

HEALTH PROFESSIONS COUNCIL

PRACTICE NOTE

Equal Treatment

Introduction

Justice in a modern and diverse society must be 'colour conscious' rather than 'colour blind.' This means that those who administer justice – including the Council's Fitness to Practise Panels - must be aware of, and responsive to, the differences among people who appear before them while remaining fair, independent and impartial.

No one conforms to an average or typical model. A colour-blind approach to hearing cases ignores differences in need and experience. A system that welcomes diversity will also be more effective in achieving justice and being seen to be just. If members of minorities have confidence in the system, then they will be encouraged to use, and abide by, its processes. A system attuned to minority differences will be more easily adapted to the needs of all its users.

Social diversity includes not only issues of race and ethnicity but also differences in linguistic, religious and cultural backgrounds, as well as issues of gender, sexuality and questions of disability. Equal treatment is simply good practice which helps to create greater awareness and understanding of the personal beliefs and lifestyles of individuals.

This Practice Note is intended to be used as a quick, practical reference rather than as an alternative to more detailed materials such as the Judicial Studies Board's *Equal Treatment Bench Book*. Inevitably, a brief document of this kind over-simplifies some issues. Nonetheless it is hoped that all those involved in the work of HPC Fitness to Practise Panels will find it helpful.

The Council is requested to approve the document.

EQUAL TREATMENT: SOME BASIC DOS AND DON'TS

DO:

- ascertain how parties wish to be addressed
- make a point of obtaining in advance precise details of any disability or medical problem from which a person who is appearing before you suffers
- allow more time for special arrangements, breaks etc. to accommodate special needs at hearings
- give particular thought to the difficulties facing disabled people who attend a hearing – prior planning will enable their various needs to be accommodated as far as possible.
- 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.
- admit a child's evidence, unless the child is incapable of giving intelligible testimony.
- ensure that appropriate measures are taken to protect vulnerable witnesses, for instance children, those with mental or physical disabilities or those who are afraid or distressed.
- be understanding of people's difficulties and needs.

DON'T

- underestimate the stress and worry faced by those appearing, particularly when the ordeal is compounded by an additional problem such as disability or having to appear without professional representation.
- overlook the use – unconscious or otherwise – of gender-based, racist or 'homophobic' stereotyping as an evidential short-cut.
- allow advocates to attempt over rigorous cross-examination of vulnerable witnesses.
- use words that imply an evaluation of the sexes, however subtle – for instance, 'man and wife', 'girl' (unless speaking of a child), 'businessmen'.
- allow anyone to be put in a position where they face hostility or ridicule.

THOSE APPEARING WITHOUT LEGAL REPRESENTATION

One group that is often overlooked when considering equal treatment are those who appear without legal representation.

There are various reasons why people choose to represent themselves rather than instructing a lawyer and, for many, it is simply an issue of cost. However, whatever their reason for not employing a lawyer, unrepresented registrants or appellants are likely to be stressed and worried. Their professional reputation or livelihood may be at stake and yet they may be unaware of basic legal principles and procedures. It is to be expected that they will be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage.

Panels must try to maintain a balance between assisting the unrepresented party and ensuring that the proceedings are not hindered by problems arising from the unrepresented party's lack of legal knowledge.

Those who appear without legal representation:

- may lack understanding of legal terminology and specialist vocabulary;
- may be ignorant of law and procedure may have no experience of advocacy;
- may lack objectivity;
- may lack the ability to cross-examine or test evidence;
- may not grasp the true issues of a case;
- may have difficulty in marshalling facts;
- may fail to understand orders or directions, or their obligations to comply with pre-hearing directions;
- may not appreciate the importance of documentary or photographic evidence, or the duty to disclose documents;
- may misunderstand the purpose of a hearing;

At the hearing, the Chairman should explain to an unrepresented party:

- who the Chairman is and how he or she should be addressed;
- who everybody else is, respective functions and how to address them;
- the purpose of the hearing and the issue which is to be decided;
- the rule that only one person at a time may speak and that each side will have a full opportunity to present its case;

- that, if the unrepresented party does not understand something, he or she should say so;
- that a party may take notes (but not tape-recordings);
- that if the unrepresented party would like a short break in the proceedings, he or she has only to ask;
- that the issue is decided on the evidence, documented and oral, before the court and nothing else.

Cross-examination by an unrepresented party

The Chairman must be ready to assist an unrepresented registrant in the conduct of his or her case, particularly when they are examining or cross-examining witnesses and giving evidence. The Chairman should always ask whether they wish to call any witnesses.

