

Investigation Committee guidance

The purpose of the Guidance

The General Optical Council (GOC) recognises that it is important that complainants, opticians, professional and representative organisations, and other stakeholders including the general public are aware of the basis upon which the GOC's Investigation Committee operates and makes decisions about fitness to practise complaints.

This document contains guidance to be used by the GOC's Investigation Committee when considering complaints about a GOC registrant's fitness to practise/train/carry on an optical business. The guidance is intended to encourage consistent decision-making by the Investigation Committee. However, every decision that the Investigation Committee makes will be based upon the facts of the case being considered.

This Guidance is a public document and is available from the GOC's website at: http://www.optical.org/en/about_us/policies_procedures_and_protocols/index.cfm

Definitions

The GOC currently registers around 23,500 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and student dispensing opticians who must be registered with the GOC in order to undertake training.

Throughout this document:

“optician” refers to any individual or business registered with the GOC.

“fitness to practise” refers to:

- the fitness to practise of qualified optometrists or dispensing opticians
- the fitness to undertake training of student optometrists or dispensing opticians
- the fitness to undertake business of business registrants (optical businesses that are registered with the GOC).

“complaint” refers to a complaint that relates to an optician's fitness to practise.

Revision of the Guidance

This Guidance is intended to be a living document. It will be amended as and when appropriate, taking into account the growing experience of the Investigation Committee in dealing with fitness to practise complaints, as well as legal developments, including the amendment/introduction of legislation and new case law. The GOC will review this guidance periodically.

The GOC will highlight any significant amendments to this Guidance by publishing the amended version on the GOC's website, www.optical.org at least one month before the amended Guidance will be used by the Investigation Committee.

The General Optical Council

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. The GOC is the regulator for the optical professions in the UK.

The constitution, purposes and functions of the GOC are set out in the Opticians Act 1989¹. The GOC is responsible for promoting high standards of professional education, conduct and performance among opticians in order to protect, promote and maintain the health and safety of the public. The main statutory functions of the GOC are to:

- set standards for optical education and training, performance and conduct;
- approve qualifications leading to registration;
- maintain registers of individuals who are qualified and fit to practise, train or carry on business as optometrists or dispensing opticians;
- investigate and act where a registrant's fitness to practise, train or carry on business is impaired.

The GOC can also take action if the laws in relation to the sale of optical appliances, or the testing of sight, are being broken and where there is a risk to the public. The GOC's Protocol on the Investigation and Prosecution of Criminal Offences sets out the Investigation Committee's role in this process and is available from: www.optical.org/en/about_us/policies_procedures_and_protocols/index.cfm.

The role of the GOC's Investigation Committee in relation to fitness to practise complaints

You can find out more about the GOC's complaints process in the leaflet "How to complain about an optician" which is available from: www.optical.org/en/our_work/Investigating_complaints/How_to_make_a_complaint/index.cfm.

Every complaint is considered by the Investigation Committee². The Investigation Committee's procedures and powers are set out in the Opticians Act 1989³. The Investigation Committee must decide whether or not each complaint (a complaint is referred to as an "allegation" in the legislation) ought to be referred to the GOC's Fitness

¹ http://www.opsi.gov.uk/acts/acts1989/pdf/ukpga_19890044_en.pdf

² Section 13D(5) Opticians Act 1989 – see note 1 above

³ See note 1 above

to Practise Committee⁴. The Investigation Committee must also consider whether an application should be made to the Fitness to Practise Committee for the imposition of an interim order suspending or placing conditions upon the optician's registration. Further information about the Investigation Committee's role in applications for interim orders is set out below.

If the Investigation Committee decides that a particular complaint ought not to be referred to the Fitness to Practise Committee, it must then consider whether the registrant in question should receive a warning⁵. The GOC has issued separate guidance about Investigation Committee warnings, which is available from:

http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/c_37_08_annex_1.pdf.

Every year, the GOC's annual report includes statistical information about the number and types of complaints that have been considered by the Investigation Committee. The GOC's annual reports are available from:
www.optical.org/en/news_publications/Publications/annual_reports_archive.cfm.

Only a minority of the complaints that are considered by the Investigation Committee result in a referral to the Fitness to Practise Committee⁶. In the majority of cases, the Investigation Committee decides that there is no need for any further action to be taken, or that the complaint can be appropriately dealt with by issuing the optician with a warning, by providing the optician with a letter of advice, or asking them to attend a voluntary performance review. Further information about each of these potential outcomes is provided below.

The Investigation Committee's membership and decision-making procedures

The legislation specifies the membership of the Investigation Committee and its decision-making procedures⁷.

