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COUNCIL

Fitness to Practise Panels Hearings & Indicative Sanctions: consultation outcome

Meeting: 11 May 2016 **Status:** For decision
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Purpose

1. The purpose of this paper is to update Council on the outcomes arising from the consultation on the revised Fitness to Practise Panels Hearings Guidance and Indicative Sanctions ("the guidance"), to enable Council to consider and approve the document for publication.

Recommendations

2. Council are asked to **approve** the guidance document (**annex two**).

Strategic objective

3. The review of the guidance forms part of the Standards project which is included within both the 2015/16 and 2016/17 business plans. The project supports the 2014/17 Strategic Plan objective of promoting higher standards across the optical profession.

Risks

4. The following risks are associated with the issue, as identified in the corporate risk register in that there is a risk that:
   4.1 in the absence of a revised guidance document our fitness to practise decision makers will not be aided and supported in making good decisions; and
   4.2 public confidence in the General Optical Council (GOC) may become damaged if parties to a fitness to practise process are unaware of the guidance by which a panel will be making their decisions.

Background

5. 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 from all walks of life,

including those who may be vulnerable, and therefore trust from both parties is paramount but 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.

6. 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.

7. It is for that reason that the GOC has the powers 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 (FTP) panel to determine an appropriate sanction.

8. The guidance was developed by the GOC for use by its FTP panel when undertaking hearings and considering what sanction to impose following a finding of impaired fitness to practise.

9. We are now reviewing the present version of the guidance. We want to be sure that it is fit for purpose, accessible to all, and is a basis for fair and proportionate decisions used at an FTP hearing. We also want to make sure that it takes account of both legal and regulatory changes.

10. It is noted that our GOC's new Standards took effect on 1 April 2016.[1] The new Standards more clearly outline the expectations of the GOC in respect of its registrants. The Standards also explicitly include additional expectations namely, for registrants to be candid when they have done something wrong and to raise concerns they may have in respect of patient safety. The review of the guidance needs to reflect clearly how the FTP panel will assess non-compliance with the Standards in the context of sanction.

11. Further, in ensuring that it is fit for purpose, FTP panellists are a key stakeholder in reviewing the workability and practicability of the guidance. As part of a focussed Hearings & Indicative Sanctions workshop with the Fitness to Practise Committee (FTPC), and a session with the FTPC Chairs, the panel asked for further clarity and detail in respect of various matters. This included types of registrant, details in respect of the hearings process and that all types of hearings to be included within the document.

[1] Our new Standards can be found at:
https://www.optical.org/en/Standards/Standards_for_optometrists_dispensing_opticians.cfm

12. The review also considered the hearings & indicative sanctions guidance from other healthcare regulators and any feedback received from GOC panel firms and defence representatives.

13. The resulting document is a comprehensive amalgamation of all hearing procedures, an indicative sanctions guidance as well as a bank of standard conditions. It is meant to be a document that is capable of being used in respect of allegations relating to breaches of both the Code and the Standards.

Analysis

Key changes to the guidance

14. In February 2016, Council considered and approved for consultation a revised guidance document. The key changes proposed within the revised guidance are outlined below.

Fitness to Practise Panel Hearings

15. The main changes within the first part of the guidance set out:
    - 15.1 a revised structure and tone to make sure the guidance is more accessible to a wider audience, particularly everyone involved in the hearings process;
    - 15.2 an outline of the different types of registrants;
    - 15.3 an outline of the full process in respect of all hearings (substantive, substantive reviews, interim order/interim order reviews, restoration and registration appeal hearings);
    - 15.4 more context for each section to make it easier for people to understand the process;
    - 15.5 inclusion of additional considerations – in respect of private hearings, bias and proceeding in the absence of the registrants; and
    - 15.6 more clarity on the process of reaching decisions, including the principles guiding the decisions and relevant case law.

Indicative Sanctions

16. The main changes within the second part of the guidance set out:
    - 16.1 outlining specific guidance in respect of duty of candour, raising concerns and obtaining patient consent – to help committees with their decision-making;
    - 16.2 proposing that the FTP panel should consider a fixed expiry period when imposing a Warning;
    - 16.3 proposing that the FTP panel may consider the stage of a student Registrant's career/training when making decisions; and
    - 16.4 proposing that the FTP panel may consider how a business registrant operates in considering sanction.

Bank of Conditions

17. The main changes within the third part of the guidance set out:
    17.1 a revised structure with sub-headings to enable more clarity and better accessibility; and
    17.2 proposing amending the term "immediately" to consideration of a defined period ie. within 14 days of the Order taking effect.

Consultation

18. The consultation on the revised guidance was launched on 12 February 2016 and concluded on 28 April 2016, to which we received 16 completed responses from a range of stakeholders including:
    18.1 FTP panellists (6);
    18.2 Professional Standards Authority (1);
    18.3 Optical Professional Bodies (2);
    18.4 Legal firms (2); and
    18.5 Registrants (5)

19. The guidance has also been considered in full by the Standards Committee who provided their support for, as well as feedback on the document.

Summary of responses

20. All of the responses to the consultation are outlined at **annex one**. Overall, the majority of respondents were supportive of a review of the current guidance document, and to the changes that were proposed.

21. Key themes from the consultation responses were:

Support for the review

22. There was support for a review of the Council's current guidance. Of the 16 respondents, 13 indicated that they supported the review:

> *"In general terms, we commend the Guidance for its clarity and believe that it will promote consistent and proportionate decision making". (Legal firm)*
>
> *"We would first like to congratulate the GOC on producing this useful guidance and to commend the robust engagement and openness to comment it has demonstrated". (Optical Professional Body)*
>
> *"In general I found the guidance very comprehensive and of assistance" (FTP panellist)*
>
> *"It is pretty clear and logical in its approach and will more helpful than the current - nicely broken into paragraphs so it is easy to find the bit in question. (FTP panellist)*

"I have read through this really useful document and taken heed of the content" (Registrant)

Clarity and Accessibility - generally

23. Overall, there was general consensus that the policy was clear and accessible in respect of the three parts of the guidance with between 70% - 80% of respondents reporting 'Clear' or 'Very Clear'. There was some concern expressed around inconsistencies in terminology and referencing, clarity of some of the wording and appropriateness to sequencing/chronology. Very helpfully, suggestions were provided in respect of omissions or where further guidance was required.

"I have noticed a few typos, inconsistencies etc. which I have highlighted for your consideration" (FTP registrant panellist).

"It may be helpful to provide on your website a link to the guidance issued by you in relation to the six bullet points set out in this paragraph" (Legal firm)

"Re: para 27.3 – in respect of the list of factors consider, "and/or" is included after sub-paragraph (b) and "and" is included after sub-paragraph (i). This may cause confusion. Is there a reason for these words to be included after those two sub-paragraphs only?" (Optical Professional Body)

"You may take the view that it makes more chronological and logical sense for the narrative in 10.2 to appear before the narrative in 10.1" (Legal firm)

"In our collective view, there is therefore a lack of clarity in this section as to which kinds of evidence – broadly termed "mitigation" – is relevant and admissible at each stage of the proceedings". (Optical Professional Body)

"You may consider it confusing and therefore unhelpful to suggest that the criteria set out at 11.1 provide a "definition" of impaired fitness to practise. You may take the view that the word "grounds" more accurately describes what is set out from 11.1(a) to (g). As you have made clear elsewhere in the document, impaired fitness to practise is not defined in your Act". (Legal firm)

"I particularly like the discussion in 20.5 -20.9 (application of standard of proof)" (Registrant)

"Although under the heading in paragraph 11 you refer to both registered individuals and students, our understanding is that, when a Committee considers a case regarding students, it is assessing their fitness to undertake training and not their fitness to practise and this could be made more clear in this part of the document". (Legal firm)

"We would suggest the following to be included in respect of the factors that make a good determination …. The need to use clear language and vocabulary …. Clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is disputed .. confirmation as to whether the FTP has taken guidance into account and to what extent … this will aid clarity" (Optical professional body)

"We are not sure what paragraph 15.3 adds" (Legal firm)

"It may be helpful in the section regarding interim order reviews to set out the Committee's powers on review". (Legal firm)

Approach to candour

24. There was general consensus for the GOC's approach to candour within the guidance with 60% agreeing with the way it was expressed in the draft guidance. The concerns regarding the approach mainly related to a view that it may not have been expressed as seriously as it should be and that it should not feature as an aggravating factor in determining sanction.

25. There seemed to be some confusion regarding the approach as set out in the GOC's new Standards of Practise and the statement that the GOC signed up with the other healthcare regulators in respect of the professional duty of candour. The view provided was that in effect there were two approaches being expressed which could lead to confusion. The joint statement however, made it clear that the duty of candour referred to the professional duty which "*may be expressed in different ways within our statutory guidance*". The GOC's Standard 19 for fully qualified registrants is in very similar terms to that as expressed within the statement, namely that registrants should tell the patient that something has gone wrong, offer an apology or other remedy or support and explain fully to the patient what has happened and the likely short-term and long-term effects. The Standard further outlines the expectation that registrants will be open and honest with others and take part in reviews and investigations when requested.

"This approach supports the new Standards of Practice for Optometrists and Dispensing Opticians making the care, well-being and safety of patients to be the first concern … Transparency encourages a responsible attitude to errors and mistakes where a registrant can confidently reflect on and improve practice standards in a safe and open environment". (FTP registrant panellist)

"This is an essential element in ensuring a public confidence in the profession" (FTP panellist)

"We welcome the addition of guidance relating to the duty of candour. There is though no indication given to panels as to how seriously candour should be treated – ie. explaining that being open and honest with patients is a patient right and is central to professionalism. Additionally, there is little guidance on how to assess the seriousness of cases (for example that covering up is worse than an omission). We also found it unhelpful that lack of candour is described both as a stand-alone charge and an aggravating feature". (Professional Standards Authority)

"[The wording relating to the GOC's Standard on candour] is different from the form of words contained in the statement the GOC previously signed up to in conjunction with a number of other regulators. Given the potential ramifications for registrants in not complying with the professional duty of candour, and GOC guidance, including this, should replicate the joint regulator statement, already signed up to, and provide clear guidance for both registrants and Committee as to when the professional duty of candour has been breached ……. (Legal firm)

In relation to charging breaches of duty of candour: "In our collective view, if it is to be suggested that a registrant has breached his or her duty of candour this must be alleged as a specific factual allegation and adjudicated upon by the FTPC at the facts stage. Only if that is done can such a breach be taken into account at subsequent stages of the hearing ….. (Optical Professional Body)

In relation to a breaches of duty of candour being considered an aggravating feature: "It is not an aggravating feature … It is an allegation in itself, which must be considered as such by the FTPC". (Registrant)

Approach to raising concerns

26. Of the 16 respondents who responded, 60% indicated that they agreed with the Council's proposed approach to raising concerns. The main concern raised related to a disagreement to a breach of the relevant standard being considered as an aggravating factor when determining sanction:

"This approach supports Standards 10 and 11. This approach is a preventative measure against errors and failures in healthcare arising which helps to reduce the likelihood that the patients are exposed to significant risk in the first place" (Registrant)

"A failure to raise concerns should not be regarded as an "aggravating factor" … it is an allegation in itself, which must be considered as such by the FTPC" (Optical Professional Body).