The Chairman should be ready to restrain any unnecessary, intimidating or humiliating cross-examination of witnesses – particularly a complainant - by an unrepresented party.

After the hearing, unrepresented parties often do not fully understand the outcome of the case or the reasons for it. The Chairman should always set out clearly the reasons for the decision and explain to the unrepresented party his or her rights of appeal.

PEOPLE WITH DISABILITIES

It is estimated that there are at least 8.5 million people who currently meet the definition of disabled person under the Disability Discrimination Act 1995. This provides that a 'disability' is any 'physical or mental impairment which has a substantial and long term adverse effect on . . . normal day-to-day activities'. 'Disability' may for example relate to mobility, manual dexterity, physical co-ordination, incontinence, speech, hearing or sight, memory, and ability to concentrate, learn or understand.

The Disability Discrimination Act 1995 and Human Rights Act 1998 impose on Panels a duty to take account of disabilities and therefore steps must be taken to accommodate the special needs of litigants, defendants and witnesses arising from disability.

Awareness of the issues which disability may raise in the management of a hearing are important and special arrangement may have to be made with regard to:

- **memory and comprehension** – form of questioning, procedures;
- **mobility** – access requirements;
- **communication** – visual aids, speech interpreters;

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, or take medication, or go to the lavatory at frequent intervals. The presence of a carer or helper may be necessary. The order in which evidence is heard can be re-arranged so that witnesses are not kept waiting.

Some types of disability

- Alzheimer's disease – most sufferers of this progressive disease are elderly. It can take the form of lapses of memory and unsettling behaviour patterns. The stress of appearing at a hearing can have a detrimental effect.
- Autism – a lifelong development disability which impedes the ability to communicate and to relate socially.
- Cerebral palsy – sufferers experience disorders of movement as well as posture and communication problems.
- Cerebral vascular accidents ('stroke') – symptoms can include weakness or paralysis, speech difficulties, loss of balance and incontinence.
- Deafness – this covers a range of hearing impairments. Wherever possible hearings should take place at venues fitted with an induction loop. The use of sign language interpreters may be necessary.
- Diabetes – this can be controlled by medication, but sufferers can experience symptoms ranging from irritability to slurred speech and loss of consciousness.

- Down's syndrome – this is associated with a low IQ and varying communication difficulties.
- Dyslexia – sufferers have difficulty with information processing and short-term memory.
- Epilepsy – sufferers have seizures or fits which may be brought on by stress
- Incontinence – this may arise in conjunction with other disabilities or in isolation, and may worsen with stress. Additional breaks in proceedings may have to be arranged.
- Inflammatory bowel disease – a pre-arranged signal for an urgent trip to the lavatory may be necessary.
- Mental health problems – these vary greatly and the Panel will have to make a careful assessment of affected individuals and how to deal with them as witnesses.
- Motor neurone disease – a progressive degenerative disease with symptoms extending to loss of limb function and wasting of muscles.
- Multiple sclerosis – symptoms can include visual damage and restricted movement and sufferers are likely to fatigue rapidly.
- Spina bifida and hydrocephalus – the range of mobility is wide, and some sufferers have impaired brain function.
- Thalidomide sufferers – usually limb disabled; some have hearing impairment.
- Visual impairment – one of the commonest disabilities. The best method of communicating should be established at the outset of, or preferably before, a hearing.

RACE AND RELIGIOUS BELIEF

A traditional approach to race and justice has been to perceive minority communities as constituting a "problem". A decade ago magistrates were still saying to a black or Asian defendant who was born here that "this isn't the way we do things in this country".

Race awareness training for courts and tribunals tends to focus on *differences*, for example, that care has to be taken over the administration of different oaths, or that minority people's naming systems are different, or that there are other general difficulties in communication, whether by word or body language. Inevitably this encourages a view that once these "problems" are identified and understood, there is nothing more to learn; a view that risks turning black and Asian people into permanent victims.

Some of the information set out below does focus on those differences but its purpose is to assist Panels to ensure that they treat everyone who comes before them equally and with dignity and respect.

