

FOR FITNESS TO PRACTISE COMMITTEE

HEARINGS AND INDICATIVE SANCTIONS GUIDANCE

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This guidance is a 'living document', which will be updated and revised as the need arises. Please email any comments or suggestions for consideration for further revisions to the Hearings Manager at hearings@optical.org

1. Introduction

1.1 The over-arching objective of the General Optical Council (GOC) in exercising its functions is the protection of the public. The aim of this document is to assist all individuals when sitting on the Fitness to Practise Committee to understand their individual and collective responsibilities, leading to the making of fair and just decisions. The professional and lay personnel appointed to sit on the Committee exercise their own judgments in making decisions, but must also take into consideration the standards of good practice the General Optical Council (GOC) has established.

1.2 This guidance is in three parts:

Part A: Hearings and the decision making process

Part B: Sanctions guidance

Part C: Bank of conditions

2. Types of registrant

Individual registrants

2.1 In the GOC's legislation and this guidance, the term "individual registrant" refers to a registered optometrist or a registered dispensing optician. This includes those undertaking training as an optometrist or dispensing optician, and visiting optometrists and dispensing opticians from relevant European States. See section below on student registrants.

Student registrants

2.2 A student registrant is a person registered with the GOC as undertaking training as an optometrist or as a dispensing optician.

2.3 The GOC legislation states that only students currently in education or training can remain on the register. If a student is not studying (for example, is taking a gap year) they are not able to remain registered. Students need to apply to be restored to the register when they recommence their studies.

2.4 All registered optometry and dispensing optics students must renew their registration each year. This is called 'student retention'. The GOC sends all existing student registrants a notification of retention in April each year. Applications must be completed and the retention fee paid by 15 July.

2.5 Anyone who fails to submit an application and pay their annual fees by the annual retention deadline may be removed from the student register. Students who are not registered may be excluded from clinical training and examinations.

2.6 The GOC may not recognise qualifications of applicants for full registration who were not registered for all or part of their training.

- 2.7 The GOC has a legal duty to register and set the standards expected of optical students. Until 31 March 2016 these were contained in the "Code of Conduct for optometrists, dispensing opticians and optical students".
- 2.8 From 1 April 2016 the existing Code of Conduct has been replaced by new Standards of Practice for Optical Students. All student optometrists and student dispensing opticians will have to confirm that they have read and will abide by the standards.
- 2.9 These standards define the standards of behaviour and performance the GOC expects of all registered student optometrists and student dispensing opticians.
- 2.10 The care, well-being and safety of patients are at the heart of being a professional. Students should recognise that patients will often have the same expectations of them as they would have of qualified healthcare professionals. As such, patients must always be a student's first concern from the beginning of their studies through to pre-registration training and beyond.
- 2.11 The specific standards for optical students take account of the fact that they will develop their knowledge, skills and judgement over the period of their training.
- 2.12 Once a student's training is complete and they register as a practising optical professional, they will then be expected to meet the separate Standards of Practice for Optometrists and Dispensing Opticians.

Business registrants

- 2.13 A business registrant is a body corporate registered with the GOC as carrying on business as an optometrist, dispensing optician or both.
- 2.14 A body corporate is a limited company or limited liability partnership that has been incorporated with Companies House.
- 2.15 The GOC has a legal duty to set the standards expected of optical businesses. It does this in a Code of Conduct for business registrants.
- 2.16 Certain areas of practice are restricted by legislation and rules. Listed below are the key areas that may affect the day to day running of business registrants, and about which the GOC has produced further guidance¹ to assist registrants in applying their professional judgement to meet the standards:
- Sight test
 - Sale and supply of optical appliances
 - Fitting of contact lenses
 - Cosmetic (zero-powered) contact lenses
 - Low vision aids

¹ This guidance can be found at: https://www.optical.org/en/about_us/legislation/goc-statements-interpreting-legislation/index.cfm

- Fluorescein

2.17 Decisions taken against a business registrant must be about fitness to practise of the business as a whole and not about an individual involved in the business (ie. a director), although the actions of an individual director may lead to fitness to practise allegations against the business registrant.

3. What is this guidance is for?

3.1 This guidance has been developed by the Council for use by its Fitness to Practise Committee when undertaking hearings and considering what sanction, if any, to impose following a finding of impaired fitness to practise.

3.2 The Indicative Sanctions Guidance is an authoritative statement of the Council's approach to sanctions issues. This guidance is not an alternative source of legal advice. When appropriate, the legal adviser will advise the Fitness to Practise Committee on questions of law, including questions about the use of this guidance and the approach it should take to it. Each case is different and should be decided on its own unique facts and merits.

4. Who this guidance is for?

4.1 This guidance is addressed to the members of the Fitness to Practise Committee.

4.2 It will be made publicly available on our website and may be useful for others involved personally or professionally in fitness to practise cases.

5. Responsibility for decisions

5.1 As independent Fitness to Practise Committee members, you are asked to keep this guidance in mind when considering cases. The publication of this guidance does not undermine your independence, or the separation of responsibilities which exists between the Council in setting policy and you as members of the Fitness to Practise Committee.

5.2 This guidance provides a crucial link between two key regulatory roles of the GOC – of setting standards for the profession, and of taking action on registration when a registrant's fitness to practise is called into question because those standards have not been met. The professional and lay members appointed to sit on committees exercise their own judgement in making decisions, but must take into consideration the standards of good practice the GOC has established. Decisions taken by committee members in relation to sanction are at their discretion. However, the members should refer to this guidance when making their decisions.

6. Human rights

6.1 The General Optical Council is a public authority for the purposes of the Human Rights Act 1998. The GOC will seek to uphold and promote the principles of the European Convention on Human Rights in accordance with the Act. In particular, Article 6 of the European Convention on Human Rights provides that when an individual is facing a decision that will affect their right to earn a living or run a

business they are "entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The European Courts have made it clear that this right applies to Fitness to Practise Committee hearings and determinations.

7. Equality and diversity

- 7.1 The GOC is committed to promoting equality and valuing diversity and to operating procedures and processes which are fair, objective, transparent and free from discrimination. This includes setting out in guidance, by way of the Code of Conduct for individual registrants, the Code of Conduct for Business registrants and the Standards of Practice for Optometrists and Dispensing Opticians, the attitudes and behaviours expected of registrants. Promoting equality is also a requirement under the Equality Act 2010 – everyone who is acting on behalf of the Council is expected to adhere to the spirit and letter of this legislation.
- 7.2 Members of the profession are required to treat both patients and colleagues fairly, with respect and without discrimination.

8. Our objective

- 8.1 The over-arching objective of the Council in exercising their functions is the protection of the public. This objective encompasses the following aims:
- (a) To protect, promote and maintain the health, safety and wellbeing of the public;
 - (b) To promote and maintain public confidence in the professions regulated under the Opticians Act;
 - (c) To promote and maintain proper professional standards and conduct for members of those professions; and
 - (d) To promote and maintain proper standards and conduct for business registrants.

While this is an obligation on the Council, the Fitness to Practise Committee should consider how their decisions meet these objectives.

9. Fitness to practise and what it means

- 9.1 Optometrists and dispensing opticians must demonstrate safe and competent practice. To do this they must establish and maintain proper and effective relationships with patients and colleagues alike. Their position in society as a respected professional gives them access to patients, including those who may be vulnerable. As such, trust between both parties is paramount. Should that trust be brought into question through the registrant's conduct, it may be considered that he/she should not continue to work in unrestricted practice.

9.2 The public expect their optometrist or dispensing optician to be fit to practise and are entitled to a good standard of care and indeed, the majority achieve and maintain such standards but there will always be a minority who fail to maintain standards.

9.3 It is for that reason the Council has the power to take appropriate action where it appears that there may be an impairment of an optometrist's or a dispensing optician's fitness to practise, and it is for the Fitness to Practise Committee to determine whether to impose a sanction and, if so, which one.

10. The public interest

10.1 When determining sanctions in relation to the registration of an optometrist, a dispensing optician, a student or a business registrant, the Fitness to Practise Committee should consider whether their decision would adequately protect members of the public or the wider public interest. This may include the particular need to protect the patient or another individual(s) and the collective need to maintain public confidence in their profession.

10.2 Public interest includes: protection of patients; maintenance of public confidence in the profession; and declaring and upholding proper standards of conduct and behaviour. Therefore, the Fitness to Practise Committee should bear those factors in mind when considering exercising its powers to make interim orders, determining the question of impairment and deciding upon an appropriate sanction regarding an optometrist's or a dispensing optician's registration.

IMPAIRMENT

11. Grounds of impaired fitness to practise in accordance with s13D(2-3) of the Opticians Act 1989

Registered individuals (including students)

11.1 A finding of impaired fitness to practise (fitness to undertake training in the case of students) against a registrant can be based on any of the following:

- (a) Misconduct;
- (b) Deficient professional performance (not in the case of a student registrant);
- (c) A conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
- (d) The registrant having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal) or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992 (penalty as alternative to prosecution);
- (e) The registrant, in proceedings in Scotland for an offence, having been the subject of an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging him absolutely;
- (f) Adverse physical or mental health; or
- (g) A determination by any other UK health regulatory body that fitness to practise is impaired (or a determination by a regulatory body elsewhere to the same effect).

Business registrants

11.2 A finding of impaired fitness to practise against a business registrant can be based on any of the following:

- (a) Misconduct (by the business registrant or a director);
- (b) Practices or patterns of behaviour occurring within the business which:
 - (i) The registrant knew or ought reasonably to have known of; and
 - (ii) Amount to misconduct or deficient professional performance.
- (c) The instigations by the business registrant of practices or patterns of behaviour within the business where that practice or behaviour

amounts, or would if implemented amount, to misconduct or deficient professional performance;

- (d) A conviction or caution in the British Islands of the business registrant or one of its directors for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
- (e) The registrant or one of its directors having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992;
- (f) The registrant or one of its directors, in proceedings in Scotland for an offence, having been the subject of an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging it or him absolutely;
- (g) A determination by any other UK health regulatory body that:
 - (i) The business registrant's fitness to carry on business as a member of that profession is impaired; or
 - (ii) The fitness of a director of the business registrant to practise that profession is impaired (or a determination by a regulatory body elsewhere to the same effect).

11.3 There is no statutory definition of impairment of fitness to practise. It is clear from case law that the decision on impairment should be a separate decision from the decision on whether what has been found proved amounts to misconduct, deficient professional performance or adverse physical or mental health, etc. Having made that decision, the Committee must go on to determine whether, as a result, fitness to practise is impaired. It may be that despite a registrant having been guilty of misconduct, for example, a committee may decide that his/her fitness to practise is not impaired.

12. Misconduct

12.1 There is also no definition of misconduct in the GOC's legislation, and it will be for the Fitness to Practise Committee as an exercise of its judgment to determine whether an act or omission amounts to misconduct.

12.2 In *Roylance v GMC [1999] Lloyd's Rep Med 139* misconduct was described as:

"A falling short by omission or commission of the standards to be expected among [medical practitioners] and such falling short must be serious"... It is of course possible for negligent conduct to amount to serious professional conduct, but the negligence must be to a high degree".

