clearly and leave space between each note. Don't try to squeeze as much information as possible on to one page, keeping the items separate will make them easier to recall;

- avoid stringing points together continuously, one after the other on the page. You will find it very difficult to separate them from each other after some time has elapsed.

- prepare a chronology or timeline in complex cases, to assist you to evaluate the evidence in a logical sequence.

Noting the evidence

Different people have different approaches to how they write their notes and the most important thing is to identify what works for you and to then stick to it.

One common method of note-taking is to draw a line down the middle of the page; using the right hand column to record the evidence, and the left hand column to record observations and comments, such as the relevance of the evidence, the demeanour and credibility of

the witness, significant non-verbal behaviour (e.g. “slow to answer”, “could not remember without notes”), etc.

It will often be helpful to develop a simple system of shorthand for such notes, for example:

- marginal notes as to whether a witness was credible or not can be recorded using something as simple as a tick or a cross;

- abbreviations can be developed for use in all cases (for example, “DNR” for did not remember, “DNK” for did not know, etc.) or a list of abbreviations can be created for specific cases (for example, “TGH” for Trumpton General Hospital). In complex cases it may be necessary to record what an abbreviation with several meanings stands for in that case (for example, that “RSI” means repetitive strain injury rather than rapid sequence induction);

- for the stages of questioning a witness, the abbreviations commonly used by advocates can be adopted, as follows:

    - examination in chief: XC or XinC
    - cross-examination: XX or CX
    - re-examination: RX or ReX

- instead of trying to record the question and answer separately, speed up the process by writing a single sentence which encompasses both. In this way, the following question and answer:

  Example:

  Advocate: *“did you give X permission to unfasten your bra*

  Witness: *“No, I didn’t”*

  may be recorded without loss of context or meaning as:

  “Didn’t give X permission to unfasten her bra”

- if the case has more than one element or ‘count’ then give them simple labels them for ease of identification (e.g., “Assault 1”, “Assault 2”, “Theft A”, “Theft B", etc.);

- record and number the order of witnesses, identifying them by their initials and the party upon whose behalf they appear. In complex cases, it may help to create a “cast list” as part of your notes;

- if items of real evidence are exhibited, number and record a short description of the exhibits.

Example

<u>JOHN SMITH (JS)</u> CNHC Witness 1 XinC	
Couldn't recall all events clearly. Vaguely remembers what occurred but clinic was busy that day.	reluctant?
But recalls Patient A, says she was rude to him.	slow/hesitant in claim
JS spoke to her briefly before seen by Registrant (SP).	
Confirms SP did treat her without chaperone, not ideal but often happens when busy.	
Unaware of any complaint by Pt A about SP, certainly didn't to JS at time.	not v. credible in answer
Certain about it even though said could not recall clearly.	

CNHC PANEL TRAINING NOTES

ENGAGEMENT SKILLS

Introduction

In order to fulfil their function, CNHC Panels must engage in an appropriate manner with all those who appear before them, to ensure that fair and reasoned decisions are made based upon the available evidence.

Engagement requires a non-judgemental, non-confrontational approach in which all parties are listened to, treated with respect and addressed or questioned in an appropriate manner.

Failure to listen actively and accurately will inhibit a Panel's ability to be effective in its decision-making. Failure to disregard the biases that we all have is even more of a barrier. Stereotyping, labelling, and biased perceptions of people should not form part of a Panel member's considerations.

Barriers to engagement

Status

The fact that a Panel is in a position of authority and will be making decisions about a registrant's fitness to practise will significantly influence the process of engagement from the perspective of the registrant.

Hearing procedure

The way proceedings are conducted, for example, whether the parties must sit or stand when addressing the Panel, will affect the process of engagement.

Cultural misinterpretation

Body language is defined by our own culture and, therefore, body language which is the acceptable norm within other cultures may be misinterpreted.

Emotional distractions

For the registrant and witnesses there are many emotional distractions including:

- fear of the unknown;
- reluctance to reveal personal details in front of strangers;
- worries about how the proceedings may affect their lives;
- feelings of guilt or remorse.

Panel members may also find themselves distracted. Concerns about managing the engagement process itself, which can result in a focusing of the mind on the next question rather than actively listening to the response.

Lack of response

The most effective barrier to communication is to receive no response. Whilst it is very uncomfortable to sit through silence and the natural desire is to fill the vacuum, there is need to transfer the pressure of the silence to the person concerned by not responding on their behalf. Options for practically managing this difficult situation include:

- slowly counting to ten
- Adopting the reflective question technique, for example, “You are looking uncomfortable. Do you feel uncomfortable speaking in public?”

Prepare for the hearing

Being prepared is an important aspect of the engagement process. Panel members should arrive punctually, familiarise themselves with the venue, confer as necessary with their colleagues and ensure that everything is in order.

When the hearing starts, Panel members should ensure that everyone is correctly identified and understands the nature of the proceedings. The introductory process is not something to be brushed aside in the interests of ‘getting on with the case’. The first issue is to ensure that everyone is clear about the names of those appearing before the Panel. It really helps at the outset to be aware of the names of the parties, witnesses and representatives and, more importantly, the name by which they wish to be addressed during the proceedings.

The introduction should set out who everyone is, what will happen during the hearing, the procedures to be followed and how the decision will be made.

Active listening

Listening actively means far more than establishing that you are able to hear what is being said. Many methods of communication do not involve the spoken word at all. One inappropriate look (whether an expression of boredom, disinterest or lack of enthusiasm) can send a misleading message to those appearing in the proceedings. What is important when listening to a case is a demonstration of attentiveness to what is being said.

Effective non-verbal communication should demonstrate to all that the Panel are actively involved in the proceedings. Look interested by maintaining appropriate eye contact. Examine, read and be seen to read any documentation that is handed in.

Effective engagement relies heavily on active listening skills. Active listening creates an influential environment more likely to generate positive outcomes. Active listening is about accepting the person – hearing what they have to say without any preconceptions or biases. Demonstrating understanding where appropriate and using non-judgemental behaviour. In accepting the person we do not have to condone their behaviour.

Demonstrating active listening

Speakers recognise an active listener as a person who is:

- maintaining appropriate eye contact;;
- employing appropriate gestures – e.g. nodding of the head;
- making ‘supportive noises’- “yes, I see”, “please continue”... ;
- adopting an interested posture;
- avoiding distracting mannerisms;
- summarising, paraphrasing and clarifying;
- noting down key words or phrases which help personal retention.

Active listening is not really difficult, but it is surprising how many of us find it so. The reasons often rest within ourselves. Poor listening habits include:

- lack of concentration, from distraction or disinterest
- uncertainty about how to effectively manage the situation, thus distracting us from hearing what is being said
- mentally rehearsing our planned questions
- interrupting – not hearing the whole message and therefore not understanding the complete meaning of what is being said. Sometimes this may result in a distorted perspective
- hearing what we expect to hear and missing the point or jumping to conclusions
- defensive listening because we anticipate being challenged or attacked
- aggressive listening, when we listen only for those key remarks upon which we can disagree.

Overcoming poor listening habits

Prepare - structure the engagement process, taking account of your own bad habits

Pay attention - demonstrate that you are giving your full and undivided attention to the speaker through appropriate body language, using eye contact, head nodding.

Listen to the whole message - check the speaker's body language and words for consistency. Listen for feelings, motives and intentions as well as for facts.

Hear before evaluating - listen to what the speaker says before reaching a premature conclusion. Listen until the speaker has finished speaking. Use questions asked in a non-judgemental way, in order to help clarify exactly what the speaker wants to say.

Demonstrate understanding - where appropriate, empathise with the speaker in order to signal your complete understanding of the situation, for example, 'that must have been very difficult for you.'

Paraphrase what you heard - repeat back to the speaker what you heard and check if you have understood correctly.

Relax !

Body language

Body language is an important part of the way we communicate. Numerous studies have shown that the impact body language has upon face-to-face messages varies between 55% and 80%. If words and body language are not synchronised then the message received is confused and doubted rather like 'wooden' acting. If a person looks as though they are lying, we believe what we see rather than what we hear.

First impressions count. We form an initial impression of a person within seconds of them entering a room and before they have spoken - just through body language.

Those first impressions, or constructs, are based upon individual experience and belief systems and are used by us to make sense of a confusing world. We rarely doubt their validity and use them in our decision-making processes about people. Unless we are aware

of this we can actively seek information, which confirms our initial impressions - and discount information, which in anyway serves to disprove our opinion. In other words, we form prejudices.

Making use of constructs is normal. We use them to pre-judge people and situations and to predict what will happen. Constructs can, however, lead us into making errors of judgements through for example, stereotyping or making over generalised assumptions.

Given that body language is very influential upon the process of engagement, we need to ensure that we do not allow a person's demeanour before a Panel to influence decision making inappropriately, either negatively or positively.

Questioning Skills

CNHC Fitness to Practise Panels are inquisitorial proceedings in which the majority of the questions will be put by the parties, or those representing them, following the traditional pattern of:

EXAMINATION IN CHIEF

↓

CROSS-EXAMINATION

↓

RE-EXAMINATION

The Panel has the right to ask questions and should do so where this will aid the decision-making process. For that reason it is important for Panel members to be able to identify and use the various types of question.

Open questions are good to begin with because they require the subject to produce an answer that has not been suggested by the question itself.

Sometimes it will be important to allow a party to express himself or herself freely. It also concentrates the mind of the individual concerned. Open questions are also particularly useful during the initial stages of the hearing. They can promote a good atmosphere or set the scene for subsequent questions. Sometimes it will be useful to ask an open question to introduce new topics later in the hearing or provide an opportunity to investigate in more detail matters already raised in evidence. The beauty of open questions is that they do not suggest a 'yes' or 'no' answer or any other type of monosyllabic response.

Closed questions will sometimes be appropriate, but generally this should be for clarification or to ensure that the Panel understands the basis upon which evidence is being given or submissions have been made. There is also value in asking a closed question when a specific confirmation of fact is required or where it is necessary to obtain specific items of information or to test out hypotheses that have arisen out of a period of questioning. On occasion, it will be necessary to bring the proceedings back to the realms of relevance where a witness has 'gone off the rails'. Closed questions should be used as sparingly as possible, however, and, wherever possible, followed up with more open questions.

Our natural tendency is towards asking closed questions.

PRACTICE NOTE

Unrepresented Parties

Introduction

Although the procedures adopted by the CNHC Practice Committees have been deliberately designed to enable registrants to represent themselves, for many registrants the prospect of having to appear before a Panel will nonetheless be a daunting experience. The unrepresented registrant may be apprehensive or nervous about having to present a case before a Panel and this may manifest itself in apparently hostile, belligerent or even rude behaviour. Panels need to be aware of this and should take all reasonable steps to put unrepresented registrants at ease, including:

- being patient at all times and making appropriate use of adjournments;
- explaining what will happen in straightforward terms, avoiding legal jargon or, where it is necessary, explaining it;
- where appropriate, asking the legal adviser to explain the proceedings;
- explaining what the registrant may or may not do, why and when;
- trying to get the registrant to identify the issues in dispute and ensuring that the registrant has said what he or she needs to say;
- giving clear reasons for any rulings or decisions that are made.

Maintaining a fair balance

Unrepresented registrants are unlikely to be familiar with law or procedure and, in particular, the presentation of evidence by the examination and cross-examination of witnesses. They should be allowed some latitude in the presentation of their case, in order to ensure that they receive a fair hearing, but this does not mean that they should be allowed to exploit or abuse the lack of representation. Panels should ensure that an unrepresented registrant has every reasonable opportunity to make his or her case and, for example, it may be necessary for the Panel to help the registrant to put a point to a witness in the form of a question. However, Panels must be careful not to interfere in matters which must be decided by the registrant alone, such as whether or not to give evidence.

Panels are expected to give clear procedural guidance in every case before them, but it is especially important to do so in cases where a registrant is unrepresented. As a minimum the following should be explained:

- who the members of the Panel are;
- who the other people present are and their respective functions;
- the procedure which the Panel will follow, including:
    - that the CNHC will open proceedings and then call witnesses to give evidence;

- an explanation of the normal order of examining witnesses (examination in chief, cross-examination and re-examination);
- that the registrant may be able to object to the admission of evidence; and
- that, once the CNHC has put its case, the registrant may give evidence personally (and may be cross-examined) and may call and question witnesses;
- that when all the evidence has been heard, the registrant may address the Panel and thus will have the 'last word';

- that everyone will have the opportunity to present their case, and that the registrant should not interrupt when someone else is speaking;
- that the registrant may make notes, and may have a friend or colleague sitting alongside to make notes or help to present the case;
- that, if the registrant would like a short break in the proceedings at any time, that is likely to be granted;
- that, if the registrant does not understand something or has a problem about the case, the Panel should be told so that it can be addressed.

