GUIDANCE FOR CASE EXAMINERS

The purpose of this guidance

1. The General Optical Council (GOC) recognises that it is important that patients, registrants, professional and representative organisations, and other stakeholders including the general public are aware of the basis upon which the GOC’s case examiners operate and make decisions about reports of fitness to practise.

2. This document contains guidance to be used by the GOC’s case examiners when considering reports about a GOC registrant’s fitness to practise, train or carry on an optical business. The guidance is intended to encourage consistent decision-making by the case examiners. However, every decision that the case examiners make will be based upon the facts of the case being considered.

3. The new Fitness to Practise Rules define a case examiner as an officer of the Council appointed by the registrar on the Council’s behalf for the purposes of exercising the functions of the Investigation Committee (IC), in accordance with these rules, being a registered optometrist or dispensing optician, or a lay person.

4. This guidance is a public document and is available from the GOC’s website at:


5. The GOC currently registers around 26,000 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and student dispensing opticians who must be registered with the GOC in order to undertake training.

Definitions

6. Throughout this document:

   “Allegation” refers to a complaint about:

   - a business registrant’s fitness to conduct business;
   - an individual registrant’s fitness to practise; or
   - a student registrant’s fitness to undertake training.
“Business registrant” refers to a body corporate that is registered with the GOC.

“Fitness to practise" refers to the fitness to:

- practise of registered optometrists or dispensing opticians;
- undertake training as a student optometrist or dispensing optician; or
- undertake business as a business registrant (optical businesses that are registered with the GOC).

“Individual registrant” refers to an individual who is registered with the GOC.

Revision of the Guidance

7. This guidance is intended to be a ‘living document’. It will be amended as and when appropriate, taking into account the growing experience of the case examiners in dealing with allegations, as well as legal developments, including the amendment/introduction of legislation and new case law. The GOC will review this guidance annually or as the need arises.

8. The GOC will highlight any significant amendments to this guidance by publishing the amended version on the GOC’s website, www.optical.org at least one month before the amended guidance will be used by the case examiners.

The General Optical Council (GOC)

9. The GOC is one of 12 organisations in the UK known as health and social care regulators. These organisations oversee the health and social care professions by regulating individual professionals (and in some instances registered businesses). The GOC is the regulator for the optical professions in the UK.

10. The constitution, purposes and functions of the GOC are set out in the Opticians Act 1989.¹ The GOC is responsible for promoting high standards of professional education, conduct and performance among optical professionals in order to protect, promote and maintain the health and safety of the public. The main statutory functions of the GOC are to:

- set standards for optical education and training, performance and conduct;
- approve qualifications leading to registration;
- maintain registers of individuals who are qualified and fit to practise or train as optometrists or dispensing opticians;

¹http://www.legislation.gov.uk/ukpga/1989/44/contents
• maintain lists of bodies corporate who carry on business as ophthalmic or dispensing opticians;

• investigate and act where a business registrant’s or an individual registrant's fitness to practise is impaired.

11. The GOC can also take action if the laws in relation to the sale of optical appliances, or the testing of sight, are being broken and where there is a risk to the public. The GOC’s Protocol on the Investigation and Prosecution of Criminal Offences sets out the Council’s role in this process and is available from:

www.optical.org/en/about_us/policies_procedures_and_protocols/index.cfm

12. Information about the GOC’s complaints process in set out in the leaflet entitled “How to complain about an optician” which is available from:


13. Every year, the GOC publishes both a general report across all its activities and another dedicated to fitness to practise matters, with statistical information about the number and types of complaints that have been considered by the organisation. The GOC’s annual reports are available from:


14. Only a minority of the complaints made to the GOC result in a referral to the FTPC\(^2\). In the majority of cases, the current IC decides that there is no need for any further action to be taken or that the matter can be appropriately dealt with by issuing a business registrant or an individual registrant with a warning or a letter of advice or asking an individual registrant to attend a voluntary performance review.

