Fact-finding in Fitness to Teach Conduct Cases
Practice Statement

Introduction

This document provides guidance to support the rational and consistent determination of fitness to teach conduct cases.

Determining fitness to teach conduct cases involves a 3 stage process. A Panel has to decide, in turn:

1 Whether it finds the facts alleged proved;
2 Whether, on the basis of the facts found proved, the Teacher's fitness to teach is impaired or he/she is unfit to teach; and
3 If it finds that fitness to teach is impaired, what action should be taken or sanction imposed in view of that identified impairment.

This document sets out general and specific guidance for Panels regarding **stage 1** of the process described above. Guidance regarding stages 2 and 3 of the process is set out in the separate "Indicative Outcomes Guidance" practice statement.

In *Cohen v GMC* the English High Court stated that it was "critically important" to appreciate the different tasks which Panels undertake at each step in the adjudication process (as listed above). It described stage 1 as requiring a Panel:

"to consider the [allegations] and decide on the evidence whether the [allegations] 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 [registrant] has a good record or… performed any other aspect of the work… with the required level of skill".

Another way of explaining this stage is that it requires the Panel to decide whether the facts (or conduct) alleged happened or not. Fact-finding is therefore one of the central tasks that a Panel performs and is what it does at stage 1 of the hearing process. A Panel cannot move on to stages 2 and 3 without establishing that the facts alleged have been proved (whether in full or in part).

Panel members must always exercise their own judgement in fact-finding and must consider each case individually according to the evidence. Panels will also receive advice from Legal Assessors in each case. This guidance does not purport to provide exhaustive or prescriptive lists of the principles and factors that may require to be considered in assessing evidence and fact-finding. However, it is designed to provide a useful starting point for Panels to refer to and to use with a view to ensuring a general consistency of approach.

Standard and Burden of Proof

The standard of proof is the test that a Panel has to apply to decide whether or not the fact(s) alleged are proved. This is different from the *burden* of proof. The burden of proof relates to the matter of who is required to prove the fact(s) alleged: this rests with the Presenting Officer in conduct cases.

The Rules set out that in terms of finding facts at any hearing, the required standard of proof will be on the balance of probabilities. Another way of describing this test is to say that a fact will be proved if it is judged more likely to have happened than not. This is the standard of proof that also applies to civil court proceedings in Scotland.

It is important to note that it has been established through case law that this standard of proof does not shift or vary depending on the gravity of the allegations or the seriousness of the consequences for the person concerned: the one standard is applied universally.

It is also important to note that this standard is quite different from the standard applied to the proof of charges in criminal court proceedings in Scotland (i.e. beyond reasonable doubt). Note too that there is no requirement for evidence to be corroborated (i.e. supported by another item of evidence from a different source) as there may be in a criminal court context.

As the burden of proof rests with the Presenting Officer, he/she will generally present at the hearing first: the Teacher will follow.

Admissibility of Evidence

Evidence that is "admissible" is what may be lodged for a Panel to consider in determining the case presented.

The Rules set out that:

"Subject to the requirements of relevance and fairness, and upon receiving the advice of a Legal Assessor as appropriate, a Panel may admit at a hearing oral, documentary or other evidence, whether or not such evidence would be admissible in court or criminal proceedings in the United Kingdom."

A Panel is not therefore bound by the same rules of evidence that apply in court proceedings.

Evidence is "relevant" if it is in some way logically connected to the allegation under consideration. The requirement of "fairness" requires an assessment of whether the item of evidence can be fairly relied upon by the party seeking to do so and whether, in all the circumstances of how it has been obtained, it would be fair to admit it.

If a party wishes to challenge the admissibility of an item of evidence put forward by the other (and excepting late evidence which is covered further below), it is expected that they inform the Servicing Officer of this as soon as possible through the case management process in order that a procedural hearing may be arranged to consider the matter as necessary (thus keeping it separate from the full hearing).

Note: it is important to draw a clear distinction between evidence that has been admitted for consideration at a hearing from what evidence (if any) is ultimately accepted by a Panel in making its findings in fact following the assessment process described below.

