

Amendments to the Fitness to Practise Rules: Consultation

We are seeking feedback on new Fitness to Practise Rules which, once approved, will replace the General Optical Council (Fitness to Practise) Rules 2005.

February 2011



About the General Optical Council

Introduction

The General Optical Council (GOC) is one of 13 organisations in the UK known as health and social care regulators. These organisations oversee the health and social care professions by regulating individual professionals. We are the regulator for the optical professions in the UK. The Council currently registers around 24,000 optometrists, dispensing opticians, student opticians and optical businesses.

Mission and values

The GOC's mission is to protect the public by promoting high standards of education, conduct and performance amongst opticians. Our work is built on a foundation of six core values. These values are based on the Better Regulation Commission's criteria for good regulation.

Proportionate:

We will identify and target the issues of greatest risk to public safety.
We will remove unnecessary bureaucracy.

Accountable:

We will seek, and respond to, the views of stakeholders and partners.
We will consider and review the consequences of our actions.

Consistent:

We will work in collaboration with UK health regulatory bodies and other partners to develop consistent policies and procedures.

Transparent:

We will explain and publicise decisions, and make public, wherever possible, Council information, activities and proceedings.

Targeted:

We will ensure that our activity is focused on the areas of greatest risk, or where there is most benefit to public health and safety.

Organisational Excellence:

We will provide good value for money.
We will pursue high standards of customer service.
We will ensure that the Council is a good place to work, particularly through developing and training our staff and members.
We will promote and develop equality and diversity in all our work.

Responding to the consultation

Respond to

Please send your responses to **Kisha Punchihewa**, Assistant Director of Legal and Fitness to Practise, no later than **Friday 29 April 2011**. A consultation response form is attached to this document. Responses should be sent to:

Post: 41 Harley Street, London, W1G 8DJ.

Email: **kpunchihewa@optical.org**

Please include contact details so that we can follow up any relevant aspect of your response. Unless you state otherwise (and an automatic disclaimer generated by your IT system will not be taken as such) we will assume you are happy for us to publish your response and to share it with other appropriate bodies and stakeholders.

Further information

Where possible, please provide evidence to support your response. If you are a representative group, it would be helpful if you could include a summary of the people and organisations that you represent.

A copy of this consultation has been sent to a large number of stakeholder groups representing our registrants, the public, patients, partner organisations and other groups. If you have any queries about the consultation then please contact Kisha Punchihewa on 020 7307 3452 or **kunpchiheva@optical.org**

Our commitment to consultation

We believe it is important that the people affected by our work have a say in how we deliver it. We believe it is vital to consult with all the groups with an interest in the GOC; patients, the public, our registrants, optical organisations, healthcare organisations, employers, other regulators, staff and other stakeholders.

How we consult with our stakeholders is set out in our *Consultation Framework*, available in the consultation section of our website.

Feedback on the consultation process itself would be welcome. If you have any comments then please contact **Simon Grier** on **sgrier@optical.org**

GOC Amendments to the Fitness to Practise Rules Consultation

Information

Start date: 14 February 2011

End date: 29 April 2011

Results published: Rules to be made in a new statutory instrument finalised following a review of consultation responses.

Contact: Kisha Punchihewa. 020 7307 3452, kpunchihewa@optical.org

About this consultation

Our Fitness to Practise Rules outline how we deal with complaints about our registrants' fitness to practise. The current Rules came into force on 30 June 2005, and we are now considering changes that may be required to reflect current good practice in healthcare regulation and recent developments in regulatory case law.

We also want to reduce the time spent on investigations and we believe the new draft Rules we have prepared, if implemented, will help us to achieve this.

We are now consulting to ensure that we consider the views of all stakeholders in our Fitness to Practise processes, including complainants, registrants, professional and representative bodies and our fellow healthcare regulators.

We welcome all views on the proposed new Rules.

About the Fitness to Practise Rules

The Opticians Act 1989 establishes the legal framework for considering complaints about our registrants. The Act allows us to make rules detailing the procedures for considering and dealing with complaints from initial receipt of a complaint by the GOC to final conclusion.

Introduction

In preparing the new draft Fitness to Practise Rules, the GOC has been guided by its mission to protect the public by promoting high standards of education, conduct and performance amongst opticians and the GOC's six core values which are based on the Better Regulation Commission's criteria for good regulation:

- Proportionality
- Accountability
- Consistency
- Transparency
- Targeted
- Organisational excellence

The current Fitness to Practise Rules [the 2005 Rules] have been in operation for five years and to ensure they remain fit for purpose, we are now reviewing and updating the Rules. The key purposes of the changes are:

- To ensure that the procedural rules continue to provide a framework for dealing with complaints which has the protection of the public and patients as its primary focus;
- To ensure that the Rules reflect current best practice amongst healthcare regulators and are up to date with recent developments in regulatory law;
- For the benefit of all participants in fitness to practise procedures, to ensure transparency and certainty in the procedures;
- Based upon the experience of the last five years, to clarify and improve upon the procedures in the 2005 Rules;

- To continue to promote procedural fairness in the interests of all parties participating in the process, including registrants and witnesses;
- To provide greater procedural efficiency and cost effectiveness.

Understanding the changes

The Opticians Act 1989 remains in force; there has been no new primary legislation governing the functions of the GOC. The GOC has not been granted any new or different legislative powers. The new Fitness to Practise Rules must therefore still be consistent with, and within the rule making powers given by, the Opticians Act 1989.

The Opticians Act 1989 sets out the powers given to the GOC to deal with complaints of impairment of fitness to practise by registrants. It sets out the key provisions about the procedure for the handling of fitness to practise complaints. These may not be repeated in the procedural Rules and therefore the new draft Rules require (as did the 2005 Rules) to be read in conjunction with the 1989 Act.

