



Witnesses and Hearsay Evidence Practice Statement

Introduction

This practice statement provides guidance to GTC Scotland staff, Presenting Officers, Panels and Conveners in respect of the evidence of witnesses who are vulnerable as a result of their age or any other factor. This practice statement also provides guidance on the use of hearsay evidence, including where witnesses are unwilling or unable to participate in fitness to teach proceedings.

This statement also provides guidance to ensure that those involved in the fitness to teach process are aware of the competing interests which must be balanced when consider the admissibility of hearsay evidence, including fairness to both parties and regard to the public interest so that vulnerable witnesses are not put at unnecessary risk of emotional or psychological harm.

Role of GTCS in Respect of Vulnerable Witnesses

When considering the issue of asking vulnerable witnesses to provide evidence as part of fitness to teach proceedings, in particular witnesses who are school children, decision makers ought to have regard to two primary factors, firstly the protection of the interests of the Teacher (i.e. the Teacher's interest in being able to cross-examine a witness) and secondly the protection of the interests of the witness, including their health, wellbeing and general welfare. These factors must be balanced fairly and it would be wrong to automatically prefer the interests of one individual over the other.

When considering the use of evidence from vulnerable witnesses, fairness to the Teacher must be balanced and weighed up with the potential negative impact that appearing before a Fitness to Teach Panel and undergoing questioning about difficult or traumatic events may have on witnesses, in particular vulnerable witnesses. It is important also to have regard to the underlying purpose of the regulatory process, namely public protection.

Due to the fact that many of the allegations considered through the fitness to teach process occur within a school setting, a significant number of the cases before Fitness to Teach Panels will involve children who are either victims of, or witnesses to, the conduct alleged. Being asked to give evidence in a formal setting, including being cross-examined, is often a daunting prospect for any witness, but it is especially so for vulnerable witnesses who may not fully understand the purpose of proceedings.

When considering what witness evidence ought to be gathered in the course of an investigation, or led at a Fitness to Teach Hearing, regard must be had to the wider public interest (see The Public Services Reform (General Teaching Council Scotland) Order 2011 part 7 (the Order)). There is a clear public interest in ensuring that a Fitness to Teach Panel is provided with the best possible evidence, however this must be weighed against the public interest in ensuring that children and vulnerable adults are not unnecessarily put through processes which may cause them emotional or psychological harm.

Witness Evidence

The legal tests relating to witness evidence are set out in the GTCS Fitness to Teach Rules 2017 (the Rules) and the Order:

- Rule 1.7.17 allows for the admission of oral and documentary evidence regardless of whether it would be admissible in civil or criminal proceedings in UK courts, subject to the requirement that admission of such evidence is both fair and that the evidence is relevant.
- Rule 1.7.23 allows for any fact to be proved by the evidence of a witness being provided in

writing (assuming such evidence would be permitted were the evidence given orally) unless the Convener or Panel orders otherwise.

- Rule 1.7.24 allows for a party to apply to the Panel for permission to cross-examine a witness or to order that the person to attend at a hearing to provide evidence orally. If when so ordered the witness does not attend their evidence will not be used without the permission of the Panel.
- Rule 1.7.29 details the circumstances in which a Panel may treat a witness as a vulnerable witness. These are where:
 - The witness is under the age of 18.
 - The quality of witness's evidence is likely to be diminished due to the fact that:
 - They have a mental disorder,
 - They have a significant impairment of intelligence and/or social functioning,
 - They are the alleged victim of behaviour of a sexual and/or violent nature,
 - They are suffering from fear or distress in connection with giving evidence.
- Rule 1.7.30 sets out various measures which can be put in place to assist vulnerable witnesses in giving evidence, including but not limited to: video links, pre-recorded evidence (provided that the witness is available for cross-examination at the hearing), use of interpreters and hearing the evidence in private.
- Where necessary any party may apply to the Court of Session to order the attendance of a witness at a hearing (schedule 4 part 2(5)(a) of the Order), assuming that the person would not be entitled to refuse doing so in actions before the Court of Session.

Assuming the above legal tests are met, it will be competent to lead evidence from any witness, including vulnerable witnesses, in Fitness to Teach proceedings. What the GTCS must consider when carrying out its regulatory function is how to proceed where there is, or appears to be, evidence from witnesses who are vulnerable, and for whom participating in Fitness to Teach proceedings may result in emotional or psychological harm. To this end, GTCS will place witnesses into three categories where certain presumptions will apply.

Presumption 1

Presumption 1 relates to those witnesses who GTCS will never seek to obtain statements from as part of fitness to teach proceedings, no matter how relevant. These are witnesses who are highly unlikely to be able to provide evidence which would be of assistance in the determination of the case. The persons falling within the category are as follows:

- Children under the age of 5. In this circumstance and where considered appropriate, parents/guardians/carers would be approached to give statements regarding what, if anything, was reported to them and any other information that they are in a position to provide relevant to the allegations.
- Any person who is incapable of communicating substantively or understanding the proceedings.

Presumption 2

Presumption 2 relates to those witnesses who GTCS will seek to obtain statements from as part of the investigation process and subsequently ask to attend a Fitness to Teach Hearing, if necessary, but will not seek to compel to attend a hearing by court order if they are unwilling to participate. The witnesses falling under this presumption are:

- Children over the age of 5.
- Adults who are, or in the view of GTCS are likely to be, vulnerable witnesses with reference to

the definition set out in the Fitness to Teach Rules set out above.

- Adults who have significant health issues impacting on their ability to participate.

