

COUNCIL

GUIDANCE ON FITNESS TO PRACTISE RULE 16

Meeting: 16 May 2013

Status: for approval

Lead responsibility:
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Purpose

1. This paper seeks Council's agreement to a focussed consultation on draft fitness to practise guidance on Rule 16 (annex 1), prior to final Council approval and issue for use by the Investigation Committee.
2. The approved guidance will support those making and determining a Rule 16 application, which is to review and possibly cancel a case previously referred to the Fitness to Practise Committee.

Strategic Objective

3. There is no specific business plan project objective in relation to this work. The guidance has been developed in response to an emerging need and will ensure the GOC's legislative and policy framework supports good decision making in our fitness to practise work and will demonstrate openness in our procedures. It also complies with our statutory duty to provide guidance on fitness to practise and, prior to issuing such guidance, the need to consult with relevant groups¹. This also meets standard 5 of the Professional Standards Authority's Performance Review Standards².

Background

4. The fitness to practise work of the Council is governed by statutory rules³, one of which (numbered 16) is entitled *Termination of referral*. This is a commonplace 'checks and balances' provision for healthcare regulators that enables the Investigation Committee to review and possibly cancel a referred case in the light of an application from any of the involved parties.

¹ Opticians Act 1989 c.44, section 13A

² The Performance Review Standards – Standards of Good Regulation, June 2010, as amended

³ General Optical Council (Fitness to Practise Rules) Order of Council 2005/1475

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5. The work of the Investigation Committee (IC) is to consider reports about registrants fitness to practise and decide, in the light of information gathered from an initial investigation (together with health or performance assessments where relevant), whether the matter should be referred for a full investigation and hearing before the Fitness to Practise Committee (FTPC).
6. After the IC has referred a case to the FTPC, it may consider an application, from the registrant or the Council, as to whether the investigation should be terminated. The guidance is intended to assist those making or determining applications for review, by describing the procedure used by the General Optical Council.

Analysis

7. Applications for a Rule 16 review were infrequent in the past but the FTP team has processed more (seven) so far this (calendar) year than in all of 2012 (six).
8. Possible reasons for this increase include more registrants using this Rule in an attempt to cancel the investigation. Where registrants' defence bodies have instructed solicitors experienced in using similar provisions with other regulators, they may seek to use the Rule more often than our registrants' defence have in the past.
9. So far, the Council uses these provisions more than the defence to terminate cases which, after investigation, are considered to fail the 'realistic prospect test'. This test must be applied to both the factual allegations and the question whether, if established, those facts would demonstrate that practitioners' fitness to practise is impaired to a degree justifying action on their registration. It is in no one's interests for the FTP Committee to hear cases that are bound to fail.
10. The Executive have drafted the guidance in order to ensure transparency of process which is in the public interest. The guidance simply describes the process of making and considering an application to terminate an investigation by the Investigation Committee under Rule 16. The guidance does not propose any new provisions or practices that are not already in existence.
11. In order to comply with our statutory duty⁴ to consult with interested groups before issuing or varying guidance, a focussed consultation will

⁴ Opticians Act 1989 c.44, section 13A(3)

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be carried out. Following the agreed GOC Consultation Framework, it is recommended that the consultation is proportionate in its format and lasts for three months. This means targeting key stakeholders which include registrants' defence bodies and membership organisations, patient groups, solicitors, departments of health and the Professional Standards Authority. It is recommended that Council consider and agree the format and scope of the consultation.

12. Once the consultation has concluded, a report will be drafted which will include the number and quality of responses, whether new or helpful suggestions were made and the extent to which the draft guidance was amended as a result. The consultation report with finalised guidance (taking into account feedback) will be presented for consideration and approval by Council at the meeting scheduled for 14 November 2013.
13. The recommended decision would have the following implications on:
 - **GOC's reserves** – None
 - **GOC budget** - None
 - **Legislation** - None
 - **Resources** – Executive time in creating and issuing the consultation, then collating, tabulating and analysing the responses.
 - **Equality and Diversity** - None
 - **Human Rights Act** - None

Devolved Nations

14. There are no implications in relation to this area for the devolved nations and it is not necessary to publish the consultation or guidance in Welsh.

Communications

15. A public consultation will be undertaken to gather views from those who are most likely to use or be interested in Rule 16 prior to final adoption of the guidance by Council. The consultation report and agreed guidance will be sent to those who responded to the consultation.

Risks

16. The guidance on Rule 16 applications should provide clarity for all parties involved about our procedures and should ensure greater consistency in decision making and less risk of a challenge to those decisions.

Recommendations

17. It is recommended that Council consider and agree:
 - 17.1 the draft guidance for consultation;
 - 17.2 that a focussed consultation or three months is undertaken with key stakeholders including: registrants' defence bodies and membership organisations, patient groups, solicitors, departments of health and the Professional Standards Authority; and
 - 17.3 to consider the consultation report and approve finalised guidance at its November 2013 Council meeting.