Protecting witnesses

A person who is unfamiliar with the presentation of evidence by means of examination and cross-examination is likely to make statements to, rather than asking questions of, witnesses and may adopt an aggressive, offensive or unnecessarily confrontational approach to the questioning of witnesses.

Although such behaviour is likely to arise inadvertently, Panels should protect witnesses from questioning which goes beyond the acceptable limits of testing or challenging their evidence by means of cross-examination. Striking the right balance on this issue will often be difficult, but Panels must intervene as necessary in order to protect both the interests of witness and the registrant's right to a fair hearing.

PRACTICE NOTE

Proceeding in the Absence of the Registrant

Introduction

As a general principle, a registrant who is facing a fitness to practise allegation has the right to be present and represented at a hearing. However, if a registrant is neither present nor represented, the Panel may nevertheless proceed if it is satisfied that all reasonable steps have been taken to serve notice of the hearing on the registrant. The decision to proceed with a hearing in the absence of the registrant is a matter within the discretion of the Panel. However, that discretion is one which has been described by the courts as "severely constrained". As the House of Lords held in *R v Jones*, the discretion to commence and conduct proceedings in the absence of the registrant "should be exercised with the utmost care and caution." In exercising that discretion, Panels must strike a careful balance between fairness to the registrant and the wider public interest.

Exercise of discretion

In deciding whether to proceed in the absence of the registrant, Panels must consider all of the circumstances of the case, including whether the registrant's actions amount to a waiver of the right to be present or represented. In reaching a decision, Panels should take account of the factors identified by the Court of Appeal in *R v Jones*. That case concerned the absence of a criminal defendant, but the factors identified in that case (appropriately modified as set out below) are relevant to fitness to practice proceedings:

- the nature and circumstances of the registrant's absence and, in particular, whether the behaviour may be deliberate and voluntary and thus a waiver of the right to appear;
- whether an adjournment might result in the registrant attending the proceedings at a later date;
- the likely length of any such adjournment;
- whether the registrant, despite being absent, wished to be represented at the hearing or has waived that right;
- the extent to which any representative would be able to receive instructions from, and present the case on behalf of, the absent registrant;
- the extent of the disadvantage to the registrant in not being able to give evidence having regard to the nature of the case;
- the seriousness of the allegation;
- the general public interest and, in particular, the interest of any victims or witnesses that a hearing should take place within a reasonable time of the events to which it relates;
- the effect of delay on the memories of witnesses;

- where allegations against more than one registrant are joined and not all of them have failed to attend, the prospects of a fair hearing for those who are present.

Procedure

If a Registrant fails to attend a hearing and has not provided any explanation for being absent, the Panel will need to determine whether it is appropriate to proceed in the registrant's absence. The Panel should first seek clarification of whether notice of the hearing was correctly sent to the registrant. If it is satisfied that notice was properly given (but not otherwise) the Panel should then consider the factors set out above to determine whether, in all the circumstances, it is appropriate to proceed with the hearing in the absence of the registrant. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.

If the Panel decides that a hearing should take place or continue in the absence of the registrant, they must ensure that the hearing is as fair as the circumstances permit. In particular, reasonable steps must be taken during the giving of evidence to test the CNHC's case and to make such points on behalf of the registrant as the evidence permits. The Panel must also avoid reaching any improper conclusion about the absence of the registrant and, in particular, must not treat the registrant's absence as an admission of guilt.

PRACTICE NOTE

Joinder

Introduction

The procedural rules for fitness to practise proceedings provide that, where it would be just to do so, a Panel may consider and determine together:

- two or more allegations against the same registrant; or
- allegations against two or more registrants.

Joining allegations against one registrant or dealing jointly with registrants accused of related allegations provides obvious practical benefits such as reducing demands on resources and witnesses' time. However, the overriding factor which Panels must take into account in considering the joinder of allegations is whether it would be just to do so.

Joinder

Joining allegations is a discretionary power, the exercise of which must be carefully considered by Panels. In exercising that discretion, the principles to be applied are largely derived from practice in the criminal courts, most notably the decision in *R v Assim* as follows:

- the governing factor in making joinder decisions is whether it is just to do so. In reaching a decision, Panels need to consider the interests of justice as a whole and foremost among those interests must be the interests of the registrant(s) concerned;
- as a general rule, it would be inappropriate for a Panel to join together several, unconnected, allegations against one registrant or to join unconnected allegations against several registrants;
- joining allegations against a single registrant will only be appropriate where the allegations are linked in nature, time or by other factors, for example where the registrant faces several allegations:
    - of the same or similar character;
    - based on the same acts, events or course of dealing; or
    - based on connected or related acts, events or courses of dealing.
- joining allegations against more than one registrant will only be appropriate where they are subject to the same allegation, where there is evidence that they acted in concert or the allegations against them are linked in time or by other factors, for example where:
    - the allegations concern participation in the same act, event or course of dealing (or any series of them);
    - the allegations are based upon connected or related acts, events or courses of dealing; or
    - the allegations relate to actions taken in furtherance of a common enterprise.
- even if, based on the nature of the allegations, joinder would be appropriate, there may be other reasons why the discretion to do so should not be exercised. For example, where one registrant has failed to respond and joinder might cause delay or unfairness in dealing with another registrant or where it is apparent that registrants will present antagonistic or mutually exclusive defences.

Evidence

If allegations against more than one registrant are joined, it will not necessarily be the case that all of the evidence can be considered against all of the registrants. Each registrant is entitled to have their case decided solely on the evidence against them and Panels must take care to consider evidence only in relation to the allegation and registrant to which it relates.

Severance

The decision to join allegations will often be taken at an early stage in the case management process and, as matters progress, it may become apparent that it would be more appropriate for those allegations to be dealt with separately, for example, where witnesses are not available in respect of all the joined allegations or where one registrant is causing delays which will unfairly affect another. The Panel's discretion to join allegations includes the discretion to sever those allegations and deal with them separately where it would be just to do so.

PRACTICE NOTE

Finding that Fitness to Practise is "Impaired"

Introduction

In determining whether allegations are "well founded", Panels of the Conduct and Competence Committee and the Health Committee are required to decide whether the CNHC, which has the burden of proof, has discharged that burden and proved that the registrant's fitness to practise is impaired.

Impairment

An allegation is comprised of three elements, which Panels are required to consider sequentially:

1. whether the facts set out in the allegation are proved;

2. whether those facts amount to the 'ground' set out in the allegation (e.g. misconduct or lack of competence); and

3. in consequence, whether the registrant's fitness to practise is impaired. It is important for Panels to note that the test of impairment is expressed in the present tense; that fitness to practice "is impaired". As the Court of Appeal noted in *GMC v Meadow*:

"…the purpose of FTP procedures is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The [Panel] thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past".

Thus, although the Panel's task is not to "punish for past misdoings", it does need to take account of past acts or omissions in determining whether a registrant's present fitness to practice is impaired.

Factors to be taken into account

In *Cohen v GMC* the High Court stated that it was "critically important" to appreciate the different tasks which Panels undertake at each of step in the adjudicative process.

The initial task for the Panel is:

"to consider the charges and decide on the evidence whether the charges are proved in a way in which a jury… has to decide whether the defendant is guilty of each count in the indictment. At this stage, the Panel is not considering any other aspect of the case, such as whether the [health professional] has a good record or… performed any other aspect of the work… with the required level of skill".

Subsequently, the Panel is:

"concerned with the issue of whether in the light of any misconduct [etc.] proved, the fitness of the [health professional] to practise has been impaired taking account of the critically important public policy issues".

Those “critically important public policy issues” which must be taken into account by Panels were described by the court as:

“the need to protect the individual patient and the collective need to maintain confidence in the profession as well as declaring and upholding proper standards of conduct and behaviour which the public expect… and that public interest includes amongst other things the protection of patients and maintenance of public confidence in the profession”.

Thus, in determining whether fitness to practise is impaired, Panels must take account of a range of issues which, in essence, comprise two components:

1. the ‘personal’ component: the current competence, behaviour etc. of the individual practitioner; and

2. the ‘public’ component: the need to protect patients, declare and uphold proper standards of behaviour and maintain public confidence in the profession.

As the court noted in *Cohen*, the sequential approach to considering allegations means that not every finding of misconduct etc. will automatically result in a Panel finding that fitness to practice is impaired as:

“There must always be situations in which a Panel can properly conclude that the act… was an isolated error on the part of the... practitioner and that the chance of it being repeated in the future is so remote that his or her fitness to practise has not been impaired…It must be highly relevant in determining if... fitness to practise is impaired that... first the conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated”.

It is important for Panels to recognise that the need to address the “critically important public policy issues” identified in *Cohen* -to protect patients, declare and uphold proper standards of behaviour and maintain public confidence in the profession- means that they cannot adopt a simplistic view and conclude that fitness to practise is not impaired simply on the basis that, since the allegation arose, the registrant has corrected matters or “learned his or her lesson”.

Character evidence

In deciding whether conduct “is easily remediable, has been remedied and is highly unlikely to be repeated”, Panels may need to consider 'character evidence' of a kind which, in other proceedings, might only be heard as mitigation as to sanction after a finding had been made.

Whilst it is appropriate for Panels to do so, in admitting character evidence for the purpose of determining impairment, they must exercise caution. As the Court of Appeal noted in *The Queen (Campbell) v General Medical Council,* issues of culpability and mitigation are distinct and need to be decided sequentially and:

“The fact that in some cases there will be an overlap, or that the same material may be relevant to both issues, if they arise, does not justify treating evidence which is exclusively relevant to personal mitigation as relevant to the prior question, whether [the allegation] has been established.”

In deciding whether to admit character evidence, Panels must draw a distinction between evidence which has a direct bearing on the findings it must make and evidence which is

simply about the registrant's general character. The latter will only be relevant if the Panel needs to hear mitigation against sanction.

At the impairment stage, Panels may properly take account of evidence such as the registrant's competence in relation to the subject matter of the allegation; the registrant's actions since the events giving rise to the allegation; or the existence or absence of similar events. Character evidence of a more general nature which has no direct bearing on the findings to be made by the Panel, such as the registrant's standing in the community, should not be admitted at this stage. Expressions of regret or remorse will usually fall within the latter category. However, where there is evidence that, by reason of insight, that regret or remorse has been reflected in modifications to the registrant's practice, then it may be relevant to the question of impairment.

In deciding whether to admit character evidence at the impairment rather than the sanction stage, Panels need to consider whether the evidence may assist them to determine whether fitness to practise is impaired. Whilst caution needs to be exercised, an over-strict approach should not be adopted, as it is important that all evidence which is relevant to the question of impairment is considered, such as evidence as to the registrant's general competence in relation to a competence allegation.

In considering evidence at the impairment stage, Panel's will readily recognise and be able to disregard character evidence of a general nature which is unlikely to be relevant to the issue of impairment. As the decision in *Cheatle v GMC* highlights, Panels must be careful not to refuse to hear evidence at the impairment stage about a registrant's general professional conduct which, when heard at the sanction stage, raises doubts about the conclusion that the registrant's fitness to practise is impaired.

The sequential approach

As noted above, Panels must adopt a sequential approach to determining whether fitness to practise is impaired. In reaching their decision, other than in the simplest of cases Panels should act in a manner which makes it clear that they are applying the sequential approach by:

- first retiring to determine whether the facts as alleged are proved and, if so, amount to the 'ground' (e.g. misconduct) of the allegation;
- if that question is answered in the affirmative, hearing further argument on the issue of impairment and then retiring for a second time to determine whether the registrant's fitness to practise is impaired; and
- if that question is answered in the affirmative, hearing submissions on the question of sanction and then retiring for a third time to determine what, if any, sanction to impose.

Whilst there is no general obligation to give separate decisions on finding of fact, in more complex cases may be necessary to do so. As the Court of Appeal stated in *Phipps v General Medical Council*:

"every Tribunal ... needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?

If in asking itself those questions the Tribunal comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents ... are entitled to know in clear terms why such findings have been made."

PRACTICE NOTE

Complaints handling

INTRODUCTION

Currently, on receipt of a complaint made in the form required by the Council, the Council considers whether the nature of the complaint is such that in the first instance it is appropriate to seek for it be resolved informally. If it is not appropriate to seek for it to be resolved informally, or if informal resolution has not been successful, the Council refers the complaint to a panel two independent Case Examiners to determine whether there is a case to answer. This practice note sets out the form in which Council require a complaint to be made.