Where such a witness indicates that they are unwilling to engage with the investigation, or in exceptional circumstances where it appears that continued contact from GTCS will cause emotional or psychological harm to the witness, no further steps will be taken to contact them after their response. However, in the majority of cases, GTCS will make further contact with the witness in order to outline measures which may assist them, including, but not limited to, taking a statement in person and having a supporter present when the statement is taken. GTCS will also, as a matter of course, apply to have these witnesses treated as vulnerable witnesses, where the test is likely to be met. Where, after additional measures have been offered and the witness remains unwilling to participate, GTCS will not seek to compel these witnesses to attend Fitness to Teach Hearings or to engage with the Fitness to Teach investigation by way of a court order. GTCS considers that this approach is appropriate, proportionate and in the public interest.

Presumption 3

The last presumption relates to:

- Adults who do not fall under Presumption 2

Where there are witnesses within this category, GTCS will ask them to participate in the investigation. Again, where such witnesses refuse to participate in the proceedings, GTCS will correspond further with them to seek to encourage and support them to take part.

However, where all other alternative means have been exhausted, GTCS may seek a court order authorising the taking of evidence from them and ordering them to attend at a Fitness to Teach Hearing to give oral evidence.

Teachers and Other Regulated Professionals

It should be noted that GTCS expects registered teachers, and other persons registered with professional regulatory bodies, to participate in Fitness to Teach proceedings if requested to do so as part of what is expected of them as a professional. Where registered teachers, or other registered professionals, are unwilling to do so, GTCS is likely to seek a court order to compel participation.

Any decision to seek a court order would be a last resort and would be taken after considering the particular facts and circumstances of the case.

Role of Hearsay Evidence in GTCS Proceedings

There may be cases where GTCS is unable to secure the attendance or co-operation of witnesses and where seeking a court order would be disproportionate or contrary to the public interest in line with the presumptions outlined above. In these cases, GTCS may seek to admit hearsay evidence in respect of the testimony of the witness.

Hearsay evidence is evidence which has been provided by the 'main' witness to a third party. For example, if a witness speaks to a police officer about a crime they have witnessed, the police officer's account of what the witness told him/her would constitute hearsay evidence. Hearsay evidence can constitute both oral testimony (i.e. witnesses speaking to what other witnesses told them) and written evidence (such as witness statements where the witness is not present to be questioned).

As a general rule, hearsay evidence may be admissible within regulatory proceedings, including GTCS proceedings. However, the decision as to whether the hearsay evidence is, or is not, admissible will depend on the facts and circumstances of each particular case. The only requirement of evidence used in Fitness to Teach proceedings, as set down in rule 1.7.17, is that it is relevant and fair. The overriding consideration will be the duty on the Panel to ensure that the proceedings are fair. The factors which ought to be considered by the Panel have been discussed in a range of cases and are summarised below.

Factors to be Considered

- Regard ought to be had to the steps taken to secure the attendance of the witness¹.
- If the hearsay is the sole or decisive evidence careful consideration ought to be given to whether it ought to be admitted. Where the hearsay is the sole or decisive evidence it is more likely that admitting the evidence would be unfair, however this will depend on the facts and circumstances of the case².
- There is no absolute prohibition on hearsay evidence, even where it is the sole or decisive piece of evidence³.
- There is no absolute right to cross-examine witnesses in disciplinary proceedings⁴.
- Fairness is to be considered in the round, having regard to all of the relevant factors⁵.
- If the allegations are of a particularly serious nature then admission of hearsay evidence is subject to heightened scrutiny⁶.
- The extent to which the contents are in dispute and whether there are particular concerns about the credibility of the witness will be relevant considerations and will call for additional scrutiny⁷.
- It is unlikely that it will be fair to admit anonymous hearsay evidence⁸.
- Hearsay is more likely to be admissible where there are good reasons for the non-attendance of a witness⁹. These can be practical reasons (such as the witness being unavailable on the date in question due to a pre-existing commitment¹⁰). It is the position of the GTCS that this also applies for broader reasons of public interest.
- Hearsay is more likely to be admissible where it is supported by other pieces of primary evidence. In other words, if there are other direct witnesses who speak to the same events as the hearsay account, and these direct witnesses are available for cross-examination, then it will be less likely that admission of hearsay will be unfair¹¹.
- The absence of the Teacher at the hearing may also be a relevant factor but it is unlikely to be decisive¹².
- The nature and quality of the hearsay evidence will be a key factor in assessing the fairness of admission. The better the quality of the evidence the more likely it will be that admission will be fair. Relevant considerations will include why and how it was recorded¹³.

Please note that the factors listed above are not exhaustive and there may be additional factors to consider in individual cases. Additionally this practice statement only addresses the matter of admissibility, once hearsay evidence is admitted it must still be assessed by the panel and careful consideration should be given to the appropriate weight to attach to it.

¹ *Nursing and Midwifery Council v Ogbonna* [2010] EWCA Civ 1216

² *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)

³ *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) ⁴ *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin) ⁵ *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585 (Admin)

⁶ *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)

⁷ *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)

⁸ *White v Nursing and Midwifery Council and Turner v Nursing and Midwifery Council* [2014] Med LR 205

⁹ *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)

¹⁰ *Ogudele v Nursing and Midwifery Council* [2013] EWHC 2748 (Admin)

¹¹ *R (Vali) v General Optical Council* [2011] EWHC 1585 (Admin)

¹² *Shaikh v General Pharmaceutical Council* [2013] EWHC 1844 (Admin)

¹³ *El Karout v Nursing and Midwifery Council* [2019] EWHC 19 (Admin)