The case examiners

15. The rules specify who can be a case examiner and their decision-making procedures. A case examiner is an officer of the Council appointed by the registrar on the Council's behalf. A case examiner will be a registered optometrist or a registered dispensing optician or a lay person. The decision at the end of the investigation stage is to be taken by one registered case examiner and one lay case examiner. The decision of the case examiners must be unanimous and where the case examiners do not agree, the matter will be decided by the IC. The consideration of the case examiners shall take place in

\(^2\) 14.6% of complaints received were considered by the FTP Committee (2012-2013)
private. The case examiners powers are set out in the GOC's (Fitness to Practise) Rules 2014³.

Referral of cases to the case examiners

16. The registrar initially considers all reports concerning fitness to practise received by the GOC⁴. Where the registrar considers that the matter falls within one of the grounds described at section 13D⁵, (s)he shall refer the allegation(s) to the case examiners for consideration (save for those relating to a conviction which has resulted in the imposition of a custodial sentence, which shall be referred directly to the FTPC).⁶ Alternatively, if the registrar does not consider that the allegation(s) falls within any of the relevant grounds, (s)he shall notify the complainant and the report will be closed. The case examiners will consider the matter reported and may decide unanimously whether or not it should be referred to be considered by the FTPC.

17. The case examiners will be able to deal with the majority of cases, however, there are limited circumstances in which cases must be referred to the IC for further action. Cases will be referred to the IC (by the case examiners) in two situations: (1) where the case examiners decide to refer an individual registrant for a health and/or performance assessment, which can only be directed by the IC; (2) where the case examiners cannot reach a unanimous decision about the appropriate disposal of the matter. Both of those situations are explained in further detail below.

Interim orders

18. If either of the case examiners is of the opinion that the FTPC should consider making an interim order in relation to a registrant, that case examiner must direct the registrar (in accordance with s13D(9)) who will refer the matter to the FTPC and notify the involved parties⁷.

19. An interim order can:
   - suspend any registrant from practice completely; or
   - temporarily remove an entry relating to a specialty or proficiency, or
   - make their registration conditional on compliance with requirements imposed by the FTPC.

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³ Created by a delegation of the functions of the IC under section 13E(i) of the Opticians Act 1989
⁴ In accordance with Rule 4 of the GOC (Fitness to Practise) Rules 2013
⁵ The Opticians Act 1989 (see note 1 above)
⁶ The GOC (Fitness to Practise) Rules 2014 – rule 4(5)
⁷ In accordance with Rule 12(7) of the GOC (Fitness to Practise) Rules 2014 and S13D(9) of the Opticians Act 1989
An interim order can last for a maximum of 18 months, unless extended by the relevant court, and will be subject to regular reviews during that period.

20. If a case examiner is of the opinion that the FTPC should consider making an interim order in relation to a registrant, that case examiner must direct the registrar (in accordance with S13D(9)) who will refer the matter to the FTPC and notify the involved parties. In particular, Section 13L of Opticians Act 1989, which states that the FTPC may make an interim order where they are satisfied that it is:

- necessary for the protection of members of the public; or
- otherwise in the public interest; or
- in the interests of a registrant.

21. In order to reach a decision about whether the FTPC should consider making an interim order the case examiners will:

(a) Take into account the circumstances, specified in the FTPC’s Guidance, as being likely to mean that an interim order is necessary. A copy of the FTPC’s Guidance is attached; and

(b) Have regard to all the factors that will be taken into account by the FTPC when considering such a referral, including:

(i) the effect which any order might have on the registrant;

(ii) the requirement on the FTPC to balance the need for an order against the consequences which an order would have for the registrant, in order to satisfy themselves that the consequences are not disproportionate to the risk to the public;

(iii) that the primary purpose of an interim order is to protect the public from a real present or likely future risk. It will be relatively rare for an interim order to be made only on the ground that it is in the public interest (for example to maintain public confidence in the profession); and

(iv) that an interim order might be made at an early stage of the investigation and therefore, although the allegation ought to have been made in writing, it may not yet be supported by formal witness statements.

Early disposal of cases

22. On review of a report of fitness to practise, the case examiners may unanimously determine to close certain categories of cases which, in the public
interest, ought not to proceed through the fitness to practise procedure. The categories of cases are as follows:

- Those in which the fitness report arises from events which occurred more than five years before the matter was brought to the attention of the GOC, separate guidance in relation to this appears at [insert hyperlink]
- An allegation which is made by a complainant who wishes to remain anonymous; or
- Any allegation which the case examiners consider is vexatious in nature.

**Further investigation**

23. At any stage, prior to making their final decision, the case examiners may adjourn their consideration of the case pending further investigation.\(^8\) If such further investigation is required, the case examiners will inform the registrar who will undertake the further investigation. The registrar will provide any additional evidence obtained to the registrant(s), giving them a reasonable opportunity to respond and, where appropriate, the maker of the allegation. The registrar will then provide the case examiners with all additional evidence obtained, together with the registrant(s) comments. The case examiners will then resume their consideration of the matter.

**Referral to the IC - Assessments (Health and/or Performance)**

24. Where the case examiners decide that they require further information about a registrant's health and/or the standard or quality of their work before they can reach a decision on the case, they must refer the matter to the IC, requesting that an assessor (or assessors) be appointed and an assessment be directed. The IC may direct that any one or more of the following investigative actions should be carried out (including if required, more than one assessment):

- a health assessment of the individual registrant\(^9\); or
- a performance assessment of the individual registrant\(^10\).

The GOC has published separate guidance relating to performance assessments, available from:


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\(^{8}\) In accordance with Rule 12(a)(iii)

\(^{9}\) In accordance with Rule 6 of the GOC (Fitness to Practise) Rules 2013

\(^{10}\) As above
25. The IC must specify the matter on which the registrant is to be assessed. If more than one assessor is appointed, they will each write their own report on their assessment but must together prepare a joint report for the IC. The registrant will be sent a copy of any report prepared and may submit comments on the report to the registrar within 28 days of receipt\textsuperscript{11}.

26. Where a registrant co-operates and an assessment (or assessments) has taken place, the IC must refer the allegation back to the case examiners. The case examiners will receive a copy of the assessment report (or reports), together with any information provided by the registrant. The case examiners will resume their consideration of the matter under the provisions of rule 12.

27. If a registrant fails to co-operate with, or submit to, an assessment (or assessments), the IC shall not refer the allegation back to the case examiners for determination and shall instead proceed to consideration of the case itself. In these circumstances, the case examiners will cease to have any further involvement in the case.

Decision-making process

28. When making their decision about a particular allegation, the case examiners will consider not only the original fitness to practise report, and any evidence that has been gathered by the GOC, but also any written representations that have been received from the registrant concerned. The rules state that a registrant must be given copies of any information or documents received in support of the allegation and allowed 28 days in which to make any written representations before the case examiners consider the allegation(s).

29. The case examiners will also consider any comments received from the complainant, made once the complainant has seen any written representations made by the registrant. Any comments from the complainant are also copied to the registrant.

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

Potential outcomes of the case examiners’ consideration of an allegation

\textsuperscript{11} In accordance with rules 10(4) and (5) of the GOC (Fitness to Practise) Rules 2013
31. There are a number of different potential final outcomes arising from the case examiners’ consideration of an allegation:

- referral of the case to the FTPC;
- the issue of a warning to the registrant;
- a decision to invite an individual registrant to attend a voluntary performance review;
- referral to the IC where the case examiners are unable to reach a unanimous decision; or
- a decision to take no further action, which may include issuing a registrant with advice about their future conduct.

Further information about each of these potential outcomes is set out later on in this guidance.

The public interest

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

Equality and Diversity

33. The case examiners must be aware of and apply the GOC’s Equality and Diversity Scheme.


Allegation of fitness to practise

34. An allegation that an individual registrant's fitness to practise is, or may be impaired, can relate to acts or omissions which occurred outside the United Kingdom or at a time when that registrant was not registered.

35. A registrant's fitness to practise may be impaired only on certain grounds which are set out at Section 13D (2) and (3) of the Opticians Act 1989. Those grounds vary, depending on whether it is a business registrant, a student registrant or an individual practitioner. Case law has established the following principles

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12 In accordance with Rule 12(1) of the GOC (Fitness to Practise) Rules 2013
13 Section 13D(4) of the Opticians Act 1989
14 Section 13D(2) and (3) of the Opticians Act 1989
regarding the concepts of “misconduct” and “deficient professional performance”:15

- “misconduct” does not mean any breach of the duty owed by a business registrant or an individual registrant to their patient; it connotes a serious breach which indicates that the business registrant's or an individual registrant’s fitness to practise is impaired;

- mere negligence does not constitute “misconduct” but negligent acts or omissions which are particularly serious may amount to “misconduct”;

- a single negligent act or omission is less likely to cross the threshold of “misconduct” than multiple acts or omission. However, there may be some circumstances in which a single negligent act or omission, if particularly grave, could be characterised as “misconduct”; and

- “deficient professional performance” connotes a standard of professional performance which is unacceptably low. A single instance of negligent treatment would be unlikely to constitute “deficient professional performance” unless it was very serious indeed. Except in exceptional circumstances, “deficient professional performance” should be based on consideration of a fair sample of work.

Referral of an allegation to the FTPC

36. When considering whether a case ought to be referred to the FTPC, the case examiners should keep in mind the GOC’s’ main objective as set out in the legislation16:

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

37. When considering whether a fitness to practise report ought to be referred to the FTPC, the case examiners should ask themselves the following question: is there a realistic prospect of establishing that the registrant's fitness to practise is impaired to a degree that justifies action being taken against their registration (this is known as “the realistic prospect test”).

38. This involves consideration of two issues:

- Is there a realistic prospect of being able to prove the facts alleged against the registrant, if the allegation is referred to the FTPC?

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15 Calhaem v GMC [2007] EWHC 2606 (Admin)
16 Section 1(2A) of the Opticians Act 1989
If the alleged facts were proved, are they so significant as to indicate that the registrant's fitness to practise is or may be impaired to a degree that justifies action being taken against their registration?

39. It is not the role of the case examiners to decide whether or not a registrant's fitness to practise is impaired – that is a decision for the FTPC to make (if the matter is referred onto that stage).

40. When considering the realistic prospect test, the case examiners should have regard to the following:

- they should proceed with caution (given that, among other considerations, the case examiners are working from documents alone and the evidence before them may be untested);

- the FTPC will only find facts disputed by the registrant proved if, having heard the evidence, the Committee considers it more likely than not to have happened (the “civil standard of proof”);

- the case examiners are entitled to assess the weight of the evidence. However, the case examiners must not (normally) resolve substantial conflicts of evidence;

- where there is a plain conflict between two accounts, either one of which may realistically be correct, and on one account the matter would call into question the registrant's fitness to practise, the conflict should be resolved by the FTPC, not the case examiners;

- if the case examiners are in doubt about whether to refer the matter to the FTPC, they should consider the complainant’s version of events at their highest then apply the realistic prospect test;

- it is not the case examiners' role to refer to the FTPC an allegation that is not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the registrant's fitness to practise could be found impaired by the FTPC;

- there is a public interest in both business registrants and individual registrants not being harassed by unfounded allegations;

- where the realistic prospect test is met, there is a public interest in there being a public hearing before the FTPC;

- they should proceed with caution in reaching a decision not to refer a case where the decision may be perceived as inconsistent with a decision made by another public body (with input from optical professionals, or an NHS body for instance), in relation to the same or substantially the same facts. If the case
examiners do reach such a decision, they should give reasons for any apparent inconsistency;

- they should note the statement within the GOC’s Protocol on the handling of criminal convictions disclosed by a registrant and, in particular, that the registrar will generally presume against registration, restoration or retention on the GOC Register where an applicant discloses a conviction for an offence (included in Schedule 4 of the Criminal Justice and Court Services Act 2000). A copy of the GOC’s Protocol on the handling of criminal convictions disclosed by a business registrant or an individual registrant is attached and also available from: http://www.optical.org/goc/download.cfm?docid=8812D3B1-8400-4770-940FF1EB5A6E7501

- they should further note the factors identified within the FTPC’s Guidance as indicating that (if the case is considered by the FTPC) erasure is likely to be the appropriate sanction, see attached which is also available from: http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf

- they should keep in mind the presence of mitigating factors which might result in a decision by the case examiners not to refer an allegation to the FTPC but only where the mitigating factors:
  
  (a) are well-supported by credible evidence;

  (b) relate to the circumstances of the allegation rather than to matters that are personal to a business registrant or an individual registrant;

  (c) are so significant that there is no realistic prospect of the FTPC finding that a registrant's fitness to practise is impaired.

- the likely impact on the FTPC’s consideration of any evidence showing that:
  
  (a) a registrant's admitted failings are capable of being remedied; and/or

  (b) have already been remedied;

  (c) as well as the level of any risk of repetition.

- certain types of misconduct may be more capable of being remedied than others, for example, allegations concerning deficient professional performance. Such evidence may not always be available, and where it is available, it may not be clear or persuasive. Even if the case examiners are satisfied that there is evidence that a registrant has remedied their failing, they may still decide that it is in the public interest for the case to be referred to the FTPC.
Recording decisions

41. All decisions made by the case examiners shall be recorded in writing setting out full and detailed reasoning for the decision made.

Guidance regarding warnings issued by the case examiners

42. Before considering giving a warning, the case examiners will ensure that they have correctly identified the grounds for the allegation that a registrant’s fitness to practise is impaired under section 13D(2) or (3) of the Optician’s Act 1989 (OA).

43. For example, the case examiners may consider that the facts of the complaint amount to an allegation of “misconduct” under section 13D(2)(a) of the OA, by failing to treat every patient politely and considerately, in breach of paragraph 2 of the GOC Code of Conduct for Individual Registrants.

44. Alternatively, the case examiners may consider that the facts of the complaint amount to an allegation of “misconduct by the business registrant or by one of its directors” under section 13D(3)(a) of the OA, by failing to take reasonable and proportionate steps to ensure that advertising or publicity complies with appropriate advertising codes of practice, in breach of paragraph of the GOC Code of Conduct for Business Registrants.

45. When considering alleged breaches of the GOC’s Code of Conduct for Business Registrants, the case examiners will bear in mind that the obligations imposed on business registrants are not absolute. The obligations are to take “reasonable and proportionate steps” to comply with its provisions.

The issue of a warning to a business or individual registrant

46. The case examiners will only consider issuing a warning once it has decided that the matter should not be referred to the FTPC.

47. When considering a complaint, the case examiners must ensure that the potential ground for the allegation against a registrant under section 13D has been identified, so that it can assess the prospects of being able to prove the necessary facts against the registrant in order to sustain the allegation.

48. In giving reasons for issuing a warning, the case examiners must avoid giving the impression that it has made a finding or determination of matters of fact on substantive issues arising from the complaint.

49. The terms of any warning must be in clear terms, and must not seek to impose on a registrant a more onerous obligation than that required under the terms of the GOC Codes. For example, if a warning is given for a breach of the GOC Code for Business Registrants, it must qualify an instruction as to future conduct to the effect that the registrant must take “reasonable and proportionate steps”
to comply with the relevant provisions of the Code, rather than seek to impose an absolute obligation to do so.

50. A warning issued by the case examiners is a record of their concern which, while not requiring referral to the FTPC, is potentially significant. A warning is not shown on the publicly available GOC register, but it is recorded by the GOC for a period of time. The period of time is not set down in legislation but is stated as four years in the current IC guidance dated November 2011. It is proposed that there should be greater flexibility. A warning may be given for a period of up to four years. Proportionality is an important consideration. Independent legal advice is available to the case examiners.

51. Warnings are only issued by the case examiners once the registrant has been given an opportunity to make further written representations to them, having been advised of the nature of the warning being considered. The case examiners must consider any representations made by a registrant and decide whether or not to give a warning in the particular circumstances17.

52. The GOC has published separate guidance on warnings, available from:


An invitation to attend a voluntary performance review

53. If the case examiners decide that an allegation should not be referred to the FTPC or result in the issue of a warning, they may decide to invite an individual registrant to attend a voluntary performance review before ordering the case to be closed.

54. A voluntary performance review will address any aspect of an individual registrant's practice that the case examiners believe would be beneficial an individual registrant and the standard of their practice.

55. The case examiners will only consider inviting a registrant to attend a voluntary performance review if they are confident that there are no public safety issues arising from the registrant's current practice.

Taking no further action

56. If the case examiners decide that an allegation does not need to be referred to the FTPC, or result in the issue of a warning, it may decide to close a case without taking any further action.

57. The case examiners may decide to close a case and take no further action if:

17 In accordance with Rule 14 of the GOC (Fitness to Practise) Rules 2013
• the report of fitness to practise demonstrates no issue that could call into question a registrant's fitness to practise; or

• the alleged facts, even if proved, are not serious enough to result in that registrant's fitness to practise being impaired to the extent that would justify action being taken against their registration, and a warning is deemed unnecessary; or

• the alleged facts, if proved, may demonstrate that a registrant's fitness to practise is impaired, but there is no realistic prospect of being able to prove the alleged facts for evidential reasons, and a warning is deemed unnecessary.

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

Notification

59. Following the case examiners’ decision, the complainant(s) and the registrant(s) concerned and, in the case of individual practitioners, their employer, receive a letter from the GOC setting out the case examiners’ decision and the reasons for that decision.

Other parties

60. The case examiners may instruct the GOC to refer an allegation to the police if it appears to relate to the commission of a criminal offence (or to refer the allegation to another enforcement agency, as appropriate) if it appears to relate to a non-GOC optical professional for example, to the General Medical Council if the allegation concerns laser eye surgery carried out by a doctor.

Case examiners are unable to reach a unanimous decision

61. Cases will be considered by a lay case examiner and a registrant case examiner. The case examiners must be unanimous in their decision about the disposal of an allegation. In the event that they are unable to reach a unanimous decision in a particular case, they must inform the registrar and the registrar will refer the matter to the IC\(^\text{18}\). The GOC has published separate guidance for the IC, attached: [insert hyperlink]

Review of decision not to refer

\(^{18}\) Rule 13 of the GOC (Fitness to Practise) Rules 2013
62. At any time within five years of a decision not to refer having been made, the case examiners may review the original decision. However, a review can only take place if the case examiners consider that there is new evidence or information which makes a review necessary for the protection of the public, necessary for the prevention of injustice to a registrant, otherwise necessary in the public interest or information is available to indicate that the GOC have erred in its administrative handling of the case (and it is necessary in the public interest to review).

63. If a review is to be undertaken, the registrar will inform the registrant (and, in the case of individual practitioners, their employer) and the complainant that new information is available and if appropriate, provide the same. A registrant and the complainant (if any), may provide representations. Thereafter the case examiners will consider all the available information. The case examiners may determine:

- that the original decision should stand;
- that a warning may be given;
- to refer the matter to the FTPC; or
- to remove from a registrant's record, any previous warning that has been issued.

Termination of a referral

64. Where an allegation has been referred to the FTPC, the case examiners may review the referral. If a review is to be undertaken, the registrar will write to the complainant and give them the opportunity to provide comment (within 28 days). The case examiners will then consider the available information and, if they decide that the case should not be considered by the FTPC, give a direction to the registrar, who will notify the relevant parties.

Guidance for case examiners on Findings by Other Regulators

65. By section 13D(5) of the Opticians Act 1989 (“the Act”), the IC is required to investigate an allegation (often referred to as a complaint) made to the GOC that the fitness to practise of an individual registrant, the fitness to carry on business of a business registrant, or the fitness to undertake training of student registrant is or may be impaired (section 13D(1) of the Act).

66. By section 13D(2) of the Act, the only grounds on which the fitness to practise of an individual registrant, or the fitness to undertake training of a student registrant, can “impaired” for the purposes of the Act are as set out in section 13(2)(a)-(g). These grounds include “misconduct” (section 13(2)(a)), and
“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect” (section 13D(2)(g)).

67. By section 13D(3) of the Act, the only grounds on which the fitness to carry on business of a business registrant can be “impaired” for the purposes of the Act are as set out in section 13D(3)(a)-(g). These grounds include “misconduct by the business registrant or by one of its directors” (section 13D(3)(a)), and

“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect 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” (section 13D(3)(g)).

This guidance will assist in deciding upon the evidential status of a determination of impairment of fitness to practise or carry on business by another UK health or social care regulator for the purpose of section 13D(2)(g) or (3)(g).

68. When the case examiner is considering an allegation of impairment by reason of a finding of impairment of fitness to practise by another UK health or social care regulator, it must examine the evidential status of the determination of the other regulator on which the GOC allegation is based. Such a determination does not have the same status as a conviction for a criminal offence, which is normally proved by a certificate of conviction from the court concerned, and cannot normally be challenged in professional disciplinary proceedings. A criminal conviction may be a ground for impairment under section 13D(2)(c) or 13D(3)(d) of the Act.

69. A determination by another UK health or social care regulator will, save in exceptional circumstances, be strong prima facie evidence of the facts found proved in relation to that determination, but is not conclusive. The registrant must be given a fair chance to explain himself, but a fitness to practise panel is
not required to conduct itself as a court of law rehearing all the evidence underlying the original determination.\textsuperscript{19}

70. The main test to be applied when examining the status of such a determination is whether the process whereby the determination was reached was fair. In the case of other UK health or social care regulators, the decision will have been reached by the disciplinary panel after a hearing conducted in accordance with due legal process. The regulator will have had the burden of proving the allegations to the required standard of proof. Legal representation of the parties will have been permitted. The panel may have considered and assessed oral evidence tested under cross-examination, and any documentary evidence submitted by the parties. The panel will have received legal advice, from an independent legal advisor or from a member of the panel, before reaching its decision. The determination of the panel will have contained the reasons for its findings.

71. Therefore, in the case of a determination by another UK health or social care regulator, that determination can usually be relied upon by the case examiner to provide a reliable basis for referring the allegation to the FTPC. This is on the basis that there is a realistic prospect of being able to prove the facts as found by the other regulator, and that they are so significant as to indicate that the registrant’s fitness to practise is or may be impaired to such a degree that justifies action being taken against their registration.

72. It will be for the FTPC to determine whether there are exceptional circumstances in any particular case to question the determination of the other regulator, or to find that the findings of the other regulator are not sufficient to find impairment of fitness to practise of a GOC registrant.

73. It is possible that a determination by another UK health or social care regulator may be sufficient to justify an allegation of misconduct under section 13D(2)(a) or 13D(3)(a), in addition to an allegation under section 13D(2)(g) or 13D(3)(g). In that case, the principles as to the status of the determination of the other regulator set out above are equally applicable.

This guidance will assist in deciding upon the evidential status of an adjudication made by the Advertising Standards Authority (ASA) that a GOC registrant has acted in breach of their codes

74. The ASA is the independent body responsible for regulating advertisers in the United Kingdom. Upon receipt of a complaint it will consider and determine whether an advertiser has acted in breach of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Advertising (CAP Codes). Its decision

\textsuperscript{19} See General Medical Council v. Spackman (1943) AC 627, Neelu Chaudhari v. General Pharmaceutical Council (2011) EWHC
is published as an adjudication. An ASA adjudication can be reviewed at the request of the advertiser by the Independent Reviewer of ASA Adjudications.

75. It is not unusual for an ASA adjudication against a registrant of the GOC, normally a business registrant, to be sent to the GOC for consideration as to whether any disciplinary action should be taken against the registrant. If an ASA adjudication is sent to the case examiner for investigation and consideration, the case examiner must examine the status of that adjudication in relation to any allegation against the registrant on one of the grounds under section 13D(2) or (3) of the Act.

76. In the following paragraphs, the guidance will deal with ASA adjudications against a GOC business registrant, but similar principles will apply to adjudications against individual registrants.

77. Unlike a determination by another UK health or social care regulator, an adjudication by the ASA against a GOC registrant does not, of itself, constitute a ground for impairment under section 13D(2) or (3) of the Act. Therefore, it is important for the case examiner, at the outset, to identify the potential ground under section 13D for an allegation against the registrant. In most cases, the only potential ground will be “misconduct by the business registrant or one of its directors” under section 13D(3)(a), by reason of a potential breach of the GOC Code of Conduct for Business Registrants (the GOC Code).

78. In the case of an ASA adjudication, the allegation of misconduct will normally have to be based on a potential breach of paragraphs 7 and/or 11 of the GOC Code, which provide as follows:

“…a business registrant will take reasonable and proportionate steps to:

7. Ensure that advertising or publicity complies with the appropriate advertising codes of practice; .....

11. Ensure that financial and commercial practices do not compromise patient safety.”

It is stressed that these obligations under the GOC Code are not absolute. The obligations under the GOC Code are to take “reasonable and proportionate steps” to comply with its provisions.

79. The case examiner must not assume that an ASA adjudication, without more evidence, will prove itself in the same way as a conviction, or that the mere fact of an ASA adjudication will prove an automatic breach of the GOC Code.
80. The evidential status of an ASA adjudication is that it is likely to be admissible at a hearing of the FTPC as prima facie evidence that the registrant has acted in breach of the CAP Codes. However, that finding may be rebutted by the registrant, who may seek to adduce evidence to go behind the ASA adjudication. The reason for this is that the ASA adjudication process is very different from that adopted in disciplinary hearings before other UK health or social care regulators. The ASA has no power to consider impairment of fitness to practise. No hearings are held, and the whole process is conducted on paper, with the advertiser submitting written representations. Thus, there is no oral evidence tested by cross-examination. The burden of proof rests with the advertiser to prove that it has not acted in breach of the CAP Codes (i.e. the ASA applies the reverse burden of proof to that applied by the GOC and other UK health or social care regulators). The adjudication body does not receive independent legal advice before making its adjudication. Thus, it may be possible for a registrant to argue that the ASA adjudication process was not fair, and that its findings should not be admissible or should carry little weight.

81. Even if breaches of the CAP Codes are proved, or admitted, that is not enough to prove a breach of the GOC Code, which requires registrants to take "reasonable and proportionate steps" to comply with the CAP Codes. The position will depend on the evidence of the steps taken by the registrant.

82. In deciding whether to refer an allegation based on an ASA adjudication to the FTPC, the case examiner must consider the representations made by the registrant in response to the allegation under rule 5 of the rules.

83. The case examiner may take the view that the material indicates that the registrant has taken sufficient steps to comply, in which case, the case examiner may decide to take no action.

84. The case examiner may take the view that there is a dispute as to whether the findings of the ASA of breaches of the CAP Codes are justifiable, and/or whether the registrant has taken "reasonable and proportionate steps" to comply with the CAP Codes. In which case, the case examiner may decide to refer the allegation to the FTPC. The case examiner must not make any findings of fact on the substantive issues arising from the complaint.

85. If the case examiner decides not to refer the allegation to the FTPC, it has the power to issue a warning to the registrant under section 13D(7) of the Act. In deciding to issue a warning, the case examiner must take care to ensure that it does not appear to be making findings of fact on material issues that are in dispute relating to the allegation. If a warning is given, it must not be given in absolute terms, but must reflect the "reasonable and proportionate steps" qualification in the GOC Code. If a warning is being considered, reference should be made to the separate Guidance regarding Warnings.
This guidance will assist in deciding upon the evidential status of findings by other non-healthcare regulators or tribunals

86. It is possible that the evidential status of any findings against a GOC registrant by another non-healthcare regulator or tribunal will have to be examined by the case examiner in accordance with the principles set out above in relation to ASA adjudications. In each case, it will be necessary to examine the nature of the decision-making process of the relevant regulator or tribunal, and to decide whether it was fair. A finding by a civil court of law will be strong prima facie evidence of the facts found proved. A finding by another regulator with no power to consider fitness to practise, and operating a reverse burden of proof, will be more susceptible to challenge and rebuttal.

GOC’s Protocol on the handling of criminal convictions disclosed by registrants


FTPC’s Guidance (November 2013)


See the Neelu Chadhari case