The Investigation Committee has a mixture of lay and professional members. It has nine members in total, of whom three must be registered optometrists, two must be registered dispensing opticians, three must be lay persons, and one must be a medical

⁴ Section 13D(5) Opticians Act 1989 (see note 1 above) and Rule 13 General Optical Council (Fitness to Practise) Rules 2005 - http://www.opsi.gov.uk/si/si2005/uksi_20051475_en.pdf

⁵ Section 13D(7) Opticians Act 1989 (see note 1 above) and Rule 14 General Optical Council (Fitness to Practise) Rules 2005 (see note 4 above)

⁶ 16% of complaints resulted in referral to the Fitness to Practise Committee in 2009-2010

⁷ The General Optical Council (Committee Constitution Rules) Order of Council 2005 and The General Optical Council (Committee Constitution) (Amendment) Rules Order of Council 2008 - <http://www.opsi.gov.uk/si/si2005/20051474.htm> and http://www.opsi.gov.uk/si/si2008/uksi_20083113_en_1

practitioner⁸ Details of the current membership of the Investigation Committee are available from: www.optical.org/en/about_us/how_we_work/Investigation_Committee.cfm. There must be a minimum of five⁹ Investigation Committee members present in order for the Committee to make decisions about complaints (the Committee's "quorum"). This must include at least one optometrist, one dispensing optician and one lay member.

The Investigation Committee meets in private. Neither the complainant, the optician(s) nor their representatives are allowed to attend Investigation Committee meetings. The Investigation Committee takes its decisions by a simple majority vote (the Chair does not have a casting vote).¹⁰ No Committee member may abstain from voting and where the votes are equal, the legislation states that the Committee must decide in favour of the optician.¹¹

When making its decision about a particular complaint, the Investigation Committee will consider not only the original complaint and any evidence that has been gathered by the GOC, but also any written representations that have been received from the optician concerned (the legislation states that the optician must be given copies of the complaint and any evidence, and allowed 28 days in which to make any written representations before the Committee considers the complaint¹²). The Committee will also consider any comments received from the complainant (made once the complainant has seen any written representations made by the optician). Any comments from the complainant are also copied to the optician.

The Investigation Committee is also required to consider whether the Fitness to Practise Committee should consider making an interim order suspending³ or placing conditions on the registration of any optician who is the subject of a complaint³. An interim order can suspend an optician from practice completely, or temporarily remove an entry relating to a specialty or proficiency, or it can make their registration conditional on compliance with requirements imposed by the Committee. An interim order can only last for a maximum of 18 months (unless extended by the relevant court) and will be subject to regular reviews during that period. Further information about the Investigation Committee's role in the interim order process is provided below.

The Investigation Committee may instruct the GOC to refer a complaint to the police if it appears to relate to the commission of a criminal offence (or to refer the complaint to another enforcement agency, as appropriate, if it appears to relate to a non-GOC

⁸ Rule 9 of the General Optical Council (Committee Constitution Rules) 2005 as amended by the General Optical Council (Committee Constitution) (Amendment) Rules Order of Council 2008 – see note 7 above

⁹ Rule 10 of the General Optical Council (Committee Constitution Rules) 2005 – see note 7 above

¹⁰ Rule 63 of the General Optical Council (Fitness to Practise) Rules 2005 – see note 4 above

¹¹ Rule 63 of the General Optical Council (Fitness to Practise) Rules 2005 – see note 4 above

¹² Rules 4 and 5 of the General Optical Council (Fitness to Practise) Rules 2005 – see note 4 above

¹³ Section 13D(9) of the Opticians Act 1989 – see note 1 above

registrant, for example, to the General Medical Council if the complaint concerns laser eye surgery carried out by a doctor).

After each Investigation Committee meeting the complainant, the optician(s) concerned (and their employer, where relevant) receive a letter from the GOC setting out the Investigation Committee's decision and the reasons for that decision.

Further investigation

The Investigation Committee may require further information before it reaches a decision upon the appropriate outcome¹⁴. It may therefore direct that any one or more of the following investigative actions should be carried out (including if required, more than one assessment):

- A health assessment of the optician¹⁵.

This may be appropriate if the complaint (or the optician's representations) raises questions as to whether their health (including any health condition relating to substance abuse) is having any impact on their work.

- A performance assessment of the optician¹⁶.

This may be appropriate if the Investigation Committee considers that the complaint raises broad questions about the adequacy of the optician's standard of work in certain areas of practice, and that the Committee's decision-making would be assisted by a formal assessment of the optician's work in those areas. The GOC has published separate guidance relating to performance assessments, available from:

http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/c_37_08_annex_2.pdf.