PROCEDURE

The form in which the Council requires complaints to be made is as follows:

1. made in writing,

2. identifies the registrant who is the subject of the complaint,

3. identifies the person who is making the complaint and,

4. is signed by or on behalf of that person.

Where relevant, a notice or certificate that the registrant has

a. been convicted of an offence;

b. received a police caution; or

c. been the subject of a decision or determination by any other regulatory or licensing body

will be considered to be a complaint in the form required by Council, if it is in writing, in a form normally adopted for such notices or certificates by the courts, police service, law enforcement agencies or regulatory bodies and sufficiently identifies the registrant concerned. The CNHC seeks to operate fair and transparent procedures and, therefore, as a matter of policy the Council will normally not take further action in respect of complaints which are made anonymously. Anonymous complaints in this context means a complaint made by a person whose identity is unknown to the CNHC rather than by a person who has asked the CNHC not to disclose his or her identity.

Such a policy clearly disregards anonymous complaints and there is a good reason for this happening *in most cases*. The CNHC procedures are intended to provide registrants with the information required to understand the nature and substance of any complaints made against them. The Case Examiners can only consider documentation that the registrant has had an opportunity to comment upon. The policy currently adopted by the Complementary & Natural Healthcare Council is to provide the registrant with all documentation provided to the Council, including the written complaint and any additional information or clarification that the complainant has been asked to provide, to allow the registrant to make written submissions.

Any such submissions are sent to the complainant for any comment they wish to make. Any comments are copied to the registrant, for information. If the Council were to accept an anonymous complaint, it would be impossible for the Council to seek any further information or clarification from the complainant.

However, the CNHC does not adopt an unbending policy of not accepting anonymous complaints. The primary function of the Complementary & Natural Healthcare Council is to protect the public and there are circumstances in which an anonymous complaint relates to serious and credible concerns about a registrant's fitness to practise, and in such circumstance the Council will consider taking appropriate action to deal with an anonymous complaint.

PRACTICE NOTE

Concurrent Court Proceedings

Introduction

CNHC procedures require Panels to conduct fitness to practise proceedings expeditiously and it is in the interest of all parties that allegations are heard and resolved as quickly as possible. As a general principle, whilst it may be appropriate for CNHC fitness to practise proceedings to be postponed if the person concerned is being tried concurrently for related criminal charges, postponement will rarely be appropriate simply because the person concerned or the subject matter of the allegation is the subject of civil proceedings.

Concurrent criminal proceedings

A potential injustice may arise if regulatory proceedings are conducted at the same time as a related criminal trial. As more restrictive rules of evidence will apply in criminal proceedings, there is a risk that evidence which has not been admitted at that trial may enter the public domain by being admitted in the course of the regulatory proceedings. For that reason, CNHC fitness to practise proceedings may be postponed until any related criminal trial has concluded.

In addition, acquittal in the criminal courts will not always mean that no regulatory action will follow, as the grounds for acquittal may be irrelevant for the purpose of fitness to practise proceedings. For example, a registrant who is charged with a sexual offence against a client may be acquitted on the basis of doubts about the client's consent or lack of it, but may still face an allegation of misconduct based upon the inappropriate nature of the relationship with the client.

Concurrent civil proceedings

In relation to civil proceedings similar issues do not arise and the courts have shown a marked reluctance to stay regulatory proceedings when asked to do so by parties who are the subject of a concurrent civil action. As Stanley Burnton J. stated in *R v Executive Counsel of the Joint Disciplinary Scheme*:

"Regulatory investigations and disciplinary proceedings perform important functions in our society. Furthermore, the days have gone when the High Court could fairly regard the proceedings of disciplinary tribunals as necessarily providing second class justice".

The need for the discretion to stay one set of concurrent civil and regulatory proceedings to be exercised sparingly and with great care was highlighted by the Court of Appeal in *R v Panel on Takeovers and Mergers ex parte Fayed* (emphasis added):

"It is clear that the court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of other proceedings. But it is a power to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice."

Whether there is "a real risk of serious prejudice which may lead to injustice" may be a difficult question to answer and will be dependent upon the fact of the case.

It is open to the parties in fitness to practise proceedings to ask the courts to stay those proceedings but, in the first instance, it is more likely that an application to stay the proceedings will be made to the Panel which is due to hear the case.

If Panels are asked to stay proceedings on the basis that a party is subject to concurrent civil action, the approach which should be adopted, derived from the decisions of the courts, is as follows:

- Panels must exercise the discretion to stay what amounts to one of two concurrent sets of civil proceedings sparingly and with great care;
- a stay must be refused unless the party seeking the stay can show that, if it is refused, there is a real risk of serious prejudice which may lead to injustice in one or both of the proceedings;
- if the Panel is satisfied that there is a real risk of such prejudice arising then it must balance that risk against the countervailing considerations, including the strong public interest in seeing that the regulatory process is not impeded;
- each case turns on its own facts and Panels can derive only limited assistance from comparing the facts of a particular case with those of other cases.

PRACTICE NOTE

"Case to Answer" Decisions

Introduction

CNHC procedures provide that, where a complaint is referred to the Case Examiners , they shall consider, in the light of the information that they have been able to obtain and any representations or other observations made to them, whether in their opinion, there is a "case to answer".

The "realistic prospect" test

In deciding whether there is a case to answer, the test to be applied by the Case Examiners is whether, based upon the evidence before them, there is a "realistic prospect" that the CNHC will be able to establish at a hearing that the registrant's fitness to practise is impaired. That test (which in some proceedings is also known as the "real prospect" test) is relatively simple to understand and apply. As Lord Woolf MR noted in *Swain v Hillman*:

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success… or, as [Counsel] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

Applying the test

In determining whether there is a case to answer, the Case Examiners must decide whether, in their opinion, there is a "realistic prospect" that the CNHC (which has the burden of proof) will be able to establish that the registrant's fitness to practise is impaired. The test does not call for substantial inquiry or require the Case Examiners to be satisfied on the balance of probabilities. The Case Examiners only need to be satisfied that there is a realistic or genuine possibility (as opposed to remote or fanciful one) that the CNHC will be able to establish its case.

In reaching its decision, the Case Examiners :

- should recognise that they are conducting a limited, paper-based, exercise and not seek to make findings of fact on the substantive issues;
- may assess the overall weight of the evidence but should not seek to resolve substantial conflicts in that evidence. The assessment of the relative strengths of competing evidence can only be properly undertaken at a full hearing.

Registrants are not obliged to provide any evidence but many will do so voluntarily and any such evidence should be considered by the Case Examiners . However, it will rarely resolve matters at this stage, as it will typically conflict or compete with the CNHC's evidence and, therefore, will need to be tested at a hearing, where it will be for the CNHC to prove its case.

In applying the test the Case Examiners need to take account of the wider public interest, including protection of the public and public confidence in the profession concerned and the regulatory process.

The test applies to the <u>whole of the complaint</u>, that is:

1 the facts set out in the complaint;

2 whether those facts amount to the "ground" of the complaint (e.g. misconduct or lack of competence); and

3 in consequence, whether fitness to practise may be impaired.

In the majority of cases, the evidence will relate solely to the facts and, typically, this will be evidence that certain events involving the registrant occurred on the dates, and at the places and times alleged.

It will be rare for separate evidence to be provided on the "ground" or the issue of impairment and these will largely be a matter of inference for the Case Examiners , such as whether the factual evidence suggests that the service provided by the registrant fell below the standard expected of a reasonably competent practitioner or that the registrant's actions constitute misconduct when judged against the established norms of the profession. In reaching that decision the Case Examiners may wish to have regard to the CNHC Standards of Conduct, Ethics and Performance.

Impaired fitness to practise

In deciding whether there is a realistic prospect of CNHC proving that fitness to practise is impaired the Case Examiners should consider the nature and severity of the complaint.

People do make mistakes or have lapses in behaviour and CNHC would not be enhancing public protection by creating a 'climate of fear' which leads registrants to believe that any and every minor error or isolated lapse will result in a complaint being referred for a hearing.

Determining, on the basis of a limited, paper-based exercise, whether the CNHC has a realistic prospect of establishing impairment can sometimes be difficult.

A useful starting point for the Case Examiners is to consider whether the case includes evidence which, if proven, would show that the registrant does not meet a **key requirement** of being fit to practise, in the sense that the registrant:

- is not competent to perform his or her professional role safely and effectively;
- fails to establish and maintain appropriate relationships with service users, colleagues and others; or
- does not act responsibly, with probity or in manner which justifies the public's trust and confidence in the registrant's profession.

A presumption of 'case to answer' should be made by the Case Examiners in cases where the evidence, if proven, would establish:

- serious or persistent lapses in the standard of professional services;
- incidents involving:
    - harm or the risk of harm;
    - reckless or deliberate acts;
    - concealment of acts or omissions, the obstruction of their investigation, or attempts to do either;
- sexual misconduct or indecency (including any involvement in child pornography);

- improper relationships with, or failure to respect the autonomy of, service users;
- violence or threatening behaviour;
- dishonesty, fraud or an abuse of trust;
- exploitation of a vulnerable person;
- substance abuse or misuse;
- health problems which the registrant has but has not addressed, and which may compromise the safety of service users;
- other, equally serious, activities which undermine public confidence in the relevant profession.

No case to answer

A decision that there is “no case to answer” should only be made if there is no realistic prospect of the CNHC proving its case, for example, because there is insufficient evidence to substantiate the complaint or the available evidence is manifestly unreliable or discredited. In cases where there is any element of doubt, the Case Examiners should adopt a cautious approach at this stage in the process by deciding that there is a case to answer.

PRACTICE NOTE

Disposal of Cases by Consent

Introduction

The use of procedures for disposing of cases by consent is an effective case management tool which reduces the number of contested hearings which need to be held. A Panel cannot simply agree to resolve a case by consent without having regard to their wider obligations. In considering proposals for disposal of a case by consent both the CNHC and the Panel must be satisfied that:

- the appropriate level of public protection is being secured in the case before it; and
- there is no detriment to the wider public interest, for example, by undermining the deterrent effect which might arise from pursuing the case.

Disposal by consent

The consent process is a means by which the CNHC and the registrant concerned can seek to conclude a case without the need for a contested hearing, by negotiating and then putting before a Panel an order of the kind which the Panel would have been likely to make in any event. The CNHC will only consider resolving a case by consent:

- after the Case Examiners have found that there is a "case to answer", so that a proper assessment has been made of the nature, extent and viability of the allegation;
- where the registrant is willing to admit the allegation in full; and
- where the remedial action proposed by the registrant is consistent with the expected outcome if the case was to proceed to a contested hearing.

A registrant's insight into, and willingness to address failings are key elements in the FTP process and it would be inappropriate to dispose of a case by consent where the registrant denied liability.

Procedure

Disposal by consent does not affect the range of sanctions available to a Panel, it is merely a process by which the registrant and the CNHC can propose an appropriate outcome to the case and ask the Panel, assuming that it is content with that outcome, to conclude the case on that basis.

The task for the Panel is to determine whether, on the basis of the evidence before it, to:

- deal with the case in an expedited manner by approving the proposal set out in the draft Consent Order put before it; or
- reject that proposal and set the case down for a full contested hearing.

As the Panel must retain the option of rejecting a proposal for disposing of a case by consent, the CNHC has an obligation to make it clear to registrants that cooperation with the process will not automatically lead to a Consent Order being approved.

Equally, as the registrant is required to admit liability in order for the process to proceed, in the event that the proposal is rejected by the Panel, that admission will be treated in the same way as a “without prejudice” settlement offer and the full hearing will take place before an entirely different Panel which will not be made aware of the proposal unless the registrant chooses to bring it to their attention.

A template Consent Order is set out in the annex to this Practice Note.

Complementary & Natural Healthcare Council

[PRACTICE] COMMITTEE

CONSENT ORDER

TAKE NOTICE that, in respect of the [allegation made] [review of the order made by the Committee] on [date] against [name]:

1 [name of registrant] consents to the Committee [making] [revoking][varying] [a][the] [type] Order against [him][her] in respect of that matter on the terms set out below; and

2 the Council consents to the making of an Order on those terms, being satisfied that doing so would in all the circumstances be appropriate for the following reasons:

[set out reasons]

AND FURTHER TAKE NOTICE that the Panel, with the consent of the parties and, upon due inquiry being satisfied that it is appropriate to do so, now makes the following Order:

[set out Order]

Signed: _____ Panel Chair

Date: _____

Signed: _____ Signed: _____

Date: _____ Date: _____

Note: the parties may consent to the Order by all signing one copy of this form or each signing separate copies.