Approach to obtaining patient consent

27. Of the 16 respondents who responded to the consultation 80% indicated that they agreed with the Council's proposed approach to obtaining patient consent. The main concern stemmed from the reference of a civil case which it was felt was not appropriate in the regulatory context.

"An essential requirement otherwise would undermine trust". (FTP panellist)

"This seems to be appropriate in that it allows for various levels to be considered" (Registrant)

"Whilst it is fully appreciated that the principle of informed consent is integral to patient care, we do not consider it appropriate for the standard in relation to consent as set out in a civil context to be appropriate when considering the fitness to practise of an individual or business registrant, particularly given that the threshold for misconduct requires a degree of seriousness. There may be instances where a registrant has been negligent in the consenting process but where the threshold for misconduct or impairment is not met" (Legal firm)

"It is a legal obligation and central principle of all healthcare professionals" (FTP panellist)

Warning fixed expiry period proposal

28. Nearly all respondents (90%) agreed with the GOC's proposal that the FTP Committee should consider a fixed expiry when imposing a Warning. The issues raised related to the view that there was no specific guidance as to how to determine the appropriate length of time for a Warning.

"In principle, yes. However no proper guidance is given in the document as to how the FTPC should go about doing this". (Optical Professional Body)

"Circumstances change, people change. If a warning is permanent it is not a warning it is punitive. Once a warning has expired and the registrant transgresses again the existence of a prior warning will colour the judgment of the panel. If they never transgress then the warning has had effect". (Registrant)

"It's only fair for anyone to understand when something as serious as a warning will end as it has a significant impact on that person's professional standing". (FTP panellist)

"We have nothing to add about setting the length of a warning: it has the potential to be more nuanced than a warning with no expiry (expiry dates can be tailored according to the severity of a registrant's contravention). However, some guidance should be given to panels on how to set the length, possibly with reference to a benchmark". (Professional Standards Authority).

Consideration as to stage of career/training when making decisions

29. All respondents who responded to this question (100%) agreed with the Council's proposal that the FTP Committee should consider the stage of a Registrant's career/training when making decisions. The main issue raised was that the document did not provide much guidance as to how the FTP Committee should approach the stage of a registrant's career/training.

"Yes, in principle. However, we do not think that the ways in which this might be relevant are clearly explained in the document". (Optical Professional Body)

"Maturity and realisation of responsibility can sometimes affect actions". (FTP panellist)

"Registrants experience and knowledge will change throughout their career. What may be acceptable at an early stage of your career when you are relatively inexperienced, may not be acceptable when you are more experienced and possibly vice versa". (Registrant)

"The guidance provided doesn't really say anything different than would apply in the case of a normal registrant and therefore provides little assistance to panels. It is important to consider that while some registrants will have the benefit of a long and previously unblemished career, others (in particular students) will not". (Professional Standards Authority)

Consideration as to how business registrant operates in considering sanction

30. Of the respondents who responded to this question 90% agreed with the proposal that the FTP Committee may consider how a business registrant operates when determining sanction. The main issue raised related to some more guidance on this area.

"The cultural environment in which a business registrant operates can remain a risk to the patient even in the event of the FTPC finding an individual director not fit to practice. There may be working patters that is 'normal' within the business itself" (Registrant)

Yes, in principle. However there should be more detailed guidance on this point within the guidance document". (Optical professional body).

Bank of conditions

31. 90% of those who responded considered the revised conditions as set out in the Bank of conditions to be sufficiently clear to enable a Registrant to understand what was expected of him/her. The main area of concern related to the Registrant's ability to disclose a document that is not in his/her control.

"They are clear and cover all aspects" (FTP panellists)

"The revised structure has sub-headings which are clear and easily accessible" (Registrant)

"The Bank of conditions is clearly laid out, and it is up to the Hearings Panel to ensure the correct conditions are in place". (Registrant)

"There are references in the conditions to the registrant being required to "provide" a document to the GOC from a third party. It would be perverse to oblige the registrant to disclose a document that is not in his/her control …. Instead the wording should be amended to require the registrant to "request" or "seek". (Optical professional body).

32. They key actions we have taken as a result of the consultation responses:
    - 32.1 terminology has been made more consistent, referring to "the Committee" and not "you";
    - 32.2 some references to case law quotations have been amended;
    - 32.3 links to guidance documents have been included to aid a more fuller understanding;
    - 32.4 section titles and paragraphs have been amended/re-ordered to provide clarity and avoid confusion;
    - 32.5 Further guidance included in respect of Warnings, stage of a registrant's career, candour, raising concerns and how a business operates; and
    - 32.6 change in terminology for bank of conditions removing the requirement for registrants to provide documentation that is not within their control

33. Further, we note that additional guidance will be implemented in the near future in respect of consent and candour which will further be of benefit to FTP panellists, registrants and the wider public.

Impacts

34. The following implications have been identified:
    - 34.1 Reserves – no implications;
    - 34.2 Budget – we have budgeted to pursue this work including training within both the current and the next financial year;
    - 34.3 Legislation – we will consider the requirement for any future changes in legislation in the context of the Healthcare Regulation Bill;
    - 34.4 Resources – we will be utilising an external trainer in relation to utilising the guidance;
    - 34.5 Equality, diversity and inclusion (EDI) – we have considered within the guidance;
    - 34.6 Human Rights Act – we have considered within the guidance; and
    - 34.7 Sustainability – no implications

Devolved nations

35. There are no implications for the devolved nations.

Communications

36. The guidance will be published on the GOC website once approved in final form. Appropriate signposting to the guidance will be included on the website. A copy of the guidance will be provided to each member of the FTP Committee.

Timeline for future work

37. Provided Council approves the guidance, we propose to publish the policy 1 June 2016, at which point the policy will formally come into effect.

Attachments

Annex 1 - Consultation responses
Annex 2 - FTP Hearings and Indicative Sanctions Guidance with track changes
Annex 3 - Equality Impact Assessment

Summary of responses

Do you think the first part of the document "Fitness to Practise Panels Hearings" clearly sets out the process in respect of each type of hearing? **Clear/very clear 80%** **Neutral 0%** **Not clear 20%**
Do you think the part called "Indicative Sanctions Guidance" is useful in helping you to understand how the FTP panel decides upon a sanction? **Very useful 70%** **Neutral 10%%** **Not useful 20%**
Do you think the part called "Indicative Sanctions Guidance" gives a clear guidance to help FTP panellists to decide which sanction would be appropriate in a given case? **Very clear 80%** **Neutral 0%** **Not clear 20%**
Do you agree with the GOC's proposed approach to the following issues: *Candour* **Yes 60%** **No 30%** **Neutral 10%**
Raising concerns **Yes 60%** **No 20%** **Neutral 20%**
Obtaining patient consent **Yes 80%** **No 0%** **Neutral 10%** *One respondent did not answer this question.*
Do you agree with the GOC's proposal that the FTP Committee should consider a fixed expiry period when imposing a warning? **Yes 90%** **No 0%** **Neutral 10%**
Do you agree with the GOC's proposal that the FTP Committee may consider the stage of a registrant's career/training when making decisions? **Yes 100%** **No 0%** **Neutral 0%**
Do you agree with the GOC's proposal that the FTP Committee may consider how a business registrant operates in considering sanctions? **Yes 88.88%** **No 0%** **Neutral 0%** *One respondent did not answer stating "unable to answer – not clear"*
Are the conditions sufficiently clear to enable a registrant to understand what is expected of him/ her? **Yes 90%** **No 10%** **Neutral 0%**

All written responses

All comments are verbatim, ie. any spelling mistakes or typographical errors have not been corrected.

Do you think the first part of the document "Fitness to Practise Panels Hearings" clearly sets out the process in respect of each type of hearing?
Para 16.1 addresses the situation where the facts are in dispute but nowhere in the "FTP Hearings" section is there an explanation of the process for hearings where the facts are admitted in whole or in part. Para 16.1 should specify when written determinations will be prepared in relation to each stage (facts/statutory threshold/impairment/sanction). It should also be explicit that the proceedings will not progress to the next stage until that determination has been handed down to the parties. Para 16.1(d) should refer to the issue of immediate orders. Para 19 – specific guidance should be included regarding the process for adjournment applications. Paras 20.10 and 20.11 should include guidance on the handling of late submission of evidence and potential prejudice to the registrant. Para 23.5 must include the need to clearly explain the reason that the Committee has preferred some evidence over other evidence where an issue is disputed.
I particularly like the discussion in 20.5 -20.9 (application of standard of proof) because when I was on Council myself and others argued for this point of view.
We would first like to congratulate the GOC on producing this useful guidance and to commend the robust engagement and openness to comment it has demonstrated. We look forward to working together to ensure that the finalised guidance is clear and user friendly. To this end, we include the following comments in response to the consultation questions with further detail in the attached annex. We are not certain whether this is referring to the whole of the document up to the Indicative Sanctions Guidance ('ISG'), or the second section of the document entitled 'Fitness to Practise Hearings'. There is no 'first part' of the document entitled 'Fitness to Practise Panel Hearings'. In any event, we have reviewed the whole of the document up to the ISG section. We consider that some sections of that part of the document are clear, whilst some are not clear. We have set out our views on the major issues we identified below in the annex at the end of the document.
Curiously, there does not appear to be a "first part" of the document entitled 'Fitness to Practise Panel Hearings'. Accordingly I am not certain whether this question refers to the whole of the document up to the Indicative Sanctions Guidance ('ISG'),

or the second section of the document entitled 'Fitness to Practise Hearings'.

Nevertheless, I have reviewed the whole of the document up to the ISG section. Some sections of that part of the document are clear, whilst some are not clear.

Do you think the part called "Indicative Sanctions Guidance" is useful in helping you to understand how the FTP panel decides upon a sanction?

Whilst parts of the guidance are useful, some aspects lack clarity and detail, as per our comments below.

In my time on Council and when serving on IC we were advised that an admission, apparent insight and corrective steps was to be treated as an admission of guilt and indicated automatic referral to FTP. I would like some reassurance that if this applies at the FTP level it also applies at case examiner and IC level.

Do you think the part called "Indicative Sanctions Guidance" gives a clear guidance to help FTP panelists to decide which sanction would be appropriate in a given case?