- Gathering of further information/evidence by the GOC (in which event there is no requirement to inform either the complainant or the registrant of the nature of the further investigation to be undertaken).

If the Investigation Committee directs that any of these investigative actions are to be carried out, the Committee will defer making any decision about the complaint until it is satisfied that it has all the information it requires

Any additional evidence that is obtained as a result of further investigation will be provided to the optician before the Investigation Committee considers the complaint further. The optician will be given an opportunity to make additional written

¹⁴ Rule 6 of the General Optical Council (Fitness to Practise) Rules 2005 - see note 4 above

¹⁵ In accordance with Rule 7 of the General Optical Council (Fitness to Practise) Rules 2005 – see note 4 above

¹⁶ In accordance with Rule 7 of the General Optical Council (Fitness to Practise) Rules 2005 – see note 4 above

representations, which will be provided to the Investigation Committee (and, if relevant, to the person making the complaint).

There may be cases that involve concerns about a number of aspects of an optician's fitness to practise. In making a decision, it is the cumulative effect of all impairing factors that must be taken into account. Health and performance assessments are part of the process of collecting evidence but there may also be other evidence that the Investigation Committee will need to consider when reaching a decision.

Potential outcomes of the Investigation Committee's consideration of a complaint

There are a number of different potential final outcomes arising from the Investigation Committee's consideration of a complaint:

- Referral of the complaint to the Fitness to Practise Committee;
- The issue of a warning to the optician¹⁷ ;
- A decision to invite the optician to attend a voluntary performance review (conducted by one of the optical professional bodies).
- A decision to take no further action (which may include issuing the optician with advice about their future conduct); Further information about each of these potential outcomes is set out below.

The public interest

The Investigation Committee should always take into account the public interest. The wider public interest includes not just the protection of members of the public, but the maintenance of public confidence in the professions, and the declaring and upholding of proper standards of conduct and behaviour.

Equality and Diversity

The Investigation Committee must be aware of and apply the GOC's Equality and Diversity Scheme.

Allegations of Fitness to Practise

An allegation that an optician's fitness to practise is or may be impaired may relate to acts or omissions which occurred outside the United Kingdom or at a time when the optician was not registered.¹⁸ An optician's fitness to practise may be impaired only on certain grounds (for example misconduct, deficient professional performance, a criminal conviction or police caution, adverse physical or mental health, etc).

¹⁷ In accordance with section 13D(7) of the Opticians Act 1989 (see note 1 above) and Rule 14 of the General Optical Council (Fitness to Practise) Rules 2005 (see note 4 above)

¹⁸ Section 13D(4) of the Opticians Act 1989

Those grounds vary, depending on whether the optician is an individual, a business, or a student.¹⁹ Case Law has established the following principles regarding the concepts of “misconduct” and “deficient professional performance”:²⁰

- “Misconduct” does not mean any breach of the duty owed by an optician to his patient; it connotes a serious breach which indicates that the optician’s fitness to practise is impaired. The phrase “deficient professional performance” does not mean any instance of sub-standard work; it connotes a level of professional performance which indicates that the optician’s fitness to practise is impaired.
- Mere negligence does not constitute “misconduct” but negligent acts or omissions which are particularly serious may amount to “misconduct”.
- A single negligent act or omission is less likely to cross the threshold of “misconduct” than multiple acts or omission. However, there may be some circumstances in which a single negligent act or omission, if particularly grave, could be characterised as “misconduct”.
- “Deficient professional performance” connotes a standard of professional performance which is unacceptably low. A single instance of negligent treatment would be unlikely to constitute “deficient professional performance” unless it was very serious indeed. Except in exceptional circumstances, “deficient professional performance” should be based on consideration of a fair sample of the optician’s work.

Referral of a complaint to the Fitness to Practise Committee

The first question that the Investigation Committee has to decide when considering each complaint is whether it ought to be referred to the Fitness to Practise Committee.²¹ When considering whether a complaint ought to be referred to the Fitness to Practise Committee, the Investigation Committee should keep in mind the GOC’s’ main objective as set out in the legislation²² :

“The main objective of the Council in exercising such of the Council’s functions as affect the health and safety of members of the public is to protect, promote and maintain their health and safety”.

When considering whether a complaint ought to be referred to the Fitness to Practise Committee, the Investigation Committee should ask itself the following question: is there a realistic prospect of establishing that the optician’s fitness to practise is impaired to a degree that justifies action being taken against their registration (this is known as “the realistic prospect test”).