Remember:

- Everyone has prejudices. Recognise and guard against your own.
- Be well-informed - being independent and impartial does not mean being isolated from issues which affect people from minority communities.
- Don't assume that treating everyone in the same way is the same thing as treating everyone fairly.
- Be 'colour conscious', not 'colour blind'. Fair treatment involves taking account of difference.
- Don't make assumptions: all white people are not the same. Nor are all black, or Asian, or Chinese or Middle Eastern people.
- Don't project cultural stereotypes: for example that all young black people avoid eye contact. Most young black and Asian people are second and third generation British born citizens and may be no different from any other person when faced with authority figures.
- Don't perceive people from ethnic minority communities as 'the problem' - the problem may lie in the working methods and traditions of some institutions which may put some groups, such as women, people with disabilities or people from racial minorities, at an unfair disadvantage.
- If in doubt - ask. A polite and well-intentioned inquiry 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.

Appropriate words: dos and don'ts

However committed a person may be to fairness and equality, he or she may still give the opposite impression by using inappropriate, dated or offensive words. There are no right answers. Language and ideas are living and developing all the time. Some words that were once acceptable no longer are. The following can be advanced with confidence:

Black acceptable to people of African or Caribbean origin. Some Asian people are happy to be called black and some are not. 'Black and Asian' is preferable (though see below on the use of "Asian").

Coloured an offensive term that should never be used.

Non-white implies a negative value judgement and should not be used.

People of colour common in the USA but not so usual in the UK.

Visible minorities acceptable, with wider scope than 'black'.

Racial minorities alternative to 'ethnic minorities'. Both are acceptable.

Ethnics a deeply offensive term that should never be used.

African Caribbean preferable to West Indian or Afro-Caribbean. Younger people may prefer to be called black, or black British.

African acceptable, as is naming the country from which a person or family may have originated e.g. Nigerian.

Asian should be used with care. People prefer to identify themselves by reference to their country e.g. Indian, Pakistani and Bangladeshi, region e.g. Bengali, Punjabi, or religion e.g. Muslim, Hindu or Sikh. Younger people born in Britain may call themselves British or British Asians. If the country is not known, Asian or South Asian is acceptable.

Paki not acceptable.

Negro or negroid not acceptable.

Oriental not acceptable. The proper name such as Chinese, Malaysian, Vietnamese etc. should be used.

Mohammedan not acceptable. Muslim should be used.

Half-caste not acceptable. Mixed race should be used instead.

Immigrants it is inaccurate to apply this generalisation to racial minorities in the United Kingdom, many of whom are British born.

Names and Naming systems

Naming systems vary between minority groups and some are complex. A few basic principles may be stated:

- It is more important to treat people with courtesy and address them properly than to try to learn all the different naming systems.
- Ask people how they would like to be addressed, how to pronounce their name and how to spell it.
- Ask for full name: first, middle and last. Do not ask for 'Christian' name or 'surname'.
- Do not record or address a male Muslim or Sikh by his religious name only; e.g. Mohammed or Allah, or Singh - check in case these are last names.
- Do not record or address a female Muslim or Sikh by her religious name only: e.g. Begum, Bibi or Kaur.

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 churches, and indeed 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.

African religions - People from African countries may be Muslims, Christians or followers of indigenous African religions with their own practices. In some cases it may be relevant to ascertain an individual's area of origin. In all cases, when in doubt, ask what is needed in terms of oath taking or other facilities.

Chinese religions - Many religions are practised in China, including Buddhism, Christianity and Islam. Chinese religions include Confucianism and Daoism. Unless they are Christians or Muslims, most Chinese witnesses prefer to affirm.

Buddhism - There are several Buddhist traditions commonly practised in the UK. Commitment to the Three Jewels is a key element; the Buddha, the Dhamma (teachings) and the Sangha (community of monks or nuns). With a lunar calendar, festivals and special days vary from year to year. Holy days fall on full- and half-moon days. Most Buddhists usually choose to affirm.

Hinduism - Holy books are the Vedas; main religious festivals are MahaShivaratri (February), Janmashtami (August), Vinayaka Chauth (August), Dussehra or Navaratri (October), Durga Puja (October), Diwali (November), Holi (March). Oath is taken on the Gita, (which is an extract from the Vedas).

Judaism - The holy book is the Hebrew Bible (Tenach). Festivals include Rosh Hashanah (New Year, held in September/October), Yom Kippur (holiest day of the year, held 10 days after Rosh Hashanah), Pesach (March/April), Shavout (May/June), Sukkot (autumn). Holy day is Saturday (from Friday sunset). Prayers are said three times a day.

Islam - Main festivals include Eid-ul-Fitr (held after the one-month fast of Ramadan) and Eid- ul-Adha. Friday is the holy day and many will wish to attend the mosque at midday. The holy book is the Qur'an (Koran) and prayers are said five times a day. Muslims prefer to wash before handling the Qur'an and may want to cover their heads when taking the oath. During Ramadan (which may fall at various times of the year), most, if not all, Muslims may fast and will therefore not eat or drink from dawn to dusk.

