

## Health and Care Professions Tribunal Service

# PRACTICE NOTE

## Children as Witnesses

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

### Introduction

1. Panels should take steps to ensure that when children appear as witnesses in fitness to practise proceedings, they are able to participate effectively. This includes taking steps to minimise any distress or sense of intimidation.

### Background

2. The legal definition of a child varies according to context but, for the purpose of civil proceedings throughout the UK, may be regarded as a person under the age of 18.<sup>1</sup> This is consistent with the definition in the UN Convention on the Rights of the Child, to which the UK is a signatory. Article 1 of the UN Convention states:

*"For the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."*

3. Article 3.1 of the UN Convention requires that:

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

### Special measures

4. The Panel rules<sup>2</sup> provide that a witness under the age of 17<sup>3</sup> (at the time of the hearing), if the quality of their evidence is likely to be adversely affected as a result of their age, may be treated as a vulnerable witness and subject to

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

<sup>2</sup> HCPC (Investigating Committee) (Procedure) Rules 2003, r.8A; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003, r.10A; HCPC (Health Committee) (Procedure) Rules 2003, r.10A.

<sup>3</sup> It is anticipated that this will be increased to 18 when a suitable legislative opportunity arises

the 'special measures' set out in those rules. Those special measures include but are not limited to:

- a. use of video links;
  - b. use of pre-recorded evidence as the child's evidence-in-chief;
  - c. use of intermediaries;
  - d. use of screens or other measures to prevent the identity of the witness being revealed or access to the witness by the registrant; and
  - e. the hearing of evidence in private.
5. Childhood spans a broad age range and, in determining how to support and protect a child witness, Panels should take account of the child's wishes and their level of cognitive, social and emotional development. The child's age is a factor for a Panel to consider but is not a determinative factor: the particular circumstances of the facts of the case, and the witness' involvement and evidence, will dictate what special measures are necessary and appropriate.

### **Competence of child witnesses**

6. General information about the competence of witnesses is set out in the HCPTS Practice Note titled Securing Witness Engagement: Competence, compellability and Orders to attend / produce documents.
7. There is no specific age below which children are regarded as not competent to give evidence. In Panel proceedings, the basic test of competence is whether the witness is capable of giving rational testimony (in essence, being able to understand the questions put to them and to give answers capable of being understood) and understands the nature of an oath. The relevant test was articulated by Bridge LJ in the following terms in *R v Hayes*:<sup>4</sup>

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

8. However, by virtue of section 96 of the Children Act 1989, even if a child does not understand the nature of the oath, the child may give unsworn evidence if, in the opinion of the Panel, the child:
- a. understands that it is his or her duty to speak the truth; and
  - b. has sufficient understanding to justify his or her evidence being heard.
9. Whether a child is competent to give evidence is a matter for the Panel, but it is not an issue which a Panel must investigate merely because of the age of a witness. Whilst the chronological age of a child may help to inform the Panel's

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<sup>4</sup> [1977] 1 WLR 234

decision about competency, in the end it is a decision about the individual child, and their competence to give evidence before the Panel.

## **Witness management**

10. In any case where a child is to be called as a witness by the HCPC,<sup>5</sup> the HCPC will offer an early meeting between the child (supported as necessary by a parent, guardian or other appropriate adult), and the HCPC and/or its representatives. This will enable the HCPC to provide support and reassurance at an early stage. The HCPC will be responsible for arranging this meeting.
11. Normally, in the course of that meeting a vulnerable witness assessment will be conducted and will seek to identify any special measures that would assist the child witness in giving their evidence. That information will form part of the submissions put to the Panel by the HCPC at any preliminary meeting.

## **Proactive Case Management**

12. The HCPC should consider holding a preliminary hearing for the purpose of active case management in any case that involves a child witness. In doing so, the Panel should have regard to the full range of special measures that are available, taking account of the child's wishes and needs.
13. Although the adoption of special measures is subject to any representations made by the parties (and any advice provided by the Legal Assessor), there should be a presumption that all child witnesses will give their evidence-in-chief by video-recorded interview and any further evidence by live video link unless the Panel considers that this will not improve the quality of the child's evidence.
14. Older children may prefer to give live evidence and, if that is the case, there should be a presumption that they will do so from behind a screen. A child witness who does not wish to use a screen should be permitted that choice if the Panel is satisfied that the quality of the child's evidence will not be diminished.
15. At any preliminary hearing the Panel should seek to fix an early date for the hearing of the case and agree a timetable that avoids adjournments. The timetable needs to take account of the child's circumstances, such as their concentration span and the length of any recorded evidence-in-chief. Generally, if a child's evidence is taken early in the day it reduces the time that the child must spend at the hearing and also minimises the risk of delay caused by procedural or other matters that may arise as the day progresses.