12.3 Although the terminology has changed since the *Roylance* case, the Courts have been clear that it was "inconceivable" that the change in language should signify a lower threshold for disciplinary intervention.

12.4 Misconduct can be found in relation to a single act where the conduct has been particularly serious.

12.5 Where a registrant may have been negligent misconduct may be constituted by a series of acts, unless the one act in question was particularly serious; see *R (on the application of Vali) v General Optical Council [2011] EWHC 310 (Admin)*:

"Mere negligence does not of itself show that the act was misconduct. A higher degree of gravity than mere carelessness is required. I also note and agree that a single act is less likely to cross the threshold of misconduct but that depends of course on the gravity of the act."

13. Deficient professional performance

13.1 There is also no definition in legislation for deficient professional performance, although it is a separate concept to misconduct (or negligence). *Calhaem v GMC [2007] EWHC 2606 (Admin)* explained the concept of deficient professional performance:

"(3)... It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.

(4) A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute "deficient professional performance".

(5) It is neither necessary nor appropriate to extend the interpretation of "deficient professional performance" in order to encompass matters which constitute "misconduct".

13.2 The case of *Vali* emphasised that, because the definitions of misconduct and deficient professional performance are distinct, any particular set of facts can only be decided as one or other category.

14. Health

14.1 Under Section 13D(2)(f), a registrant's fitness to practise may be impaired by reason of adverse physical or mental health.

14.2 To find an allegation of adverse physical or mental health proved, the Fitness to Practise Committee must be satisfied that the registrant's health may put patient safety at risk. Expert evidence in the form of a medical report will normally be required.

14.3 Under Rule 46(22) when determining whether a registrant's fitness to practise is impaired by reason of adverse physical or mental health, the Fitness to Practise Committee may take into account:-

- a. The registrant's current physical or mental condition;
- b. Any continuing or episodic condition suffered by the registrant; and

- c. A condition suffered by the registrant which, although currently in remission, may reasonably be expected to cause a recurrence of impairment of the registrant's fitness to practise.

Determining impairment

- 14.4 In determining impairment, relevant factors for the committee to take into account include whether the conduct which led to the allegation is remediable, whether it has been remedied and whether it is likely to be repeated. Certain types of misconduct (for example, cases involving clinical issues) may be more capable of being remedied than others.
- 14.5 In coming to a conclusion on impairment, the committee must look forward, not back. It may be that what the registrant has done is so serious, that looking forward the Committee is persuaded that the registrant is simply not fit to practise without restrictions or maybe at all. On the other hand, what the registrant has done may be such that, in the context of an otherwise unblemished career, and taking into account remedial steps taken by the registrant, the Committee may conclude that looking forward, fitness to practise is not impaired despite the misconduct (or deficient professional performance or adverse health). When reaching a decision that fitness to practise is not impaired, the Committee must make clear what remedial steps have been taken into account and why these mitigate against recurrence of the particular issues in question in the case.
- 14.6 When considering impairment of fitness to practise, the Committee must have regard to public interest considerations. In *PSA v Nursing and Midwifery Council (Grant)* [2011] EWHC 927, the High Court said that, in deciding whether fitness to practise is impaired, the Committee should ask themselves "*Not only whether the registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case.*"
- 14.7 In addition to this, the Committee must have regard to whether a practitioner is fit to practise unrestricted in their current state. In *GOC v Clarke* [2018] EWCA Civ 1463, the High Court said that in the consideration of current impairment the concept of fitness to practise is whether a practitioner is fit to practise currently rather than a deliberation of whether there is any likelihood of a return to practise, and thereby any risk occasioned by that.
- 14.8 (The above guidance on impairment is taken from *Cohen v General Medical Council* [2008] EWHC 581; *Zygmunt v General Medical Council* [2008] EWHC 2643; *Azzam v General Medical Council* [2008] EWHC 2711; *Cheatle v General Medical Council* [2009] EWHC 645; *Yeong v General Medical Council* [2009] EWHC 1923; *PSA v Nursing and Midwifery Council (Grant)* [2011] EWHC 927).

INTERIM ORDERS

15. Interim orders (s13L)

- 15.1 Where the Fitness to Practise Committee is satisfied that it is necessary for the protection of the public, or is otherwise in the public interest, or is in the interests of the registrant, for his/her registration to be suspended, or made subject to conditions, or an entry relating to a speciality or proficiency to be removed temporarily or made subject to conditions, it may make the following orders:
- a. Suspension of registration for a period not exceeding 18 months;
 - b. Temporary removal of an entry relating to a speciality or proficiency for a specified period not exceeding 18 months (together with (a) an interim suspension order); or
 - c. The registrant's registration or the entry relating to a speciality or proficiency made conditional on the registrant's compliance for a specified period not exceeding 18 months with such requirements as the Committee think fit to impose (an order for interim conditional registration).
- 15.2 The High Court has considered the three "limbs" of the grounds on which an interim order may be made, (ie. public protection, public interest and the interests of the registrant), and has considered whether a registrant can only be suspended on public interest grounds if this was "necessary". The High Court indicated that while the legislation allows an interim order on public protection grounds only if this is "necessary", there is no such qualification to the public interest limb. (*Sandler v General Medical Council* [2010] EWHC 1029).
- 15.3 However, care must be taken to explain how an order intended to safeguard public confidence is proportionate, bearing in mind the interim nature of the relief, as the public interest considerations could be fairly reflected by an appropriate decision at the final hearing. (*Sosanya v General Medical Council* [2009] EWHC 2814 (Admin) *Patel v General Medical Council* EWHC 3688 and *Houshian v General Medical Council* [2012] EWHC 3458).
- 15.4 In considering an application for an interim order, the Committee should first consider whether any order should be made. If the Committee answers this affirmatively, then it should consider whether an interim order of conditions is the most appropriate response. Only if the Committee are of the view that conditions will not meet the risks identified should it impose a period of suspension.
- 15.5 When deciding whether to impose an interim order, the Committee must take into account the following:
- a. The effect which any order might have on the registrant. Interim orders have been described as a draconian measure, and the Committee must balance the need for an order against the consequences which an order would have for the registrant and satisfy themselves that the

consequences are not disproportionate to the risk from which they are seeking to protect the public (*Madan v General Medical Council [2001] EWHC Admin 57* and *Scholten v General Medical Council [2013] EWHC 173 (Admin)*.)

- b. When considering an interim order, the Committee is not making findings of fact nor making findings as to whether the allegations are or are not established. The Committee can receive evidence from the registrant that an allegation is manifestly unfounded or manifestly exaggerated but the Committee should not decide on credibility or the merits of a disputed allegation; that is a matter for the substantive hearing. It is sufficient for the Committee to act, if they take the view that there is a prima facie case and that the prima facie case, having regard to such material as is put before them by the registrant, requires that the public be protected by an interim order (*R (George) v General Medical Council [2003] EWHC 1124 paragraph 42*; *Perry v Nursing and Midwifery Council [2013] EWCA Civ 145*).
 - c. As regards the amount of evidence before the Committee, the High Court has indicated that it would expect the allegation to have been made or confirmed in writing, although it may not yet have been reduced to a formal witness statement. The Committee will need to consider the source of the allegation and its potential seriousness. An allegation that is trivial or clearly misconceived should not be given weight (*General Medical Council v Sheill [2006] EWHC 3025*).
 - d. The High Court has also indicated that, where a registrant has been charged with a criminal offence, the Committee will not always be obliged to hear evidence or submissions as to any alleged weaknesses in the criminal case. The Committee can proceed on the basis that the Crown Prosecution Service has concluded there was sufficient substance in the matter to justify charges being brought (*Fallon v Horse Racing Regulatory Authority [2006] EWHC 2030*).
 - e. The primary purpose of an interim order is to protect members of the public. 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) (see *R (Shiekh) v General Dental Council [2007] EWHC 2972*). Even in very serious cases, the Committee must consider whether the public can be protected by conditions, such as restricting patient contact instead of a suspension order (see *Bawa- Garba v General Medical Council [2015] EWHC 1277 (QB)*).
- 15.6 An interim order determination does not need to be lengthy, but it should identify any relevant factors as listed above including details of the allegations against the registrant, the decision reached by the Fitness to Practise Committee and its reasons for them. The determination should clearly explain the proportionality of any or no interim action in respect of the identified risks (and the degree of potential harm) posed by the registrant in the specific circumstances of the case.
- 15.7 When setting the length of an interim suspension or conditional registration order, the Committee should bear in mind the length of time the Council requires

to bring the matter to a final substantive hearing which can, in some cases, be over 12 months. If a substantive hearing in the matter cannot be held before 18 months expires from the setting of the interim order (or before the expiry of an order that is imposed for less than 18 months), the Council will be required to apply to the High Court for an extension. The maximum period should not be specified as a default, and the period must be justified on the individual facts of the case. (*Harry v General Medical Council [2012] EWHC 2762*).

- 15.8 Where an order is to be made, the Committee should direct that a review be undertaken before the expiry of the six month period. Under s13L(9)(b) following a High Court extension of an order, the Committee must review the order within three months from the date of the HC extension.

Interim order review determinations

- 15.9 Interim orders may require review hearings for a number of reasons. There must be a six monthly review of ongoing interim orders and there may be an earlier review under s13L(3)(a)(ii) or (b) if there is new evidence. There also needs to be reviews if a case has an interim order but it is no longer proceeding to a Fitness to Practise Committee (see -15.14).

- 15.10 Upon a review, the Committee may:

- a. Continue the order
- b. Revoke the order
- c. Vary conditions
- d. Replace an interim conditional order with an interim suspension order (and vice versa)

- 15.11 A determination of an interim order review hearing must contain as much detail as is necessary to enable a reader to understand the details of the review hearing in isolation of previous determinations. A brief history of the case assists the reader to understand the background to the matter. A committee's determination should include:

- a. Details of the initial allegations against the registrant.
- b. A brief summary of the initial findings.
- c. Any actions taken by the registrant since the last hearing.
- d. Any decisions reached by the Committee and its reasons for them.

Revocation of interim orders

- 15.12 Any existing interim order will not automatically lapse on the making of a subsequent substantive order. The Committee at a substantive hearing must, therefore, revoke any interim order immediately after it has determined the allegation (Section 13L (11) of the Opticians Act 1989).

Interim orders when a referral to the Committee has been terminated under Rule 16

- 15.13 Where an allegation has been referred to the Fitness to Practise Committee, under Rule 16, the case examiners may review the allegation and direct the registrar that the allegation should not be considered. This may happen after the Committee has already made an interim order against the registrant under Rule 17.
- 15.14 If a referral to the Committee is cancelled when it has already made an interim order against the registrant, the Committee is required to hold a review hearing and should revoke the interim order using its powers in Section 13L.
- 15.15 If multiple allegations against the registrant have been referred to the Committee but the case examiners have directed that only one or some of the allegations should no longer be considered by the Committee, the Committee must use the interim order review hearing to determine whether the remaining allegations meet the above requirements for an interim order. The Committee may decide to continue the interim order or to vary or revoke the interim order.