In the light of this, rather than introducing a completely new scheme, the new draft Rules build upon and, where necessary, expand the 2005 Rules. The impetus for the changes is to take account of our experience of working with the 2005 Rules; of recent developments in other healthcare fitness to practise schemes, and in regulatory law to ensure the Rules are fit for purpose in the current regulatory environment.

Some provisions in the new draft Rules remain unchanged from the 2005 Rules. This consultation will seek views on the significant changes proposed in the new draft Rules.

In one area (screening of complaints by the case examiners) we intend to publish guidance that will support the statutory Rules. The guidance does not form part of the Rules and so is 'informal'. However, the guidance will inform

participants involved in our fitness to practise process about how we intend to deal with certain aspects of the process. For that reason, the guidance forms part of this consultation and we are also inviting your views on this – see **‘Introduction of the case examiners process’** below.

The draft Fitness to Practise Rules and the consultation questions

Definition of “allegation” - Rule 2(1) - Interpretation

The definition of “allegation” in the Rules now clarifies that under section 13D(2) (relating to individual registrants) or section 13D(3) (relating to business registrants) of the Opticians Act 1989, the allegation of impairment of fitness to practise is a single allegation which may be based on any one or more of the grounds set out in section 13D(2) or, in the case of business registrants, section 13D(3).

A complaint may allege, for example, that an individual registrant’s fitness to practise is impaired both by reason of an incident of misconduct *and* the holding of a criminal conviction.

The new definition clarifies the position. The approach is consistent with that of other healthcare regulators, such as the General Medical Council (GMC), whose legislation on this point is framed similarly to the Opticians Act 1989. It is also in the public interest because it means that more than one possible “cause” of a registrant’s alleged impairment may be considered within the same hearing and so enables the Fitness to Practise Committee to have a full picture of the registrant’s fitness to practise. It enables cases to be dealt with in a streamlined manner whereby all issues concerning a registrant are brought together and considered within one hearing process.

From the registrant’s perspective, the GOC believes it is to the registrant’s benefit that all relevant issues are brought together within one hearing process and disposed of at a single hearing, rather than the registrant potentially facing several different processes.

Question 1: do you agree with our proposed approach to the single allegation of impairment of fitness to practise, in the light of the public and registrants’ interest issues described above?

Introduction of the case examiners process – Rule 2(1) and Rule 12

The GOC has decided to introduce a mechanism whereby two individual case examiners (one professional and one lay in each case) will undertake initial consideration of cases referred by the registrar, in the place of the full Investigation Committee.

In summary, the case examiners will be able to deal with the majority of cases and take most of the decisions which currently must be taken by the Investigation Committee under the 2005 Rules. Cases will only be referred to the full Investigation Committee in limited circumstances – see below.

The case examiners will decide whether the allegation should be referred to the Fitness to Practise Committee for a hearing or not. Where they decide to take no action, they will be able to give the registrant a warning. Either of the two case examiners will be able to refer a registrant to the Fitness to Practise Committee for consideration of an interim order where necessary.

However, in compliance with the GOC's powers in the Opticians Act 1989, the case examiners will not be able to direct an assessment of the registrant's health or performance. If they consider that an assessment is appropriate, they must refer the matter to the Investigation Committee, which will direct an assessment.

The GOC has decided to introduce the case examiner mechanism to enable the investigation process to be faster and more efficient, to the benefit of all parties concerned in the regulatory process. It will reduce the workload of the Investigation Committee and will improve the pace of throughput of cases. It will mean that, in many cases, a complaint will not have to await consideration by the full Investigation Committee at one of its periodic meetings.

The process introduced in the new draft Rules follows the model used by the GMC in its 2004 Fitness to Practise Rules which has enabled the GMC to speed up its investigation process and improve efficiency.

The case examiner mechanism is created by a delegation of functions of the Investigation Committee under section 13E(1) of the Opticians Act 1989. The case examiners will be appointed as “officers of the Council” and as such, may exercise the functions of the Investigation Committee under section 13D of the Act.

“Case examiner” is defined in section 2(1) as an *“officer of the Council appointed by the registrar on the Council’s behalf for the purposes of exercising the functions of the Investigation Committee in accordance with these Rules, being a registered optometrist, registered dispensing optician or a lay person”*.

Cases will be considered by two case examiners, one lay and one professional. It is important to note that if the case examiners are not unanimous in their decision about the disposal of an allegation, they must inform the registrar and the registrar will refer the allegation on for consideration by the Investigation Committee.

The GOC recognises that registrants may perceive a concern that a complaint against a registrant will be considered by two case examiners, rather than by the fully quorate Investigation Committee. It is possible that patients and the public could have a similar concern.

However, the GOC believes that reassurance is provided by the requirement that, in any case where the two case examiners are not unanimous in their decision about the appropriate disposal of the complaint, it will be referred for consideration by the full Investigation Committee. The GOC believes that the efficiency benefits of the case examiner mechanism, combined with the above safeguard where they are not unanimous, mean there will be a real benefit for all stakeholders in the process.

Rule 12, which sets out the functions of the case examiners, is dealt with in more detail below.

Question 2: do you agree that the introduction of the case examiner provisions will make the throughput of complaint cases faster and more efficient?

Guidance to the case examiners supplementary to the new draft Rules

Under the powers given by the Opticians Act 1989, the GOC is not able, unlike some other healthcare regulators, to make statutory rules allowing the case examiners to 'screen out' certain categories of complaint which, in the public interest, ought not to proceed through the fitness to practise process. Please see the guidance document at http://www.optical.org/en/news_publications/consultations/index.cfm

The GOC is of the view, which is consistent with the approach of other healthcare regulators such as the GMC, that this category should include:

- Complaints which are made more than five years after the original incident;
- Complaints which are made by a complainant who wishes to remain anonymous; and
- Complaints which are vexatious¹ in nature.