Rastafari - The holy book is the Bible. Festivals include Ethiopian Constitution Day (16 July), the birthday of Emperor Haile Selassie 1 (23 July), Marcus Garvey's birthday (17 August), Ethiopian New Year's Day (11 September), anniversary of the coronation of Haile Selassie (2 November), Ethiopian Christmas (7 January). Rastafarians may take the oath on either the Old or New Testaments, or may prefer to affirm.

Sikhism - The holy book is the Guru Granth Sahib. Main festivals include Vaisaki (13 April), Diwali (October/November), Guru Nanak's birthday (November/December), Guru Gobind Singh's birthday (December or January), Guru Arjan Dev's Martyrdom (May/June). The Sunder Gutka, an extract from the Guru Granth Sahib, has been treated as the appropriate form of a Sikh holy book to be used in courts in the UK.

Oath-taking: some practical points

The Oaths Act 1978 accords statutory precedence to Christianity, but it is essential that proper respect is paid to the religious beliefs of all those appearing before Panels. The holy book of people from any community who appear at a hearing should be available. It is likely that most demand will be for the Gita, the Qur'an and the Sunder Gutka.

- Religious practices in relation to oath taking should be handled sensitively - not as though they are a nuisance.
- Not everyone from racial minority communities is religious: some may prefer to affirm.
- Muslim, Hindu and Sikh women may prefer to affirm if having to give evidence during menstruation or shortly after childbirth.
- Requests to wash hands, feet or other body parts before taking the oath should be treated sympathetically.
- Some witnesses may want to remove shoes or cover their heads or bow with folded hands.
- Holy books should be covered at all times when not in use in cloth or velvet bags. When uncovered, they should only be touched by the person taking the oath, not by Panel members or staff. They should not be marked inside or out.

CHILDREN

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 going to court do not decrease with age, and adolescent witnesses are more likely to exhibit adverse psychological reactions than younger ones.

Cases involving children should be expedited as far as possible. Panels need to be aware of the sort of stresses and worries going through a child's mind when involved in legal 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 Civil Procedure Rules (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 the 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. Law-makers and law-enforcers have in the past, however, mostly been men and a male outlook can still prevail. 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.

In legal proceedings, women often feel humiliated, patronised and disbelieved as witnesses and as advocates. They can feel that they lack credibility as witnesses or may feel ill at ease in a hearing room filled with men. This is likely to be particularly true when any intimate medical issue or issue of sexuality arises. A woman may appear to minimise the impact of sexual harassment or sexual assault out of embarrassment and a wish to end the ordeal of having to appear.

It is also important to be careful not to regard a woman who works full-time as a selfish mother or neglectful of her children. She may also carry the main responsibility for their care. Conversely, a man who stays at home to look after children is not lazy or incompetent.

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. Although attention has focused in the recent past on the problems of criminal defendants who dismiss their counsel and want to cross-examine the complainants in rape cases themselves, the demeaning experience of cold, skilful and remorseless questioning by a detached advocate can be even worse. Panels should intervene to restrain insulting or offensive questions and humiliation of the witness. The Human Rights Act has implications for the amount of permissible infringement of the witness's right to respect for her private and family life.

A common misconception is 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.

SEXUAL ORIENTATION

There is a historical background of widespread discrimination against homosexuals and perceptions of prejudice by the gay and lesbian community extend to their experiences of the judicial system.

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. Judicial decision-makers need to be aware of the harm done to people, and to the reputation of the judicial system, 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 the dangerous assumption that a lesbian may be better able to defend herself in a hostile situation, may be more able to fight off sexual attack or will be more resilient to harassment than a heterosexual counterpart.
- 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.

Transsexual and transvestite people should not be considered as merely an extension of, or dimension of, the gay and lesbian sub-culture. Additionally, there are basic differences within and between the transsexual and transvestite experiences.

Many transsexual and transvestite people would not consider themselves gay or lesbian, and many would consider their sexuality as closer to that of heterosexuals. It is unlikely that a transvestite who cross-dresses in private and sometimes in public, will cross dress in court. However, this may not always be the case, and a desire or need to cross-dress may still be a relevant and important issue. 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.

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 physical surgery, but for those that do, the surgical stage is just part of a longer and larger sequence of events and processes that are intended to help the physical identity match the person's inner sense of gender identity. These events and processes are likely to involve great strain, and bring the transsexual person into situations of unwanted tension.

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