PART A: FITNESS TO PRACTISE HEARINGS

16. The process

- 16.1 At a substantive hearing the following process is to be followed. Once the Fitness to Practise Committee has heard the evidence, it must decide and prepare a written determination in respect of each decision as to:
- a. Whether the facts alleged have been found proved.
 - b. Whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance, or that he/she has adverse physical or mental health (where the allegation relates to a criminal conviction, stages (a) and (b) are in effect merged as a conviction is itself a ground for impairment).
 - c. Whether the misconduct, conviction, deficient professional performance, or adverse physical or mental health, leads to a finding that the registrant's fitness to practise is currently impaired.
 - d. What sanction (if any) is to apply.
 - e. Whether an immediate order should be imposed.

17. Private hearings

- 17.1 Where the Fitness to Practise Committee is not considering a health allegation, Rule 25 states that Committee hearings must be held in public unless it considers it appropriate for the hearing to be held in private. When considering whether to hold the hearing in private, or for part of a hearing to be in private, the Committee must have regard to the interests of the maker of the allegation, any witness or patient concerned and the registrant, as well as the wider circumstances and the public interest.
- 17.2 Where the Committee is considering the registrant's health, the hearing must be in private unless the Committee considers it appropriate to meet in public, again having regard to the interests of the maker of the allegation, any witness or patient concerned and the registrant, as well as the wider circumstances and the public interest.
- 17.3 "Considering the registrant's health" may be broader than considering allegations of adverse physical or mental health, such as where the registrant raises health evidence in mitigation.
- 17.4 There may be certain types of allegations where the Committee is more likely to consider a private hearing. For example, allegations that are of a particularly sensitive nature or involving sexual allegations. However, the Committee should also consider its powers under Rule 41 regarding vulnerable witnesses.

- 17.5 As with any public hearing, the Committee should be careful to respect the privacy of any patients involved in the allegations and not to refer to the names or personal details of individuals whose details have been redacted from the material being considered. It should be noted that, according to *GMC v BBC [1998] 1 WLR 1573*, a committee hearing cannot be considered in court for the purposes of the Contempt of Court Act 1981.
- 17.6 Journalists may attend public hearings. Journalists are members of the public and should not be treated any differently to any other member of the public.

18. Bias

- 18.1 Article 6 of the European Convention on Human Rights, as well as English common law, entitles everyone to a fair hearing by an independent and impartial tribunal. This also applies to registrants in professional regulatory hearings and the Committee.
- 18.2 It is important that Committee members are aware of anything that might give rise to a bias on their part to ensure that the registrant receives an impartial hearing. It is the responsibility of the Committee members to bring to the attention of the parties any potential conflict about which only they might know. (For example, in relation to proposed witnesses or some other interest in or knowledge of the facts which are to be considered). The long established principle in *Porter v Magill [2001] UKHL 67* has been confirmed in *Rasool v General Pharmaceutical Council [2015] EWHC 217*, that the test for whether a committee member may be biased is whether "*a fair-minded observer, having considered the relevant facts, would conclude that there was a real possibility that the [Committee] was, consciously or subconsciously biased. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge is biased [...] The appearance of independence and impartiality is just as important as the question of whether these qualities exist in fact. Justice must not only be done, it must be seen to be done*". This makes it clear that the test relates to actual bias as well as the appearance of it.
- 18.3 Whether a committee member should recuse themselves is a decision to be taken by the Committee as a whole and not the individual member. The subjective views of the Committee member in question as to whether they feel able to decide the case with impartiality are to be given limited weight.

19. Proceeding in the absence of the registrant and adjournments

- 19.1 Rule 22 states that:

"Where the registrant is neither present nor represented at a hearing, the Fitness to Practise Committee may nevertheless proceed if:-

- a. It is satisfied that all reasonable efforts have been made to notify the registrant of the hearing in accordance with section 23A and rule 61; and*
- b. Having regard to any reasons for absence which have been provided by the registrant, it is satisfied that it is in the public interest to proceed."*

- 19.2 This must be considered as a two stage test. Firstly, whether all reasonable efforts have been made to notify the registrant of the hearing and then whether, in all the circumstances, it is appropriate to proceed in the absence of the registrant and any representatives.
- 19.3 *R v. Jones* [2002] UKHL sets out that the discretion to proceed in the absence of the registrant should be done with great care; that this discretion should be exercised in favour of proceeding in a registrant's absence only in rare and exceptional circumstances.
- 19.4 Relevant factors to consider may include:
- a. The nature and circumstances of the registrant's absence, in particular whether he or she has voluntarily waived their right to attend;
 - b. The seriousness of the allegation;
 - c. Whether an adjournment has been requested, the likely length of any such adjournment and whether an adjournment might result in the defendant attending future proceedings;
 - d. The risks of reaching the wrong conclusion about either the registrant's absence or the wrong conclusion in the substantive case; and
 - e. The general public interest and the interests of witnesses in ensuring that hearing should take place without undue delay.
- 19.5 The more recent professional regulatory case of *General Medical Council v Adeogba* [2016] EWCA Civ 162 expanded on the criminal factors and assists with principles to be applied in the context of professional regulation. The High Court acknowledged that the main statutory objective of the Regulator must also be considered in such circumstances, meaning that the fair, economical, expeditious and efficient disposal of allegations made against practitioners is of very real importance. Further, the High Court recognised that it would “*run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process.*”
- 19.6 The Committee may also wish to consider practical steps such as the Hearings Officer contacting the registrant to confirm that they are not attending and to consider whether they are represented.
- 19.7 If the registrant is absent due to ill health, the Committee should consider the registrant's evidence for this and any challenges to the evidence. The case law suggests that, if on the balance of probabilities the Committee considers that the registrant is unwell and his/her absence is involuntary, it will usually be appropriate for the Committee to adjourn the hearing unless the registrant is represented and asks that the hearing should go ahead. It may be appropriate to make clear whether medical evidence will be required to support future applications.

20. Evidence and the standard of proof

- 20.1 Rule 38 establishes the standard of proof to be applied by the Fitness to Practise

Committee when making findings of fact:

"The standard of proof applicable to proof of any facts alleged by the Council at substantive hearings before the Fitness to Practise Committee is the standard applicable in civil proceedings."

- 20.2 The standard of proof used in criminal proceedings, and used in Fitness to Practise proceedings by the GOC before 3 November 2008, was proof beyond reasonable doubt. In civil proceedings, the standard of proof is proof on the balance of probabilities; a fact will be established if it is more likely than not to have happened. The civil standard of proof has been used in Fitness to Practise proceedings by the GOC since 3 November 2008 when the previous Rule 50A came into force.
- 20.3 It is only in relation to findings of fact that the standard of proof has any relevance. Questions as to whether or not, in the light of those findings, the registrant has acted in a way which amounts to misconduct, deficient professional performance, or adverse physical or mental health are a matter of judgement in respect of which the standard of proof is not relevant. The same is true regarding the decision as to whether the registrant's fitness to practise is impaired and what sanction is to apply (*CHRP v GMC and Biswas* [2006] EWHC 464).
- 20.4 The standard of proof is not relevant for interim orders where no findings of fact are made. Nor is it relevant where there is no dispute as to the facts. The standard of proof is only relevant where there are facts in dispute between the parties.

The application of the standard of proof

- 20.5 Case law has made clear that there is only one civil standard of proof (ie. proof that the fact in issue more probably occurred than not), and it is finite and unvarying. There is no "sliding scale", and the standard of proof does not vary depending on the seriousness of the allegations (*In re B (Children)*[2008] UKHL 35 and *In re Doherty* [2008] UKHL 33).
- 20.6 The application of the civil standard of proof was considered by the House of Lords in the case of *In re Doherty* [2008] UKHL 33. Lord Carswell stated:
- "...in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place..., the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from the acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or an especially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

- 20.7 When considering whether something is more likely than not to have occurred, the Committee should bear in mind that there is no *necessary* connection between the seriousness of what is alleged and inherent probability. Lord Hoffman said (*In Re B*, approved in *S-B Children*) "It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probably that one rather than the other was the perpetrator".
- 20.8** Considering the potential consequences for the registrant during the fact finding stage does not mean that the Committee makes a decision on sanction at this stage. The potential consequences for the registrant are simply a corollary of the seriousness of the allegations presented to the Committee. Any final decision in relation to sanction can only be taken by the Committee at the final stage of the process once both parties have had an opportunity to make further submissions on the appropriate outcome.

Admissibility of evidence

- 20.9 Rule 40 of the Fitness to Practise Rules sets out what evidence the Committee may hear. It may "admit any evidence it considers fair and relevant to the case before it, whether or not such evidence would be admissible in a court of law" (Rule 40(1)). However, if the evidence would not be admissible in a civil court, the Committee should not admit it unless, having considered the advice of the legal adviser, the Committee believes that its duty to make due inquiry makes it desirable to hear the evidence (Rule 40(2)).
- 20.10 Production of a certificate (e.g. memorandum of conviction/ certificate of conviction) to illustrate that the practitioner has been convicted of a criminal offence will stand as conclusive evidence of the offence committed. (Rule 40(3)).
- 20.11 Production of a certificate signed by an officer of a regulatory body that has made a determination about the fitness to practise of a practitioner shall be conclusive evidence of the facts found proved in relation to that determination. (Rule 40(4)).
- 20.12 Therefore, the Committee cannot look behind a criminal finding and must accept it as evidence. However, civil findings will not be accepted as conclusive evidence and must be proved during the Fitness to Practise hearing.

Hearsay

- 20.13 On many occasions a witness will attend a hearing in person, so that both the registrant and the case presenter can examine and cross-examine them and the Committee may ask questions. However, if a witness cannot attend the hearing, the Committee may decide to admit their written statement as hearsay evidence. Hearsay evidence can only be admitted when the Committee is satisfied that it is fair to do so. What is fair will depend on the circumstances of each case and, in particular, on the seriousness and gravity of the allegations and the importance of the hearsay evidence to any disputed facts or allegations. The court in *R (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin) stated that:

"in the absence of a problem in the witness giving evidence in person or by video link, or some other exceptional circumstance, fairness requires that in disciplinary proceedings a person facing serious charges, especially if they amount to criminal offences which if proved are likely to have grave adverse effects on his/her reputation and career, should in principle be entitled by cross-examination to test the evidence of his accuser(s) where that evidence is the sole or decisive evidence relied on against him."

- 20.14 The Committee may decide to admit hearsay evidence but to give it less weight than evidence where both parties have been able to examine the witness.

However, it may not always be a sufficient answer to the objection to admissibility (*Thorneycroft v NMC [2014] EWHC 1565*). The Committee will also need to consider why the witness is not attending the hearing, and whether the GOC has tried to secure their attendance (*Ogbonna v NMC [2010] EWCA Civ 1216*).