Regarding Q2 & 3: Whilst in principle, it is useful to have guidance of this nature, and I found some sections of the Indicative Sanctions Guidance to be clear and helpful, however, others within it to be unclear and unhelpful.

- 27.1:

  This paragraph states: *"When issuing a warning, the Fitness to Practise Committee should consider setting a date of expiry of the warning. If no date is set the Committee should set out clearly its reasons.*"

  We consider that there should be no reference to the possibility of issue of a warning with no date set. We refer to the GOC's Guidance for Case Examiners (April 2014) at paragraph 54 which states: "*A warning is not shown on the publicly available register, but it is recorded against the registrant's entry in the relevant register for four years from the date of the warning letter.*"

  This is also consistent with the GOC's May 2012 guidance entitled: "*Guidance regarding warnings issued by the Investigation Committee".* That guidance stated at pages 3 and 4: "*A warning is in force for four years from the date that it is issued. It will expire after those four years have passed.*"

  The current guidance to Fitness to Practise Committees is therefore inconsistent with the guidance to Case Examiners (which in turn reflected earlier guidance to the Investigation Committee) and should be revised accordingly.

  Furthermore, Committees should be given guidance as to when it might be appropriate to issue warnings for periods of less than 4 years.

- 27.3:

  We respectfully invite removal of this paragraph in its entirety as the factors listed are essentially those which might provide a reason for *not* imposing a warning at

all rather than those indicating that a warning is necessary.

If this type of guidance is considered appropriate, the proper way forward would be to identify factors relevant to whether the concerns raised are sufficiently serious to require a formal response from the Fitness to Practise Committee. We refer to paragraphs 19 and 20 to the GMC's Guidance on Warnings by way of example. Factors listed within the GMC guidance include, in summary:

a. A clear and specific breach of *Good medical practice* or the supplementary guidance.

b. That the particular conduct, behaviour or performance approaches, but falls short of the threshold for the realistic prospect test or in a case before a tribunal, that the doctor's fitness to practise had not been found to be impaired.

   Concerns sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise.

c. A warning will be appropriate when 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 (because additional action may be required in the event of any repetition.

- 33:

This section is directed primarily towards individual registrants. It would be helpful to include more detailed reference to considerations that apply to the imposition of conditions upon corporate registrants.

Do you agree with the GOC's proposed approach to the following issues?

Candour

This approach supports the new Standards of practice for Optometrists & Dispensing Opticians making the care, well-being and safety of patients to be the first concern. The GOC approach to Candour supports the standard 16 Be honest & trustworthy, 18, respond to complaints effectively and 19 Be candid when things go wrong. Being candid allows the patient to be informed about any short-term or long term effects, what support is available and how to seek it – to allow adequate further patient care.

Transparency encourages a responsible attitude to errors and mistakes where a registrant can confidently reflect on & improve practice standards as outlined in standard 5 in a safe and open environment amongst peers.

I have some concerns about it being included as a separate allegation, as I feel there is a possibility it may just become a blanket allegation

Whilst we have a duty of candour, I feel that it should be part of the determination of the facts as to whether the duty of candour was appropriate and did or did not occur as the case may be.

Lack of duty of candour should definitely be considered at the sanction stage. I think it is ill defined and open to interpretation. There is no case law. It is motherhood and apple pie.
We note that the GOC in its new Standards of Practice for Optometrists and Dispensing Opticians, which are effective from 1 April 2016, confirms that the professional duty of candour is triggered when the optometrist or dispensing optician has identified that things have gone wrong with a patient's treatment or care which has resulted in them suffering harm or distress or where there may be implications for future patient care [our emphasis]. This is different from the form of words the GOC previously signed up to in conjunction with a number of other regulators. Given the potential ramifications for registrants in not complying with the professional duty of candour, clear guidance is required for both registrants and Committees as to when the professional duty of candour has been breached. It is also not clear why a breach of this particular standard should be considered as an aggravating feature by the Committee in determining sanction. Further guidance on this important issue is awaited.
No, for the reasons we have set out below.
Raising concerns
This approach supports standard 10 Work Collaboratively with colleagues in the interests of patients, 11 Protect and safeguard patients, colleagues and others from harm. This approach is a preventative measure against errors & failure in healthcare arising which helps to reduce the likelihood that the patients are exposed to significant risk in the first place.
Raising concerns about someones FtP is always a very delicate matter, whilst the concern should not be ignored, it needs to be acted upon appropriately. Whilst I understand the need for this to be a part of the duty of candour, I have similar concerns to those above.
No, for the reasons we have set out below
Once again, whilst guidance exists for individual optometrists and dispensing opticians in relation to raising concerns about standards of care and risks to patient safety, there is little guidance available to business registrants. Given the implications of not complying with this standard, clear and comprehensive guidance is welcomed. It is also not clear why a breach of this particular standard should be considered as an aggravating feature by the Committee in determining sanction.
This is an essential element in ensuring public confidence in the profession.
Obtaining patient consent
This seems to be appropriate in that it allows for various levels to be considered.

A essential requirement otherwise would undermine trust.
Optometrists and DO's are low risk and do not undertake invasive procedures. Consent at this level should be verbal. There is no need for written informed consent and this should be made clear. It is a legal obligation and central principle of all healthcare professionals.
Whilst it is fully appreciated that the principle of informed consent is integral to patient care, we do not consider the standard in relation to consent as set out in a civil context (*Montgomery v Lanarkshire Health Board 2015*) to be appropriate when considering the fitness to practise of an individual or business registrant, particularly given that the threshold for misconduct requires a degree of seriousness. There may be instances where a registrant has been negligent in the consenting process but where the threshold for misconduct or impairment is not met. We also consider it inappropriate for issues relevant to causation (whether the patient would have consented had they been aware of treatment and its material risks) to factor into any consideration of misconduct and impairment. Whilst it is fully appreciated that the principle of informed consent is integral to patient care, are you sure that consideration of the standard in relation to consent as set out in a civil context (Montgomery v Lanarkshire Health Board 2015) is appropriate when considering the fitness to practise of an individual or business registrant, particularly given that the threshold for misconduct requires a degree of seriousness. There may be instances where a registrant has been negligent in the consenting process but where the threshold for misconduct or impairment is not met. It should also be consider inappropriate for issues relevant to causation (whether the patient would have consented had they been aware of treatment and its material risks) to factor into any consideration of misconduct and impairment. In High Street optics consent is only necessary for additional tests, such as dilation, OCT, etc. Booking an appointment is consent to the sight test on its own. Also, parents quite often arrive after their children have gone into consulting room and sign the Sight Test Voucher (ie: consent) afterwards. Therefore real life should be taken into account.
Do you agree with the GOC's proposal that the FTP Committee should consider a fixed expiry period when imposing a warning?
I am still undecided about this proposal. My feeling is that this proposal would bring it in line with other Regulators
This section allows for a commonsense approach as it allows for an appropriate timeframe relevant to the impairment. It's only fair for anyone to understand when something as serious as a warning will end as it has a significant impact on that person professional standing.
I also wonder if it would be useful to include a part (similar to the determination) saying 'what makes a good warning' to help given an idea to panelists of the

structure of a warning.
Circumstances change, people change. If a warning is permanent it is not a warning it is punitive. Once a warning has expired and the registrant transgresses again the existence of a prior warning will colour the judgment of the panel. If they never transgress then the warning has had effect.
However, there is no guidance to the Committee regarding setting an expiry for a warning including guidance on the appropriate length of time. Furthermore, it appears from the guidance that the Committee may be able to impose a warning without an expiry. If the GOC consider that the Committees have this power then any such action would be extremely unfair.
Do you agree with the GOC's proposal that the FTP Committee may consider the stage of a registrant's career/training when making decisions?
Registrants experience and knowledge will change throughout their career. What may be acceptable at an early stage of your career when you are relatively inexperienced, may not be acceptable when you are more experienced and possibly vice versa.
Maturity and realisation of responsibility can sometimes affect actions.
One part of a broader context as to whether the issue is part of a repeating pattern or a one off competence issue.
Obviously. Also mode of practice and isolation. In principle, yes. However, no proper guidance is given in the document as to how the FTPC should go about doing this.
Do you agree with the GOC's proposal that the FTP Committee may consider how a business registrant operates in considering sanctions?
The cultural environment in which a business registrant operates can remain a risk to the patient even in the event of the FTP finding an individual director not fit to practice. There may be working patterns that is 'normal' within the business itself.
This may have a bearing on the allegation.
Important part of how a business registrant's conduct is assessed in general
Important to have clear responsibilities however I believe as a registered professional the ultimate accountability sits with the registrant. We cannot risk registrants use their employer as an excuse for poor performance.
All employees have a choice about who they work for and must take ownership for their own registration.
Unable to answer as I do not know what you mean.
However, there should be more detailed guidance on this point within the guidance document.

In principle yes. However, we do not think that the ways in which this might be relevant are clearly explained in the document. We have addressed this further below.
Are the conditions sufficiently clear to enable a registrant to understand what is expected of him/her?
The revised structure has sub-headings which are clear and easily accessible.
The Bank of conditions is clearly laid out, and it is up to the Hearings Panel to ensure the correct conditions are in place.
They are clear and cover all aspects.
In principle, yes. However, no proper guidance is given in the document as to exactly what this means or how the FTPC might take this into account.
A1 – "*…It does not bind Committees, who must always ensure that the conditions are relevant* **and necessary**." There are multiple references in the conditions [e.g. A1.3(f), A3.2(c), A3.2(d), A4.4(c)] to the registrant being required to "provide" a document to the GOC from a third party. It would be perverse to oblige the registrant to disclose a document that is not in his/her control, particularly where the failure to do so would render the registrant in breach of his/her conditions and liable to further action under the Fitness to Practise procedures. Instead, the wording of the condition should be amended to require the registrant to "request" or "seek" the relevant document/report for disclosure to the GOC. In those circumstances, where the third party fails to provide the necessary document the registrant can remain compliant with his/her conditions provided they had requested/sought the document appropriately. A3.2(e) – typo. Should read "Submit a copy of the treatment **report** to the Registrar…"
General responses
Comments on the FTP Hearing Guidance and Indicative Sanctions Guidance Section 2: Types of Registrant
Paragraphs 2.1-2.17 The only concern we have is in respect of paragraph 2.10, which states that "Patients will often have the same expectations of students as they would of qualified professionals, and they must always be a student's first concern from the beginning of their studies through to pre-registration training and beyond." The guidance given that patients must be a student optometrist's first concern throughout their training is obviously both correct and important. However, the first part of the sentence quoted above has the potential to send out the wrong message. Patients may well expect the same of a student as of a fully qualified optometrist. But such an expectation may be unrealistic in many respects. No

doubt that is why the GOC, in its new guidance document for student registrants, acknowledges that a student will "develop their knowledge, skills and judgment over the period of their training".