The GOC therefore proposes to adopt and publish informal guidance which will supplement the statutory Rules. It will not form part of the Rules and will be voluntary. However, it will set out the guiding factors which the case examiners will apply in reaching their decision on complaints which fall into these three categories.

By publishing the guidance, the GOC seeks to provide transparency, certainty and consistency in how such cases will be considered.

A draft version of the proposed guidance is appended to this consultation document.

¹ See guidance document for definition of vexatious

Question 3: do you agree with the terms of guidance to the case examiners relating to complaints where more than five years has elapsed since the incident leading to the complaint?

Question 4: do you agree with the terms of the guidance where the complainant wishes to remain anonymous?

Question 5: do you agree with the terms of the guidance relating to vexatious complaints?

Initial consideration of allegations by the registrar and referral for consideration of an interim order: Rule 4

A complaint made to the GOC is initially considered by the registrar in accordance with Rule 4. The registrar initially assesses whether the complaint falls within section 13D of the Opticians Act 1989 and therefore is within the GOC's jurisdiction. If so, the registrar will refer the allegation to the case examiners. If not, the registrar will inform the maker of the allegation.

Under the new draft rule 4(2), the registrar may now consider whether the complaint information warrants direct referral to the Fitness to Practise Committee for consideration of an interim suspension or interim conditional registration order.

Under the 2005 Rules, only the Investigation Committee is able to refer a matter to the Fitness to Practise Committee for consideration of an interim order. However, the new draft Rules delegate this power to the registrar under Section 13E(1) of the Opticians Act 1989, so that the registrar may exercise the functions conferred on the Investigation Committee under S13D.

The new approach has been adopted so that in serious cases, an interim order can be considered urgently, at the earliest stage of the process. The need for consideration of an interim order will arise where the complaint information raises serious concerns about the registrant's continued right to

practise unrestricted whilst an allegation is investigated by the GOC. Protection of the public requires that such applications can be considered as a matter of urgency. The 2005 Rules, however, envisage that the Investigation Committee will consider referral for an interim order after the full investigation into the allegation has been conducted and *at the same time* that it considers whether it ought to be referred to the Fitness to Practise Committee for a hearing. In practical terms, this may lead to a delay in interim order referrals being made in order to allow time for sufficient investigation of the complaint and for the registrant to be given the required 28 days to make written representations to the Investigation Committee.

The interim order jurisdiction is intended to permit regulators to take swift action to prevent a risk to the public, to the registrant him or herself, or to the reputation of the profession arising from an individual continuing to practise unrestricted pending the conclusion of the investigation into their fitness to practise. The GOC therefore considers there should be provision for such matters to be referred to the Fitness to Practise Committee promptly after the allegation/information is received by the GOC. This approach is consistent with that of other healthcare regulators, including the GMC and the General Pharmaceutical Council (GPhC).

The GOC does not believe the change will result in any significant detriment to the registrant, other than the possibility that an interim order may be imposed at an earlier stage than might have been the case under the 2005 Rules. However, the threshold test against which the need for an interim order is assessed by the Fitness to Practise Committee has not changed and is a high one, that it be 'necessary' for an order to be imposed.

The new process does not therefore result in any increase in the likelihood of a registrant being made the subject of an interim order. The GOC believes that the benefit in terms of public protection outweighs any detriment to the registrant and, furthermore, is consistent with the GOC's primary duty to protect patients and the public.

Question 6: do you agree that the provision for the registrar to refer a matter directly to the Fitness to Practise Committee for consideration of an interim order is appropriate in the public interest?

Fast-tracking of serious criminal convictions: Rule 4(5)

The new rule 4(5) provides that the registrar shall refer an allegation relating to a criminal conviction which has resulted in the registrant receiving a custodial sentence directly to the Fitness to Practise Committee for a hearing, without the need for the allegation to be considered by the case examiners or the Investigation Committee. This provision effectively allows a serious criminal conviction to be 'fast-tracked' through the process, in order that action in relation to the registrant's registration can be taken swiftly to protect the public and/or the reputation of the profession.

The only potential detriment foreseen to registrants is the removal of the opportunity to make written representations at the investigation stage. However, a serious criminal conviction would almost inevitably be referred to the Fitness to Practise Committee and the only legal basis upon which a conviction can be challenged is by evidence that the registrant is not the person who was convicted.

The equivalent rules of other healthcare regulators, including the GMC and the GPhC, include similar provisions. The GOC believes the public interest benefit in being able to take prompt action in serious cases outweighs the relatively minor detriment to the registrant.

Question 7: do you support the provision for the registrar to refer serious criminal convictions directly to the Fitness to Practise Committee?

Disclosure and exchange of written observations upon the complaint during the investigation process: Rule 5

Rule 5 deals with the investigation of an allegation before it is considered by the case examiners or the Investigation Committee and, in particular, the process for informing the registrant of the allegation and seeking his or her written representations upon it.

By rule 5(1), as was the case in the 2005 Rules, the registrant must be informed that his or her representations about the complaint will, where the registrar considers it appropriate, be disclosed to the maker of the allegation for comment.

The subsequent procedure for exchange of comments is made clearer in the new draft Rules. By rule 5(2), unless the registrar considers it inappropriate, the registrar will disclose the registrant's representations to the maker of the allegation, inviting written comments from the maker of the allegation within a specified period.

Rule 5(3) then provides that any comments received from the maker of the allegation will be sent to the registrant, but in normal circumstances (that is, *"unless the registrar so decides in the particular circumstances of the case"*) any further comments the registrant might make will not go before the case examiners or the Investigation Committee when they consider the matter.