Timeline for future work

18. Consultation periods are normally three months. Allowing time for the collation, tabulation and analysis of responses, and consideration by Council in November 2013 the guidance would come into use at the Investigation Committee meeting scheduled for 26 November 2013.

Attachments

- Annex 1. The Investigation Committee Rule 16 draft Guidance is attached.

**GENERAL OPTICAL COUNCIL
INVESTIGATION COMMITTEE**

DRAFT RULE 16 GUIDANCE

Introduction

1. Rule 16 of the General Optical Council (Fitness to Practise Rules) 2005 states that where an allegation against a registrant has been referred to the Fitness to Practise Committee the Investigation Committee may review the referral.
2. The purpose of this guidance is to assist those making and determining applications for review by understanding the procedure that will be adopted by the General Optical Council (GOC).

Human Rights

3. The Council is a public authority for the purposes of the Human Rights Act 1998. Promoting equality is also a requirement under current and emerging equality legislation – everyone who is acting on behalf of the Council is expected to adhere to the spirit and letter of this legislation.

Revision of the Guidance

4. 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 applications for termination under Rule 16, as well as legal developments, including the amendment / introduction of legislation and new case law. The GOC will review this guidance periodically and at least annually.
5. 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.

Who can make an application for termination?

6. Rule 16 (1) states simply that "*The Investigation Committee may review the referral*". It does not define those who can make an application. It may reasonably be inferred that:
 - (a) the registrant may make an application
 - (b) the Council may make an application
 - (c) the Investigation Committee of its own motion may terminate a referral

How should an application be made?

7. Any application for a termination of the referral under Rule 16 should be made in writing, supported by any documentary evidence upon which the applicant wishes to rely.
8. The application should be sent to the Registrar for the attention of the Investigations Manager. Upon receipt of the application, the Investigations Manager will list the application for consideration by an Investigation Committee. In listing the application, the Investigations Manager will take into account the need to seek comments upon the application from the following before the application can be considered by the Investigation Committee:
 - (a) The complainant
 - (b) The registrant
 - (c) The registrar
 - (d) Any other person who may reasonably be expected to have an interest in the application

The Investigations Manager should record and give reasons for any decision not to seek comments from those listed at (a) to (c) above.

9. In seeking comments upon the application, the Investigations Manager will send to those listed in paragraph 8 (from whom it has been decided that comments will be sought) above, a copy of the application and supporting documents indicating the timescale within which any representations must be received to allow the consideration of them by the Investigation Committee.
10. Any comments requested by the Investigations Manager in accordance with paragraph 9 above should be made within 28 days of the request for comments. The person making the Rule 16 application will then have 14 days to respond to any comments received from any other party. No further comments will be sought after the receipt of further comments, if any, from the person making the Rule 16 application. For the avoidance of doubt, the applicant has the final opportunity to comment before the application is considered by the Investigation Committee. In exceptional cases, the deadlines referred to above may be extended by the Investigations Manager.
11. The Investigations Manager will prepare and submit to the Investigation Committee copies of the application and any comments received in response to it.

Consideration of the application by the Investigation Committee

12. Upon receipt of an application for termination, the Investigation Committee must consider whether, in the light of all the evidence

available and after considering any written representations made to it, the allegation ought still to be referred to the Fitness to Practise Committee.

13. In considering the application, the Investigation Committee should follow the guidance set out in the Investigation Committee Guidance and, in particular the test and criteria set out in that guidance. The Investigation Committee must consider whether there remains a realistic prospect of proving the facts alleged and, if those facts are proved, are they so significant to indicate that the fitness to practise of the registrant is, or may be, impaired to a degree that justifies action being taken against their registration.
14. When considering an application under Rule 16, the Investigation Committee may:
 - a) Terminate the referral with no further action.
 - b) Terminate the referral and give advice to the registrant.
 - c) Terminate the referral and be minded to issue the registrant with a warning (having considered any representations received by the registrant in relation to the proposed warning).
 - d) Continue with the referral.
 - e) Continue with the referral, with a direction for the matter to be passed to an FTP Committee for consideration of whether or not an interim order should be imposed.
 - f) Continue with the referral, with a direction for the matter to be passed to an FTP Committee for consideration of whether or not an Interim Order should be imposed, and/or a direction for a Performance Assessment to be carried out.
 - g) Continue with the referral, with a direction for the matter to be passed to an FTP Committee for consideration of whether or not an Interim Order should be imposed, and/or a direction for a Health Assessment to be carried out.
 - h) Adjourn its decision pending the receipt of further information.

Reasons for decision

15. In all cases, the Investigation Committee must give reasons for its decision so that those affected by it understand why the Investigation Committee made the decision they did. Reasons should be clear and detailed. If any legal advice was given in relation to the application, such advice should be recorded with an indication as to whether or not it was accepted by the Investigation Committee.

Version 1.0: April 2013

To be reviewed by: March 2014