The first part of the sentence should be deleted or, at least, amended to make clear what the GOC expects of students, rather than what patients may (unreasonably in some instances) expect?

Section 3: What is guidance is for

Paragraph 3.2

This describes the Indicative Sanctions Guidance (ISG) as an "authoritative statement of the Council's approach to sanctions issues".

This is not a description that appears in the ISG published by either the GMC or the GDC, which deal with the position in a much more neutral way as follows:

GMC (ISG in force from 3.8.15)

[1] This document provides guidance to tribunals on imposing sanctions on a doctor's registration, including why the tribunal should impose sanctions and what factors they should consider. It provides a crucial link between two key regulatory roles: setting standards for the medical profession, and taking action when a doctor's fitness to practise is called into question because they have not met the standards.

[2] When serious concerns have been raised about a doctor, the case may be referred to the MPTS for a hearing. Fitness to practise tribunals use the guidance to make sure they take a consistent approach when deciding:

a. whether to issue a warning when a doctor's fitness to practise is not impaired

b. what sanction to impose, if any, when a doctor's fitness to practise is impaired.

[3] The sanctions guidance makes sure that the parties are aware from the outset of the approach that the tribunal will take to imposing sanctions. The tribunal should use their own judgement to make decisions, but must base their decisions on the standards of good practice established in Good medical practice and on the advice provided in this guidance.

[4] In making their decisions on sanction, tribunals must have regard to the overarching objective of protecting the public (see paragraph 13).

[5] The sanctions guidance is also available to GMC decision makers when they are deciding whether to refer a case to the MPTS for a hearing

GDC (ISG in force from 6.4.15)

[1.1] This guidance has been developed by the General Dental Council (GDC) for use by fitness to practise panels in cases which have been referred to them for a hearing. The aim is to provide guidance for panels on exercising their powers in relation to fitness to practise matters and on considering what sanction to impose

following a finding that the registrant's fitness to practise is impaired. This guidance outlines the decision-making process and the factors which should be considered when deciding on sanction.

[1.2] This guidance and its appendix are intended to assist the Professional Conduct Committee (PCC) at fitness to practise hearings. It may also be used by the Professional Performance Committee and the Health Committee, insofar as guidance provided in this document is relevant to those committees.

[1.3] This guidance is supplemented by an appendix which covers decision making considerations. The guidance and appendix should be used to support the

committee's decision making but does not seek to impose a tariff or to fetter the committee's discretion.

The first sentence of paragraph 3.2 should be deleted as it gives the impression that the ISG is a statement of the GOC's submissions on sanction (which it should not be), rather than guidance that is designed to assist the FTPC in making an appropriate decision as to sanction in line with established legal principles. It also comes close to infringing the principles in Bevan v GMC [2005] EWHC 174 (Admin) regarding the need to make sure that committees are not unduly influenced by submissions from the regulator as to the appropriate sanction to be imposed:

[69] However, there is a real difference between these disciplinary proceedings and criminal proceedings, and in my view there is nothing wrong in principle in counsel representing either the complainant, who technically counsel may represent, or instructed by the GMC, in putting forward to the Committee the penalty that is considered to be the appropriate penalty. But I think it is undesirable that it is put in the way that counsel put it in this case, namely that she was instructed by the GMC, particularly as the instructions appear to have come from the deputy registrar off his own bat, subject to consulting the guidance. That is what he appears to be saying in the letter to which I have already referred.

[70] No doubt counsel will discuss with those instructing him or her and the relevant representatives of the GMC what sort of penalty, depending of course on what facts are found established, would be considered to be appropriate, and therefore what would be put to the Committee. It clearly would be entirely proper, and in some cases appropriate, to refer to specific cases if in those cases guidance could be obtained that is relevant to the individual case before the Committee. All that is perfectly proper, but it must be made clear that these are merely submissions, and I do not think it is desirable that it should be put in the form that it was put in this case.

[71] More importantly, it is in my view essential that the Committee are publicly informed by the legal assessor that this must not be regarded in any way as something which they should be influenced by, beyond knowing that it is a submission. Of course they will take it into account, but they must exercise their

own independent judgment, based of course upon such guidance as may be helpful from the various instructions issued by the GMC to doctors so that they know what is required of them and also the guidance to which I have already referred. What concerns me is that that was not done in this case and so there is a real concern expressed on behalf of Dr Bevan that the PCC may have been influenced — and unduly influenced — by the knowledge that it was said that the GMC were desiring that a particular penalty be imposed.

Section 9: Fitness to Practise and what it means

Paragraph 9.3

This paragraph explains that the Council has powers to take appropriate action against registrants where there may be impairment of fitness to practise, and that "it is for the Fitness to Practise Committee to determine an appropriate sanction".

This is incorrect. The FTPC does not simply "determine an appropriate sanction". It considers whether the registrant's fitness to practise is currently impaired by reason of any of the relevant statutory grounds. Only if fitness to practise is found to be currently impaired may the FTPC impose a sanction.

Paragraph 9.3 ought to be re-drafted to reflect the statutory scheme and the process actually adopted in proceedings before the FTPC.

Section 10: The Public Interest

Paragraphs 10.1 – 10.2

These paragraphs are inconsistent and potentially confusing.

Paragraph 10.1 suggests that the FTPC should consider the public interest "when determining sanctions".

Paragraph 10.2 suggests that the public interest should be considered by the FTPC when "considering exercising its powers to make interim orders, determining the question of impairment and deciding upon an appropriate sanction".

Paragraph 10.2 is correct. The public interest is potentially relevant to decisions in relation to interim orders, impairment of fitness to practise and sanction. Paragraph

10.1 should therefore be amended to reflect this.

Section 12: Misconduct

Paragraph 12.1

This paragraph correctly states that there is no misconduct in the GOC's legislation but goes on to suggest that "it will be for the FTPC with its own expertise to determine whether an act or omission amounts to misconduct" (with my emphasis).

It is well established that the question of whether the established facts amount to misconduct is a question of judgment for the professional disciplinary committee

(see CHRP v GMC & Biswas [2006] EWHC 464 (Admin) at paras. 40-41, approving the views expressed by Dame Janet Smith in para. 21.32 of the Fifth Shipman Report).

However, the FTPC exercising its judgment to determine an issue is not the same as it using "its own expertise" to do so. A FTPC of the GOC will include at least one qualified optometrist or dispensing optician (perhaps more if it is a 5 person committee). The lay members of the committee may hold qualifications in other areas of healthcare or may be legally qualified. Paragraph 12.1 as currently drafted might be read as an invitation for FTPC members to be 'backstage experts' and to provide opinions based on their "expertise" to other members of the FTPC during its in camera deliberations. The clear risk is that, in those circumstances, decisions may be made on the basis of an expert view which has not been the subject of evidence or argument during the hearing. This would be a breach of the principles of natural justice and give rise to a potential ground of appeal.

For an example of this, see Lawrence v GMC [2012] EWHC 464 (Admin), where a Fitness to Practise Panel of the GMC stated in its determination on the facts:

[…] from its own expertise the panel reasoned that a woman with low self esteem unless encouraged would be unlikely to fantasise that she was attractive to another.

The High Court allowed the doctor's appeal in part, stating at para. 213 that:

[213] In my view that renders the FTPP's finding one which it was not open to it to make without giving Dr Lawrence an opportunity to address it by seeking to adduce evidence and/or making submissions. The failure of the FTPP to afford Dr Lawrence that opportunity and its inclusion of that finding in its Determination was in my view a material procedural irregularity. It was unfair to Dr Lawrence and contrary to a fundamental principle of natural justice that a court or tribunal will only make findings of fact in respect of matters on which the parties have been afforded a fair opportunity to make submissions and/or to seek to adduce evidence as appropriate.

This paragraph therefore ought to be amended to reflect the position as set out in Biswas, ie: that "it will be for the FTPC as an exercise of its judgment to determine whether an act or omission amounts to misconduct". No mention should be made of the FTPC's "expertise" in this context.

Paragraph 12.3

This paragraph relates to the well established principle that 'misconduct' in the new fitness to practise legislation is to be equated with 'serious professional misconduct' under the old law. This is derived from Meadow v GMC [2006] EWCA Civ 1390 at para. 198:

[….] it is inconceivable that 'misconduct' - now one of the categories of impairment of fitness to practise provided by section 35C of the Act, as substituted

by article 13 of the 2002 Order - should signify a lower threshold for disciplinary

intervention by the GMC.

However, in recent hearings before the FTPC this has been a subject of some confusion, with a suggestion being made that 'misconduct' is not the same as 'serious professional misconduct' and, in fact, is a lower threshold because the word 'serious' does not appear in the statute.

Paragraph 12.3 should make the position absolutely clear for the FTPC by explicitly stating that, although the relevant legislation makes reference to "misconduct" rather than "serious professional misconduct", the meaning is the same. This could be achieved by amending paragraph 12.3 to read "Although the terminology has changed since the Roylance case (ie: the current fitness to practise legislation now refers to 'misconduct' rather than 'serious professional

misconduct'), the courts have been clear [….]".

Paragraphs 12.4 – 12.5

These paragraphs seek to provide assistance to the FTPC in relation to misconduct in cases where the registrant has been negligent. As presently drafted, they do not properly convey the legal position and may cause confusion.

Of particular concern is paragraph 12.5, which states "where a registrant may have been negligent misconduct is likely to be constituted by a series of acts" (my emphasis).

Although it attempts to summarise the law as set out in Calhaem v GMC [2007] EWHC 2606 (Admin) and considered in Vali v GOC [2011] EWHC 310 (Admin), this sentence unfortunately implies that:

* A finding of misconduct could properly be made if a registrant "may have been negligent". This is incorrect. The authorities require "negligence [….] of a high degree" to be established before misconduct can properly be found;

* Misconduct is "likely to be" found where a registrant has committed a "series" of negligent acts. Again, this is incorrect. The authorities make it clear that "a single negligent act or omission is less likely to cross the threshold of 'misconduct' than multiple acts or omissions". However, this does not mean that "multiple acts or omissions" are therefore likely to amount to misconduct. Whether a "series" of negligent acts amounts to misconduct depends on the gravity of the negligence in question. It is possible that even repeated

negligent acts or omissions will not be serious enough to meet the high threshold for a finding of misconduct.

These paragraphs should simply quote in full from the judgment in Calhaem at para. 39 as follows:

(1) Mere negligence does not constitute "misconduct" [….] Nevertheless, and depending upon the circumstances, negligent acts or omissions which are

particularly serious may amount to "misconduct".

(2)) A single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as "misconduct".