The consequence of providing an express process for comments is that either the registrant or the maker of the allegation must have 'the last word' in the process. The position under the new rule 5(3) means that in normal circumstances, the maker of the allegation will have the last chance to submit comments which are seen by the case examiners or the Investigation Committee. However, the Rules do allow the registrar a discretion in the particular circumstances of a given case there remains the possibility for the registrant to submit to the registrar that in the circumstances, his or her further comments should be seen by the case examiners/Investigation Committee.

The GOC considers that these changes are desirable because they set out clearly the process for the exchange of comments between the registrant and the maker of the allegation and provide a fixed end point in the process, thereby removing any uncertainty. It also ensures that both the registrant and the maker of the allegation are clear in advance as to how their comments will be disclosed.

This approach is in line with the recommendations of the Council for Healthcare Regulatory Excellence (CHRE) on the subject, in its December 2009 report *Handling Complaints*.

Question 8: do you support the express provision for a process for the submission of observations by the registrant and the maker of the allegation?

Assessment of individual registrants: Rules 6-11

Joint assessment report on performance:

The provisions in the new draft Rules relating to the appointment of assessors and directions for assessment by the Investigation Committee (Rule 6) and the Fitness to Practise Committee (Rule 7) remain substantially unchanged from the 2005 Rules.

There are three areas where a change has been made. Rule 10(1) provides for the assessors of the standard or quality of a registrant's work, where more than one assessor is appointed, to provide a joint report, rather than individual reports. The change has been introduced as a matter of practicality, reflecting that the two assessors of a registrant's performance usually provide a joint report.

Failure by a registrant to co-operate with an assessment:

Rule 11 deals with failure by a registrant to submit to, or co-operate with, an assessment. Section 23C(3) of the Opticians Act 1989 provides for the committee which directs an assessment to draw such inference in relation to the registrant as seems appropriate to it. However, the 2005 Rules only make specific reference to the drawing of an inference by the Fitness to Practise Committee where it has directed an assessment, but not by the Investigation Committee when it has done so.

The new draft Rules therefore expressly provide for the Investigation Committee, as well as the Fitness to Practise Committee, to draw an inference where the registrant fails to co-operate with an assessment.

The GOC considers that it is appropriate that the Investigation Committee should have the equivalent provision to the Fitness to Practise Committee and be able to draw inferences in the event of non-cooperation by a registrant.

Question 9: do you agree that the new Rules should allow the Investigation Committee (IC) and Fitness to Practise Committee to draw such inferences as seem appropriate to them in relation to a registrant who does not co-operate with an assessment that has been directed by the IC?

Registrant's comments on the assessment report:

The new draft Rules now provide, at rule 10(4), for the registrant to have the opportunity to submit comments upon the assessment report within 28 days of it being sent. This opportunity has been given informally in practice by the GOC, but it is now made an express right in the new draft Rules.

Consideration and decisions of the case examiners - Rule 12

Rule 12 deals with the decisions which the case examiners may make when an allegation is referred to them by the registrar. Since the case examiners act

under the powers delegated to them from the Investigation Committee, the case examiners may also make decisions under Section 13D of the Opticians Act 1989.

The new draft rule 12(1) sets out the decisions which the case examiners may take: to decide either that an allegation ought to be referred to the Fitness to Practise Committee, or that no further action will be taken. The case examiners may also decide that a warning should be given to the registrant regarding his or her future conduct or performance.

The case examiners may decide that further investigations should be conducted and if they do so, they must inform and direct the registrar as to what further investigations are to be undertaken. The Rules also provide that any further evidence obtained from those investigations must be provided to the registrant and may be provided to the maker of the allegation. There is a process for submission of comments upon further evidence, and for that and the comments to be provided to the case examiners when they resume their consideration of the allegation.

The GOC recognises that the issue of the need for an assessment of health or performance may arise during the case examiners' consideration. The Opticians Act 1989 does not permit the powers relating to the ordering of assessments which, under the Act, belong to the Investigation Committee, to be delegated to the case examiners. Therefore, the new rule provides that if the case examiners consider that an assessment of the registrant is necessary, they will adjourn their consideration of the case and refer the allegation to the Investigation Committee, requiring the Investigation Committee to appoint an assessor and direct an assessment in accordance with Rules 6, 8, 9 and 10.

Provided that the registrant co-operates with the assessment, in due course the assessment report will be referred to the case examiners, who will then continue with their consideration of the allegation under Rule 12. Where the registrant does not co-operate with the assessment process, further

consideration of the allegation will be dealt with by the Investigation Committee (see rule 13, below) and the case examiners will take no further part in consideration of the allegations.

The case examiners' power to refer for consideration of an interim order:

Finally, rule 12(7) deals with referral to the Fitness to Practise Committee for consideration of the making of an interim order.

Rule 12(7) provides that, if at any stage during their consideration of the allegation, either one of the case examiners is of the opinion that an interim order should be considered, then that case examiner shall direct the registrar accordingly and the registrar will refer the matter to the Fitness to Practise Committee.

The GOC considers that this provision, together with the similar power given to the registrar by the new rule 4(2) and to the Investigation Committee by section 13D(9) of the 1989 Act, ensure public protection. This is because at any stage of the process, whether the matter is before the registrar, the case examiners or the Investigation Committee, if the necessity arises, a registrant may now be referred to the Fitness to Practise Committee for consideration of an interim order.

Question 10: do you agree with the provisions relating to the decisions which the case examiners may take?

Consideration by the Investigation Committee – Rule 13

As explained above, in the light of the introduction of the case examiner mechanism, under the new draft Rules, cases will only be referred to the Investigation Committee in two situations: where the case examiners are not unanimous in their decision about the appropriate disposal of the matter; or where the case examiners decide to refer a registrant for an assessment which must be directed by the Investigation Committee.

In the first situation, the decisions available to the Investigation Committee remain unchanged from the 2005 Rules.