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

16. Panels should also seek to limit the issues on which evidence needs to be given by a child witness, by having as much of the child's evidence as possible accepted in advance as admitted fact. A child witness must always be given the opportunity to refresh their memory before being asked questions, whether by viewing their evidence in chief (if video-recorded) or reading any written statement they have made. If a child witness's evidence is video-recorded, a Panel should recognise that the child may be uncomfortable seeing themselves on video. The HCPC, or their lawyers, should ensure that the child witness views the footage prior to the hearing.
17. Panels should also direct that appropriate familiarisation takes place before the day of the hearing. The nature of this familiarisation will depend on the type of hearing. For a hearing in person, the child and their supporter should be offered a visit to the hearing venue. For a virtual hearing, they should be offered a demonstration of the software used to conduct virtual hearings. This provides time for the child to consider and provide an informed view about any special measures and, if necessary, for an application to be made to the Panel to vary those special measures.

### **At the hearing**

18. Although HCPC's adjudication team are responsible for the logistical arrangements for hearings, Panels must satisfy themselves that the relevant equipment is functioning properly before a child witness is called to give evidence. Malfunctions, delays, or the need to run equipment checks whilst a child witness is in the room will not help that child to achieve best evidence.
19. As a minimum it is necessary to ensure that:
  - a. the child's pre-recorded evidence-in-chief can be played;
  - b. the child will be able to see the face of any person asking questions;
  - c. if relevant, that the child cannot see the registrant.<sup>6</sup>
20. Before the proceedings begin the Panel should check (via the Hearings Officer) whether the child would like to meet the Panel. This helps the Panel to establish rapport with the witness and allows them to encourage the witness to let the Panel know if they have a problem, such as not understanding a question or needing to take a break.
21. The Panel (or Hearings Officer) should also explain that the Panel will be able to see the witness over the live link even if the witness cannot see them and that everyone else at the hearing (including the registrant, if relevant) will also be able to see them.

### **Questioning**

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<sup>6</sup> For example, where the witness is the victim of alleged abuse by the registrant

22. Panels should be cognisant that any witness may experience difficulties in giving evidence when they are asked questions at too fast a pace, or which are too complex. This is a more relevant consideration when the witness is a child.
23. To ensure that they achieve best evidence, Panels need to recognise that children may need more time to process questions than adults.
24. Although it is good practice for Panels to begin by asking children to say when they do not understand a question, they may be reluctant to do so and will often try to answer questions they do not fully understand. Panels need to be vigilant in this regard. Asking a child whether they understood the question is not always a reliable indicator of comprehension and probing question along the lines of “what do you mean when you say...” may be helpful.
25. Advocates should not be permitted to behave in an aggressive or intimidating manner towards any witness. Panels should always challenge and prevent such conduct.
26. Complex questions may confuse witnesses. Panels should encourage advocates to use language that is appropriate to the abilities of the witness, and to allow adequate time for the witness to process and answer questions.
27. Advocates also need to be encouraged to:
- a. speak slowly and pause after each question, to give children enough time to process and answer it;
  - b. ask short and simple questions which address one point at a time;
  - c. use simple, common language appropriate to the age and understanding of the child;
  - d. avoid complex questions which require the child to remember too much detail in order to answer them;
  - e. avoid questions which assert facts or contain other suggestive forms of speech, which a child witness may struggle to answer accurately when asked by an adult in a position of authority;
  - f. adopt a structured approach which ‘signposts’ the subject and warns when the subject is about to change.
28. Panels should not permit a child witness to be asked questions concerning intimate touching by being asked to point to parts of their own body. If such questions need to be asked, the Panel should direct that the witness be asked to point to a body diagram.
29. Further information about good practice when questioning children in legal proceedings can be found in the NSPCC/Nuffield Foundation publication *Measuring up? Good practice guidance in managing young witness cases*

*and questioning children*<sup>7</sup>. There is also some helpful information on good practise in the Ministry of Justice/National Police Chiefs' Council publication *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures*<sup>8</sup>, but please note that this guidance arises from a different legal framework and so aspects of it will not apply to HCPTS proceedings.

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<sup>7</sup> [https://www.nuffieldfoundation.org/sites/default/files/files/measuring\\_up\\_guidance\\_wdf66581.pdf](https://www.nuffieldfoundation.org/sites/default/files/files/measuring_up_guidance_wdf66581.pdf)

<sup>8</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1051269/achieving-best-evidence-criminal-proceedings.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051269/achieving-best-evidence-criminal-proceedings.pdf), see in particular paragraphs 2.34-2.77