This guidance, which is routinely quoted by Legal Advisors and applied by committees across all healthcare regulators, summarises the law fairly and succinctly. There is no reason why this should not be included in the GOC's document in full (particularly when the second half of para. 39 of Calhaem has been quoted in full at paragraph 13.1 of the GOC's document in relation to Deficient Professional Performance).

There is no objection to the quotation from Vali being included as well, however it does no more than summarise para. 39 of Calhaem and may be thought to be unnecessary if para. 39 were to be included.

Additional Comments

In addition to Calhaem, reference ought to be made to Spencer v General Osteopathic Council [2012] EWHC 3147 (Admin),which establishes that a finding of 'misconduct' carries with it an implication of "moral blameworthiness" and a degree of "opprobrium":

[23] [….] The critical term is "conduct". Whichever dictionary definition is consulted, the leading sense of the term "conduct" is behaviour, or the manner of conducting oneself. It seems to me that at first blush this simply does imply, at least to some degree, moral blameworthiness. Whether the finding is "misconduct" or "unacceptable professional conduct", there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen. That is an observation not merely about the natural meaning of the language, but about the likely effect of the finding in such a case as this, given the obligatory reporting of the finding under the Act.

Section 14: Health

Paragraph 14.1

This paragraph states that the FTPC must consider "the same tests" when considering impairment by reason of adverse health as with any other kind of impairment.

It is not clear which "tests" are being referred to here. If this is a reference to the guidance given in the authorities such as Cohen v GMC [2008] EWHC 581 etc., it is clear that such cases are to be regarded as identifying relevant factors to be considered in determining impairment, rather than laying down a 'test' to be applied, see CHRE v NMC & Grant [2011] EWHC 927, at paras. 87-95:

[95] In misinterpreting the decision in Cohen as establishing a three-fold test, rather

than identifying relevant factors to be considered, the weight of which would vary from case to case depending on the facts, I agree that the Committee appear to have lost sight of the fundamental, public interest requirements that must be factored in at this stage.

Paragraph 14.2

This refers to a FTPC finding an allegation of "adverse physical or mental health proved".

This has the potential to cause confusion. If this is referring to an allegation that a registrant's fitness to practise is currently impaired by reason of their adverse physical or mental health, no burden or standard of proof applies to the FTPC's consideration of impairment (see Biswas, as above).

Section 15: Interim Orders

General Comments

This section appears to have been cut and paste from legal advice given in a particular case, as it refers in some instances to the FTPC as "the Committee" and in others as "you" – for example:

Paragraph 15.2: "There may be other relevant matters which you must consider"
Paragraph 15.3: "you should be careful to make such an order"

Paragraph 15.4: "you may make the following orders"

The FTPC should be referred to consistently as "the Committee" throughout the document.

Paragraphs 15.1-15.2

These paragraphs are likely to be confusing because:

They refer to interim orders being made in "the public interest", but use that term to include orders made in order to protect the public or because it is in the interests of the registrant;

* The final sentence of paragraph 15.2 states that there "may be other relevant matters which you must consider", but nowhere in the guidance is this explained further;

* The final sentence of paragraph 15.2 refers to the FTPC's obligation to "uphold the good name of the profession of optician" – apart from being poorly written, opticians and optometrists are of course not the same.

We believe that decision makers are likely to be better assisted with an explanation of the statutory grounds on which an interim order might be made, rather than the kind of vague commentary that appears in these two paragraphs.

Paragraph 15.5

This relates to orders made on the "otherwise in the public interest" limb.

It is correct that the word 'necessary' in the legislation applies only to the "necessary to protect the public" limb and that the High Court confirmed this in Sandler v GMC [2010] EWHC 1029. However, further important guidance was given on this issue in Sandler – in particular para. 14 – which should be included in summary form at least:

[14] There was some debate at the hearing as to whether the IOP could only suspend Dr Sandler on public interest grounds if this was 'necessary'. In my judgment, the Legal Adviser was plainly right to observe that, while the statute allows suspension on public protection grounds only if this is necessary, there is no such qualification to the public interest limb. In Sheikh at [15] Davis J. thought that nonetheless 'if the public interest is to be invoked in this context under the statute, then that to my mind, does at least carry some implication of necessity; and certainly it at least carries with it the implication of desirability.' He added at [16] 'At all events, in the context of imposing an interim suspension order, on this particular basis, it does seem to me, adopting the words of Mr Winter [counsel for the Claimant], that the bar is set high; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality.' I certainly agree that a doctor could not be the subject of interim suspension unless this was at least desirable in the public interest. I also agree that the Panel must consider very carefully the proportionality of their measure (weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising), but I do, with respect, think that the Court must be cautious about superimposing additional tests over and above those which Parliament has set.

FITNESS TO PRACTISE HEARINGS

Section 16: The Process Paragraph 16.1

Paragraph 16.1 addresses the situation where the facts are in dispute but nowhere in the "FTP Hearings" section is there an explanation of the process for hearings where the facts are admitted in whole or in part.

Paragraph 16.1(c) should make it clear that the issue at this stage is whether the registrant's fitness to practise is currently impaired.

Paragraph 16.1 should also specify when written determinations will be prepared in relation to each stage (facts/statutory threshold/impairment/sanction). It should also be explicit that the proceedings will not progress to the next stage until that determination has been handed down to the parties.

Paragraph 16.1(d) should refer to the issue of immediate orders.

Section 17: Private Hearings

Paragraph 17.3

This paragraph is vague and likely to be unhelpful to decision makers and registrants.

The phrase "considering the registrant's health" is clearly intended to cover a much broader set of circumstances than simply where a committee is considering an allegation of impairment by reason of adverse physical or mental health.

The example given of where a "registrant raises health evidence in mitigation" obviously involves a committee "considering the registrant's health". In accordance with the Rules, such evidence must be in private unless the committee considers that it would be appropriate to meet in public.

Guidance to the FTPC on this important issue should not be left in a state of uncertainty. The GOC's position as to the meaning of the words "considering the registrant's health" should be made clear and the implications of this expressly stated.

Section 18: Bias

Paragraph 18.2

This paragraph is confusing and is unlikely to assist committees in considering an application for recusal of a committee member based on actual or apparent bias.

The first sentence requires further clarification. In particular:

* It is not clear what is meant by "biases" in this context, ie: of committee members being "aware" of their "biases". Is this referring to facts which might suggest a conflict on interest, such as a connection between a committee member and one of the parties in a case? Or is this a reference to personal feelings and beliefs that a committee member may have about, for example, the subject matter under consideration?

* It is not clear how a committee member is expected to be aware of their "unconscious" bias. By definition, any "unconscious" bias would not be known to the committee member.

* It is not clear how a committee member is supposed to "manage any bias" to ensure an "impartial hearing". The requirement under Article 6 is for an independent and impartial tribunal. If a committee member is actually biased, either for or against the GOC or the registrant, they should not sit as a committee member.

The second sentence correctly states the well-known test from Porter v Magill [2002] 2 AC 357, as quoted in Rasool v General Pharmaceutical Council [2015] EWHC 217 (Admin). However:

* The test in Porter v Magill is not a test for determining "whether a committee member may be biased". It is a test designed to assist in determining whether (in the context of proceedings before the FTPC) a committee member ought to recuse

themselves due to an appearance of bias.

* We would suggest that this section would be made more helpful by quoting or summarising the salient points contained in paragraph 25 of Rasool as follows:

The test for bias can be un-controversially stated as follows. Would a fair-minded observer, having considered the relevant facts, conclude that there was a real possibility that there was a real possibility that the tribunal was (consciously or subconsciously) biased [….] The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge as 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.

* The third sentence is correct in the sense that the test in Porter v Magill is focused not on actual bias, but the appearance of bias. However, the guidance should make clear that, while a party applying for recusal of a committee member need not establish actual bias in order to be successful, this does not preclude such an application being made on the basis of actual bias if evidence to support that contention is available. In those circumstances, the committee will have to determine whether there is actual bias or, alternatively, an appearance of bias in accordance with Porter v Magill.

Paragraph 18.3

We do not agree that Mahfouz says this specifically. In that case, the issue was with a number of the committee members who had apparently read a potentially prejudicial newspaper article. It is right that in Mahfouz the committee as a whole considered whether the Porter v Magill test was made out. However, we cannot see that it was stated as a point of principle that the committee as a whole must make the decision and that, for example, if an objection is taken as to a particular committee member that member is not entitled to take a decision to recuse themselves without the whole committee becoming involved.

General Comments

We would like to see added that where an application is made that a committee member should recuse themselves because there is either actual or apparent bias, 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, if any, weight. See for example R (Mahfouz) v GMC [2004] EWCA Civ 233, at paragraph 32:

[32] For my part, I would prefer to avoid the use of the terms “bias” or “apparent bias” (with their overtones of possible impropriety) in a case like this. Such expressions are best reserved for cases where the impartiality or apparent impartiality of the tribunal has been put in question, whether by its own conduct or by the disclosure of a possible apparent connection with one of the parties. In such cases, it is obvious that little weight can be attached to the subjective view of the

very tribunal whose impartiality has been put in doubt. Porter v Magill and Lawal v Northern Spirit Ltd [2003] UKHL 35 were examples of such cases [….] In such cases, however strong the decision-maker's own confidence in his ability to decide the case impartially, the decisive issue must be the impression made on the fair-minded observer.

Section 19: Proceeding in the absence of the registrant

Paragraphs 19.2 – 19.3

These paragraphs accurately summarise that the FTPC must consider a "two stage test" when deciding whether to proceed with a hearing in the absence of a

registrant and set out some of the important considerations derived from the case of R v Jones [2001] QB 862 (CA) and [2002] UKHL 5.

However, the guidance should emphasise the fact that a registrant has a right to attend and be represented (subject to him waiving that right through his or her own conduct); that the FTPC has a discretion as to whether to proceed in a registrant's absence; that this discretion must be exercised with great care; that this discretion should be exercised in favour of proceeding in a registrant's absence only in rare and exceptional circumstances; that in considering whether to proceed in those circumstances fairness to the registrant is paramount but fairness to the prosecution must also be considered; and that the extent to which the registrant may be disadvantaged if unable to give his/her account of events having regard to the nature of the evidence against him/her must be considered. Those points are based on Jones in the Court of Appeal:

(1)) A defendant has, in general, a right to be present at his trial and a right to be legally represented.

(2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws *873 instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

(3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

(4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

(5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have

regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally

represented at the trial or has, by his conduct, waived his right to representation;

(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

Paragraph 19.5

This paragraph concerns proceeding in the absence of a registrant who is absent due to ill health. It states that it will "usually be appropriate for the Committee to adjourn the hearing" if the registrant is unwell and his/her absence is involuntary.

This should be stated more firmly, in line with Jones where it was stated at para. 13 that:

If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.

General Comments

In addition, the guidance should include reference to the recent case of Lawrance v GMC [2015] EWHC 586 (Admin), which suggests that a committee should consider in certain cases either adjourning proceedings at the close of the prosecution case or, at least, before imposing a severe sanction to allow an absent registrant the opportunity to attend and give evidence or make representations, see paras. 37 – 42. Specific guidance should be included regarding the process for adjournment applications.

[37] It would have been open to the panel to have decided to proceed to hear the witnesses but only to decide the facts and to seek to notify the appellant with a

view to her attending on the issue of dishonesty. That is what the panel in Tait had done. It is something which in my view should have been considered. It would have meant that the witnesses were able to give their evidence and the appellant, whose behaviour had led to the need to go ahead in her absence, could at least try to show she had not been dishonest.

[….]

39 I have no doubt that the panel ought to have considered before imposing any sanction, particularly as they clearly had erasure in mind, whether attempts should have been made to contact the appellant to enable her to put forward any mitigation.

[….]

[42] Since I have decided that the panel erred in its approach to a finding of dishonesty and in failing both before finding dishonesty and particularly before deciding on sanction to contact the appellant to invite her to attend to make representations, I will allow this appeal and send the case back to the panel [….]

Section 20: Evidence and the standard of proof

The application of the standard of proof

Paragraph 20.6

Reference is made in this paragraph to Re: S-B (Children) [2009] UKSC 17, in which the Supreme Court commented on the House of Lords decision of Re: B (Children) [2008] UKHL 35.

The quotation from Re: SB (Children) explains that the House of Lords in Re: B

"reaffirmed" the principles adopted in Re: H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563.

As presently drafted, Paragraph 20.6 is:

* Unnecessary, as it adds nothing to the point correctly made in Para 20.5 that the "standard of proof does not vary depending on the seriousness of the allegations";

* Likely to confuse a reader who is not familiar with the numerous authorities in this area, as reference is made to the judgment of Lord Nicholls in Re: H (Minors), but without any explanation of what he said and what was being "reaffirmed".

If Paragraph 20.6 is to be included, in order for the quotation from Re: SB (Children) to be properly understood and fairly applied the guidance document should set out the relevant passage from Lord Nicholls' judgment in Re: H (Minors) as follows:

[p586] The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in

mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability [….] Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.

Paragraph 20.8

This paragraph correctly quotes from Lord Hoffman's judgment in Re: B in order to make the point that there is no necessary connection between the seriousness of what is alleged and inherent probability.

However again, in order for this to be properly understood and fairly applied, the guidance document should include the remainder of paragraph 15 of Lord Hoffman's judgment as follows as this provides a helpful example of a situation where there would be no such connection:

[15] [….] 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 no 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 probable that one rather than the other was the perpetrator.

Admissibility of Evidence

Paragraphs 20.11

Paragraph 20.11 does not appear to relate directly to the admissibility of evidence but rather to the FTPC's consideration of the evidence that it has decided to receive. There is no objection to paragraph 20.11 being included somewhere in the guidance, but the stage of the FTPC's consideration of the case that these observations are relevant to should be made clear and should include guidance on the handling of late submission of evidence and potential prejudice to the registrant.

Hearsay

Paragraph 20.13

The first sentence of this paragraph relates to the possibility that a panel may admit hearsay evidence, but give it less weight because the witness' evidence has not

been tested. The case of Thorneycroft is relied on in support of this proposition. If this is to be mentioned, the particular paragraph of Thorneycroft should be quoted or summarised, again from para 45:

1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.

Paragraph 20.14

The last sentence suggests that "particular caution must be exercised if the [hearsay] evidence is also anonymous", relying on White v NMC [2014] EWHC 520. As in other areas of the guidance document, the GOC's summary does not properly convey the caution urged by the High Court. In fact, the court in White said this at para. 13:

[13] In the context of disciplinary proceedings, it is difficult to conceive of circumstances in which the admission of potentially significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirement of fairness. This is not because the rule in criminal cases applies without more, but because of the underlying principle which it applies and illustrates. It cannot normally be fair for significant evidence about the attitude and conduct of a registrant to be admitted against her which she has no opportunity to test or meet by anything beyond a bare denial. Anonymity prevents her from advancing any informed reason why the informant might be critical of her attitude and conduct, but does permit cross- examination of the informant. The fact that the evidence in hearsay precludes testing by cross-examination but not by other enquiries or conflicting evidence.

There is no reason why this should not be summarised, by saying something to the effect of "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 requirement of fairness".

Vulnerable witnesses

Paragraph 20.15

This paragraph states that "When hearing witness evidence, the Committee should be aware that some witnesses before it may be considered vulnerable". Obviously, vulnerability must be considered and addressed well before the committee starts hearing from the witness, not simply "when hearing witness evidence". This could be clarified by simply deleting the first four words of the first sentence of the paragraph.

Section 21: Dishonesty

Paragraph 21.1

This paragraph seeks to give “examples of dishonesty”.

It is our collective view that these examples are likely to cause confusion, potentially prejudicial to registrants and wholly unnecessary.

As explained in Fabiyi v NMC [2012] EWHC 1141 (Admin) dishonesty relates to the accused’s state of mind, not merely his or her conduct, see paras. 47-48:

[47] Turning to Lord Lane's introduction [in R v Ghosh] to the question of how the jury should have been directed in relation to the allegations of dishonesty, the Lord Chief Justice said this:

"Is "dishonesty" in section 1 of the theft Act 1968e intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think it is the latter, then the knowledge and belief of the accused are at the root of the problem."

[48] Thus, in alleging that EF undertook seven external agency shifts dishonestly, the NMC was alleging that she undertook them with a state of mind which she knew was dishonest [….]

That being so, it is both wrong and misleading to list types of conduct, which may or may not be dishonest depending on the state of mind of the person concerned, but nevertheless state that they are examples of dishonesty.

In relation to sub-paragraphs (a) and (b), it may be that the word “defrauding” was intended to imply dishonesty in the sense of obtaining money to which a person was not entitled by deception, ie: with a deliberate intention to deceive. However, it is not made clear in the document that it is the intention that would make the obtaining of money in those circumstances dishonest, rather than simply the act of obtaining monies to which the individual was not entitled. In relation to sub-paragraphs (c) – (f) however, these are examples of conduct that may or may not be dishonest, depending on the intention of the person at the time.

This paragraph should either be deleted in its entirety. The test for dishonesty is adequately summarised in paragraph 21.4 based on the recent cases of Hussain v GMC [2014] EWCA Civ 2246, PSA v HCPC & David [2014] EWHC 4657 and Kirschner v GDC [2015] EWHC 1377.

Alternatively, the paragraph could be amended to read “Examples of dishonesty could include, depending on the registrant’s state of mind at the relevant time: ….]”. However, it would be fairest to delete it in its entirety.

Paragraph 21.2

This paragraph seeks to provide a definition of “research misconduct”.

The definition itself is not in contention. However, the explanation given highlights the problem with categorising "research misconduct" as dishonest conduct per se, as it states that the term "is used to describe a range of misconduct from presenting misleading information in publications [which may or may not be dishonest] to dishonesty in clinical trials [which would obviously be dishonest, although unhelpfully the meaning of this is not explained further]".

It is our collective view that this should be included in the ISG part of the guidance rather than here, as it is focusing on the seriousness of research misconduct rather than on the general principles relating to dishonesty. Including it in this part of the document has the potential to cause confusion.

Paragraph 21.3

This paragraph emphasises how seriously dishonest conduct is viewed in the context of healthcare regulation and, in particular, dishonestly defrauding the NHS.

Again, while this may be relevant to the ISG part of the guidance, it is not relevant to this section. Including it in this part of the document has the capacity to cause confusion.

Section 22: Mitigation

This section has caused us particular concern. It is extremely confusing for decision makers, and it fails to make sufficiently clear at the outset which kinds of evidence favourable to a registrant might be relevant to the different stages of a hearing before the FTPC.

The High Court in Campbell v GMC [2005] EWCA Civ 250 found that some such evidence might go to the question of "culpability", whereas some might be "personal mitigation" that was relevant only to the question of sanction (see paras. 19-21 and 43-44, some of which are quoted in full below):

[21] Notwithstanding some potential difficulties with the language of the rules, as a general proposition it would be surprising if rules governing the disciplinary procedures for the medical professional were to achieve the somewhat startling result that the question whether a practitioner was guilty of serious professional misconduct could be influenced by matters of personal mitigation which went to the appropriate disposal of the complaint. It is in our view elementary that any evidence considered by the committee should be relevant evidence. Mitigation arising from the circumstances in which the practitioner found himself or herself may be relevant to the level of culpability: once serious professional misconduct is proved, personal mitigation will be relevant to possible penalty. In our judgment, these are distinct issues, to be determined separately, on the basis of evidence relevant to them.

[….]

[44] The complainant in the present case, dissatisfied with the decision of the committee, has argued that its approach was wrong in principle. Having analysed the judgments in the Rao [2003] Lloyd's Rep Med 62 and Silver [2003] Lloyd's Rep Med 333 cases and the misreading of the earlier decision in Preiss's case [2001] 1 WLR 1926, we have respectfully concluded that the personal mitigation advanced in the present case, in particular Dr Birkin's "unblemished medical practice", and the outstanding testimonials which showed that he was a highly committed caring and professional doctor, were not relevant to the question whether his treatment of Michael Boyle and Amy Tasker should properly be described as serious professional misconduct. We respectfully agree with Dame Janet Smith that to the extent that they decided that evidence exclusively relevant to personal mitigation could be considered by the committee when deciding whether serious professional misconduct was proved, the decisions in the Rao and Silver cases were wrong. Although the committee is not to be criticised, it misdirected itself in law, and accordingly, the decision in this case was flawed.

Campbell was a case under the old legislation and, clearly, some modification was required to take account of the additional consideration of current impairment of fitness to practise implemented after 2005. Further guidance was provided in Cohen and Azzam v GMC [2008] EWHC 2711 (Admin) as follows (with my emphasis):

Cohen:

[65] Indeed I am in respectful disagreement with the decision of the Panel which apparently concluded that it was not relevant at stage 2 to take into account the fact that the errors of the appellant were “easily remediable”. I concluded that they did not consider it relevant at stage because they did not mention it in their findings at stage 2 but they did mention it at stage 3. That fact was only considered as significant by the Panel at a later stage when it was dealing with sanctions. It must

be highly relevant in determining if a doctor’s fitness to practice is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated. These are matters which the Panel should have considered at stage 2 but it apparently did not do so.

[….]

[67] I have concluded that the decision of the Panel that the fitness to practice of the appellant was impaired was wrong […] There are four significant factors which individually and cumulatively have led me to this conclusion and I will set them out in no particular order of importance.

[….]

[69] Second, the reasoning of the Panel which I set out at paragraph 55 above suggests that having found misconduct proved against the appellant, they

considered that it automatically followed that his fitness to practice was impaired without looking at the other relevant factors, such as first the appellant's long previous unblemished record, second the references showing his conduct since Mr. B was his patient and third that the misconduct was "easily remediable".

Azzam:

[44] It seems to me that, in the light of the authorities cited, it must behove a FTP Panel to consider facts material to the practitioner's fitness to practice 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 Miss Callaghan's submission that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at the "impairment" stage (paragraph 54 of her skeleton argument). However, the line is a fine one and it is clear to me that evidence of a doctor's overall ability is relevant to the question of fitness to practice. Even if Miss Callaghan is correct as to the construction of rule 17(2)(j) (which I doubt, but do not have to decide) the rule clearly envisages the admission of relevant further evidence at stage 2. The panel must consider that evidence (in the same manner as any other evidence received) and weigh it up, decide whether to accept it and then to determine whether, in the light of the further evidence that it does accept and the facts found proved at stage 1, the practitioner's fitness to practise is impaired.

Those limited citations above demonstrate that this is not an entirely straightforward area and requires particularly clear guidance to committees to ensure that relevant evidence is properly taken into account at each stage of the hearing process.

As presently drafted, all evidence favourable to a registrant is dealt with together in this section under the heading of "mitigation". However, it is clear that the kinds of evidence outlined in paragraph 22.1 may be relevant to different stages of a substantive hearing in different ways.

Unfortunately, this is not explained at the outset of the section. Rather, the information given is confusing and incomplete. For example:

* Paragraph 22.2 states that "Certain (limited) types of evidence may be relevant to decisions in the course of Fitness to Practise hearings (see Part 6 below)". It is not clear why this paragraph suggests only that "limited" types of evidence of this kind may be relevant to hearings before the FTPC. This may be seeking to convey that certain kinds of evidence are only relevant to certain stages of proceedings. However (if that was the intention) it does not do so adequately and, in fact, suggests that some of the types of evidence outlined in paragraph 22.1 may not be relevant at all to decisions made in the course of fitness to practise

proceedings.

* Paragraph 22.3, within a section entitled 'The relevance of mitigating circumstances', focuses solely on "evidence of mitigating circumstances surrounding **established** impairment of fitness to practise" which might be relevant "to the evaluation of risk (**and hence your choice of sanction**)" (our emphasis).

This is confusing, as it might be taken to suggest that evidence of mitigating circumstances is only relevant to the question of sanction. While that may be true for certain aspects of purely personal mitigation, it is certainly not the case for "mitigation" in the wider sense as set out in paragraph 22.1.

* Paragraphs 22.7 – 22.10 seek to explain the stages at which evidence of "personal mitigation and testimonials" may be relevant. These paragraphs explain that evidence of good character may be relevant where an allegation of dishonesty is made (paragraph 22.8); that evidence establishing remedial steps will be relevant to the issue of current impairment (paragraph 22.9, which includes the quotation from Azzam that we have reproduced above) and that evidence of purely personal mitigation will usually only be relevant to sanction. This is correct. However, the guidance does not address the important question of when evidence going to the context of a registrant's conduct (and therefore the culpability to be attached to it) may be relevant, nor does it explain that evidence of a good character may be relevant to current impairment and sanction in addition to potentially being relevant to the facts stage if a registrant faces an allegation of dishonesty.

* There is, surprisingly, no attempt to address in any detail the question of the practitioner's insight, what kinds of evidence may indicate insight or a lack of insight, the fact that insight may be expressed in different ways and that cultural differences may play a part in how a practitioner expresses insight. These issues

are expressly addressed in ISG documents produced by the GMC (paras. 37 – 42) and the GDC (paras. 5.22 – 5.26). By contrast, the term insight is only referred to once in this section in paragraph 22.1, which states that "a demonstration of insight of those concerns coupled with actions taken to avoid repetition of them may also be regarded as mitigating factors".

Overall, in our collective view, there is therefore a lack of clarity in this section as to which kinds of evidence – broadly termed "mitigation" – is relevant and admissible at each stage of the proceedings. This section should be re-drafted to make this clear as it is an important topic in the context of hearings before the FTPC. This could potentially be achieved by addressing the categories of evidence that might arise in turn, providing examples and explaining the stage at which such evidence might be relevant. Those categories might be taken to be:

* Good character

* Evidence of the context in which events occurred

* Remediation evidence

* Insight

* Testimonial evidence

* Personal mitigation

* The absence of evidence

The list of generic aggravating and mitigating factors set out at paragraph 22.3 is non contentious and, indeed, a similar list appears in ISG documents issued by other regulators. However, in our collective view view, it would be better incorporated in the ISG section rather than in this section.

Section 23: Decision Making

Paragraph 23.3

This paragraph correctly states that the amount of detail required in a written determination "will depend on the complexity of the case" and goes on to state that the determination should "set out what the facts of the case are with sufficient detail to enable to reader to understand the nature and seriousness of the allegations".

It is not clear why this paragraph gives such importance to the need to include detail to establish the "nature and seriousness of the allegations", while making no mention at all of the crucial requirement that a determination must be sufficiently

detailed to ensure that the parties know what has been decided and why. This flows from the decision in Phipps v GMC [2006] EWCA Civ 397, for example at para.

85:

[85] [….] In every case, as it seems to me, every Tribunal (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?

Paragraph 23.5

This paragraph sets out the factors that make a "good determination".

We would suggest that, in addition to the factors set out at sub-paragraphs (a) – (p), reference to the following could be included:

* The need to use clear language and vocabulary so that the registrant, the other parties to the hearing, members of the public and any appellate court will understand the decision and the reasons for it.

* A clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is disputed.

* Confirmation as to whether the FTPC has taken into account any guidance and, if so, the extent to which that guidance has been taken into account.

Paragraph 23.6

The meaning of the first sentence of this paragraph is not clear at all. INDICATIVE SANCTIONS GUIDANCE

Section 27: Fitness to practise not impaired (warning)

General Comments

This section is, overall, relatively fair. However, we believe that much more detailed guidance could be given, in particular on issues such as:

* The effect of issuing a warning on any subsequent fitness to practise proceedings;

* The purpose of issuing a warning;

* How to draft a warning.

The GMC has issued such detailed guidance in a separate document from its ISG, entitled 'Guidance on Warnings' (2015), which can be found at http://www.gmc-uk.org/Guidance_on_Warnings.pdf_25416870.pdf.

Paragraph 27.1

Paragraph 27.1 states: "When issuing a warning, the Fitness to Practise Committee should consider setting a date of expiry of the warning. If no date is set the Committee should set out clearly its reasons."

However, there is no guidance to the Committee regarding setting an expiry for a warning including guidance on the appropriate length of time. Furthermore, it appears from the guidance that the Committee may be able to impose a warning without an expiry. If the GOC consider that the Committees have this power then any such action would be extremely unfair.

We consider that there should be no reference to the possibility of issue of a warning with no date set. We refer to the GOC's Guidance for Case Examiners (April 2014) at paragraph 54 which states: "A warning is not shown on the publicly available register, but it is recorded against the registrant's entry in the relevant register for four years from the date of the warning letter."

This is also consistent with the GOC's May 2012 guidance entitled: "Guidance regarding warnings issued by the Investigation Committee". That guidance stated at pages 3 and 4: "A warning is in force for four years from the date that it is issued. It will expire after those four years have passed."

The current guidance to Fitness to Practise Committees is therefore inconsistent with the guidance to Case Examiners (which in turn reflected earlier guidance to the Investigation Committee) and should be revised accordingly.

Furthermore, Committees should be given guidance as to when it might be appropriate to issue warnings for periods of less than 4 years.

Paragraphs 27.1 – 27.3

These paragraphs should make clear that a warning may be given when the fitness to practise of a registrant "is found not to be currently impaired" and should refer to "a finding of 'no current impairment'".

Paragraph 27.3

In respect of the list of factors consider, "and/or" is included after sub-paragraph

(b) and "and" is included after sub-paragraph (i). This may cause confusion. Is there a reason for these words to be included after those two sub-paragraphs only?

Moreover, we respectfully invite removal of this paragraph in its entirety as the factors listed are essentially those which might provide a reason for not imposing a warning at all rather than those indicating that a warning is necessary.

If this type of guidance is considered appropriate, the proper way forward would be to identify factors relevant to whether the concerns raised are sufficiently serious to require a formal response from the Fitness to Practise Committee. We refer to paragraphs 19 and 20 to the GMC's Guidance on Warnings by way of example.

Factors listed within the GMC guidance include, in summary:

a. A clear and specific breach of Good medical practice or the supplementary guidance.

b. That the particular conduct, behaviour or performance approaches, but falls short of the threshold for the realistic prospect test or in a case before a tribunal, that the doctor's fitness to practise had not been found to be impaired.

Concerns sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise.

c. A warning will be appropriate when 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 (because additional action may be required in the event of any repetition.

Section 28: Impaired fitness to practise etc.

Paragraph 28.1

Rather than referring to a conclusion that "the registrant remains fit to practise and does not require any restriction on his/her registration", which may cause confusion, this paragraph should simply read "Where you conclude that the

registrant's fitness to practise is not currently impaired, none of the [….]".

Section 29: Available sanctions

Paragraph 29.1

This paragraph should refer to where fitness to practise is "found to be currently impaired".

Paragraph 29.2

This paragraph deals with the possible sanctions available to the FTPC.

Taking no action following a finding of current impairment is just as much an option for the FTPC as the sanctions listed at sub-paragraphs (a) – (e). In our collective view, this paragraph should set out the options open to the FTPC if it finds that a registrant's fitness to practise is currently impaired. This includes "Take no action", which should be listed as sub-paragraph (a). This could be achieved by the paragraph reading "Where a committee finds that a registrant's fitness to practise is currently impaired, it can (a) Take no action, (b) [….]".

Section 30: Proportionality

Paragraph 30.1

This paragraph does not clearly explain the concept of proportionality. It should include an explanation to the effect that proportionality requires that any sanction imposed must:

* Strike a proper balance between the interests of the registrant and the public interest;

* Be the least severe sanction that deals adequately with the issues identified in the particular case.

Further, this paragraph must make clear that the FTPC must consider the sanctions "in ascending order, starting with the least severe" and must only move on to the next sanction if the one under consideration is not sufficient.

Paragraph 30.2

This paragraph addresses the stage of a registrant's career/training and its potential relevance to determining the proportionate sanction for a student registrant. It follows quite closely the guidance issued by the GMC in its ISG document at paras. 26-29, which read as follows:

The stage of a doctor's UK medical career

[26] When a doctor graduates from medical school and begins working in the UK, they may well experience a steep learning curve as they take on new responsibilities. As a doctor's medical career progresses, the tribunal would expect the doctor to gain increased understanding of the social and cultural context of

their work, appropriate standards, and national laws and regulations that apply to their area of work.