In the second situation, the Investigation Committee must direct an assessment of the registrant. Rule 13(2) provides that, where the registrant co-operates and the assessment has taken place, the Investigation Committee will refer the allegation back to the case examiners with the assessment report and the registrant's comments on the report, if any. The case examiners will then resume their consideration under the provisions of rule 13.

However, if the registrant does co-operate with the assessment, the Investigation Committee will proceed to consider the allegation and the case examiners' role is concluded.

Question 11: do you agree with the provisions relating to the decisions which the Investigation Committee may take?

Warnings – Rule 14

The process for the giving of a warning to the registrant where it is decided that the allegation ought not to be referred to the Fitness to Practise Committee is set out in Rule 14 in the new draft Rules. The process is unchanged from the 2005 Rules, other than that, by virtue of the introduction of the case examiner mechanism, the case examiners may now issue a warning in the same circumstances as the Investigation Committee.

Review of decision not to refer – Rule 15

The 2005 Rules enable the Investigation Committee to review a decision not to refer an allegation to the Fitness to Practise Committee. The 2005 Rules provide:

- That the Committee will not review such a decision unless it considers that there is new evidence or information which makes such a review necessary for the protection of the public;
- For the prevention of injustice to the registrant, otherwise necessary in the public interest; or
- Where the Investigation Committee receives information indicating that the Council has erred in its administrative handling of the case and a review is necessary in the public interest.

The new Rules follow a similar process but make two changes to this part.

First, the decision to review is now delegated to the registrar, rather than the Investigation Committee. This is a further measure which will improve the pace and efficiency of the process and will reduce the workload of the full Investigation Committee.

Question 12: do you agree with the provision for the registrar, rather than the Investigation Committee, to be able to review a decision not to refer?

Secondly, whereas the 2005 Rules did not specify a limit upon the time period for reviewing a decision, the new draft Rules impose a limit of five years from the date of the letter informing the registrant of the decision. There remains a discretion for the registrar to review a decision within a longer period where the registrar considers the circumstances are exceptional.

This change has been introduced because the GOC considers that it is appropriate in the majority of cases to place a time restriction on when a decision not to refer may be reopened. The period of five years has been chosen because, in terms of public protection, this should be an adequate period of time for any issues likely to justify a review to emerge.

From the registrant's perspective, the GOC considers it is fairer that there should in most cases be a limit upon the period of time within which the registrant is at risk of having a decision not to refer a complaint reopened. The change provides a greater degree of certainty for the registrant. The GOC considers that the discretion reserved to the registrar in exceptional circumstances is adequate to protect the public.

Question 13: do you agree that a time limit should be imposed upon the ability to review a decision not to refer?

Question 14: if you agree under question 13, do you agree that five years is an appropriate time period?

The 2005 Rules enabled the Investigation Committee to determine either that the original decision should stand, or that the matter ought to be referred to the Fitness to Practise Committee. They did not deal with the issue of warnings. The new draft Rules correct this position and additionally, in rule 15(4), allow the registrar to decide when reviewing a decision, that, where no warning was given to the registrant at the time of the original decision, that a warning should now be given.

The registrar is also able to decide that a warning given at the time of the original decision should not have been given and that any record the GOC has of it should be removed.

The GOC consider that the additional provisions fill a gap in the 2005 Rules and ensure that the appropriate ranges of options are now available upon review.

Question 15: do you support the new provisions in rule 15(4) relating to warnings where a decision to not to refer has been reviewed?

Termination of referral – Rule 16

The 2005 Rules permitted the Investigation Committee to review a referral to the Fitness to Practise Committee where it no longer considered that the allegation ought to be considered by that Committee. The Rules required that the registrant, the maker of the allegation and any other person the registrar considered had an interest in receiving a notification should be informed of the decision, with written reasons.

In the new draft Rules, the process remains largely unchanged, but the power to terminate a referral has been delegated to the case examiners. The GOC has made this change because, in the majority of cases, the original decision will have been made by the case examiners by virtue of the delegation in section 3 of the 1989 Act.

In the new draft Rules, it is expressly provided that the maker of the allegation shall be notified of the intention to review the referral and given an opportunity to submit comments within a period of 28 days. The Rules go on to provide that any comments received from the maker of the allegation will be considered by the case examiners when they decide whether or not to terminate the referral. The maker of the allegation will continue to be informed of the outcome, as under the 2005 Rules.

The GOC considers that this change, in notifying the maker of the allegation and allowing him/her the opportunity to comment, is appropriate in the public interest. It ensures that the views of the maker of the allegation will be taken into account before a decision to terminate the referral originally made by the case examiners is taken, rather than simply notifying the maker of the allegation of the decision after the event, as was the position under the 2005 Rules.

Question 16: do you agree that it is appropriate for the case examiners rather than the Investigation Committee to be able to terminate a referral to the Fitness to Practise Committee?

Question 17: do you support the new provisions in rule 16 permitting the maker of the allegation to be notified of the possible termination of the referral and to be given the opportunity to make comments which the case examiners will take into account?

Interim Orders – Rules 17-20

Interim Order hearings to be in private:

The new draft Rules set out in more detail the process for notification of an application for an interim order and the content of the notification in Rules 17-19. Rule 20 then sets out in detail the procedure for the conduct of Interim Order hearings.

Rule 20(2) provides that Interim Order hearings shall be held in private. The 2005 Rules provide for Interim Order hearings to be held in public, which is now not typical of healthcare regulatory rules. Private hearings are considered to be more appropriate in relation to applications for Interim Orders, given that when considering an Interim Order application, the Fitness to Practise Committee is not testing the evidence presented and reaching a decision on proof or otherwise of the allegation of impairment of fitness to practise. The Committee is reaching a judgment, on the basis of the information available to it at what may be an early stage of the investigation, as to the level of risk should the registrant be permitted to continue practising unrestricted until such time as the substantive hearing determines whether his or her fitness to practise is impaired.