¹⁹ See Section 13D(2) and (3) of the Opticians Act 1989

²⁰ Calhaem v General Medical Council [2007] EWHC 2606 (Admin)

²¹ Section 13D(5) of the Opticians Act 1989 – see note 1 above

²² Section 1(2A) of the Opticians Act 1989 – see note 1 above

This involves consideration of two issues:

- Is there a realistic prospect of being able to prove the facts alleged against the optician, if the complaint is referred to the Fitness to Practise Committee?
- If the alleged facts were proved, are they so significant as to indicate that the optician's fitness to practise is or may be impaired to a degree that justifies action being taken against their registration?

It is not the role of the Investigation Committee to decide whether or not the optician's fitness to practise *is* impaired – that is a decision for the Fitness to Practise Committee to make (if the complaint is referred onto that stage).

When considering the realistic prospect test, the Investigation Committee should have regard to the following:

- The Investigation Committee should proceed with caution (given that, among other considerations, the Committee is working from documents alone and the evidence before them may be untested.)
- It is not the Investigation Committee's role to make any findings of fact on the substantive issues arising from the complaint. It is for the Fitness to Practise Committee to make factual findings.
- If the complaint is referred to the Fitness to Practise Committee, that Committee will only find any fact which is alleged by the GOC and disputed by the optician proved if, having heard the evidence, the Committee considers it more likely than not to have happened (the "civil standard of proof"²³).
- It is not the Investigation Committee's role to refer to the Fitness to Practise Committee complaints that are not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the optician's fitness to practise could be found impaired by the Fitness to Practise Committee. If necessary, the Investigation Committee can adjourn for further information.
- There is a public interest in opticians not being harassed by unfounded complaints.
- Where the realistic prospect test is met, there is a public interest in there being a public hearing by the Fitness to Practise Committee.
- The Investigation Committee is entitled to assess the weight of the evidence. However, the Committee must not (normally) resolve substantial conflicts of evidence.

²³ Rule 50A of the General Optical Council (Fitness to Practise) Rules 2005 as inserted by the General Optical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules 2008 - http://www.opsi.gov.uk/si/si2008/pdf/uksi_20082690_en.pdf

- Where there is a plain conflict between two accounts, either one of which may realistically be correct, and on one account the matter would call into question the optician's fitness to practise, the conflict should be resolved by the Fitness to Practise Committee, not the Investigation Committee. Where there is any element of doubt, the Committee should make a referral.
- The Committee should proceed with caution in reaching a decision not to refer a case where the decision may be perceived as inconsistent with a decision made by another public body with input from optical professionals, or an NHS body for instance, in relation to the same or substantially the same facts. If the Committee does reach such a decision, it should give reasons for any apparent inconsistency.
- In considering whether the alleged fact(s) is/are so significant that (if proved) they would indicate that the optician's fitness to practise may be impaired:
 - The statement within the GOC's Protocol on the handling of criminal convictions disclosed by registrants (attached at Annex 1 and also available from:
http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/protocol_on_the_handling_of_criminal_convictions_disclosed_by_registrants_approved_26_mar_2009_21840.pdf that the Registrar will generally presume against registration, restoration or retention on the GOC Register where an applicant discloses a conviction for an offence included in Schedule 4 of the Criminal Justice and Court Services Act 2000;
 - The factors identified within the Fitness to Practise Committee's Guidance (attached at Annex 2 and also available from:
http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf as indicating that (if the complaint is considered by the Fitness to Practise Committee) erasure is likely to be the appropriate sanction.
- These matters may be relevant to the Investigation Committee's consideration of the realistic prospect test in relation to a particular complaint because they indicate that certain types of facts (if proved) are likely to be viewed as so significant as to justify non-registration or erasure from the register.
- The factors that are identified within the Fitness to Practise Committee's Guidance (attached at Annex 2 and also available from:
http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf) as generic mitigating/aggravating factors. The presence of mitigating factors will only result in a decision by the Investigation Committee not to refer a complaint to the Fitness to Practise Committee where:
 - The mitigating factors are well-supported by credible evidence;
 - The mitigating factors relate to the circumstances of the complaint, rather than to matters that are personal to the registrant;

- The mitigating factors are so significant that there is no realistic prospect of the Fitness to Practise Committee finding that the optician's fitness to practise is impaired.
- The likely impact on the Fitness to Practise Committee's consideration of any evidence showing that:
 1. the optician's admitted failing is capable of being remedied; and/or
 2. has already been remedied;

as well as the level of any risk of repetition.

Certain types of misconduct may be more capable of being remedied than others (for example, complaints concerning deficient professional performance). Such evidence may not always be available, and where it is available, it may not be clear or persuasive. Even if the Investigation Committee is satisfied that there is evidence that the optician has remedied their failing, the Investigation Committee may still decide that it is in the public interest for the complaint to be referred to the Fitness to Practise Committee.