Assessing Evidence in Order to Make Findings in Fact

Making findings in fact requires a Panel to carefully assess all of the evidence which has been admitted and presented to it which may include documentary evidence, oral evidence, "real" evidence (i.e something that is tangible and physical like a weapon: often referred to as "productions") and opinion evidence. This will require a Panel to distinguish between what evidence is and what evidence isn't as follows:

- What a witness says orally under oath/affirmation is evidence. [Note: questions or suggestions put to a witness aren't evidence unless the witness agrees with what has been put to him/her and if all that the witness does is agree with what has been put to them, it may affect the weight that the Panel gives to the evidence (see below).]
- Matters put to a witness who can't remember those matters or who doesn't know about them, aren't evidence.
- Submissions, speeches or views on the evidence made by the parties aren't evidence.

A Panel must make its findings based on the evidence placed before it. A Panel must not speculate or guess. A Panel should also only start to determine its findings in fact once it has heard all of the evidence to be presented by the parties at this stage. Where a Panel is concerned that evidence that is relevant and important has not been placed before it by the parties, it should seek advice from the Legal Assessor as to how to proceed taking account of the particular circumstances.

A Panel may be presented with a wide range of evidence, some of which provides direct proof of the facts alleged in the complaint and some of which is more circumstantial in nature. For example, a Panel may hear from a witness who speaks directly to the alleged event (e.g. "I saw the assault of pupil X") as well as another

witness who speaks indirectly to that same event (e.g. "I saw pupil X leaving the scene in a distressed state"). The Panel will need to assess all of the evidence in order to make its findings and will often need to consider all of the items of evidence together in carrying out this exercise.

The first step for a Panel is to consider what (if anything) has been admitted by the Teacher or has been agreed between the parties. Those facts admitted or agreed will be considered proved without the requirement for further evidence to be led in relation to them: the Panel's focus will then move to determining the facts that remain in dispute by assessing the other evidence before it.

Assessing the evidence will require a Panel to determine what evidence it accepts because it believes it to be true and what evidence it rejects because it believes it to be false or unreliable.

Assessing witness evidence will require the Panel to consider credibility and reliability. A credible witness is an honest one, doing his/her best to tell the truth. A witness is reliable if he/she recalls events accurately (i.e. not affected by things like: failure of memory; a defect of observation or a misconstruction of what was observed).

In assessing the credibility and reliability of witness evidence, a Panel may find it helpful to ask itself the following questions:

- How did the witness give his/her evidence? Do you believe that he/she is telling the truth?
- What was the demeanour/attitude of the witness in giving his/her evidence? [Note: this should be approached with caution: demeanour can be a very unreliable factor to use to determine credibility as it can be affected by things like: a disability, personal characteristics/disposition or culture]
- How well placed was the witness to form an objective view on what happened?
- Does the witness demonstrate greater knowledge or understanding of matters relevant to the facts in dispute than another witness?
- How reliable (or accurate) is the witness' recollection of events?
- How well has the witness conveyed his/her recollection?
- Is the evidence inherently probable or improbable?
- Is the evidence consistent with facts which are known or certain?
- Is the evidence consistent with what the witness has stated on other occasions?
- Does the witness have a motive or interest in the outcome of the disputed facts?
- How does the evidence compare with other evidence in the case?

Note: where a witness has not attended the hearing to provide evidence in person, a Panel should refer to the section headed "Hearsay Evidence" below with regard to the bullet points above.

It is important to bear in mind that <u>all</u> witnesses must be judged in the same way no matter who they are: police officers, doctors, teachers, lay people, children or others.

Where inconsistencies are identified in witness evidence, a Panel should bear in mind that quite often witnesses give differing accounts of the same event because the ability to observe and recall can vary (and this will inevitably be exacerbated with the passage of time). If witness accounts on crucial matters are substantially similar, minor differences of detail don't matter. Where, however, there are differences on important matters, the Panel will need to decide which version it accepts and whether the relevant facts alleged have been proved.

Where there are conflicts in the evidence of different witnesses, a Panel can accept the evidence of one witness and reject the evidence of another. Where there are conflicts in a single witness's evidence, a Panel can also accept part of it and reject part. Where evidence is rejected because a Panel is of the view that a witness is lying or unreliable, that evidence must then be put from the Panel's mind: a Panel must not speculate that this means the opposite is true.

Once the Panel has reached conclusions on what evidence it is going to accept and what it is not, it should then consider what weight it attaches to the evidence that it has accepted. The "weight" of an item of evidence means the degree of reliance which the Panel places upon it in order to determine whether the facts alleged are proved or not. By way of example, a Panel may decide (based on the particular case circumstances) to place greater weight on witness evidence where the witness has attended the hearing than witness evidence provided via a written statement only (see the "Hearsay Evidence" section below for further information on

this). A decision as to relative weighting may also be influenced by considerations as to whether or not the particular piece of evidence is the best evidence that could be found to support the particular fact or issue.

The final stage in the process will be for the Panel to decide (bearing in mind its determinations as to the relative weight of the evidence) how powerful and convincing the body of evidence it has is and whether it considers it more likely than not that the facts alleged happened. Where more than one allegation is set out in the complaint, the Panel must take each allegation in turn and decide whether or not the facts have been proved: a Panel cannot say "because we're satisfied that one allegation is proved, it must mean all the other allegations are proved too". The same piece of evidence can, however, be relevant to more than one allegation.

Hearsay Evidence

Hearsay evidence is evidence of what one person says that another person has said to them or, to put it another way, what somebody else has been heard to say. That evidence is not normally allowed in criminal court proceedings in Scotland[1] but, as noted earlier in this practice statement, a Panel is not bound by the same rules as apply to such proceedings. Hearsay evidence may therefore be admitted in fitness to teach complaint proceedings and a Panel may accept it as evidence to use in its fact-finding exercise. If the Panel decides to accept such evidence, it will need to think carefully about what weight should be attached to it with reference to the guidance set out above.

Also of relevance in this context is where a Panel is asked to accept the evidence of a witness based on a written witness statement only. If the Panel is satisfied that the witness provided the written statement and that it has been accurately recorded, the Rules are clear that it can be regarded as part of the evidence in the case. The Panel will, however, still have to make determinations about the credibility and reliability of the witness concerned. The Panel can compare the statement with other evidence given in the case and judge whether it fits in with that other evidence or not. The Panel can also decide what effect consistencies and inconsistencies have and take into account what other evidence may tell it about the sort of person that the witness is which may have a bearing on the credibility and reliability of his/her account. The Panel will, however, have to bear in mind that it has not seen the witness give his/her evidence in person to give the Panel the opportunity to assess the way that he/she gives evidence, his/her demeanour and how he/she responds to questioning (including cross-examination). The Panel will also have to bear in mind that the statement hasn't been given under oath/solemn affirmation at the hearing. The fact that the Panel has not seen the witness give his/her evidence in person will be more material in some instances than others: this very much turns on the evidence that he/she provides in the context of the particular case. As noted above, the Panel will have to balance all of these factors in the particular circumstance and reach a judgement on the relative weighting of the evidence accordingly.

Examination and Questioning of Witnesses

The parties may each ask witnesses to provide evidence that they believe supports their case. The effect of Rules is that a written witness statement for each witness requires to be prepared in advance of the hearing and this will also, in any event, usually be required of the parties as part of the case management process in the lead up to a hearing. The requirement to provide and disclose witness statements in advance in this way is so that parties have the opportunity to prepare their cases properly and so it is part of ensuring that the process is fair.

As noted earlier in this practice statement, a written witness statement may be admitted without a witness attending the hearing to give that evidence orally but (depending on the content of the statement and the other circumstances of the case) this may affect the weight ultimately given to that evidence by the Panel. Where the other party has asked that the witness be called to the hearing for cross-examination (see below) if the witness is not then called/fails to attend, the Rules provide that this evidence may not be used unless the Panel permits otherwise: where this issue arises, advice will be given according to the specific circumstances. In all cases, where a statement is admitted into evidence, the Rules require that (as a general rule) the witness statement be read aloud at the hearing which seeks to ensure that the process is transparent and that due regard is given to all of the evidence.

[1] Note: the position in civil court proceedings in Scotland is different: hearsay evidence is (as a general rule) admissible in this context under the Civil Evidence (Scotland) Act 1988.

Should a party wish to compel a witness to provide evidence or attend a hearing in support of his/her case (i.e. where that witness is unwilling to do so voluntarily), an application to the Court of Session to this effect would need to be made by him/her[2].

"Examination-in-chief" is the first stage in the giving of evidence by a witness. This is the questioning of the witness by the party that called him/her: in accordance with the Rules, this should be covered to a substantial extent by the reading aloud of his/her witness statement with the oral evidence at the hearing being used only to amplify his/her statement and/or give evidence in relation to new matters which have arisen since the witness statement was prepared. Examination-in-chief is followed by cross-examination which is the questioning of the witness by the other party with a view to testing the truthfulness of the witness and the accuracy of his/her evidence as well as in order to obtain from him/her evidence on points on which that witness has not already been questioned and which may support that party's case. Once a witness has been cross-examined, he/she may be asked further questions by the party that called him/her (this is called "re-examination"). The Panel may then ask the witness questions. The Panel should take care to ensure its questioning of a witness:

- Is relevant to the matters at issue. This means that the question should relate to determining the facts alleged: they shouldn't look to open up new fields of enquiry or relate to anything else
- Has a clear purpose and is concise: the witness should be in a position to easily understand the question asked, which should be short and simple, addressing one point at a time only
- Is open and not leading
- Maintains and supports its role as an independent decision-maker; not an advocate for either party
- Avoids value judgments, any suggestion of bias and any opinion

Child Witnesses

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

In trying to ensure that children provide the best evidence that they can, parties and Panels should recognise that children need more time to process questions than adults, and even more so when they are distressed. Parties and Panels should also bear in mind that adolescents are at risk here too: assumptions should not be made about their ability to cope with what is taking place any more than younger children.

Although it is good practice for a Panel Convener to begin by asking children to say when they do not understand a question that they are asked at a hearing, it should be borne in mind that children may be reluctant to do so and will often try to answer questions they do not fully understand. Panels therefore need to be vigilant in relation to this. Asking a child whether they understood the question is not always a reliable indicator of comprehension: probing question along the lines of "what do you mean when you say…?" may be helpful.

When examining and cross-examining child witnesses, parties should not be permitted to behave in an aggressive or intimidating manner and Panels should always challenge and seek to prevent such conduct.

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

Parties should also be encouraged to:

- speak slowly and pause after each question, to give children enough time to process and answer it
- use simple, common language and avoid idiomatic phrases
- avoid questions which are complex or 'front-loaded' and require the child to remember too much detail in order to answer them

[2] Such an application may be made with reference to Paragraph 2, Schedule 4 of the Public Services Reform (General Teaching Council for Scotland) Order 2011.

- avoid questions which assert facts or contain other suggestive forms of speech, which children struggle to answer when asked by an adult in a position of authority
- adopt a structured approach which 'signposts' the subject and warns when the subject is about to change

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

Unrepresented or Absent Teachers

As noted in the separate Practice Statement on Postponements, Adjournments and Proceeding in the Absence, if a hearing is to proceed in the absence of the Teacher, the Panel must ensure that the hearing is conducted as fairly and in as balanced a way as the circumstances permit.

Where a Teacher is unrepresented, a Panel has a similar obligation to ensure that the proceedings are fair by facilitating the proper and effective participation of the Teacher in hearing proceedings. Whilst a Panel must never take a role in advising the Teacher on how to present his/her case, it should ensure steps are taken to inform and encourage him/her at the hearing as required.

In both these circumstances, further advice will be provided to the Panel as to the appropriate steps to take in the context of the particular case.

Expert Evidence

Occasionally, an expert witness may be led by a party to provide evidence on technical matters that are beyond the reasonable knowledge and experience of the Panel. Any Panel hearing this kind of expert evidence should bear in mind that the role of the expert witness is to guide the Panel through the particular specialist area: he/she is not there to make a decision on the facts (which is a matter for the Panel).

Where there are conflicting expert opinions presented, a Panel will need to carefully analyse the evidence of each expert and should consider things such as:

- The comparative education, experience and expertise of the experts.
- The assumptions that have been made in coming to their opinions.
- The information that the opinions are based upon.
- The methodology that they have used.

Further advice will be provided to the Panel on assessing expert evidence in the particular context should this arise.

Late Evidence

The Rules require that the evidence to be presented be shared between parties well before the day of a hearing. This is an important part of ensuring that the process is fair and that each party has adequate time to consider all the material and prepare their case.

If a party seeks to submit documentary (papers) or other evidence after the required deadlines, the Panel should hear representations from both parties on the issue. The party submitting the evidence late should, as part of this process, explain and justify to the Panel why it is that the evidence is being submitted late. The Panel should then carefully consider whether to allow the evidence to be admitted or not taking account of any detriment that would be caused to either party and what is in the interests of fairness. Further advice will be provided to Panels taking account of the particular circumstances.

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