The GOC considers there is an inherent difficulty in holding Interim Order hearings in public. A public hearing may be attended by a member of the public or the press and the application thereby put into the public domain. This could operate unfairly upon the registrant where ultimately no Interim Order is considered to be necessary.

The GOC considers that public interest is satisfied by the publication of information about the interim order where such an order is in fact made. Where no Interim Order is made, it is not appropriate that the matter should be in the public domain.

Question 18: do you agree that it is appropriate that Interim Order hearings should be held in private?

Evidence at Interim Order hearings:

Rule 20(3) to (5) relate to the evidence which is receivable by the Fitness to Practise Committee at an interim order hearing.

The new rule adopts a similar process to that within other regulators' rules, including those of the GMC and the GPhC, so that oral evidence is not usually heard at Interim Order hearings. This reflects the different purpose of Interim Order hearings from that of substantive hearings: that is, to establish whether or not it is necessary to impose an interim order restricting the registrant's practice in the public interest pending the substantive hearing, rather than to determine whether or not the allegation of impairment is proved to the required legal standard. However, the new draft Rules retain a discretion, in rule 20(4), whereby the committee may still agree to receive oral evidence at an Interim Order hearing if it considers such evidence is desirable to enable it to discharge its functions.

Question 19: do you agree with the provisions in rule 20 that in most cases, oral evidence will not be given at interim order hearings?

Procedure at Interim Order hearings

The 2005 Rules provided little detail as to the procedure to be followed at Interim Order hearings. The new rule 20(7) sets out the hearing process in more detail. The GOC believes this will assist all parties and the Committee to

follow a clear and consistent procedure. The procedure is similar to that adopted by other regulators and in the GMC Rules.

Question 20: do you support the new procedure set out in the Rules for Interim Order hearings?

Standard directions for case management and procedural hearings: Part 7

Part 7 of the draft Rules deals with the procedure to be followed once an allegation has been referred for consideration by the Fitness to Practise Committee, including:

- the notification to the registrant of the necessary information about the hearing which includes the allegation and the particulars, information about the registrant's right to attend and be represented;
- the power for the Fitness to Practise Committee to proceed in his or her absence; and
- the registrant's right to call and cross-examine witnesses at the hearing.

The 2005 Rules require that a procedural hearing before the Fitness to Practise Committee must be held in **every** case prior to the substantive hearing and that the timetable for preparatory steps leading to the hearing are set during the procedural hearing.

The new draft Rules remove the requirement for a procedural hearing in every case – in many straightforward cases, such a hearing is not necessary. The new Rules therefore introduce, at Rule 29, a table of standard procedural directions which will take effect in every case referred to the Fitness to Practise Committee, without the automatic requirement for any procedural hearing.

The standard directions set out a timetable for the various steps to be taken by both parties in the period leading up to the fitness to practise hearing, including service of each side's evidence, provision of time estimates for the hearing, provision of witness lists, agreement and preparation of document bundles to be used at hearing and identification of agreed witness evidence. These provisions replace the requirements relating to completion of hearing questionnaires in the 2005 Rules.

The timetable set out in the standard directions requires both parties to take preparatory steps in advance of the hearing date and should assist in ensuring that the preparations of both parties are thorough and timely and allow each party time to consider the other side's case and prepare its own. The standard directions should therefore promote the efficient and effective throughput of cases at hearing, reducing the need for adjournments.

The new draft Rules do not now require that a procedural hearing be held in every case. However, rule 30 provides that either the registrant or the GOC's presenting officer may request a procedural hearing before the Fitness to Practise Committee if they consider that a specific case requires one. At a procedural hearing, the Fitness to Practise Committee may vary the standard directions, so that they are adapted to the requirements of a particular case.

The GOC therefore believes that new draft Rules promote the efficient and timely preparation of the majority of hearing cases, whilst retaining flexibility to vary the directions when appropriate, according to the needs of the case.

In the GOC's view the timetable set out in the standardised directions strikes a balance between ensuring that hearings are dealt with as expeditiously as possible, whilst also, as a matter of fairness, allowing both parties adequate time to prepare their cases.

Question 21: do you agree with the proposal that standard directions should apply in all cases unless varied and that a procedural hearing is not then necessary in every case?

Question 22: if you answered ‘yes’ to question 21, do you agree with the form of the standard directions, including the timescales, set out in the table at rule 29?

The standard and burden of proof – Rules 38 and 39

Rule 38 of the new draft Rules states expressly that the standard of proof applicable to the proof of any facts alleged by the GOC at substantive hearings is the civil standard, reflecting the change already implemented in 2008.

Rule 39 expressly confirms the existing position, which is the legally correct position, that the burden of proof of the facts alleged by the GOC rests upon the GOC.

Admissibility of evidence – Rule 40

Rule 40(1) retains the provision in the 2005 Rules that the Fitness to Practise Committee may admit any evidence which they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.

Rule 40(2) provides that where the evidence would not be admissible in civil proceedings in England and Wales, the Committee will not admit such evidence unless, on the advice of the legal adviser, they are satisfied that their duty of making due enquiry into the case makes its admission desirable.

The reference to admissibility on the *civil* rather than the *criminal* basis represents a change from the position in the current 2005 Rules, but one which, in the GOC’s view, is consistent with the change to the civil standard of proof already introduced in 2008.

The formulation of these two rules, which is similar in most healthcare regulatory rules, already allows for flexibility in terms of the types of evidence which may be admitted. The current rule 38(2) did not prohibit the

admissibility of evidence which would not be admissible in a criminal court, but only required the Committee to seek advice of the legal adviser, and decide if their duty of making due enquiry made the admission of the evidence desirable. The new Rules 40(1) and (2) allow the same degree of discretion, but with a reference point of the civil, rather than the criminal rules of evidence.