The issue of a warning to the optician

The Investigation Committee will only consider issuing a warning once it has decided that the complaint should not be referred to the Fitness to Practise Committee.

A warning issued by the Investigation Committee is a record of a concern on the part of the Investigation Committee which, while not requiring referral to the Fitness to Practise Committee, is potentially significant. A warning is not shown on the publicly available GOC register, but it is recorded by the GOC for a period of four years.

Warnings are only issued by the Investigation Committee once the optician has been given an opportunity to make further written representations to the Investigation Committee, having been advised of the nature of the warning that the Investigation Committee is considering issuing. The GOC has published separate guidance on warnings issued by the Investigation Committee, available from:

http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/c_37_08_annex_1.pdf.

An invitation to attend a voluntary performance review

If the Investigation Committee decides that a complaint should not be referred to the Fitness to Practise Committee or result in the issue of a warning, it may decide to invite an optician to attend a voluntary performance review with the College of Optometrists or the Association of British Dispensing Opticians (as appropriate, subject to the organisation's capacity to facilitate such a review and/or any non-member's ability to pay the relevant fee) before ordering the case to be closed.

A performance review involves an informal discussion between the optician and the relevant representative of the College or the ABDO. The review will address any aspect of

the optician's practice that the Investigation Committee believes would be beneficial to the optician and the standard of their practice.

The Investigation Committee will only consider inviting an optician to attend a performance review if confident that there are no public safety issues arising from the optician's current practice.

The Investigation Committee has no legal power to order an optician to attend a performance review, but would hope that opticians who have been the subject of a complaint would welcome the invitation as a constructive opportunity to gain advice from a peer to help them to improve/refresh their skills.

Taking no further action

If the Investigation Committee decides that a complaint does not need to be referred to the Fitness to Practise Committee, or result in the issue of a warning, it may decide to close a case without taking any further action. As explained above, the complainant, the optician(s) concerned (and their employer, where relevant) will each receive a letter from the GOC setting out the Investigation Committee's decision and the reasons for that decision.

The Investigation Committee should decide to close a case and take no further action if:

- The complaint demonstrates no issue that could call into question the optician's fitness to practise; or
- The alleged facts, if proved, may demonstrate a shortcoming on the part of the optician. However, any shortcomings are not serious enough to result in the optician's fitness to practise being impaired to the extent that would justify action being taken with regard to the optician's registration; or
- The alleged facts, if proved, may demonstrate that the optician's fitness to practise is impaired, but there is no realistic prospect of being able to prove the alleged facts for evidential reasons.

The Investigation Committee may direct that a letter of advice be sent to the optician if the case is to be closed. Such a letter has no formal status, it is simply advice. Such letters may contain (but are not limited to) advice regarding future conduct, including advice about the appropriate handling of dissatisfied patients. Where appropriate, the Investigation Committee may also include positive comments in an advice letter.

Interim Order applications

When considering whether an application for an interim order should be made, the Investigation Committee will have regard to the legislation and in particular Section 13L of the Opticians Act 1989, which states that the Fitness to Practise Committee may only make an interim order where they are satisfied that it is:

- Necessary for the protection of members of the public; or

- otherwise in the public interest; or
- in the interests of a registrant.

In deciding whether to direct the GOC to apply to the Fitness to Practise Committee for an interim order to be imposed on a particular optician, the Investigation Committee will:

- Take into account the circumstances specified in the Fitness to Practise Committee's Guidance (attached as Annex 2 and also available from: http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf) as being likely to mean that an interim order is necessary.
- Have regard to all the factors that will be taken into account by the Fitness to Practise Committee when considering such an application, including:
 - the effect which any order might have on the optician;
 - the requirement on the Fitness to Practise Committee to balance the need for an order against the consequences which an order would have for the optician, in order to satisfy themselves that the consequences are not disproportionate to the risk to the public.
 - That the primary purpose of an Interim Order is to protect the public from a real present or likely future risk. It will be relatively rare for an Interim Order to be made only on the ground that it is in the public interest (for example to maintain public confidence in the profession).
 - That an Interim Order might be made at an early stage of the investigation and therefore, although the allegation ought to have been made in writing, it may not yet be supported by formal witness statements.

Annex 1 - GOC's Protocol on the handling of criminal convictions disclosed by registrants

http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/protocol_on_the_handling_of_criminal_convictions_disclosed_by_registrants_approved_26_mar_2009_21840.pdf

Annex 2 - Fitness to Practise Committee's Guidance

http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf