PRACTISE NOTE

Conducting Hearings in Private

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

Introduction

1. As a general principle, Disciplinary and Appeal Panel hearings shall be open to the public. However, a discretion vests in the Panel Chairman to hold all or part of the hearing in private, whether or not the parties request it[1].

2. However, the principle of 'open justice' requires that, in general, proceedings should be held in public; evidence should be communicated publicly; and fair, accurate and contemporaneous media reporting of proceedings should not be prevented unless strictly necessary. Unlike a court of law, in Disciplinary and Appeal Panel hearings there is no 'intermediate' option of excluding the media from, or imposing reporting restrictions on, a hearing conducted in public.

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3. Historically, concerns about the conduct of proceedings have been about the failure to sit in public and, for that reason, the common law has long required that quasi-judicial proceedings should be held openly and in public on the basis that: '…*publicity is the very sole of justice…and the surest of all guards against improbity. It keeps the judge…, while trying, under trial*'[2] Similarly, Article 6(1) of the European Convention on Human Rights ('the ECHR') is directed at preventing the administration of justice in secret. It guarantees the general right to a public hearing, for the purpose of protecting the parties from secret justice without public scrutiny and to maintain confidence in the courts[3], although that right is subject to the specific exceptions set out in Article 6(1).

4. Consequently, there are circumstances in which proceedings can be heard in private but, unless one of the exceptions applies, a decision to sit in private will be a violation

1 Rules 23 and 42 of the Institute's Disciplinary Procedure Rules.
2 *Scott v Scott* (1913) AC 417
3 *Diennet v France* (1995) 21 EHRR 554

of the ECHR. There are two broad circumstances in which all or part of a hearing may be held in private: where it is in the interests of justice to do so; or where it is done in order to protect the private life of the person who is the subject of the allegation, the complainant, a service user, or a witness giving evidence.

5. The discretion to conduct proceedings in private where doing so 'is in the interests of justice' must be construed in line with the test set out in Article 6, which provides that proceedings may be held in private 'to the extent strictly necessary in the opinion of the [Panel] in special circumstances where publicity would prejudice the interests of justice.' The narrow scope of that test means that the exercise of the 'interests of justice' exception should be confined to situations where it is strictly necessary to exclude the press and public and where doing otherwise would genuinely frustrate the administration of justice (such as cases involving public interest immunity applications, national security issues, witnesses whose identity needs to be protected, or a risk of public disorder).

6. Under Article 6(1), the protection of a person's private life is not subject to the same 'strict necessity' test, but nonetheless quasi-judicial panels do need to establish a compelling reason for deciding that a hearing should be held in private. It is not justified merely to save parties, witnesses or others from embarrassment or to conceal facts which, on general grounds, it might be desirable to keep secret (including the existence of prior convictions, either spent or unspent[4]). The risk that a person's reputation may be damaged because of a public hearing is not, of itself, sufficient reason to hear all or part of a case in private unless a Panel can be satisfied that the person would suffer disproportionate damage.

7. Furthermore, given that conducting proceedings in private is regarded, generally, as the exception, disciplinary panels are required always to consider whether it would be feasible to conduct only part of the proceedings in private before taking the decision to conduct all of the proceedings in that way. A panel should consider whether other, more proportionate, steps could be taken, for example by anonymising information, redacting exhibited documents, or by concealing the identity of complainants, witnesses or service users (referring to them by initials or as "Person X" etc.).

Procedure

8. A decision on whether to sit in private for all or part of the proceedings may be taken by the Chairman on his or her own motion or following an application made by one of the parties. Regardless of how the issue arises and no matter how briefly it can be dealt with, the Chairman should provide the parties with an opportunity to address the Panel on the issue before a decision is taken. The decision reached and the reason for doing so should be recorded as part of the record of the proceedings.

[4] *L v The Law Society* [2008] EWCA Civ 811