The GOC recognises that a registrant may perceive the proposed change to be to his or her detriment in potentially allowing wider, or too great, latitude as to the types of evidence which may be admissible at hearings. It could be said, however, to be a less critical change than the policy already introduced in healthcare regulation in applying the civil *standard* of proof. It is likely, that fitness to practise committees will continue to look for and expect the best available evidence to be presented by the regulator before finding allegations proved.

The GOC considers this is an appropriate change and is consistent with the move in healthcare regulatory hearings to the application of the civil rather than criminal standard of proof. Since disciplinary proceedings are by their nature civil in character, it is more appropriate to have the reference point of civil rules of evidence in rule 40(2). This is also the position under the rules of other healthcare regulators including the NMC, the HPC and the GPhC. The GMC currently retains the reference to criminal proceedings in its 2004 Rules, although it too applies the civil standard.

Question 23: do you agree that it is now appropriate for the reference point in the Rules in relation to admissibility of evidence should be the civil rather than criminal rules?

Evidence to prove a criminal conviction – Rule 40(3) and (5)

Unlike the rules of most healthcare regulators, the 2005 Rules do not specify the means by which a criminal conviction may be proved at a hearing, nor do they state that the only means by which a registrant is able to challenge a

criminal conviction is to show that he or she is not the person who was convicted.

In order to simplify hearings relating to criminal convictions, as well as to bring the GOC's procedures in line with those of other healthcare regulators, the new rule 40(3) provides for a criminal conviction to be proved by means of a certificate of conviction signed by an officer of the relevant court.

Evidence to prove a determination of another UK regulatory body – Rule 40(4)

Rule 40(4) relates to the ground of impairment set out at section 13D(2)(g) of the Opticians Act 1989. This ground relates to a determination of impairment of fitness to practise by another UK regulatory body of a health or social care profession, or by a regulatory body elsewhere to the same effect. The new rule 40(4) provides that production of a certificate signed by an officer of the relevant regulatory body shall be conclusive evidence of the facts found approved in relation to that determination.

The new rule 40(5) provides that the only means by which a criminal conviction or the determination of another regulatory body may be challenged is by bringing evidence for the purpose of proving that the person referred to in the certificate or record of determination is not the person referred to in the certificate or extract.

Rules 40(6), (7) and (8) introduce provisions dealing with admissions of facts, the use of copy documents and provision for either party to serve a notice to produce documents, all of which will facilitate evidential issues at hearings. In relation to admission as to facts, Rule 46(6) provides that where facts are admitted in the hearing, the Chair shall announce that those facts are proved.

Question 24: do you agree that the provisions relating to evidence now included at Rules 40(3) to (8) are appropriate for the GOC's Fitness to Practise hearing process?

Hearings of the Fitness to Practise Committee: Rule 46

The 2005 Rules do not set out a detailed, step by step procedure for hearings before the Fitness to Practise Committee. The GOC believes that a clearer and more specific procedure will assist the parties and the Committee, remove any element of doubt about the steps in the process, and facilitate the smooth running of hearings.

The new draft Rules bring together the various aspects of the 2005 Rules, but set out a step by step procedure, progressing through the stages of the hearing in Rule 46 (2) to (23). Rule 46(1) allows the Fitness to Practise Committee discretion to vary the procedure if appropriate in a particular case.

The new draft Rules provide expressly for submissions of 'no case to answer' to be made by the registrant at the close of the GOC's case, under rule 46(8). There is no express provision in the 2005 Rules. In the new Rules, the registrant may make such a submission (1) on whether sufficient evidence has been led upon which disputed facts could be found proved; and (2) on whether the facts could support a finding of impairment.

In particular, Rules 46(11)-(17) set out clearly the four stages of the decision-making process in relation to the Committee's determination as to proof of the facts alleged, whether the alleged ground of impairment has been established, whether fitness to practise is found to be impaired and also the appropriate sanction. The Fitness to Practise Committee is required to provide reasons for its decisions at all stages, other than in relation to its findings of fact.

This process with clearly delineated stages is consistent with current good practice in healthcare regulatory tribunals and with recent developments in regulatory case law. The new Rules therefore bring the GOC's process into line with that regarded as appropriate by the High Court and the process generally adopted by other healthcare regulators. The new process has the

practical benefit of providing clarity, certainty and consistency of approach to all cases, for both the parties and the Fitness to Practise Committee.

Question 25: do you agree that the detailed hearing process now set out at rule 46 will facilitate and provide certainty in the procedure to be followed at substantive hearings of the Fitness to Practise Committee?

Power to amend the allegation – Rule 46(20)

Rule 46(20) permits the Fitness to Practise Committee to amend an allegation where they consider it appropriate, rather than only upon the application of the GOC's presenting officer. This is consistent with the provisions of other healthcare regulators' rules, including those of the GMC and the NMC. Such a provision is necessary, as it permits the Committee, in a case in which it becomes apparent during the hearing itself that additional or different allegations should be considered, to consider amending the allegation in the Notice of Inquiry. This may occur in circumstances where the public interest requires that such steps be taken.

In the rare circumstances where this is likely to occur, the Committee would then have to consider whether it is fair to allow the hearing to continue, or whether it is necessary to adjourn the hearing to allow either the registrant or the GOC further time in which to gather evidence and prepare to deal with the amended allegation.

A safeguard is provided against any potential prejudice or injustice to the registrant since the Committee would be required by the rule to hear submissions from the parties, to seek the advice of the legal adviser and consider the interests of justice before deciding whether to make an amendment. #

Question 26: do you support the provision in rule 46(20) for the Fitness to Practise Committee to amend an allegation at a hearing, bearing in mind the safeguards and the public interest?

Costs and expenses – Rule 52

The 2005 Rules provide for the Fitness to Practise Committee to summarily assess the costs of any party to the proceedings and order a party to pay all or part of the costs or expenses of another party, taking into account an individual registrant's ability to pay. The Rules do not specify to which types of hearing the costs provisions apply, and do not provide any detail as to the procedure to be followed.

The new draft Rules specify that costs awards may be considered at substantive hearings and review hearings, but not at initial interim order hearings, or interim order review hearings. Given the different nature and purpose of interim order hearings, we do not believe that the application of costs powers would be appropriate.

The new draft Rules set out a procedure for a party wishing to make such an application to the Fitness to Practise Committee to notify the other parties and the Hearings Manager 48 hours in advance, and to serve a schedule of the costs or expenses.

The Chair of the Committee may invite representations from the parties as to whether the costs should be assessed and, if the Committee decides to make an order, the Chair may summarily assess the costs or to require the parties to agree a figure or submit to a taxation.

This process is similar to that found in the equivalent rules of the GPhC, which also has the power to assess costs.

Question 27: do you agree that the power for the Fitness to Practise Committee to make costs orders should be available for substantive and review hearings, but not for either initial or review hearings relating to interim orders?

Question 28: do you agree that the new procedure for the costs process will make the process clearer for the parties and the Fitness to Practise Committee?

Notification of outcomes to a registrant's current employer

Rule 51 now provides for the outcomes of investigations and hearings by the case examiners, the Investigation Committee and the Fitness to Practise Committee to be notified to the registrant's current employer, if known to the registrar.

We believe the introduction of this provision is relevant, since Section 13C(1) of the Opticians Act 1989 requires the GOC to notify the registrant's current employer when an allegation is received. It is appropriate therefore to inform the current employer of the outcome of the matter. To do so is also consistent with the public interest and with Section 13C(3) of the Act, which permits us to disclose to any person any information relating to a registrant's fitness to practise where we consider it in the public interest to do so.

For similar reasons, notification of outcomes to the current employer is expressly provided for Rule 15(5)(c) (reviews of decisions to refer to the Fitness to Practise Committee) and Rule 16(5)(c) (termination of referrals).

Question 29: do you support the change to the Rules to make express the ability for the GOC to notify a registrant's current employer of key outcomes of the fitness to practise process under Rules 15, 16 and 51?

Consultation response form

How to respond

Please send your responses no later than **Friday 29 April**. Responses should be sent to:

Kisha Punchihewa
Assistant Director of Legal and Fitness to Practice
General Optical Council
41 Harley Street
London
W1G 8DJ

By email: kpunchihewa@optical.org

Response form template

Your details

Name:

Address:

Telephone number:

Email:

Are you replying on behalf of an organisation?

Name of the organisation:

Your position:

Nature of the organisation's work:

Keeping in touch

Because we value your input, we would like to contact you occasionally to let you know when we launch consultations and to invite you to future events. We will not pass your data on to any third party. Please tick here if you do not wish to be contacted in this way about the GOC's consultations:

Consultation Questions

Question 1: do you agree with our proposed approach to the single allegation of impairment of fitness to practise, in the light of the public and registrants' interest issues described above?

Question 2: do you agree that the introduction of the case examiner provisions will make the throughput of complaint cases faster and more efficient?

Question 3: do you agree with the terms of guidance to the case examiners relating to complaints where more than five years has elapsed since the incident leading to the complaint?

Question 4: do you agree with the terms of the guidance where the complainant wishes to remain anonymous?

Question 5: do you agree with the terms of the guidance relating to vexatious complaints?

Question 6: do you agree that the provision for the registrar to refer a matter directly to the Fitness to Practise Committee for consideration of an interim order is appropriate in the public interest?

Question 7: do you support the provision for the registrar to refer serious criminal convictions directly to the Fitness to Practise Committee?

Question 8: do you support the express provision for a process for the submission of observations by the registrant and the maker of the allegation?

Question 9: do you agree that the new Rules should allow the Investigation Committee (IC) and Fitness to Practise Committee to draw such inferences as seem appropriate to them in relation to a registrant who does not co-operate with an assessment that has been directed by the IC?

Question 10: do you agree with the provisions relating to the decisions which the case examiners may take?

Question 11: do you agree with the provisions relating to the decisions which the Investigation Committee may take?

Question 12: do you agree with the provision for the registrar, rather than the Investigation Committee, to be able to review a decision not to refer?

Question 13: do you agree that a time limit should be imposed upon the ability to review a decision not to refer?

Question 14: if you agree under question 13, do you agree that five years is an appropriate time period?

Question 15: do you support the new provisions in rule 15(4) relating to warnings where a decision to not to refer has been reviewed?

Question 16: do you agree that it is appropriate for the case examiners rather than the Investigation Committee to be able to terminate a referral to the Fitness to Practise Committee?

Question 17: do you support the new provisions in rule 16 permitting the maker of the allegation to be notified of the possible termination of the referral and to be given the opportunity to make comments which the case examiners will take into account?

Question 18: do you agree that it is appropriate that Interim Order hearings should be held in private?

Question 19: do you agree with the provisions in rule 20 that in most cases, oral evidence will not be given at interim order hearings?

Question 20: do you support the new procedure set out in the Rules for Interim Order hearings?

Question 21: do you agree with the proposal that standard directions should apply in all cases unless varied and that a procedural hearing is not then necessary in every case?

Question 22: if you answered 'yes' to question 21, do you agree with the form of the standard directions, including the timescales, set out in the table at rule 29?

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Question 26: do you support the provision in rule 46(20) for the Fitness to Practise Committee to amend an allegation at a hearing, bearing in mind the safeguards and the public interest?

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Question 28: do you agree that the new procedure for the costs process will make the process clearer for the parties and the Fitness to Practise Committee?

Question 29: do you support the change to the Rules to make express the ability for the GOC to notify a registrant's current employer of key outcomes of the fitness to practise process under Rules 15, 16 and 51?

**February 2011
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