- 20.15 While there are no hard rules on when it would be unfair to admit hearsay evidence, and there is no absolute right to cross-examine a witness, the courts have been reluctant to allow hearsay evidence when its use has been challenged by the registrant and where hearsay is the only evidence to support a disputed charge. “*Particular caution must be exercised if the hearsay evidence is also anonymous. The High Court has stated that it is difficult to conceive of circumstances in which the admission of significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirements of fairness*”. (*R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin)*, *Ogbonna v NMC [2010] EWCA Civ 1216*, *White v NMC [2014] EWHC 520*).

Vulnerable witnesses

- 20.16 The Committee should be aware that some witnesses before it may be considered vulnerable. This might include children, young people, those with mental disorders or physical disabilities, or witnesses who were the victims in cases where the allegations are of a sexual nature (see Rule 41(1)). In such cases, the Committee may take measures to allow it to hear evidence from a vulnerable witness, including video links, interpreters or screens. Where the allegations are of a sexual nature the registrant may not directly cross-examine a witness who was a victim without their written consent.
- 20.17 When considering what measures to put in place for a vulnerable witness, the Committee will again need to consider what is fair for the parties involved. Cases involving vulnerable witnesses may be suitable for a procedural directions hearing.

21. Dishonesty

- 21.1 The GOC’s Code of Conduct for individual registrants and the new Standards document both state that the registrant must *‘be honest and trustworthy’*. Dishonesty is particularly serious as it may undermine trust in the profession. Examples of dishonesty may include:
- a. Defrauding an employer, a colleague or an insurance company;
 - b. Defrauding the NHS (see 21.3 below);
 - c. Improperly amending or changing the detail on patient records;
 - d. Submitting or providing false references and information on a CV;
 - e. Research misconduct; or

- f. Failure to disclose to the Council or employer or PCT criminal convictions and cautions.
- 21.2 The term 'research misconduct' is used to describe a range of misconduct from presenting misleading information in publications to dishonesty in clinical trials. Such behaviour can undermine the trust that the public and the profession have in optometry as a science regardless of whether this leads to direct harm of the patient and, because it has the potential to have far reaching consequences, this type of dishonesty is particularly serious.
- 21.3 The Privy Council in *Dr Shiv Prasad Dey-v-GMC (Privy Council Appeal No. 19 of 2001)* has emphasised that:
- '...Health Authorities must be able to place complete reliance on the integrity of practitioners; and the Committee is entitled to regard conduct which undermines that confidence as calculated to reflect on the standards and reputation of the profession as a whole.'*
- 21.4 The question of whether or not a registrant's conduct is dishonest will be decided by the Committee at the fact finding stage, at which stage consideration will need to be given to: the nature of the alleged conduct and the evidence to suggest it took place; the registrant's state of mind and evidence of this; and what motivation there would be for the registrant to be dishonest².
- 21.4 There is a wide range of evolving case law in this area and, where the Committee must determine whether the registrant was dishonest, it should consider carefully any advice given or case law referred to by the Legal Adviser.
- 21.5 The most recent case of *Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC 67* puts the test for dishonesty in criminal and regulatory proceedings in line with civil proceedings. When dishonesty is in question the Committee must:
1. First ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts.
 2. When his state of mind as to knowledge or belief as to facts is established, the question, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.
- 21.6 There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.
- 21.7 *Ivey* overrides previous case law relating to dishonesty (*Hussain v GMC [2014] EWCA Civ 2246*, *PSA v HCPC and David [2014] EWHC 4657*, *Kirschner v GMC [2015] EWHC 1377*) sets out a two-stage test:
1. Whether, on the balance of probabilities, the registrant acted dishonestly by the standards of ordinary and honest members of that profession; and
 2. Whether the registrant realised (again on the balance of probabilities) that what they were doing was, by those standards, dishonest.

21.8 [Section 39 below considers sanction in relation to findings of dishonesty].

22. Mitigation

What counts as mitigation and when to take it into account?

22.1 Mitigation evidence can include evidence about the circumstances leading up to the incidents in question, as well as evidence about the registrant's previous good character and history. It may include evidence about the time lapse since the incidents occurred and evidence of actions taken to apologise for and/or address the concerns which resulted in the proceedings being brought. A demonstration of insight of those concerns coupled with actions taken to avoid

² Radeke v General Dental Council [2015] EWHC 778 (Admin)

repetition of them may also be regarded as mitigating factors. Whether a factor is a mitigating circumstance or not is entirely a matter for the Committee to determine. In each case, the Committee must consider both mitigating and aggravating features as set out in the evidence they have heard. They should also take into account any representations about these matters made on behalf of the Council and the registrant, but bearing in mind always that representations are not evidence.

22.2 Certain types of evidence may be relevant to decisions in the course of Fitness to Practise hearings (see Part 6 below).

The relevance of mitigating circumstances

22.3 Evidence of mitigating circumstances surrounding established impairment of fitness to practise can be helpful in forming a picture of how a registrant has responded to stresses in life and professional practice, which may be significant in relation to the question of fitness to practise. Evidence that lapses have been associated with extreme circumstances which no longer exist may give some degree of reassurance, but the risk of recurrence of stressful circumstances may be relevant to the evaluation of risk (and hence to your choice of sanction). (*Bawa-Garba v General Medical Council [2018] EWCH 76 (Admin)*)

Mitigating factors

The following are examples of mitigating factors:

- No impact on victim – to include both harm and potential harm*;
- Evidence that the registrant has shown insight and remorse (taking into account, where relevant, their attitude and behaviour at the hearing). This may include the registrant accepting they should have behaved differently, taking timely steps to remediate and apologise at an early stage, making efforts to prevent recurrence and demonstrating the timely development of insight during the investigation and hearing. The Committee should be aware that cultural differences and the registrant's ill health could affect how they express insight.
- If the registrant is presenting evidence that they have attempted to address or remediate the problem, the Committee should be aware that the Standards of Practice states that the registrant should do the following:
 - a. Raise concerns if patients are at risk and put matters right where possible;
 - b. Ask for advice if they are concerned that a colleague may not be fit to practise and may be putting patients at risk. If they remain concerned they must report this in line with GOC guidance and any relevant workplace policy;
 - c. Be open and honest with patients if things go wrong and respond promptly, fully and honestly to complaints and apologise where appropriate.
- The stage of the registrant's career – the Committee may consider the stage of a registrant's career, including that of students, when making decisions. Evidence that the registrant has gained insight, once they might have done things differently with the benefit of experience, may be a mitigating factor.
- The incident was spontaneous;
- The conduct was a one-off event;

- The conduct has been remediated which can take a number of forms, including coaching, mentoring or training.

* Regard may have to be given as to whether harm has been included (and proved) by the charge if this is disputed. A Fitness to Practise Committee should not make any findings in relation to 'causation' if the GOC has not pleaded the actual causative effect of the failures that they allege nor should a committee take such matters into account in determining impairment or sanction (see *El-Baroudy v GMC* [2013] EWHC 2894).

Aggravating factors

The following are examples of aggravating factors:

- The registrant lacks insight:
 - a. By refusing to apologise or accept their mistakes.
 - b. By promising to remediate, but failing to take appropriate steps, or only doing so when prompted immediately before or during the hearing.
 - c. Not demonstrating the timely development of insight.
 - d. Not telling the truth during the hearing.
- Where the incident has occurred in the light of previous findings made by the GOC or another regulator.
- Where the actions involved an abuse of trust or position.
- Where the circumstances surrounding the event are likely to lead the Committee to consider taking more serious action:
 - a. A failure to raise concerns.
 - b. A failure to work collaboratively with colleagues.
 - c. Attempting to conceal wrongdoing or mistakes.
 - d. Sexual misconduct.
 - e. Sexual offences and/or child pornography.
- Where the registrant has been dishonest.

Personal mitigation and testimonials

22.4 The Fitness to Practise Committee should consider testimonials in the light of the factual findings that have been made. Testimonials prepared in advance of a hearing need to be evaluated in the light of the factual findings made at the hearing. The Committee should consider whether the authors of the testimonials were aware of the events leading to the hearing and what weight, if any, to give to them. The Committee should also consider how long the author has known the registrant, how recently the author has had experience of the

registrant's behaviour at work and whether there is any evidence that the author has a conflict of interest in providing the testimonial.

- 22.5 The Fitness to Practise Committee should consider the relevance of testimonials, mitigating circumstances, remorse, insight and apologies in relation to the primary issue of fitness to practise. If a registrant's conduct shows they are fundamentally unsuited for registration as a healthcare professional, no amount of remorse or apologies – or indeed positive personal qualities in other respects – can “mitigate” the seriousness of that conclusion and its impact on registration. Persuasive evidence of rehabilitation and a credible commitment to high standards in the future will be directly relevant to the question of fitness to practise, to the registrant's credit, even though there may have been a lapse in the past, possibly a serious one.

Absence of evidence

- 22.6 The Fitness to Practise Committee should only take account of evidence (for example, testimonials) that is put before it and should not draw inferences from an absence of such evidence, because:
- a. There may be cultural or other reasons why a registrant would not or could not solicit testimonials from colleagues or patients, and
 - b. In any event, such inferences would be likely to be influenced by the Committee's assumptions about the sort of references that might have been produced, assumptions which are untested.

At what stage should the Committee receive personal mitigation and testimonials?

- 22.7 The Committee will need to consider what the appropriate stage is for them to take account of personal mitigation and testimonials.
- 22.8 Where there is an allegation of dishonesty, it may be appropriate for them to take into account testimonials as to a registrant's good character at the fact finding stage, when deciding the issue of dishonesty. This is because such evidence, while not a defence in itself, may be relevant to the registrant's credibility and propensity to do what is alleged (*Donkin v The Law Society [2007] EWHC 414 (Admin)* and *Wisson v Health Professions Council [2013] EWHC 1036 (Admin)*)
- 22.9 Letters of testimonial or other evidence which attests to the steps taken by the registrant to remedy the conduct which led to the hearing (for example, from professional colleagues) and evidence of the registrant's current fitness to practise, will be relevant at the point when the Committee is considering the issue of impairment. Such evidence should not be left to the sanction stage. As Mr Justice McCombe said in *Azzam v General Medical Council [2008] EWHC 2711*:

“It must behove a FTP Panel to consider facts material to the practitioner's fitness to practise looking forward, and for that purpose to take into account evidence as to his present skills or lack of them and any steps taken, since the

conduct criticised, to remedy any defects in skill. I accept ... that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at the "impairment" stage. However, the line is a fine one and it is clear to me that evidence of a [practitioner's] overall ability is relevant to the question of fitness to practise"

- 22.10 Mitigation which is purely personal in nature (ie. does not relate to work place competence) including testimonials and references will usually only be relevant at the point of considering sanction.

23. Decision making

Giving reasons in determinations

23.1 In the judgment on the registrant appeal against the GOC decision in the case of *Threlfall*, it was held that there are obligations at common law and pursuant to Article 6 of the European Convention on Human Rights for a Disciplinary Committee, in any case in which a decision is made to impose a disciplinary order, to give adequate reasons in good time. The Judge stated: "*There is a further practical reason why disciplinary Committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Health Care Professionals to consider whether to exercise its powers under section 29 of the 2002 Act*".

23.2 Generally, failings in this regard tend to fall into four main areas:

- a. Failure to explain what the allegations are in sufficient detail to enable the reader to understand the seriousness of the allegation;
- b. Failure to explain why allegations have or have not been found proved;
- c. Failure to explain why, in light of any mitigation, the registrant is or is not found to be impaired;
- d. Failure to explain why the committee feel that a particular sanction is the most appropriate sanction for them to apply.

How detailed does a determination have to be?

23.3 The amount of detail will depend on the complexity of the case. The determination should clearly set out what the facts of the case are with sufficient detail to enable the reader to understand what has been decided and why.

Findings of fact

23.4 If a decision turns on the credibility of one witness as opposed to another, then the reasons for the decision might be brief depending on the circumstances of a case. In cases where a finding may appear to be inexplicable in relation to the evidence received by the Fitness to Practise Committee, then there would be a compelling need for detailed reasons. The courts have clarified that in 'exceptional' cases, eg. where the factual background is complex or the evidence does not all go one way, more is required by way of explanation. In

particular, the reasons why a witness is or is not found to be credible must be given where the witness evidence has been inconsistent, and where the Committee considers a witness has been dishonest in the evidence they have given, this must be stated clearly and reasons given. (*Southall v General Medical Council* [2010] EWCA Civ 407 and *Casey v General Medical Council* [2011] NIQB 95 and *Yaacoub v General Medical Council* [2012] EWHC 2779 (Admin)).

What makes a good determination?

23.5 The Fitness to Practise Committee should explain fully why they have come to the decision that has been reached and why that outcome is more appropriate than any other possible outcomes. The Committee should use clear language and vocabulary so that the registrant, the other parties to the hearing and members of the public will understand the decision and the reasons for it. The Committee should consider the following before making a determination and a full explanation should always cover:

- a. A description of the allegations (a reference to the Code of Conduct may be made);
- b. An explanation of why each factual allegation was or was not found proved;
- c. An explanation of any important background facts which led the Committee to reach its conclusion;
- d. Confirmation or otherwise that the Committee has accepted any legal advice given by the legal adviser (it is particularly important to give a full explanation of the Committee's position in relation to any advice it has not accepted);
- e. Confirmation as to whether the Committee has taken into account any guidance, and if so, the extent to which that guidance has been taken into account;
- f. The Committee's conclusions on the main submissions made to it by the parties or their representatives;
- g. A clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is in dispute;
- h. Whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance or that he/she has adverse physical or mental health, and why;
- i. Whether the fitness to practise of a registrant is currently impaired, and if so, why and, if not, why not;
- j. Why and what sanctions are being imposed and how the sanction imposed protects the public;
- k. Why the Committee rejected the other sanctions available;

- l. The Professional Standards Authority (PSA) also recommends that the Committee should consider the sanction immediately above that which they are minded to impose, and give reasons why the more severe sanction is not required.
- m. Make mention of any details of good character that have been submitted;
- n. In a case where the registrant is suspended or has conditions placed on registration, whether or not a review hearing should be held with reasons, and if there will be a review, an explanation of the sort of evidence the registrant would be expected to provide at the review hearing and the issues the review panel may wish to consider;
- o. Where conditions or a suspension has been imposed and the Committee has not directed a review hearing, reasons why and what factors led the Committee to decide that the registrant will be fit to return to unrestricted practice when the conditions or suspension lapse;
- p. Whether or not to make an order for immediate conditions or suspension, with reasons and, if so, which of the grounds in Section 13I (1) or (2) the Committee is relying on;
- q. A review hearing determination should include details of the initial allegations against the registrant, a brief summary of the initial findings and the actions taken by the registrant since the last hearing. It should also include any decisions made by the Committee as to any directions or orders made and its reasons for them, and where the registrant is considered fit to return to unrestricted practise, the reasons why;
- r. Where a matter has been adjourned and an interim order imposed, quote the powers under which the order has been made.

23.6 There are many reasons that the Committee could provide and it will aid all interested parties to understand the decision. Additionally, a committee that feels obliged to give reasons is more likely to come to a reasonable outcome and it is in the Committee's own interest to produce a well-reasoned decision as it is far less likely to result in the PSA asking for additional information, unless the decision appears to be clearly inappropriate (this applies to both substantive and interim order hearings). Giving clear reasons will also avoid adverse inferences being drawn, for example by the PSA or the courts, that matters were not considered or that there was no reasonable basis for the decision.

23.7 In summary, whatever the Fitness to Practise Committee decides in a case, it needs to explain its reasons. The Committee needs to explain why it has or has not found allegations proved and why it has or has not imposed a sanction. The public, witnesses and the parties will be able to see why a particular course has been taken, even if they disagree with the outcome. The registrant and, as mentioned previously, the PSA may have the right to appeal against the Committee's decision. A complainant might also wish to apply for leave for judicial review of the decision. A full explanation of the reasons for the Committee's decision will help them decide whether to exercise that right and will help the court which has to consider any appeal.

OTHER TYPES OF HEARING

24. Review hearing – by Fitness to Practise Committee

- 24.1 A substantive review hearing will always be treated as a substantive hearing and will commence at the impairment stage. Impairment needs to be considered afresh (*Clarke v General Optical Council [2017] EWHC 521 (Admin)*).
- 24.2 The Committee should bear in mind that, as at the original hearing, orders for conditional registration (or orders varying conditions), suspension and erasure (including orders regarding entries relating to a specialty or proficiency) will not take effect until the end of the appeal period or, if an appeal has been made, before the appeal has been concluded (Section 23H).
- 24.2 The Committee will need to satisfy itself that the registrant has fully appreciated the gravity of the offence, has not re-offended and has maintained his/her skills and knowledge, and that the registrant's patients will not be placed at risk by resumption of practice or by the imposition of conditional registration (following a period of suspension or more stringent conditions).
- 24.3 The Committee should consider whether the registrant has produced any information or objective evidence regarding these matters. At a review hearing, where a registrant has not shown tenacity in pursuing targets for attendance at relevant courses in connection with conditional registration, and where the training institutions have offered to provide further tutorials to the registrant, the Committee should always consider elevating those recommendations into conditions.
- 24.4 At a review hearing, if the Committee considers that the registrant will not improve his/her performance through existing conditions without further supervision, the Committee should always consider imposing further educational or training conditions.
- 24.5 All sanctions are available to a committee at a substantive review (see s13F(7) and (13)), but the reasons for sanction must reflect the current situation and can only follow a finding that the registrant's fitness to practise remains impaired.

Under s13F(8) and (9) in a case which involves only impairment by reason of adverse physical or mental health where the review hearing is within two months of the period when the current suspension order would expire, and a registrant's name will have been suspended from the appropriate register for at least two years, the Committee may direct that a registrant's period of suspension be extended indefinitely. [Such directions are themselves subject to possible review.] Any period of interim suspension prior to a substantive sanction of suspension cannot count towards the two year period (*Okeke v Nursing and Midwifery Council [2013] EWHC 714*).

25. Restoration – by Registration Appeals Committee

- 25.1 These cases are governed by the General Optical Council (Registration Appeals Rules) Order of Council 2005 which set out the procedure for considering applications for restoration to the Register following erasure or removal by the Fitness to Practise Committee, or where an entry relating to a speciality or

proficiency has been removed. The person/body concerned is defined as the Applicant.

- 25.2 The same rules set out the separate procedures which govern appeals against decisions to refuse entry to the Register (see 26 below). Applications are made under s13K Opticians Act 1989.
- 25.3 The applicant cannot make an application until 22 months have passed since the order for erasure took effect and the restoration hearing cannot take place until 24 months have passed. Prior to making the application the applicant must have acquired the required number of Continuing Education and Training points (CET).
- 25.4 The Registration Appeals Committee can order health or performance assessments of individual applicants (but not bodies corporate). Failure to submit to or co-operate with any examination will result in the Committee "*drawing such inferences as seem appropriate to them in respect of the appeal/application*" (Rule 13). The burden is on the applicant/appellant to satisfy the Committee that they are "fit" and that their name or entry should be restored.
- 25.5 The rules governing proceedings of the Registration Appeals Committee are essentially the same as those for a Fitness to Practise Committee under the Fitness to Practise Rules. The order of proceedings in Registration Appeals is different than that from a Fitness to Practise Hearing in that the appellant/applicant (registrant) goes first. In practice, Committees have found it useful for the respondent (the Council) to address the Committee first by setting out the framework of the decision making power and the evidence on which the Council relies. If the Committee proposes to follow this route, the appellant's/applicant's agreement should be sought.
- 25.6 The Committee may direct the Registrar to restore the person's name or entry relating to a speciality or proficiency to the register (s13K(6) of the Act). Factors the Committee may wish to consider for restoration cases are:
- a. The original allegations.
 - b. The Committee's reasons for the original sanction imposed.
 - c. Has the applicant demonstrated insight?
 - d. What steps has the applicant undertaken towards rehabilitation?
 - e. How has the applicant kept up-to-date with professional knowledge and skills?
- 25.7 Decisions must be in writing with reasons (see 23).
- 25.8 Under Rule 41 the Committee may assess costs and order them to be paid by any party.
- 25.9 If during the same period of erasure, a second or subsequent application for restoration is unsuccessful, the Committee may direct that the individual's or corporate body's right to make any further such applications be suspended

indefinitely. However, the Applicant can appeal against the suspension direction and after two years of the suspension of the right to apply the applicant can apply to the Registrar for that suspension direction to be reviewed by the Registration Appeals Committee.

26. Registration Appeals – by the Registrations Appeals Committee

26.1 These cases are also governed by the General Optical Council (Registration Appeals Rules) Order of Council 2005 which sets out the procedure for considering appeals against decisions to refuse entry to the Register where the person/body concerned is referred to as the appellant.

26.2 Appealable decisions are listed in paragraph 2 of Schedule 1A of the Act.

26.3 The most common decision appealed against is the refusal to register an individual or student (ie. a decision on an application made under s8 or s8A of the Act).

26.4 An Appellant's notice of appeal must be made before the end of 28 days (starting with the date of the notice of the Registrar's decision), but an extension can be granted. The Committee has the power to receive oral and documentary evidence that was not before the Registrar which means that the nature of the appeal is a fresh consideration of the issues.

26.5 The Committee may:

- a. Dismiss the appeal;
- b. Allow the appeal and quash the decision appealed against;
- c. Substitute for the decision appealed against any other decision which could have been made; or
- d. Remit the case back to the Registrar/Council to dispose of the case in accordance with the Committee's directions.

26.6 The Committee considering the appeal may make such enquiries as they consider appropriate (paragraph 4(6) of schedule 1A of the Act).

PART B: INDICATIVE SANCTIONS GUIDANCE

27. Fitness to practise not impaired (warning) (S13F(5))

27.1 A warning may be given in a case where the fitness to practise of a registrant is found **not** to be currently impaired. When issuing a warning, the Fitness to Practise Committee should consider setting a date of expiry of the warning. A warning does not directly affect a registrant's ability to practise or undertake training but is published on the Council's website and disclosed if anyone enquires about the registrant's fitness to practise history.

27.2 A warning may be appropriate where concerns raised by the case are sufficiently serious to require a formal response, but do not reach the threshold for impairment. Care should be taken to explain why a formal response is required in the light of the finding of 'no current impairment' and the mitigating factors that may, therefore, be present. The Committee will, therefore, need to record their reasons for issuing or not issuing a warning.

27.3 Factors when a finding of no impairment has been made and a warning may be appropriate:

- a. A clear and specific breach of the Standards of Practise;
- b. That the particular conduct, behaviour or performance approaches, but falls short of the threshold for current impairment;
- c. Where the concerns are sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise;
- d. There is a need to record formally the particular concerns

If the Committee are satisfied that the registrant's fitness to practise is not impaired, they can take account of a range of aggravating or mitigating factors to determine whether a warning is appropriate. These might include:

- a. Genuine expression of regret/apology;
- b. Acting under duress;
- c. Previous good history;
- d. No repetition of behaviour since incident;
- e. Appropriate rehabilitative/corrective steps have been taken; and
- f. Relevant and appropriate references and testimonials.

28. Impaired fitness to practise, carry on business or undertake training

28.1 This guidance is designed to inform your consideration of the available options. The paragraphs which follow are, therefore, relevant when there has been a finding that the registrant's current fitness to practise is impaired and the issue is what to do about that. Where you conclude that the registrant's fitness to practise is not currently impaired and does not require any restriction on his/her registration, none of the rest of this document will be relevant to your discussions and the decision of the Fitness to Practise Committee will be to take no further action, but reasons will have to be given by the Committee in its determination.

29. Available sanctions (s13F(3) (a)-(c) and s13H)

29.1 Where fitness to practise is found to be currently impaired, the Fitness to Practise Committee may impose a sanction. The purpose of any sanction is not to punish the registrant but to protect patients and the wider public interest (see 10 above).

29.2 Where a committee finds that a registrant's fitness to practise is currently impaired, it can direct:

- a. That no further action be taken;
- b. A financial penalty (except in a health case) (which may be imposed in conjunction with another sanction);
- c. Conditions (ordinarily to be followed by a review) for up to three years;
- d. A period of suspension (ordinarily to be followed by a review) for up to 12 months; or
- e. Erasure (except in a health case).
- f. Entries relating to specialty or proficiency may be subject to conditions or removal. Where impairment is found on the ground of deficient professional performance, and the deficiency relates to the performance of a specialty or proficiency particulars of which are entered in the register, the Committee may direct that the entry relating to that specialty or proficiency be subject to conditions (for up to three years), removed temporarily (for up to 12 months) or removed (s13F(4)).

30. Proportionality

30.1 The sanction should be proportionate. This means that the sanction must be appropriate bearing in mind the interests of the public and the interests of the registrant and the seriousness of the allegations found proven against the registrant. Whatever sanction the Committee decides on should be reached after considering all of the facts of the particular case. This includes taking account of any aggravating and mitigating features of the allegation, together with any personal mitigation put forward by the registrant. In deciding what

sanction is appropriate, the Committee should consider them in ascending order, starting with the least severe. The Committee must only then move on to the next sanction if the one under consideration is not sufficient in terms of dealing adequately with the issues identified. The PSA also recommends that the Committee should consider the sanction immediately above that which they are minded to impose, and give reasons why the more severe sanction is not required in the public interest.

- 30.2 When considering a proportionate sanction for a student registrant, the Committee may consider the stage of a registrant's career/training when making decisions. Whether they have gained insight once they have had an opportunity to reflect on how they might have done things differently, with the benefit of experience and/or further training, may be a mitigating factor. However, in cases involving serious concerns about a registrant's performance or conduct, or serious dishonesty, the stage of a registrant's training will have a more limited influence on a committee's decision on what action to take.
- 30.3 When considering a proportionate sanction for a business registrant, the Committee may need to have sought information on how the business operates and is registered. Any sanction should focus on public protection and the public interest.

The following sections of this guidance set out the basis of each of the sanctions in turn.

31. No further action

- 31.1 Where a registrant's fitness to practise is impaired, the Fitness to Practise Committee would usually take action in order to protect the public interest (protection of patients, maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour).
- 31.2 There may, however, be exceptional circumstances in which a committee might be justified in taking no action. Such cases are likely to be very rare. In order to be 'exceptional', circumstances must not be routinely or normally encountered (*R –v- Kelly (Edward) [2000] QB 198*) and reasons must be given as to what the relevant circumstances are, why they are considered exceptional and why they mitigate against action being taken.
- 31.3 No action might be appropriate in cases where the registrant has demonstrated considerable insight into his/her behaviour and has already embarked on, and completed, any remedial action the Committee would otherwise require him/her to undertake. The Committee may wish to see evidence to show that the registrant has taken steps to mitigate his/her actions.
- 31.4 In such cases it is particularly important that the Committee's determination sets out very clearly the reasons why it considered it appropriate to take no action, notwithstanding the fact that the registrant's fitness to practise was found to be impaired.

32. Financial penalty orders (s13H)

- 32.1 The Fitness to Practise Committee has the power to impose a financial penalty order of any sum not exceeding £50,000. The order may be made in addition to, or instead of, an erasure order, suspension or conditional registration order.
- 32.2 When making a financial penalty order, the Committee must specify the period or date within which the sum is to be paid.
- 32.3 Where the Committee is considering making such an award against an individual registrant, the registrant's ability to pay and, in the case of business registrants, the size and financial resources of the business should be taken into account.
- 32.4 There may be some types of allegations where a financial penalty order is more appropriate, for example, where the misconduct was financially motivated and/or resulted in financial gain.

33. Conditional registration (maximum 3 years) (s13F(3)(c) and 4(c))

Consider: Will imposing conditions be sufficient to protect patients and the public interest?

- 33.1 The primary purpose of conditions should be to protect the public. In such circumstances, conditions might include requirements to work under supervision. It should also be taken into consideration that the registrant may change his field of practice so the conditions placed upon him should not be restricted to just his current field of practice, or rely on him being currently employed (*Perry v Nursing and Midwifery Council [2012] EWHC 2275*).
- 33.2 Conditions might be most appropriate in cases involving a registrant's health, performance, or where there is evidence of shortcomings in a specific area or areas of the registrant's practice.
- 33.3 Conditions on the registrant's registration may be imposed up to a maximum of three years. Conditional registration allows a registrant to return to practice under certain conditions, for example, no longer being able to carry out certain procedures. Conditions may also make positive requirements of a registrant, such as a requirement to undergo training in a particular area of their practice.
- 33.4 Where the Fitness to Practise Committee has identified that there are significant shortcomings in the registrant's practice or evidence of incompetence exists, the Committee should satisfy itself that the registrant would respond positively to retraining which would thus allow the registrant to remedy any deficiencies in practice whilst protecting patients. When assessing the potential of using conditions, the Committee would need to consider objective evidence submitted on behalf of the registrant or such evidence that is available to them about the registrant's practice.
- 33.5 The objectives of any conditions placed on the registrant must be relevant to the conduct in question and any risk it presents, and should be made clear so that the registrant understands what is expected of him/her. This is also important to

help the Committee at future review hearings understand the original concerns and the exact proposals to resolve them. With these established it will be easier to evaluate whether the aims have been achieved. Any conditions should be appropriate, proportionate, workable and measurable, and should be discussed fully by the Committee before imposing them.

- 33.6 In drafting conditions, the Committee should place the onus of complying with them on the registrant. The Committee should not draft conditions which require a third party (including the Council) to undertake specific tasks, since the Committee has no jurisdiction over those third parties. Where the conditions require the involvement of a third party (such as a supervisor or medical professional), the Committee should consider the willingness or potential willingness and capacity of this third party to co-operate. Further, the Committee should not impose conditions which are tantamount to a suspension.
- 33.7 Many conditions will require the registrant to have some form of supervisor. A learning supervisor might be appropriate for a student, a workplace supervisor for an employed registrant and a professional colleague for a sole practitioner or a locum practising at a number of locations.
- 33.8 A bank of conditions which can be considered by a committee is shown at the end of this document.
- 33.9 This sanction may be appropriate when most or all of the following factors are apparent (this list is not exhaustive):
- a. No evidence of harmful deep seated personality or attitudinal problems;
 - b. Identifiable areas of registrant's practice in need of assessment or retraining;
 - c. Evidence that registrant has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision;
 - d. Potential and willingness to respond positively to retraining;
 - e. Patients will not be put in danger either directly or indirectly as a result of conditional registration itself;
 - f. The conditions will protect patients during the period they are in force; or
 - g. It is possible to formulate appropriate and practical conditions to impose on registration and make provision as to how conditions will be monitored.

Conditions - educational

- 33.10 Before imposing educational conditions the panel should satisfy itself that:
- a. The problem is amenable to improvement through education;
 - b. The objectives of the conditions are clear; and

- c. A future committee will be readily able to determine whether the educational objective has been achieved and whether patients will or will not be avoidably at risk.

33.11 When imposing conditional registration it is also normally appropriate to direct a review hearing (see section 35 below on Review Hearings).

33.12 If the Committee directs conditional registration, (or in cases based on deficient professional performance, a direction that an entry relating to a specialty or proficiency be made conditional) it should also consider whether the conditions should take effect immediately, and give reasons for its decision (see section below on immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure) (s13I)).

34. Suspension (maximum 12 months) (s13F(3)(b) or (4)(b))

Consider: Does the seriousness of the case require temporary removal from the register? Will a period of suspension be sufficient to protect patients and the public interest?

34.1 This sanction may be appropriate when some or all of the following factors are apparent (this list is not exhaustive):

- a. A serious instance of misconduct but where a lesser sanction is not sufficient;
- b. No evidence of harmful deep-seated personality or attitudinal problems;
- c. No evidence of repetition of behaviour since incident;
- d. The panel is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour;
- e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant was allowed to continue to practise even under conditions; or

34.2 If the Committee directs a period of suspension, (or in cases based on deficient professional performance, temporary removal of an entry relating to a specialty or proficiency) it should also consider whether the suspension should take effect immediately and give reasons for its decision (see section above on immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure) (s13I)).

34.3 While the Committee is only able to suspend a registrant for up to 12 months, it should also be aware that any future review hearing may extend the suspension for up to another 12 months (s13F(7) and *HK v General Pharmaceutical Council [2014] CSIH 61*³). However, any extension of suspension must be based on the registrant's fitness to practise at the time of the review, rather than at the time of the initial finding of impairment.

³ This case is subject to an appeal to the Supreme Court (to be heard in 2016)

35. Directing a review hearing

- 35.1 The Committee should normally direct that there be a review of a conditional order or a suspension order before they expire. This is because before a suspension or conditions are lifted, the Fitness to Practise Committee will need to be reassured that the registrant is fit to resume practice either unrestricted or with conditions or further conditions. Also, where conditions have been imposed, the registrant must demonstrate to the Committee that they have satisfied the conditions imposed at the previous hearing (*Bangbelu v General Dental Council* [2013] EWHC 1169).
- 35.2 Where the Committee has made a decision not to direct a review hearing, it should explain why and detail the factors which led it to decide that the registrant would be fit to resume unrestricted practice when the suspension or conditions expire.
- 35.3 Where it directs a review hearing, the Committee may wish to give guidance, or clarify its expectations regarding the evidence or matters the review panel may find useful to take into account in reconsidering the case. This is non-binding and cannot form the basis of an appeal against the decision, but may assist the registrant and the future committee. (*Ferguson v NMC* [2011] EWHC 1456 and *Levy v GMC* [2011] EWHC 2351 (Admin)).

36. Erasure (s13F(3)(a))

Consider: Is erasure the only sanction which will be sufficient to protect patients and the public interest? Is the seriousness of the case compatible with ongoing registration? Can public confidence in the profession be sustained if this registrant is not removed from the register?

- 36.1 Erasure cannot be imposed in cases where impairment is only by reason of adverse physical or mental health.
- 36.2 Erasure from the register is appropriate where this is the only means of protecting patients and/or maintaining public confidence in the optical profession. The Privy Council (*Bijl v GMC (Privy Council Appeal No. 78 of 2000)*), however, has emphasised that a committee should not feel it necessary to remove:
- “...an otherwise competent and useful [registrant] who presents no danger to the public in order to satisfy [public] demand for blame and punishment.”
- 36.3 But this should be weighed against the words of Lord Bingham (*Bolton v Law Society*, adopted by the Privy Council in the case of *Dr Gupta* [2001]):
- “The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”
- 36.4 The same judgement emphasised the Committee’s role in maintaining confidence in the profession, and in particular that erasure was appropriate despite a practitioner presenting no risk.

36.5 This sanction is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional and involves **any** of the following (this list is not exhaustive):

- a. Serious departure from the relevant professional standards as set out in the Standards of Practice for registrants and the Code of Conduct for business registrants;
- b. Doing serious harm to individuals (patients or otherwise), either deliberately or through incompetence, and particularly where there is a continuing risk to patients;
- c. Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients;
- d. Offences of a sexual nature, including involvement in child pornography;
- e. Offences involving violence;
- f. Dishonesty (especially where persistent and covered up); or
- g. Persistent lack of insight into seriousness of actions or consequences.

36.6 If the Committee directs erasure (or in cases based on deficient professional performance, removal of an entry relating to a specialty or proficiency), it should also consider whether erasure or removal should take effect immediately, and give reasons for its decision (see section above on Immediate orders for conditions or suspension (where direction made for conditional registration, suspension or erasure)(s13I)).

TYPES OF CASE AND INDICATIVE SANCTIONS

37. Sexual misconduct

37.1 A wide range of conduct is encompassed in this category, from criminal convictions for sexual assault, sexual abuse of children (including child pornography), to sexual misconduct with patients, patients' relatives or colleagues. The risk to patients is vitally important and the misconduct is particularly serious where there is an abuse of the registrant's special position of trust, or where a registrant has been registered as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases.

38. Indecent images of children

38.1 Taking, making, distributing or showing with a view to being distributed to publish, or possession of, an indecent photograph or pseudo-photograph of a child is illegal and regarded as morally unacceptable. For these reasons, where there is any involvement in these offences by a registrant, the Committee should consider whether the public interest demands that their registration be affected.

38.2 Offences of this sort vary considerably according to the sort of material possessed and the Committee need to know exactly what the registrant did possess. There is considerable difference between possession of pictures at the different levels of the Oliver scale (*R v (1) Oliver (2) Hartrey (3) Baldwin - [2003] EWCA Crim 2766*) and the Committee should know how many pictures would be classified at each level (graded from 1 (lowest level) to 5 (highest level)). In the *Fleischmann* case, the judge ruled that the sanction of 12 months suspension in a matter involving a conviction for possession of a large collection of indecent images of children at varying levels, including some at the highest levels, was unduly lenient. He felt that erasure was the only appropriate sanction in this case. The judge felt that the Committee had failed to appreciate the significance of the sentence imposed by the Crown Court. The judge went on to say that as a general principle where a practitioner has been convicted of a serious criminal offence or offences, he should not be permitted to resume his practice until he has satisfactorily completed his sentence. However, in *Obukofe v GMC [2014] EWHC 498 (Admin)*, the judge clarified that, while it would generally be inappropriate for a registrant to return to practise when there was still some form of criminal sentence outstanding, this would not necessarily apply to the period for which they remained on the Sex Offenders Register.

38.3 The judge also expressed concern about the Committee taking account of the registrant's defence that he/she was suffering from depression at the time of the offences. He said that the gravity of such offending is not reduced by the asserted motivation. In short, other people who have suffered from depression have not resorted to such criminal behaviour.

38.4 A conviction for these offences is a matter of grave concern and it is, therefore, highly likely that the only proportionate sanction will be erasure. The Committee, however, must bear in mind this guidance and the issue proportionality. If it

decides to impose a sanction other than erasure, it is important that it fully explains the reasons for doing so.

39. Dishonesty

- 39.1 There is no blanket rule or presumption that erasure is the appropriate sanction in all cases of dishonesty. The Committee must balance all the relevant issues in a proportionate manner whilst putting proper emphasis on the effect a finding of dishonesty has on public confidence in the profession (*R (on the application of Hassan) v General Optical Council* [2013] EWHC 1887 (Admin and *Siddiqui v General Medical Council* [2013] EWHC 1883)).

40. Candour

- 40.1 In October 2014 the GOC, together with most of the other healthcare regulators made a statement that optometrists and dispensing opticians should be open and honest with patients when something goes wrong with their treatment or care which causes, or has the potential to cause, harm or distress. This professional duty of candour is now expressed in the Council's Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students, which require that registrants must "*be candid when things have gone wrong.*" This includes telling the patient that something has gone wrong, offering an apology or support, explaining the effects of what has been done and outlining the actions that will be taken to prevent reoccurrence. This is part of a wider culture of candour in the healthcare sector since the findings of the Francis Inquiry in 2013. Similarly, registrants are expected to raise any concerns they may have about the actions or conduct of their colleagues, including their fitness to practise, as part of a broader culture of candour, and in accordance with the Standards.
- 40.2 Failure to comply with this standard should be treated seriously. Being open and honest with patients is a patient right and is central to professionalism. A breach of this standard will normally be charged as a specific factual allegation. In these situations, the Committee should consider whether the registrant complied with the standard on candour as part of determining the facts, and any breach of the standards that might amount to misconduct.

41. Failing to provide an acceptable level of patient care and persistent clinical failure

- 41.1 Matters in this category are where the registrant has not acted in the patient's best interests and has failed to provide an adequate level of care, falling well below the professional standards expected of a registered optometrist or dispensing optician, and where a persistent failure to provide clinical care is apparent.
- 41.2 A particularly important consideration in such cases is whether or not a registrant has (or has the potential to develop) insight into these failures. Where this is not evident, it is likely that conditions on registration or suspension may not be appropriate or sufficient.

41.3 Remediation can take a number of forms including coaching, mentoring, training and rehabilitation and, where fully successful, will make impairment unlikely. However, there are some cases where a registrant's failings are irremediable. This is because they are so serious or persistent that, despite steps subsequently taken, action is needed to maintain public confidence. This might include where a registrant knew, or ought to have known, they were causing harm to patients and should have taken steps earlier to prevent this.

42. Cases involving a conviction, caution or determination by another regulatory body

42.1 Impairment of fitness to practise may be found by reason of a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence. This can include a conviction by a Court Martial. The registrant must have admitted guilt and consented to a caution in order to have been given one.

42.2 Impairment may also be based on a determination by a body in the UK responsible under legislation for the regulation of a health or social care profession, to the effect that the registrant's fitness to practise is impaired, and includes a determination by a regulatory body elsewhere to the same effect.

42.3 In cases involving convictions, cautions or determinations by another regulatory body, the purpose of the hearing is not to punish the registrant a second time for the offences committed. The purpose is to consider whether the registrant's fitness to practise is impaired and, if so, whether there is a need to impose a sanction in order to protect the public, or in the wider public interest, for example, to maintain public confidence in the profession.

42.4 The Committee should bear in mind that the sentence imposed by a criminal court, or sanction imposed by another regulatory body, is not always an accurate guide to the seriousness of the offence. There may have been particular circumstances which led that court or regulatory body to be lenient or too harsh in sentencing. For example, because it was anticipated that the registrant would be dealt with firmly by his/her regulatory body. Similarly, in the case of determinations by other regulatory bodies, the range of sanctions and how they are applied may vary significantly. While the Committee cannot question the conviction itself or the sentence given, according to *RCVS v Samuel [2014] UKPC 13*, a committee "is entitled to form its own view of the gravity of the case" and may consider the circumstances of the offence.

42.5 Some people may consider that a caution is a lower sanction than a criminal conviction and, when accepting it, the registrant may not have realised how seriously it might affect his/her professional career. However, a caution is as much a possible ground for impairment as a criminal conviction, and the Committee must judge each individual case on the evidence before it.

42.6 In *O v Nursing and Midwifery Council [2015] EWHC 2949*, it was confirmed that a guilty plea in relation to a criminal conviction can be considered as a mitigating factor when considering a regulatory sanction. A not guilty plea should not be

considered as an aggravating factor in itself, as a defendant has a fundamental right to contest a criminal charge.

43. Obtaining consent

- 43.1 It is a central principle of healthcare that patients must give informed consent to any actions or treatment performed. The concept of informed consent was developed in *Montgomery v Lanarkshire Health Board (Scotland) [2015] UKSC 11* as that:

"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is, therefore, under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

- 43.2 This is a fundamental principle in healthcare and a failure to obtain consent should be treated accordingly seriously. However, the Committee may wish to consider the scale of the treatment for which consent has not been obtained, and the likelihood that the patient would have consented had they been aware of the treatment and its material risks.

44. Raising concerns

- 44.1 Failing to raise concerns internally (or to the GOC as appropriate) can lead to failures in healthcare and cause significant risk to patients. Therefore, registrants must act to prevent problems arising in the first place. It is important that there is an environment and culture where individuals are supported in raising concerns about standards of care and risks to patient safety, and this is reflected in the new Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students.

- 44.2 A committee should take very seriously a finding that a registrant did not raise concerns to the appropriate person or body where patient safety is at risk. More serious outcomes are likely to be appropriate, as set out on page 27 with reference to aggravating factors, if a registrant has failed to raise, where:

- a. There is reason to believe a colleague's fitness to practise is impaired and may present a risk of harm to patients.
- b. Patients are at risk because of inadequate premises, equipment or other resources, policies or systems.

CONSIDERATIONS AFTER SANCTION

45. Immediate orders (where direction made for conditional registration, suspension or erasure) (s13I)

- 45.1 Financial penalties, conditional registration, suspension and erasure orders cannot take effect until the end of the appeal period or, if an appeal has been made, before the appeal has been concluded. In practice, therefore, if a registrant appeals, the sanction imposed may not come into force for some months. However, the Fitness to Practise Committee has the power to impose immediate suspension or conditional registration to cover the appeal period.
- 45.2 If the Fitness to Practise Committee has made a conditional registration order, it should consider whether there are reasons for imposing immediate conditions. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant.
- 45.3 If the Committee has made a direction for suspension or erasure (or removal of an entry relating to a speciality or proficiency), it should consider whether there are reasons for ordering immediate suspension. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant.
- 45.4 If the Committee thinks there may be grounds for immediate conditions or suspension, it must inform the registrant of these concerns and invite representations on this issue from both the Presenting Officer and the registrant/registant's representative (where present). The Fitness to Practise Committee must then decide whether or not to impose an Immediate Order and give its reasons in the usual way. The Committee must always make clear in its determination that it has considered whether to make an Immediate Order and give its reasons, even if it decides that an Immediate Order is not necessary.

46. Costs and expenses (Fitness to Practise Rules 2013 Part 7)

- 46.1 At any substantive hearing or review hearing (other than a hearing to review an interim order), the Fitness to Practise Committee has the power to summarily assess the costs of any party to the proceedings and order any party (*the GOC or the registrant*) to pay all or part of the costs or expenses of any other party.
- 46.2 Where the Committee is considering making such an award against an individual registrant, the registrant's ability to pay should be taken into account. It is incumbent on the registrant to adduce all relevant evidence and to make appropriate submissions in respect of their ability to pay any such order (*Solicitors Regulation Authority v Davis and McGlinchey* [2011] EWHC 232 (Admin) and *Sharma v Solicitors Regulation Authority* [2012] EWHC 3176).
- 46.3 When considering the amount of an award against an individual registrant, the Committee may wish to consider a statement from the registrant as to their

means, and/or any publicly available information such as Companies House or Land Registry filings.

- 46.4 Before making an order for costs against the Council, the Fitness to Practise Committee should take into account the following:
- a. A professional regulatory body such as the Council is in a wholly different position from an ordinary litigant and the general rule in litigation that “costs follow the event” has no direct application.
 - b. Unless the complaint is improperly brought or, for example, proceeds, as a “shambles from start to finish”, an order for costs should not ordinarily be made against [the Regulator] on the basis that costs follow the event.
 - c. The “event” is a factor to consider but is not the starting point.
 - d. The GOC brings proceedings in the public interest and to maintain proper professional standards. “For [a Regulator] to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage”.

(Principles from *Baxendale – Walker v The Law Society* [2007] EWCA Civ 233)

Bank of Conditions

A1	<p>Standard conditions</p> <p>This section lists conditions that will commonly be relevant to all cases before the Fitness to Practise Committee.</p> <p>Its purpose is to assist Committees and encourage consistency. It does not bind Committees, who must always ensure that the conditions are relevant.</p>
A1.1 Informing others	<p>You must inform the following parties that your registration is subject to conditions. You should do this within two weeks of the date this order takes effect.</p> <ol style="list-style-type: none"> a. Any organisation or person employing or contracting with you to provide paid or unpaid optical services, whether or not in the UK (to include any locum agency). b. Any prospective employer or contractor where you have applied to provide optical services, whether or not in the UK. c. Chairman of the Local Optometric Committee for the area where you provide optometric services. d. The NHS body in whose ophthalmic performer or contractor list you are included or are seeking inclusion.
A1.2 Employment and work	<p>You must inform the GOC if:</p> <ol style="list-style-type: none"> a. You accept any paid or unpaid employment or contract, whether or not in the UK, to provide optical services. b. You apply for any paid or unpaid employment or contract to provide optical services outside the UK. c. You cease working. <p>This information must include the contact details of your prospective employer/ contractor and (if the role includes providing NHS ophthalmic services) the relevant NHS body.</p>

<p>A1.3 Supervision of Conditions</p>	<p>You must:</p> <ol style="list-style-type: none"> a. Identify a [workplace supervisor/learning supervisor] who would be prepared to monitor your compliance with numbers [specify the conditions to be monitored by the supervisor] of these conditions. b. Ask the GOC to approve your workplace supervisor/learning supervisor within [number of weeks] of the date this order takes effect. If you are not employed, you must ask us to approve your workplace supervisor before you start work. c. Identify another supervisor if the GOC does not agree to your being monitored by the proposed supervisor. d. Place yourself under the supervision of the supervisor and remain under his/her supervision for the duration of these conditions. e. At least once a [week/month] meet your supervisor to review compliance with your conditions and your progress with any personal development plan. f. At least every [three/six] months or upon request of the GOC, request a written report from your supervisor to be provided to the GOC, detailing how you have complied with the conditions he/she is monitoring. g. Inform the GOC of any proposed change to your supervisor and again place yourself under the supervision of someone who has been agreed by the GOC.
<p>A1.4 Other proceedings</p>	<p>You must inform the GOC within 14 days if you become aware of any criminal investigation or formal disciplinary investigation against you.</p>
<p>A1.5 Registration requirements</p>	<p>You must continue to comply with all legal and professional requirements of registration with the GOC. A review hearing will be arranged at the earliest opportunity if you fail to:-</p> <ol style="list-style-type: none"> a. Fulfil all CET requirements; or b. Renew your registration annually.
<p>A2</p>	<p>Health conditions (impairment by reason of ill-health)</p> <p>This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health.</p> <p>Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about his/her health.</p>

A2.1	<p>You must:-</p> <ol style="list-style-type: none"> a. Put yourself, and stay, under the medical supervision of a [specify type of practitioner, ie. general practitioner (GP)/consultant psychiatrist/occupational health practitioner]; b. Attend appointments as arranged. c. Follow their advice. d. Follow their recommended treatment. e. Inform your GP and any medical supervisor that your GOC registration is subject to conditions, and provide him/her with a copy of these conditions. f. Inform the GOC of the contact details of your GP and any specialist within [number of days] of these conditions taking effect. g. Arrange for the GOC to receive reports from your GP or medical supervisor every [number of months] or when we ask for them. h. Keep your professional commitments under review and limit your practice in accordance with your GP or medical supervisor's advice, including ceasing all practice if so advised. <p>[NOT TO BE PUBLISHED]</p>
A3	<p>Conditions for inclusion in all determinations of substance misuse</p> <p>This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health.</p> <p>Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about his/her health.</p>
A3.1	<p>You must limit your alcohol consumption in line with the directions given by your medical supervisor/GP, abstaining completely if they tell you to do so.</p> <p>[NOT TO BE PUBLISHED]</p>
A3.1	<p>You must abstain completely from the consumption of:</p> <ol style="list-style-type: none"> a. Any alcohol. b. Any drugs other than those prescribed for you, unless agreed in advance by your GP or medical supervisor. <p>[NOT TO BE PUBLISHED]</p>

A3.2	<p>You must:</p> <ol style="list-style-type: none"> a. Attend meetings of any support or counselling service [including Alcoholics Anonymous/Narcotics Anonymous], as advised by your GP or medical supervisor. b. At least [number of weeks] before the next review hearing, provide the Registrar with a copy register evidencing your attendance, signed by an officer or organiser of the support or counselling service. c. Obtain treatment from any other agency, including local substance misuse teams, as advised by your GP or medical supervisor. d. At least every [number of months], obtain a report from any treatment agency detailing the treatment provided. e. Submit a copy of the treatment to the Registrar within [seven days] of receiving it [or at least two weeks before the next review hearing]. <p>[NOT TO BE PUBLISHED]</p>
A3.3	<p>You must:</p> <ol style="list-style-type: none"> a. Arrange and undergo [type of test] for [both the recent and long-term consumption of alcohol and/or [drug]] every [number of months] until this order ends. The results of these tests should be sent promptly to the GOC. b. Comply with the programme of random testing. c. Submit test reports to the GOC within [number of] days of each test being conducted. <p>[NOT TO BE PUBLISHED]</p>
A3.4	<p>You must not possess any drugs listed in Schedules 1-5 of the Misuse of Drugs Regulations 2001 (as amended from time to time) unless your GP or medical supervisor has prescribed these or agreed to your taking these.</p> <p>[NOT TO BE PUBLISHED]</p>
A4	<p>Deficient Performance</p> <p>This section lists conditions that will commonly be relevant to cases concerning deficient professional performance.</p>

<p>A4.1 Restriction on practice</p>	<p>You must:</p> <ol style="list-style-type: none"> a. Not undertake any locum work unless agreed in advance by your workplace supervisor / professional colleague and the Registrar. b. Not carry out [name of procedure]. c. Not carry out [name(s) of procedure(s)] unless directly supervised by a [registered dispensing optician, optometrist or medical practitioner]. d. Maintain a log detailing every case where you have undertaken the above procedure, which must be signed by the person who supervised that procedure. e. With each report to the GOC from your [workplace supervisor/professional colleague], either include a copy of the signed log or confirm that you have not undertaken the above procedure(s).
<p>A4.2 Observation of procedure</p>	<p>You must:</p> <ol style="list-style-type: none"> a. Observe a [dispensing optician/ optometrist/ medical practitioner] carrying out [name(s) of procedure(s)] for [number] sessions. b. Where possible, discuss the procedure with the clinician whom you observed. c. Maintain a log detailing every attendance, which must be signed by the clinician whom you observed. d. Submit a copy of the signed log to the GOC within [number of days] of observing the required number of procedures.
<p>A4.3 Tuition</p>	<p>You must:</p> <ol style="list-style-type: none"> a. Attend a university department or other formal learning environment for [number] hours of one-to-one tuition in [name of procedure(s)]. b. Maintain a log detailing every attendance, which must be signed by the person providing the tuition. c. Submit a copy of the signed log to the GOC within [number of days] or upon request by the GOC, of receiving the required hours of tuition.

<p>A4.4 Assessment of records</p>	<p>You must:</p> <ol style="list-style-type: none"> a. In consultation with the Chairman of your Local Optometric Committee [or your workplace supervisor/ professional colleague], identify an independent assessor willing to review a random selection of your patient records. b. Arrange for the assessor to review [number] randomly selected patient records within [number] [weeks/ months] of these conditions taking effect. c. At least [number of weeks] before the next review hearing, provide the GOC with a written report from the independent assessor, setting out his views on the quality of the records he reviewed.
<p>A4.5 Personal development plan</p>	<ol style="list-style-type: none"> a. You must work with your workplace supervisor/workplace colleague to formulate a personal development plan, which should be specifically designed to address deficiencies in the following area(s) of your practice: [specify area(s) of concern]. b. Submit a copy of your personal development plan to the GOC for approval within [number] [weeks/months] of these conditions taking effect.

NOTICE TO REGISTRANT:

- The GOC will enter these conditions against your name in the register save for any conditions that disclose information about your health.
- In accordance with Section 13C(3) of the Opticians Act 1989, the GOC may disclose to any person any information relating to your fitness to practise in the public interest.
- In accordance with Section 13B(1) of the Opticians Act 1989, the GOC may require any person, including your learning/workplace supervisor or professional colleague, to supply any information or document relevant to its statutory functions.