PRACTICE NOTE

Case Management and Directions

Introduction

Panels determine whether an allegation is well founded by means of an inquisitorial hearing process and the standard of proof shall be on the balance of probabilities. In such proceedings:

- it is for the Council to prove its case; and
- the registrant has a right against self-incrimination.

The public interest is best served by a process which is simple, accessible and fair and where the issues in dispute are identified at the earliest opportunity. Those objectives can be secured by published Detailed Procedures which require:

- the Council to set out its case;
- the registrant to identify in advance those elements of the Council's case which he or she disputes; and
- the parties to provide information to assist the Panel in the management of the case.

Expecting registrants to participate in this process is not contrary to their rights as, if they wish to deny every element of an allegation, they retain the right to do so.

Case management

Effective case management is a process which enables:

- the issues in dispute to be identified at an early stage;
- arrangements to be put in place to ensure that evidence, whether disputed or not, is presented clearly and effectively;
- the needs of any witnesses to be taken into account; and
- an effective programme and timetable to be established for the conduct of the proceedings.

In cases where a Panel considers it appropriate, the Panel may (of its own volition or at the request of one of the parties) give Special Directions for the conduct of that case which disapply, vary or supplement the published Detailed Procedures.

Withdrawal of admissions

The Panel may allow a party, on such terms as it thinks just, to amend or withdraw any admission which that party is taken to have made in relation to any notice served on that party under the published Detailed Procedures.

PRACTICE NOTE

Postponement and Adjournment of Proceedings

Introduction

Panels are required to conduct fitness to practise proceedings expeditiously and it is in the interest of all parties, and the wider public interest, that allegations are heard and resolved as quickly as possible. Where a time and venue for a hearing have been set, Panels should always aim to proceed as scheduled. Accordingly, the parties and their representatives should also be ready to proceed. Panels proceedings should not be postponed or adjourned unless it is shown that failing to do so will create a potential injustice. Requests for postponements or adjournment made without sufficient and demonstrated reasons to justify them should not be granted.

Postponements and adjournments

In relation to CNHC fitness to practice proceedings, a distinction is made between a postponement and an adjournment in that:

- **postponement** is an administrative action which may be taken on behalf of a Practice Committee by the CNHC at any time up to 14 days before the date on which a hearing is due to begin; and
- **adjournment** is a decision for the Panel or its Chair, taken at any time after that 14 day limit has passed or once the proceedings have begun or are part heard.

Postponements

An application for a postponement should be made in writing (letter, email or fax) to the CNHC at least days 14 before the hearing date. The application should set out the background to and the reasons for the request and be supported by relevant evidence.

In considering postponement requests, the CNHC will consider whether, in all the circumstances the request is reasonable; taking into account:

- the reasons for the request;
- the length of notice that was given for the hearing;
- the time remaining before the hearing is due to commence; and
- whether the case has previously been postponed.

If a postponement application is refused, the CNHC will advise the applicant to attend the hearing. The applicant and any representative must do so ready to proceed, but subject to the right to apply to the Panel for an adjournment.

Where a postponement is granted, the CNHC will seek to agree with the parties suitable alternative dates for the hearing or, where that is not possible, to agree the arrangements which need to be put in place in order for the case to be re-listed for hearing.

Adjournments

Applications for adjournment should be made in writing as early as possible and, other than in exceptional circumstances, no later than seven days prior to the scheduled date for the hearing. The application must specify the reasons why the adjournment is sought and be accompanied by supporting evidence, such as medical certificates.

Where, due to exceptional circumstances, an application for an adjournment is made less than five working days prior to the date for the hearing, it is unlikely to be considered by the Panel until that scheduled hearing date.

Panels should control and decide all requests for adjournments. In determining whether to grant an adjournment, Panels should have regard to the following factors, derived from the decision in *CPS v Picton* (2006) EWHC 1108:

- the general need for expedition in the conduct of proceedings;
- where an adjournment is sought by CNHC, the interest of the registrant in having the matter dealt with balanced with the public interest;
- where an adjournment is sought by the registrant, if not granted, whether the registrant will be able fully to present his or her defence and, if not, the degree to which the ability to do so is compromised;
- in considering the competing interests of the parties, the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh;
- the reason that the adjournment is required. If it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment;
- the history of the case, and whether there have been earlier adjournments and at whose request and why;

The factors to be considered cannot be comprehensively stated but will depend upon the particular circumstances of each case, and they will often overlap. The crucial factor is that the registrant is entitled to a fair hearing.

The Panel will exercise its discretion judicially, the crucial test being that the registrant is entitled to a fair hearing but that the convenience of the parties or their representatives is not a sufficient reason for an adjournment.

Unless advised by the Panel that an adjournment has been granted, the parties and their representatives must attend the Panel ready to proceed.

Communication

So far as possible, communications relating to postponements and adjournments should be provided in electronic form in order to ensure that they are dealt with as expeditiously as possible.

Supporting evidence

Applications for postponements or adjournments must be supported by proper evidence and both the CNHC and Panels should adopt a strict approach to evaluating such evidence. For example, claims that a person is unfit to attend a hearing should be supported by specific medical evidence to that effect. Medical certificates which simply state that a person is “off work” or “unfit to work” should generally be regarded as insufficient to establish that a person is too ill to attend a hearing. An application for a postponement or adjournment on medical grounds should normally be supported by a letter from a doctor which expressly states that the person concerned is too ill to attend a hearing.

PRACTICE NOTE

Interim Order Hearings by the Investigating Committee

Introduction

The purpose of an Interim Order Hearing (IOH) by the Investigating Committee (IC) is to consider whether CNHC registration should be restricted on an interim basis, either by suspension or by imposing conditions on registration. Hearings are held in private.

At an IOH the IC does not make findings of fact or decide whether there is a case to answer.

Absence of the Registrant

The absence of the Registrant does not preclude the proceedings from taking place. The IC may only make an Order, however, if the Registrant has been given an opportunity to attend and be heard on the question of whether such an Order should be made and it is in the public interest that the hearing should proceed in the Registrant's absence

If the Registrant does not appear and is not represented before it, the IC should proceed if it is satisfied that all reasonable efforts have been made to serve the Registrant with the Notice of the proceedings. Service of any Notice may be proved by confirmation of delivery to the Registrant's registered address or last known address or electronic email address.

The IC does not have to be satisfied that the Registrant is aware of the proceedings only that all reasonable efforts have been made to serve the Registrant with the Notice.

Information available to the IC

Prior to the IOH, papers and supporting documents are sent to the IC and the Registrant and the parties' legal representatives, and the legal adviser (if applicable). Additional documents may be tabled on the day of the IOH and should, where possible, be read by the IC before they hear any submissions on the case.

However, every effort should be made by all parties to ensure that documents are submitted in advance of the hearing to enable panels to consider them. Where documents are to be tabled by either party on the day of the hearing, the IC may request of the relevant party that the bundle is indexed and paginated. Where the size of the bundle is substantial, parties should highlight key documents for consideration by the IC.

Both the CNHC Presenting Officer and the Registrant or their representative may make submissions and provide documentary evidence. Those submissions are limited to the question whether, given the circumstances of the case, it is necessary to impose/maintain an Order either imposing interim conditions or interim suspension on the Registrant's registration. It is essential to keep in mind that the IC does **not** make findings of fact or decide whether there is a case to answer. For this reason, no person may give oral evidence before at an IOH unless the IC is satisfied that 'such evidence is desirable to enable it to discharge its functions'. However, the IC will always hear from the Registrant, if she or he wishes to give evidence.

Test to be applied

If the IC is satisfied that in all the circumstances that there may be impairment of the Registrant's fitness to practise that poses a risk to members of the public **and** after balancing the interests of the Registrant and the public interest (which includes confidence in the profession), it is satisfied that an interim order is necessary to guard against such risk, the appropriate order should be made.

In reaching a decision whether to impose an interim order the IC should consider the following issues:

a The seriousness of risk to members of the public if the Registrant continues to hold unrestricted registration. In assessing this risk the IC should consider the seriousness of the complaint, the weight of the information, including information about the likelihood of a further incident or incidents occurring during the relevant period.

b Whether it is in the Registrant's interests to hold unrestricted registration. For example, the Registrant may clearly lack insight and need to be protected from him or herself.

In weighing up these factors, the IC must carefully consider the proportionality of their response in dealing with the risk to the public and the adverse consequences of any action on the Registrant's own interests.

In assessing whether or not it is appropriate to take action, the IC should consider the seriousness of any police charges and the acceptability of their decision on interim action should the Registrant later be convicted or acquitted.

When considering whether or not to make an interim order, the IC cannot accept any undertakings given by the Registrant as it has no power to accept them and they are, in any event, unenforceable.

Allegations of sexual misconduct

In general, where allegations involve sexually inappropriate behaviour towards clients/service users or the Registrant is under police investigation for a sexual criminal offence, particular consideration should be given to the impact on public confidence if the Registrant were to continue to have unrestricted registration in the meantime.

The following factors, balanced alongside other considerations, are likely to indicate that a case is likely to raise significant public confidence issues if no interim action is taken.

a Information that a Registrant is under investigation by police in connection to serious offences such as rape or attempted rape, sexual assault or attempted sexual assault or sexual abuse of children.

b Allegations that a Registrant exhibited predatory behaviour in seeking or establishing an inappropriate sexual or emotional relationship with a vulnerable patient.

c Serious concerns about a Registrant's sexualised behaviour towards a client/service user in a single episode.

d Allegations of a pattern of sexually motivated behaviour towards patients.

Where a Registrant is under investigation for any other serious criminal offence, particular consideration should be given to the impact on public confidence if the Registrant were to continue to have unrestricted registration in the meantime.

Registrant's health

Where there are issues about the Registrant's health, the IC should bear in mind that its primary duty is to protect members of the public and the wider public interest, and not to assume responsibility for, or give priority to, the treatment or rehabilitation of the Registrant.

However, where the IC considers it appropriate to make an order for interim conditions, these may include conditions relating to the ongoing treatment and supervision of the Registrant.

Interim conditions or interim suspension?
The IC shall first consider whether it is necessary to impose an interim order on the grounds of protection of the public or otherwise in the public interest or in the Registrant's interests. If it decides that an order is appropriate, it must consider whether to impose interim conditions on the Registrant's registration. If it considers an interim order for conditions inappropriate, it must consider whether to suspend the Registrant's registration.

In deciding the appropriate action, the IC must very carefully consider the issue of proportionality in weighing the significance of any risk to client/service user safety, for example in not suspending the Registrant's registration, against the damage to her or him by preventing her or him from being able to say that he is CNHC registered.

When considering the imposition of conditions the IC must ensure that any conditions imposed are workable, enforceable and will protect the public or the Registrant's own interests.

The following factors may also be relevant:

a Whether the Registrant has complied with conditions previously imposed under CNHC fitness to practise procedures.
b The Registrant's history with the CNHC (if any).

Sexual misconduct
Where allegations involve sexual misconduct, there may be a significant risk to public safety if decisions at the interim stage are not seen to reflect the seriousness of the individual case.

Public confidence
The public has a right to know about a Registrant's fitness to practise history to enable them to make an informed choice about where to seek care. To balance this with fairness to the Registrant, complaints leading to the imposition of an interim order are not published or disclosed. It is therefore the responsibility of the IC to consider whether, if allegations are later proved, it will damage public confidence to learn the Registrant continued to be able to say she or he was on the CNHC Register while the matter was investigated.

With this in mind, the presence of one or more of the following factors are a strong indicator that conditions may not be adequate to maintain public confidence in the profession or the medical regulator.

a Information that a Registrant has been charged by police in connection to serious offences such as rape or attempted rape, sexual assault or attempted sexual assault or sexual abuse of children.

b Complaints of sexually inappropriate conduct towards clients/service users.
In exercising their discretion in relation to the particular facts of each case the IOP should also consider any immediate risk to patient safety. However, there are circumstances in which it is necessary to take action to protect public confidence even where there is no immediate risk to patients.

Criminal Charges
Where the allegations involve serious criminal charges it is incumbent on the IC to consider the individual features of each case and the particular facts of the criminal charges. In evaluating the acceptability of intervening or declining to do so, the IC should have in mind the ultimate possibilities of both the Registrant's acquittal and her or his conviction of the particular charges.

Period of order
Where it imposes an interim order the IC must specify the length of the order.

In considering the period for which an order should be imposed an IC should bear in mind the time that is likely to be needed before the matter is resolved. For example, the time needed to complete any investigation into allegations regarding the Registrant's fitness to practise, including obtaining assessments of the Registrant's health and/or performance, and for the case to be listed for hearing by a Conduct and Competence or Health Panel.

Review of interim orders
When reviewing interim orders the IC must fully consider all the circumstances relating to the case, including any new information.

Reasons for decisions
Although IC decisions should be fairly concise, they must include the following information with specific reference to the distinct features and particular facts of each individual case.

a The risk to the public should be clearly identified to support the proportionality of any action it was necessary to take.

b The risk to public confidence in the profession if the Registrant continue working without restriction on their registration and the allegations are later proved, to support the proportionality of any interim action taken.

c Where an order is made primarily because it is desirable in the public interest to uphold public confidence and there are no concerns about clinical practice, specific reasons should be given for why this is appropriate.

d Reasons for the initial period of time for which an interim order is imposed.

e Where no order is imposed, clear reasons must be given.

PRACTICE NOTE

Interim Orders following referral by the Investigating Committee

Introduction

A Panel may make an interim order, to take effect either before a final decision is made in relation to an allegation or pending an appeal against such a final decision. A Practice Committee may only make an interim order if it is satisfied that:

- it is necessary for the protection of members of the public;
- it is otherwise in the public interest; or
- it is in the interests of the registrant concerned for that person's registration to be suspended or to be made subject to conditions.

Types of order

An interim order may be either:

- an interim conditions of practice order - which imposes conditions with which the registrant must comply for a particular period of time; or
- an interim suspension order - which directs the Registrar to suspend the registrant's registration for a particular period of time.

An interim order has effect immediately and its initial duration should be set out in the order but cannot be for more than six months. The duration of any further interim order must not exceed a total period of two years.

When orders may be made

A Panel of the **Conduct and Competence Committee** or **Health Committee** may make an interim order:

- when an allegation has been referred to that Committee but it has not yet reached a decision on the matter; or
- when, having decided that an allegation is well founded, the Panel makes a striking-off order, a suspension order or a conditions of practice order but the time for appealing against that order has not yet passed or an appeal is in progress.

Procedure

Before a Panel decides that it is appropriate to make an interim order, It must give the registrant concerned the opportunity to appear before it and allow him or her the right to be heard.

In relation to interim orders made whilst an allegation is still pending this will take the form of a separate hearing held solely to consider whether an interim order should be made and, if so, its terms.

The registrant should be given seven day's notice of such a hearing unless there are exceptional circumstances which make it necessary for the Panel to hold a hearing at shorter notice.

The appropriate place to consider and weigh all of the evidence in relation to an allegation is when that allegation is being considered at a fitness to practise hearing. Therefore, in determining whether to make an interim order, a Panel will not be in a position to weigh all of the evidence but must act on the information that is available.

In essence, its task is to consider whether the nature and severity of the allegation is such that the registrant, if he or she continues to have unrestrained registration with CNHC, may pose a risk to the public or to himself or herself or that, for wider public interest reasons, CNHC registration be restrained.

In doing so the Panel may have regard to the overall strength of the evidence, whether the allegation is serious and credible and the likelihood of harm or further harm occurring if an interim order is not made.

The decision to issue an interim order is not one that should be taken lightly and will depend upon the circumstances in each case. However, cases in which restraining CNHC registration may be appropriate include those involving serious or persistent competence failures; cases involving violence, sexual abuse or serious misconduct; cases where it appears that the registrant's health means he or she may pose a risk to others or be capable of self harm; and cases where the broader public interest, such as public confidence in the regulatory process or the profession concerned, may be at risk.

Although this list is not exhaustive, the types of case in which an interim order is likely to be made are:

- cases where, if the allegation is well founded, there is an ongoing risk to service users from the registrant's serious lack of professional knowledge or skills;
- cases which may not be directly related to practice but where, if the allegation is well founded, the registrant may pose a risk to service users; for example allegations of indecent assault or where it appears that a registrant with serious health problems is practising whilst unfit to do so;
- cases where, although the there may be no evidence of a direct link to practice, the allegation is so serious that public confidence in the regulatory process would be seriously harmed if the registrant was allowed to remain registered with CNHC on an unrestricted basis; for example, allegations of murder, rape, the sexual abuse of children or other very serious offences;
- cases where the registrant has breached a conditions of practice order or suspension order previously imposed by a Panel.

A Panel may be asked to impose one or other kind of interim order in a particular case, but will in every case need to consider whether, if it is necessary to impose an order to protect the public, the registrant or the public interest, an interim conditions of practice order will secure the necessary degree of protection. An interim suspension order should only be imposed if the Panel regards conditions of practice as being an insufficient safeguard.

In imposing an interim conditions of practice order a Panel must take account of the fact that it has not heard all of the evidence in the case. Therefore, it should not impose the kind of

conditions which may be appropriate after a case has been heard and the allegation has been determined to be well founded; for example, conditions requiring the registrant to undertake additional training. Consequently, interim conditions of practice are likely to be limited to specific restrictions on CNHC registration, for example, not to provide services to children or not to undertake unsupervised home visits.

Where the Panel is considering the imposition of an interim order at the conclusion of proceedings in relation to an allegation (in order to restrain the registrant's CNHC registration during the appeal period) the decision will be made as part of the main hearing and not in separate proceedings.

However, such orders should not be regarded as an automatic outcome to such proceedings and, before imposing an interim order at the end of such proceedings, the Panel should give the registrant an opportunity to address it specifically on the issue of whether or not an interim order should be made.

The registrant may be represented at any hearing, whether by a legally qualified person or otherwise.

Review, variation, revocation and replacement

Interim orders must be reviewed on a regular basis; as a minimum within six months of the date on which the order was made and then every 12 months from the date of the preceding review until the interim order ceases to have effect. A review must also be made if new evidence becomes available after the order is made.

Orders may be varied or revoked at any time. **Terminating an interim order**

Interim orders can be brought to an end in two ways:

- by the Panel which made the order or to which the matter has been transferred; or
- automatically, when the circumstances under which the order was made no longer exist, namely:
    - in respect of an order which was made before a final decision is reached in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
    - in respect of an order made after a final decision was reached and which has effect during the 'appeal period', either when the period for appealing expires or, if an appeal is made, when the appeal is concluded or withdrawn.

Advisers and Expert Witnesses

Introduction

Advisers

The Detailed Procedures provide for the appointment of a medical or legal adviser or registrant adviser in respect of any case that is being considered.

Advisers will not appear as a witness to give oral evidence or be open to cross-examination. They will not participate in the decision making process. Any advice given to the Panel during private deliberations will be repeated in the presence of the parties.

Expert witnesses

Panels should, wherever possible, direct that matters requiring expert evidence are to be dealt with in the report of a single expert or a joint report.

Where the Panel has directed that the evidence is to be given by one expert but there are a number of disciplines involved, a leading expert in the dominant discipline should be identified as the single expert. That expert should prepare the general part of the report and be responsible for annexing or incorporating the contents of any reports from experts in other disciplines.

The expert's role

The paramount duty of any expert is to assist the Panel on matters within the expert's own expertise. This duty overrides any obligation to the party that instructs or pays the expert.

Expert evidence should be the independent product of the expert. Experts should consider all material facts, including those which might detract from their opinion and should provide objective, unbiased opinion on matters within their expertise.

An expert should make it clear:

- when a question or issue falls outside the expert's expertise; and
- when the expert is not able to reach a definite opinion, for example because of a lack of information.

Experts' reports

Experts' reports should be addressed to the Panel, not to the party who instructed the expert. An expert's report must:

- set out details of the expert's qualifications;
- provide details of any literature or other material which the expert has relied on in preparing the report;
- contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- make clear which of the facts stated in the report are within the expert's own knowledge;

- identify any person who carried out any examination, measurement, test or experiment used by the expert for the report, the qualifications of that person, and whether the task was carried out under the expert's supervision; and
- where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion.

An expert's report must be supported by a Declaration and statement of truth in the form set out in the Annex to this Practice Note.

Instructions

The instructions given to an expert are not protected by privilege, but an expert may not be cross-examined on those instructions without the consent of the Panel. Consent should usually only be given if there are reasonable grounds to consider that the statement in the report of the substance of those instructions is inaccurate or incomplete.

Declaration and Statement of Truth

I [insert full name of expert] DECLARE THAT:

1 I am aware of the requirements of Part 35 of the Civil Procedure Rules (CPR), Practice Direction 35 of the CPR and the Guidance for the instruction of experts in civil claims 2014. amount or payment of my fees is in any way dependent on the outcome of the case.

2 I understand my duty to the Panel and have complied with that duty.

3 I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true.

4 The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

5 I believe that the contents of this statement are true.

Signed Date

Name

PRACTICE NOTE

Equal Treatment

Introduction

Many people will find appearing before a Panel to be a daunting experience and it is vital that Panels, whilst remaining fair, independent and impartial, are aware of and responsive to the differing needs of those who appear before them. Social diversity includes not only race and ethnicity but also differences in linguistic, religious and cultural backgrounds, as well as issues of gender, sexuality and disability. Unless everyone involved in proceedings before a Panel can understand the process, the material put before them and the meaning of the questions asked and answers given in the course of the proceedings, the process is at best impeded and, at worst, justice may be denied. In a modern and diverse society, equal treatment does not simply mean treating everybody in exactly the same way, it is about ensuring fairness. In some cases it means providing special or different treatment, in order that justice is both done and seen to be done. By its very nature, this Practice Note can only deal briefly with a broad and complex area or practice. All Panel members should have participated in Equality and Diversity Training. A helpful reference document is the *Equal Treatment Benchbook* published by the Judicial Studies Board

http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf.

Effective communication

People with personal impairments or who are disadvantaged in society are entitled to a fair hearing, as are those who may have difficulty coping with the language, procedures or facilities of Panel proceedings. Panels should make effective use of communication and recognise that, for example, just because someone remains silent does not mean that they necessarily understand or feel that they have been adequately understood. They may simply feel too intimidated or too inarticulate to speak up. All of us view the world from our own perspective, based on our own knowledge understanding and cultural conditioning. There is a fine line between Panel members relying on this and resorting to stereotypes which can lead to injustice.

SOME BASIC DOS AND DON'TS

DO:

- ascertain how parties wish to be addressed;
- obtain advance information about any disability or health problem which a person who is appearing before you may have;
- allow more time for special arrangements, breaks etc. to accommodate special needs at hearings;
- be understanding of people's difficulties and needs;
- try to put yourself in their position – the stress of attending a hearing should not be made worse unnecessarily, through a failure to anticipate foreseeable problems;

- bear in mind the problems facing unrepresented parties;
- ensure that appropriate measures are taken to protect vulnerable witnesses.

DON'T

- underestimate the stress and worry faced by those appearing before you;
- overlook the use – unconscious or otherwise – of gender-based, racist or other stereotyping as an evidential short-cut;
- allow over rigorous cross-examination of vulnerable witnesses;
- allow anyone to be put in a position where they face hostility or ridicule;
- use inappropriate "value laden" language, for example, 'girl' other than when speaking to a child or 'British' as a synonym for white, English or Christian.

PEOPLE WITH DISABILITIES

The Disability Discrimination Act 1995 (DDA) defines a disabled person as "someone with a physical or mental impairment that has a substantial, adverse, long-term effect on their ability to carry out normal day-to-day activities". For the purpose of the DDA "long term" means as lasting for more than 12 months.

Disability may, for example, relate to mobility, manual dexterity, physical coordination, incontinence, speech, hearing or sight, memory or ability to concentrate, learn or understand.

CNHC and its Panels have a duty under the DDA to take account of disabilities and, therefore, steps must be taken to accommodate the special needs of parties, witnesses or advocates appearing before the Panel. It is important that CNHC identifies such needs as early as possible, so that appropriate steps can then be taken such as arranging for hearings to take place in accessible rooms or for suitable facilities to be made available. Wherever possible, hearings should take place at venues which are accessible and fitted with a hearing induction loop.

Often simple solutions will help. Short breaks in the proceedings may help those whose concentration is impaired or who need to eat or drink more frequently, take medication or go to the lavatory at frequent intervals. A pre-arranged signal for an urgent trip to the lavatory may be appropriate. The presence of a carer or helper may be necessary. It may help to re-arrange the order in which evidence is heard so that witnesses are not kept waiting.

Panels also need to consider how to overcome difficulties which may arise in the course of the proceedings, for example:

- by adopting a different approach to questioning where a witness has difficulties with memory or comprehension; or
- by using visual aids or providing sign language or speech interpreters to overcome communication difficulties.

In many instances the best solution will simply be for the CNHC to find out what the best method of communicating should be, ahead of the hearing, from the person concerned.

The obligation imposed on Panels extend not only to the conduct of the proceedings but also to the decisions they reach. Panels must take care to ensure that decisions do not unfairly discriminate against disabled people.

This is best achieved by Panels dealing with every case on its merits and avoiding stereotypes or judgements about what disabled people can or cannot do. By considering each case individually, Panels will avoid making assumptions about disabled people or disability and instead make an informed decision based on the individual case.

RACE AND RELIGIOUS BELIEF

Many of the steps which Panels need to take to address issues of race or religious belief are about differences, such as different naming systems. Understanding those differences is important, but it is not an end in itself. The true purpose is to assist Panels to ensure that they treat everyone who comes before them equally and with dignity and respect.

Panel members should remember:

- fair treatment involves taking account of difference, treating everyone in the same way is not the same thing as treating everyone fairly;
- everyone has prejudices, so recognise and guard against your own;
- do not make assumptions: all white people are not the same, nor are all black, or Asian, or Chinese or Middle Eastern people;
- do not project cultural stereotypes, for example that “all Asian people” avoid eye contact;
- when in doubt, ask. A polite question about how to pronounce a name or about a particular religious belief or a language requirement will not be offensive when prompted by a genuine desire to get it right.

However committed Panel members may be to fairness and equality, they may still give the opposite impression by using inappropriate, dated or offensive words. There is no fixed code, language and ideas are living and developing all the time. Panel members need to be aware that acceptable language changes and seek to keep abreast of such change. For example, “black”, once regarded as too direct is now acceptable to people of African or Caribbean origin whereas “coloured” is now an offensive term that should not be used.

Similarly, broad descriptors such as “Asian” should be used with care. People may prefer to identify themselves by reference to a specific country, region or religion and younger people of Asian origin born in Britain may refer to themselves as British or British Asians.

Names and naming systems vary considerably between minority groups and some are complex. It is more important for panel members to treat people with courtesy and address them properly than to try to learn all the different naming systems. Ask respondent registrants how they would like to be addressed, how to pronounce their name and how to spell it. Ask for their full name or first, middle and last names. Do not ask for their “Christian name” or “surname”.

Religious Diversity in the UK

Christianity has not only played a major part in the evolution of society among the white population in the UK, but has also attracted a significant number of adherents within minority

groups. There are a number of Asian and Chinese Christian churches, and black churches are currently the fastest growing within the Christian communion. However, Panels will undoubtedly encounter people with a variety of different religious beliefs -or none. There are, in addition, many degrees of devotion within the practice of any faith.

CHILDREN

Children rarely appear before Panels but, when they do, cases should be expedited as quickly as possible.

In legal terms a child is a person under the age of 18. Therefore the way in which Panels deal with children who appear as witnesses will to some extent depend upon the age of the child. However, research has shown that children's fears about appearing at hearings do not decrease with age, and adolescent witnesses are more likely to exhibit adverse psychological reactions than younger ones.

Panels need to be aware of the sort of stresses and worries going through a child's mind when involved in CNHC l proceedings. This can relate to a fear of the unknown, pressure to withdraw the complaint, fear of retaliation or of publicity, having to relate intimate personal details in front of strangers, and insensitive questioning. Children may worry about having to repeat bad language, being shouted at, not being believed, having to give their address, being sent away or being sent to prison. Perhaps the greatest problem that a child might have to cope with is a feeling of guilt

Panels should never underestimate how little of the proceedings a child understands. A child may not admit to the fact that they do not understand something, so vigilance and some second-guessing are vital.

The CNHC Detailed Procedures (which are applied by Panels) allow a broad discretion as to how evidence is given in the proceedings, and may allow a child witness to give evidence through a video link or by any other means such as the video tape of a memorandum interview conducted in the context of a criminal investigation.

This power is particularly important where children are concerned in terms of achieving the overriding objective of dealing with cases justly, including ensuring that the parties are on an equal footing. What a child has said on a previous occasion can also be put before the Panel in the form of hearsay evidence.

If a child does have to give evidence in person then the Panel should:

- make appropriate arrangements to avoid any confrontation between the child and any party to the proceedings. This includes welfare provision during breaks and after the evidence is concluded.
- adopt procedures to ensure that the child's testimony may be adduced effectively and fairly.
- permit a third party, such as a parent, to sit near to the child provided that they do not disrupt the child's testimony;
- admit the child's evidence unless the child is incapable of giving intelligible testimony. The Panel must form a view on the child's competence at the earliest possible moment;

- ensure that advocates do not attempt over-rigorous cross-examination and that they use language that is free of jargon and appropriate to the age of the child.

GENDER

There have been many positive changes in society regarding gender roles but, even though women comprise more than half of the adult population, they remain disadvantaged in many areas of life. The disadvantages that women can suffer range from inadequate recognition of their contribution to the home or society to an underestimation of the problems women face as a result of gender bias.

Stereotypes and assumptions about women's lives can unfairly impede them and frequently undermine equality. Panels members must take care to ensure that their own experiences and aspirations, as women or of women they know, are not taken as representative of the experiences of all women. Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject.

Panels need to be aware that it is a common misconception that a witness's demeanour, when giving evidence, will reflect the truthfulness of their account. This is not necessarily so. Victims of sexual or indecent acts often exhibit a controlled response and in fact mask their feelings, appearing calm and composed. A woman may appear to minimise the impact of sexual harassment or sexual assault out of embarrassment and a wish to end the ordeal.

Sexual complainants, including those complaining of sexual harassment, can suffer when there is unnecessarily over-rigorous cross-examination regarding their previous sexual history or where the assailant is known to them. Panels must intervene to restrain insulting, offensive or remorseless questions or humiliation of a witness. The Human Rights Act also has implications for the amount of permissible infringement of a witness's right to respect for her/his private and family life.

SEXUAL ORIENTATION

There is a historical background of widespread discrimination against homosexuals. Sexual orientation is just one of the many facets of a person's identity. Being a lesbian or a gay man is sometimes described as being as much an emotional orientation as a sexual one.

There is no evidence that being gay implies a propensity to commit any particular type of offence. A common, and extremely offensive stereotype, links homosexuality with a paedophile orientation. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is no evidence that gay men are more likely to abuse children than heterosexual men. Panels need to be aware of the harm caused by such stereotypical assumptions. It is misguided to:

- attribute feminine characteristics to gay men, or masculine characteristics to lesbians. Such attributions are not only offensive but can lead to dangerous assumptions, for example, that a lesbian may be more resilient to harassment than her heterosexual counterpart.

- assume that AIDS and HIV positive status are necessarily indicative of homosexual activity. HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging.

- make any assumptions as to the sexual orientation of transvestites or transsexuals. Where there is a question relating to a person's gender, the person should be asked what gender they consider themselves to be, and what gender they would prefer to be treated as.

Many transsexual and transvestite people would not consider themselves gay or lesbian and their sexuality as closer to that of heterosexuals. They should not be considered as merely a dimension or extension of gay and lesbian culture.

Additionally, there are basic differences within and between the transsexual and transvestite experiences. For many transvestites, cross-dressing is not a fetish, but an inescapable emotional need, which, particularly in public places, generates risk of conflict or ridicule. It is unlikely that a transvestite who cross-dresses in private and sometimes in public, will cross dress when appearing before a Panel. However, this may not always be the case, and a desire or need to cross-dress may still be a relevant and important issue.

The process of gender reassignment is extremely complex, requiring great personal determination, with emotional and psychological factors playing a large role. Not all transsexual people undergo surgery, but for those that do, it is just part of a wider sequence of events and processes that are intended to help the physical identity match the person's inner sense of gender identity. Panels need to be aware that these events and processes are likely to involve great strain, and bring the transsexual person into situations of unwanted tension.

PRACTICE NOTE

Restoration to the Register

Introduction

A person who has been struck off the CNHC Register by a Practice Committee and who wishes to be restored to the Register must make an application for restoration. Applications for restoration are made in writing to the Registrar, but the Registrar will refer such applications for determination by a Panel of the Conduct and Competence which made the striking off order.

When an application can be made

An application for restoration cannot be made until five years have elapsed since the striking off order came into force. In addition, a person may not make more than one application for restoration in any period of twelve months. If a person makes two applications for restoration which are refused, the Panel refusing the application may also direct that the applicant's right to make further restoration applications shall be suspended indefinitely – a "Barring Order".

Procedure

Applications for restoration will be considered by means of a hearing before a Panel. Subject to one significant modification, the procedure to be followed will generally be the same as for other to fitness to practise proceedings.

The significant modification is that, although any hearing should be conducted in the normal manner, The Panel shall adopt an order of proceedings which provides for the applicant to present his or her case first and for the CNHC Presenting Officer to speak after that.

This modification reflects the fact that, in applying for restoration, the burden of proof is upon the applicant. Panels should make clear to applicants that it is for them to prove that they should be restored to the Register and not for the CNHC to prove the contrary.

Although CNHC procedures require the applicant to present his or her case first, it will often be helpful at the beginning of a hearing for the CNHC Presenting Officer to set out the history of the case and the circumstances which led to the striking off order being made. Allowing Presenting Officers to do so will not be contrary to natural justice, provided that their comments are limited to background information of that kind and exclude any substantive arguments which the CNHC wishes to put to the Panel in relation to the restoration application.

Issues for the Panel

A Panel must not grant an application for restoration unless it is satisfied, on such evidence as it may require, that the applicant:

- meets the general requirements for registration; and
- is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

Striking off is a sanction of last resort, used in cases involving serious, deliberate or reckless acts and where there may be a lack of insight, continuing problems or denial. The reasons why a person seeking restoration was originally struck off the register will invariably be highly relevant and it is insufficient for an applicant merely to establish that they meet the requisite standard of proficiency and the other general requirements for registration.

An application for restoration is not an appeal from, or review of, the original decision and Panels should avoid being drawn into 'going behind' the findings of the original Panel or the sanction it imposed. However, in determining applications for restoration, the issues which a Panel should consider include:

- the matters which led to striking off and the reasons given by the original Panel for imposing that sanction;
- whether the applicant accepts and has insight into those matters;
- whether the applicant has resolved those matters, has the willingness and ability to do so, or whether those matters are capable of being resolved by the applicant;
- what other remedial or rehabilitative steps the applicant has taken;
- what steps the applicant has taken to keep his or her professional knowledge and skills up to date.

Conditional restoration

If a Panel grants an application for restoration, it may do so unconditionally or subject to the applicant:

- meeting any applicable education and training requirements specified by the Council; or
- complying with a conditions of practice order imposed by the Panel.

The option of replacing a striking off order with a conditions of practice order provides the better and more flexible alternative in cases where Panels wish to impose specific requirements on a registrant who is being restored to the register. A conditions of practice order can be tailored to meet the specific needs of a particular case, can be reviewed and, if necessary, extended. Such an order also provides the added safeguard that swift action can be taken against the registrant if there is any breach of those conditions of practice.

PRACTICE NOTE

Purpose of Sanctions

Introduction

The function of fitness to practise Panels is not intended to be punitive. A Panel's task is to determine whether, on the basis of the facts before it, the fitness to practise of a registrant is impaired. In effect, the task is to consider a registrant's past acts, determine whether the registrant's fitness to provide professional services is below accepted standards and to consider the risk that he or she may pose to those who may use his or her services in the future and thus what degree of public protection is required.

It is important to remember that a sanction may only be imposed in relation the facts which a Panel has found to be true or which are admitted by the registrant. In particular, if there is any suggestion that a case has proceeded on the basis of "specimen" allegations, then a sanction should not be imposed on a wider basis than that revealed by those specimen allegations. However, that limitation does not apply to evidence provided by the registrant. For example, if the registrant gives evidence which indicates that what appeared to be an isolated event is actually part of a wider or habitual pattern, the Panel is entitled to take that into account in determining the appropriate sanction

If a Panel has determined that a registrant's fitness to practice is impaired, it is not obliged to impose a sanction and, if it is satisfied that it is appropriate to do so, may decide not to take any further action.

For example, taking no further action will be appropriate for minor, isolated, lapses where there has been an apology, remorse or corrective action taken and the registrant fully understands the nature and effect of the lapse.

Equality & Diversity

The Council is committed to promoting equality and valuing diversity and Panels are expected to conduct fitness to practice proceedings in a fair and non discriminatory manner. As the primary purpose of fitness to practise proceedings is to identify and secure a proportionate measure of public protection rather than to punish, a key factor in many cases will be the extent to which a registrant recognises his or her failings and is willing to address them. In taking account of any insight, explanation, apology or remorse offered by a registrant, Panels are reminded that there may be significant cultural differences in the way that these may be expressed - both verbally and non-verbally – and especially where the registrant may not be using his or her first language. In deciding what, if any, sanction is required, the issue which the Panel needs to determine is whether the registrant has genuinely recognised his or her failings and the steps needed to address them rather than focusing on the exact form in which this may be expressed.

The Sanctions available to Panels

If further action is to be taken then a range of options are available which will enable a Panel to take the most appropriate steps to protect the public. Those options are:

- caution
- restriction of practice order

- suspension
- removal (striking off), not available to Health Panels

Although the primary function of any sanction is to address public safety from the perspective of the risk which the registrant concerned may pose to those who use his or her services, in reaching their decisions, Panels must also give appropriate weight to the wider public interest considerations, which include:

- the deterrent effect to other registrants;
- the reputation of the profession concerned; and
- public confidence in the regulatory process.

Proportionality

In deciding what, if any, sanction to impose, Panels should apply the principle of proportionality, balancing the interests of the public with those of the registrant.

Cases involving criminal convictions and cautions

Where an allegation arises from a registrant's conviction for a criminal offence, the Panel cannot "go behind" that conviction and re-try the case but must determine the appropriate sanction on the basis of the nature and gravity of the offence concerned.

A similar approach should be adopted when considering an offence for which a registrant has accepted a police caution, as a caution cannot be given unless the offender has admitted guilt.

In considering the nature and gravity of an offence for which a registrant has been convicted or received a caution, Panels should take account of whether it brings the profession into disrepute or may undermine public confidence in the profession concerned.

Panels need to remember that most criminal offences penalise conduct rather than the motive for that conduct. Consequently, a person's motives will rarely have any bearing on the assessment of the gravity of an offence as, irrespective of motive, the same harm will arise from that offence. Offending behaviour can often be explained and indeed is explained on a daily basis in the courts, but the gravity of an offence will not be reduced by the asserted motive for it.

Although Panels cannot re-try criminal cases, in determining the appropriate sanction they may take account of whether or not the registrant pleaded guilty to the offence. A person who is convicted of an offence but maintains that the conviction was wrong may lack insight into their offending behaviour and this may have a significant bearing upon the sanction which a Panel should impose in order to protect the public.

In reaching its decision, a Panel should also take account of any punishment or other order imposed by the courts, but must bear in mind that the sentence imposed is not a definitive guide to the seriousness of an offence. Panels should not assume that a non-custodial sentence implies that an offence is not serious and must remember that, among the reasons which may have led the court to be lenient, is the expectation that the registrant will be subject to regulatory action.

Community Sentences

Community sentences are intended to enable the courts to address different aspects of an individual's offending behaviour and to combine punishment with rehabilitation or reparation. Consequently, a community sentence may not simply be an order to undertake unpaid community work but may also include other orders such as compliance with a curfew, exclusion from certain areas or a residence requirement or an order to undergo mental health, drug or alcohol treatment.

Where a registrant is subject to a community sentence Panels need to take account of the terms of that sentence but, generally, it will be inappropriate to impose a sanction which would allow the registrant to continue with unrestrained CNHC registration whilst they are subject to that sentence.

Consideration needs to be given to any requirement to register under the Sex Offenders Act 1997. Although inclusion on the sex offenders' register is not a punishment, it is intended to secure public protection from those who have committed certain types of offences. Generally, Panels should regard it as incompatible with CNHC's obligation to protect the public to allow any continuation of CNHC registration.

Child Pornography Offences

The ease with which child pornography can be downloaded from the internet has resulted in a significant increase in cases involving child pornography before both the courts and regulatory bodies.

CNHC is aware that for the purposes of sentencing the Court of Appeal (in *R v Oliver* [2003] 1 Cr. App. R. 463) has established a test for determining the seriousness of offences involving downloading child pornography from the internet by reference to (1) the nature of the activity undertaken and (2) the nature of the images involved. However. CNHC considers that all child pornography involves some degree of exploitation or abuse of a child and the viewing, downloading and reproduction of such images creates further demand for them. Generally, Panels should regard any conviction for such offences as incompatible with any continuation of CNHC registration.

Sanctions

Caution

A caution remains on the registrant's record for five years.

Restriction of Practice Order

A restriction of practice order must be for a specified period of not less than one year and not more than three years. Restriction of practice will be most appropriate where a failure or deficiency is capable of being remedied and where the Panel is satisfied that allowing the registrant to remain in practise, albeit subject to restrictions , poses no risk of harm or future harm.

Restrictions must be limited to a maximum of three years and therefore are remedial or rehabilitative in nature. Before imposing restrictions a Panel should be satisfied that there is no general failure that the matter is capable of correction and that appropriate, realistic and verifiable conditions can be formulated. Whatever the restrictions imposed, another Panel must be able to consider and determine whether the restrictions have or are being met.

Restrictions of practice provide a very flexible means of disposing of cases. A combination of restrictions may be imposed, including formal education and training requirements. Equally, in some cases it will be appropriate to impose a single restriction for a relatively short period of time to address a specific concern (e.g. to undertake specific remedial training).

The imposition of restrictions requires a commitment on the part of the registrant to resolve matters and therefore restrictions of practice will not be suitable in situations where problems cannot be overcome such as serious overall failings, lack of insight, denial or matters involving abuse of clients or dishonesty.

Above all, restrictions must be realistic and there is a limit to how far they may extend. For example, a combination of restrictions which require a practitioner not to carry out home visits, out of hours working, unsupervised treatment may well amount in practice to a suspension and thus be far too wide.

Before deciding to impose restrictions of practice, Panels need to reflect on the fact that, whilst restrictions can be drafted so that they are verifiable, including providing mechanisms for verifying compliance, to a large extent the registrant will be trusted to adhere to those conditions. Where the allegation before the Panel is founded upon a breach of trust – for example, cases involving abuse or dishonesty – the Panel will need to consider carefully whether it is likely that the registrant can be trusted not to breach any restrictions of practice which may be imposed.

Panels may specify a minimum period (of up to two years) for which a conditions of practice order is to have effect before the registrant may apply to vary, replace or revoke it. In general, Panels should only exercise that power in cases where either it is clear from the evidence that earlier review is unlikely to be of value or where the nature of the conditions imposed makes it inappropriate.

Suspension Order

A suspension order must be for a specified period not exceeding two years.

Suspension should be considered where restrictions of practice are insufficient to protect the public or where the allegation is serious but a realistic prospect exists that repetition will not occur and thus striking off is not merited.

A registrant who is suspended is treated as not being registered. The registrant's name will remain on the register during this time (in an appropriately marked form) and the registrant may be the subject of further fitness to practice proceedings for events which occur whilst he or she is suspended.

Suspension is punitive in nature and this needs to be borne in mind. If the evidence suggests that the registrant will be unable to resolve or remedy his or her failings, then removal (striking off) may be the more appropriate option. However, where the registrant has no psychological or other difficulties preventing him or her from understanding and seeking to remedy the failings then suspension may be appropriate.

Suspension for short periods of time (i.e. less than a year) is a punitive step which Panels generally should not use. In particular, Panels need to be aware that a short term suspension may have long term consequences for the registrant, including being dismissed from his or her current employment.

Short term suspension may be appropriate where a registrant's current status means that they would not be able to respond to and comply with restrictions of practice but where there is a realistic prospect that, if they can resolve their present difficulties whilst suspended, conditions of practice could then be imposed.

This approach is likely to be most appropriate in cases involving, for example, substance abuse where, at the time of the case, the registrant is seeking or undergoing treatment but has not reached the stage where he or she could safely return to practice even subject to restrictions. If a short term suspension is imposed for this purpose, the Panel should give clear reasons for doing so.

Suspension orders cannot be made subject to conditions but, where the Panel expects the registrant to address certain issues or do certain things before he or she can be considered for restoration to the register – for example, to undergo substance abuse treatment – this must be made clear to the registrant so that, when the order comes to be reviewed, he or she understands what is likely to be expected of them and the evidence that may need to be submitted to the reviewing Panel.

Removal (Striking Off) Order

Removal (striking off) is a sanction of last resort for serious, deliberate or reckless acts involving abuse of trust such as sexual abuse, dishonesty or persistent clinical failure. Removal should be used where there is no other way to protect the public, for example, where there is a lack of insight, continuing problems or denial. An inability or unwillingness to resolve matters will suggest that a lower sanction may not be appropriate.

Removal is a long term sanction. Unless new evidence comes to light, a person may not apply for restoration to the register within five years of the date of a removal order being made. Panels do not have the power to vary that restriction.

Sanctioning procedure

The range of sanctions available to Panels should not influence the decision as to whether or not an allegation is well founded and the finding of fact and sanctioning phases of a hearing should be (and be seen to be) separate elements of the process.

To reinforce this point, Panels should first retire to determine whether or not an allegation is well founded and then return to announce their decision and the reasons for that decision. Where the Panel has decided that fitness to practise is impaired it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring for a second time to determine what, if any, sanction to impose and then return to announce that sanction and the reasons for that sanction.

Whilst it may appear obvious, Panels must ensure that registrants fully understand any sanction which is being imposed upon them. The Panel Chair should carefully explain what sanction, if any, the Panel has imposed, the reasons for it and its consequences for the registrant in clear and direct speech which leaves no room for misunderstanding or ambiguity. In particular, Chairs should avoid the temptation to give homilies or lectures, which often obscure clear communication of the Panel's decision.

Interim Orders to give effect to decisions

If a Panel makes a removal (striking-off) order, suspension order or restriction of practice order, the Panel may also make an interim suspension or restriction of practice order which will apply during the time allowed for appealing against the final disposal order or, if such an appeal is made, whilst that appeal is in progress.

The power to impose an interim order is discretionary and, consequently, Panels should not regard their making as an automatic outcome of such proceedings.

If the Panel is considering imposing an interim order, before doing so it must give the parties an opportunity to address the Panel specifically on the issue of whether or not such an order should be made.

Whether an interim order is necessary will depend upon the circumstances in each case, but panels should consider imposing such an order in cases where:

- there is a serious and ongoing risk to service users or the public from the registrant's lack of professional knowledge or skills; conduct or health problems; or
- the allegation is so serious that public confidence in the profession or the regulatory process would be seriously harmed if the registrant was allowed to remain on the CNHC register on an unrestricted basis.

Review of orders

Restriction of practice orders and suspension orders must be reviewed by a Panel (but not necessarily the one that made them) before they expire and caution orders may but need not be similarly reviewed. Following any review the Panel may:

- confirm the order;
- extend the period for which the order has effect (but a conditions of practice order may not be extended by more than three years at a time or a suspension order by more than one year at a time);
- replace the order with one it could have made at the time it made the order being reviewed;
- make a restriction of practice order which takes effect when a suspension order expires;
- reduce the duration of an order (but a caution order may not be reduced to a duration of less than one year);
- revoke or vary any condition imposed by the order;
- revoke the order.

When a Panel revokes a suspension order, they do so subject to the registrant complying with CNHC's "returners to practise" requirements. However, in many instances the "returners" requirements -which are primarily intended for those who have taken a career break -may be insufficiently flexible to meet the needs of the case.

In cases where Panels wish to impose specific requirements on a registrant who is being permitted to resume practising, replacing a suspension order with a restriction of practice

order is likely to be the better option. This also provides the added safeguard that further action can be taken if there is any breach of those conditions of practice.

Drafting decisions

In drafting decisions Panels should set out all of the sanctions options which are available to them, the sanction they have decided to impose and the reasons for doing so. For example:

> *The Panel has considered each of the sanctions available to it and has decided that, given the severity of the case, to take no further action or to impose a caution or restriction of practice order in this case would not adequately protect the public. Consequently, the remaining options are suspension or removal.*
>
> *Taking account of the steps which you are taking to address your conduct, the Panel reached the conclusion that removal would not be appropriate. Accordingly, the Panel has decided to suspend your registration for a period of one year. In all the circumstances we believe this to be a proportionate sanction.*

The Panel must also set out clearly the Order which they have made. Cautions, restrictions of practice, suspension and removal (striking off) orders should be written in a form which is addressed to the Registrar who must annotate or amend the register in accordance with the Panel's decision. For example:

Caution Order

ORDER: That the Registrar be directed to annotate the register entry of [name] with a caution which is to remain on the register for a period of five years.

Restriction of Practice Order

ORDER: That the Registrar be directed to annotate the register entry of [name] to show that, from the date that this order takes effect ("the operative date") and for a period of [x] years, [name] must comply with the following conditions:

1 within [time period] of the operative date, (s)he shall undertake, and provide evidence to the Committee that (s)he has undertaken training in [subject];

2 three months from the operative date and at quarterly intervals thereafter for a period of [time], (s)he shall submit to the Committee [evidence of ???];

3 promptly inform the Committee if (s)he ceases to be employed by [employer].

Suspension Order

ORDER: That the Registrar be directed to suspend the registration of [name] for a period of [x] year(s).

Removal Order

ORDER: That the Registrar be directed to remove [name] from the register.

Drafting Restrictions of Practice

From the above examples it will be seen that the drafting of Restrictions of Practice Orders is the more difficult task. This is especially so given that Orders do not take effect until the relevant appeal period has expired or, if there is an appeal, it has been disposed of or withdrawn. As a result the date from which an Order takes effect will not be a fixed date.

For most other Orders, which simply run for a fixed period of years, this does not cause much difficulty. However, conditions of practice inevitably involve periodic compliance arrangements and, if conditions of practice are to work, the dates on which evidence of compliance is to be sent to CNHC must be clear and certain, so that appropriate follow up action can be taken in relation to those who breach an Order. The simplest way to overcome this difficulty is to define the date on which the Order finally takes effect as its operative date and then to relate all other dates and time limits to that operative date.

In drafting restrictions of practice Panels also need to consider the following three questions:

1. are the conditions realistic?

- will the registrant be able to comply with these conditions?
- are the conditions proportionate and do they provide the necessary level of public protection?
- will they work if an employed registrant changes jobs?

For example, if the conditions require the registrant to improve treatment premises, facilities or equipment, they should only be set at the standard reasonably required of a typical practitioner from the profession or specialism concerned. In setting conditions of this kind, Panels should take account of any relevant guidance issued by professional bodies or similar organisations.

Equally, if conditions have been prepared with the support of the registrant's employer and are thus job-related, it may be necessary to include a condition requiring the registrant to inform CNHC if he or she changes jobs.

2. are the conditions verifiable?

- do they impose obligations that require straightforward yes or no compliance decisions?
- do they simply require the registrant to do something or must they also prove it has been done?
- can the due dates be clearly determined from the Order?

For example, conditions requiring a registrant not to treat certain types of case or client may not need ongoing proof of compliance but many other conditions will need to be supported by evidence, such as periodic written confirmation from a clinic that the registrant is continuing to undergo alcohol dependency treatment. Where evidence is required it should be in a form which allows yes or no decisions to be made. Conditions requiring registrants to submit documents or records to CNHC for assessment or audit will not meet this requirement.

In cases where compliance with conditions may need to be verified by CNHC by means of inspection -for example, conditions to improve premises or facilities, record keeping systems

or chaperoning arrangements -the Panel's order should include a specific requirement that the registrant must allow and co-operate with inspection by CNHC upon reasonable notice.

3. are the conditions directed at the right person?

- do the conditions clearly impose obligations on the registrant?
- are any conditions mistakenly directed at someone else?

It is for the registrant to comply with the conditions which have been imposed and, in drafting orders, care must be taken not to inadvertently impose a condition on a third party, such as an employer or GP. There is a significant difference between "you must submit to the Committee evidence from the doctor treating you that..." and "your GP must submit to the Committee evidence that..."

Advice from the Legal Adviser

Advisers may assist the Panel in drafting their decisions. Panels should therefore take advantage of the expertise Legal Advisers can offer in this regard, particularly in relation to the drafting of conditions of practice.

The Legal Adviser's role is to assist in the drafting of the decision and not the making of that decision. Panels should have established a clear outline of their decision, including their findings in relation to the evidence and on impairment, before asking the Legal Adviser to assist in drafting that decision.

Panels must take steps to ensure that no confusion arises on the part of the registrant or any other party as to role the Legal Adviser is playing, for example, by making it clear in open session that the Panel has reached a decision and is now asking the Legal Adviser to assist in the drafting of the decision or inviting the Legal Adviser to explain this particular aspect of their role to the parties before the Panel retires.

Timescale for publication of decisions on sanctions

Sanctions imposed by the CNHC Conduct & Competence and Health and Appeal Panels are published on the CNHC website and on the CNHC published Register. The following time limits apply to both forms of publication:

• Caution	One year
• Restriction of Practice Order (which must be for not less than one year and not more than three)	For the period specified in the Order
• Suspension Order (for a period not exceeding two years)	For the period specified in the Order
• Removal	No time limit

1. This document sets out good practice for allowing vulnerable witnesses to give their best evidence in CNHC disciplinary hearings. It is intended to be read in conjunction with the Practice Note: Equal Treatment.

2. The guidance is generic and cannot cater for every set of circumstances that may arise. Each case (and each witness) is different and the manner in which they might or can be supported to give evidence will need to be adapted to their particular circumstances. It does, however, contain a rough guide as to the sort of witness that would be regarded as vulnerable and a number of examples of measures that can be adopted in appropriate circumstances in order to assist witnesses to give their best evidence.

3. At the end is a simple checklist.

Vulnerable Witnesses

4. Almost all witnesses will find giving evidence a daunting and/or stressful prospect. However, both civil and criminal litigation recognise the concept of witnesses who may have particular troubles, often described as 'vulnerable witnesses'. A witness can be vulnerable for a myriad of different reasons but a useful starting point is the definition (for the purposes of criminal proceedings) in s. 16 Youth Justice and Criminal Evidence Act 1999 (as amended by the Coroners and Justice Act 2009). This defines vulnerable witnesses as:

   (a) All child witnesses (under 18); and
   (b) Any witness whose quality of evidence is likely to be diminished because they:
      (i) are suffering from a mental disorder (as defined by the Mental Health Act 1983);
      (ii) have a significant impairment of intelligence and social functioning; or
      (iii) have a physical disability or are suffering from a physical disorder.

5. The quality of a witness's evidence may be affected by their vulnerability. As stated in the Practice Note: Equal treatment, it is therefore important to try to identify any vulnerabilities of complainants, registrants or other witnesses at an early stage.

6. The issue of vulnerability should be kept under review. A number of individual personal factors (for example, incapacity, impairment or medical condition), environmental factors, or a combination of the two, can give rise to vulnerability. For example, an environmental factor, such as being in the hearing room or seeing one of the parties might 'trigger' anxiety.

7. It is important to take into account the views of the individual witness. Vulnerable people are not a homogeneous group and not everyone with a disability will automatically be vulnerable or would wish to be regarded as such. They may also be embarrassed or ashamed of their vulnerability and seek to hide or mask it.

Mental Disorder

8. 'Mental Disorder' is legally defined in section 1(2) Mental Health Act 1983 (as amended by the Mental Health Act 2007) – not the Mental Capacity Act 2005. Section 1(2) defines 'mental disorder' broadly as 'any disorder or disability of the mind'. An inexhaustive list of disorders that may affect the giving of evidence could include:

    - affective disorders, such as depression and bipolar disorder;
    - schizophrenia and delusional disorders;
    - neurotic, stress-related and somatoform disorders, such as anxiety;
    - phobic disorders, obsessive compulsive disorders, post-traumatic stress disorder and hypochondriacal disorders;
    - organic mental disorders such as dementia and delirium (however caused);
    - personality and behavioural changes caused by brain injury or damage (however acquired); and
    - personality disorders.

9. This can be a very difficult category to identify whether and what measures might assist the witness because of the fluctuating nature of many mental disorders.

10. A mental disorder does not preclude the giving of reliable evidence. However, for many disorders there may be a need to protect the witness from additional stress and provide support to enable them to give reliable evidence. Giving evidence

(particularly about a traumatic event) can cause particular distress and may affect their evidence unless approached in a structured manner.

11. Disorders can affect evidence in a number of ways. A witness with a delusional disorder may be able to give good evidence, but they might give unreliable evidence as a result of delusional memories or by reporting hallucinatory experiences, which are accurate as far as the witness is concerned but bear little or no relationship to reality. Challenging their account can cause extreme reactions and/or distress.

12. Witnesses with anxiety disorders and/or some learning disabilities may wish to please and may tell the interviewer what they think they want to hear or fabricate imaginary experiences to make up for a loss of memory. The latter is also not uncommon with a witness with a dementia-type illness, who may (normally unconsciously) fabricate events in order to fill in gaps of lost memory (confabulation).

13. What measures are appropriate will depend on the type of disorder and severity. In certain circumstances, it may be necessary to obtain expert medical advice – particularly if there are concerns about the competency of the witness to give evidence.

Impairment of intelligence or social functioning (learning disability)

14. A multitude of different factors might affect a person's ability in relation to learning and social functioning to varying degrees. While some two hundred causes of learning disability have been categorised, most diagnoses are still of 'unspecified learning disabilities'.

15. People with high support needs may be easily identified but people with mild or moderate learning disabilities may be more difficult to identify.

16. Though generalisations cannot and should not be made, some characteristics may be more common in relation to some symptoms. For example, witnesses with autistic spectrum disorder will have a huge range of abilities/disabilities but will often:
    a. have difficulty in making sense of the world and in understanding relationships;
    b. have difficulty understanding the emotional pain or problems of others; and

c. display great knowledge of certain topics and have an excellent vocabulary, but could be pedantic and literal and may have obsessional interests.

17. Some witnesses with a learning disability communicate using a mixture of words and gestures (e.g. Makaton signs/symbols when used as an augmentative communication system). While an intermediary should be considered in every case where a witness has a learning disability, the services of an intermediary will be almost essential in circumstances where a witness communicates using a mixture of words and gestures.

18. Appropriate special or additional measures will depend upon the disability and severity but common measures will include adopting simpler language, using an intermediary and/or regular breaks.

Physical Disabilities

19. Most physical disabilities will not affect evidence in the same way as mental disorders or learning difficulties. However it may be appropriate to provide easy access to a hearing, regular breaks and more comfortable seating (as examples). Where a witness is blind or deaf, more complex measures may need to be adopted (such as an intermediary or a sign language translator).

Special Measures

20. In criminal proceedings, the practice (now enshrined in statute) has arisen of assisting witnesses to give their best evidence by adopting 'special measures'. The main special measures are set out in the Youth Justice and Criminal Evidence Act 1999 (as amended) and include:
    - screening the witness from the accused;
    - giving evidence by live link (eg from a different room);
    - giving evidence from a private location;
    - evidence being via pre-recorded video interview;
    - giving evidence via an intermediary;
    - giving evidence via an interpreter; and
    - using communication aids.

21. Although there is no statutory provision for these special measures in civil cases, it is accepted that they can be adopted in appropriate cases in the interests of natural justice and fairness. The same would apply for CNHC hearings.

22. In addition to these specified 'special measures' is the possibility of protecting a witness (particularly a complainant) from cross-examination by the accused in person. In criminal proceedings this is mandatory in certain classes of case involving sexual offences and is discretionary in other types of case. It is commonly adopted as best practice in disciplinary proceedings where there are allegations of sexual harassment or similar complaints.

23. This prohibition can be achieved in a way that is fair to both the accused and the witness by either (1) arranging for an advocate to represent the accused and cross-examine on their behalf; (2) arranging for the witness to give a pre-prepared statement or pre-prepared answers to questions or (3) arranging for the questions to be put to the witness by the tribunal chair rather than by the accused in person (usually on the basis of pre-agreed questions).

24. Other additional measures to assist a witness might include:

    a. Organising a familiarisation visit either prior to or immediately before the hearing in order that the vulnerable witness is familiar with the room in which they will be giving evidence and where all the parties will be sitting;
    b. Sometimes it may be appropriate (particularly if the witness is a child) for the vulnerable witness to meet the tribunal panel before the hearing so that they can introduce themselves to the witness and settle them. However care does need to be taken to avoid the appearance of bias if a complainant is given the opportunity of meeting the panel before the hearing. Usually it will be appropriate to afford the registrant or their representative the opportunity to be present at such a meeting so that they can be assured there is nothing amiss in such a pre-meeting;
    c. Provision of separate waiting areas or reserved, secure conference rooms if the witness feels intimidated;
    d. Making arrangements for the vulnerable witness to arrive at and/or leave the hearing venue by a different entrance to avoid meeting others in the case;

e. Allowing a carer or a representative of an advocacy service (for example, provided by Mencap) to be present during the hearing;
f. Requiring an advocate or the accused in person to adjust their style (such as no 'tagged' questions – eg "You did that, didn't you") or adjust their language (short sentences and simple and straightforward language);
g. Offering the witness additional or extra breaks when giving their evidence and a simple means to communicate the need for a break.
h. Providing the witness with a way of alleviating stress and maintaining concentration while giving evidence (such as a stress toy).

25. Vulnerable witnesses should be consulted about proposed special or additional measures.

26. A balance needs to be reached between ensuring the witness can give their best evidence without reducing the value of that evidence or the weight that can be placed upon it. Similarly, where the vulnerable witness's evidence forms the basis of the allegation, care needs to be taken that the accused still has a fair hearing.