[27] Many doctors joining the medical register have previously worked, lived or were educated overseas, where different professional standards and social, ethnic or cultural norms may apply. Doctors are expected to familiarise themselves with the standards and ethical guidance that apply to practising in the UK before taking up employment, although experience of working as a doctor in the UK plays a key role in their development.

[28] In some cases, the tribunal may consider the stage of a doctor's UK medical career, and whether they are new to the UK medical register, when making decisions. Evidence that the doctor has gained insight (see paragraphs 37–42), once they have had an opportunity to reflect on how they might have done things differently with the benefit of experience, may be a mitigating factor.

[29] In cases involving serious concerns about a doctor's performance or conduct – for example, predatory behaviour to establish a relationship with a patient (see paragraphs 105–106), or serious dishonesty (see paragraphs 129–137) – the stage of the doctor's UK medical career will have limited influence on the tribunal's decision about what action to take. Serious poor practice or misconduct is not acceptable simply because the doctor is inexperienced.

We think that it is entirely proper for a FTPC to take the stage of a student registrant's career into account in determining the appropriate sanction, in cases where a finding of current impairment has been made. However:

* The only factor specifically stated is that it may be a mitigating factor if a student gains 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". This is perhaps obvious and, in any event, is not much different from the relatively common situation seen by the FTPC of a fully registered optometrist who has allowed his or her knowledge/skills to deteriorate over time due to isolation, lack of training etc. In our collective view, the guidance document should provide for clarity to committees as to how the stage of a student registrant's career may be relevant.

* This paragraph deals only with sanction. However, the stage of a student registrant's career may also be relevant to other stages of the fitness to practise process as well. The guidance document should explain how, perhaps in a separate section on this issue rather than in a single paragraph in the ISG.

* The final sentence of this paragraph should read "[….] the stage of a registrant's training may have a more limited influence [….]". The extent to which the stage of a student registrant's career will be relevant will vary, depending on the facts of the case. It will ultimately be a matter for the FTPC to determine how much weight should be attached to it. As currently drafted, the last sentence may act so as to fetter the FTPC's discretion.

Section 31: No further action

General Comments

On our view the guidance should simply highlight the fact that the FTPC may take no action and say nothing more. This is because action should only be taken when it is required to protect the public or public confidence in the profession and there should not be a presumption in any case that a FPTC will take action.

However, we recognise that given the contents of the GMC's and GDC's ISG documents which do specifically address this issue, we anticipate that the GOC will wish to publish some guidance on the subject.

Overall, our impression is that this section is seeking to persuade committees away from taking no action in any case – in particular the use of the word "very" in paragraphs 31.2 and 31.4 ("very rare" and "very carefully") and the use of bold in paragraphs 31.2 ("Exceptional") and 31.3 ("considerable insight into his/her behavior and has already embarked on [….]"). We did not note this kind of language/formatting being used in any other section of the document.

We think that the section should be written in a much more natural way, which conveys that it will be only in exceptional cases that it will be proper to take no action but without going too far.

Further, we think that this section goes too far in seeking to limit taking no action to "very rare" cases. Paragraph 31.2 is contradictory, as "exceptional circumstances" does indeed mean in some contexts circumstances that are "not routinely or normally encountered" (relying on R v Kelly [2000] QB 198).

However, this is not the same as saying that the circumstances must be "very rare". In our view the word "very" in paragraph 31.2 should be deleted for this reason as well.

Section 32: Conditional registration

Paragraph 33.1

This paragraph states that, because the primary purpose of conditional registration is to protect the public, "the conditions should normally impose a requirement for the registrant to be under strict supervision in either his practice or other places of work".

This statement is not based on any authority or other established guidance that we are aware of and is, in our collective view, wrong. There could be no requirement to "normally impose" any form of supervision, let alone "strict supervision". Each case is different and, as a result, the requirements of each case will be different. We note that the GMC's ISG deals with the issue in a far more neutral way (para 61, with our emphasis):

[61] The purpose of conditions is to help the doctor to deal with their health issues and/or remedy any deficiencies in their practice or knowledge of English, while

protecting the public. In such circumstances, conditions might include requirements to work under supervision.

In our collective view, the relevant sentence may have the effect of fettering the FTPC's discretion. It should be deleted in its entirety.

Paragraph 33.3

This paragraph suggests that the FTPC may decide that "further training, in additional to conditional registration, is required [….]".

The meaning of this is unclear. There is no reason why "further training" cannot form the basis of a condition imposed as part of a conditional registration order. The GOC may be assisted by referring to the GDC's ISG in this regard, which states at para. 7.10 (with our emphasis):

[7.10] A Conditions of Practice Order ("conditions") may be imposed to restrict a dental professional's practice, for example by preventing him or her from: practising in certain circumstances; from carrying out certain treatments; or from treating particular categories of patient. Conditions may also make positive requirements of a dental professional, such as a requirement to undergo training in a particular area of their practice.

Paragraph 33.4

It is suggested in this paragraph that the FTPC 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" when assessing the "potential of using conditions".

Without further clarification, this paragraph as currently worded has the capacity to cause confusion, potentially to the detriment of registrants. It is not clear why "objective evidence

submitted on behalf of the registrant" has been separated out from the "other evidence that is available". It will often be the case that a registrant explains their practice to the FTPC in oral evidence at the impairment stage. Is this classed as "objective evidence"? If not, what kind of "objective evidence" is anticipated?

Paragraph 33.5

This paragraph suggests that the objectives of any conditions should be made clear to assist any future committee considering the case.

This is true, but the primary reason for making the objectives of conditions clear is to ensure that the registrant understands what is expected of him or her. Reference to this should be included. Similar wording to that used in the GMC's ISG could be adopted (see para. 70):

"[70] The tribunal should clearly set out the objectives of the conditions so the doctor knows what is expected of them. This is also important to help tribunals at future review hearings understand the original concerns and the exact proposals to resolve them, and to evaluate whether the concerns have been resolved".

Paragraph 33.9

This paragraph suggests that conditions may be appropriate when most or all of the following factors are apparent and at sub-paragraph (d) "no evidence of general incompetence" is suggested as a relevant factor.

It is not clear what "general incompetence" means. The phrase is not defined anywhere in the ISG. Nor is this a phrase mentioned, to our knowledge, in any authority on the subject of fitness to practise. Further, it is not clear why conditions could not be appropriate in circumstances where a practitioner displays "general incompetence" (whatever the phrase means), but the FTPC considers that his or her performance could be improved by further supervision and training.

In our collective view, the use of such loose language is likely to cause confusion. Sub-paragraph (d) should be deleted.

General Comments

It may also be helpful for committees to know that it would be unlawful for a condition to be imposed that is tantamount to an order for suspension (a condition that the registrant must not practise optometry, for example). This arises from the case of Udom v GMC [2009] EWHC 3242 (Admin), at paras. 31-33:

[31] In my judgment, the Panel did err in law in their approach to section 35D(2) of the 1983 Act. As I have said, subsections (b) and (c) are based on different and mutually exclusive premises.

The former (suspension) is based upon the premise that in substance registration, and hence the ability to practise cease, at least temporarily. The latter (the imposition of conditions) is based upon the premise that in substance registration, and hence the ability to practise, continue, but are restricted. They are alternatives - hence the word "or" that joins them - precisely because they are mutually exclusive. It is logically impossible to have conditions limiting the ability to practise medicine attaching to a registration that is of no effect. If conditions are

such that they divest registration of all effect, then that cannot properly be called a "conditional registration". In substance, it is no registration at all.

[32] And in my judgment, it is a matter of substance, and not simply form. I do not consider that a panel can undermine this statutory structure by bringing to an end the ability to practise through the imposition of conditions under subsection (c), rather than suspension under subsection (b). It cannot have been the intention of the provisions that a panel could do that because, if registration could be brought to

an end for a period of time by way of a conditions, then subsection (b) would be otiose and empty - and it is a tenet of statutory construction that some substance should be given to each provision. Still less could it have been the intention of Parliament, in the face of the clearly disjunctive subsections (b) and (c), that conditions could be used to emasculate registration and impose yet further obligations on the relevant doctor. Leaving aside the practical difficulties that this may impose upon that doctor, to which Miss O'Rourke referred, it is simply not a construction open on the face of the statutory provisions.

[33] That proper construction does not allow for a suspension of a registration, coupled with further obligations imposed upon the doctor. I do not consider that it is any answer for the GMC to say (as the Panel in this case did, and as Miss Griffin submitted) that one reason for the imposition of the conditions was that they were for the Appellant's own good in terms of rehabilitation. In other words, he was more likely to be rehabilitated as a doctor if he were made to pursue clinical attachments subject to the obligations set out in the conditions imposed by the sanctions determination. The Appellant happens to disagree in this case - he considers he would stand a better chance of rehabilitation if he were suspended and had more freedom to arrange clinical attachments etc - but in any event the focus of this regime is not paternalism for doctors, but rather for the protection of the public and the integrity of the profession, which can equally be maintained by a suspension of the relevant doctor. In the face of the clear provisions of the statute, there is no room for a construction that allows a panel effectively to suspend a doctor and also impose conditions upon him that arguably may assist his own rehabilitation. If that were the true construction, then all cases in which a panel intended to take from a doctor the ability to do what registration authorises him to do in terms of clinical practice, could and would be done by way of conditions that could both take away the effects of registration completely, whilst imposing upon the doctor a regime that would (in the panel's view) maximise that doctor's opportunities to rehabilitate and return to practise. Indeed, if that were the true construction, they could do so and effectively suspend the registration of a doctor for a period of 3 years, rather than 12 months. Paternal and good as the intentions of the GMC might be, that is simply not the statutory scheme.

Section 34: Suspension

Paragraph 34.1

Sub-paragraph (b) suggests that suspension may be appropriate when the conduct concerned is “not fundamentally incompatible with continuing to be a registered professional”.

In our collective view this sub-paragraph should be removed as it may lead to confusion for the reasons given in O v NMC [2015] 2949 (Admin) – see below. Simply removing the words “in that the public interest can be satisfied by a less severe outcome than permanent removal from the register” from the end of the guidance criticised in that case does not remove the real possibility of an error in

decision-making:

[37] In relation to suspension, paragraph 71 sets out a non-exhaustive list of factors indicating that suspension may be appropriate. They include the following, so far as relevant to this case:

71.1 A single instance of misconduct but where a lesser sanction is not sufficient.

71.2 The misconduct is not fundamentally incompatible with continuing to be a registered nurse or midwife in that the public interest can be satisfied by a less severe outcome than permanent removal from the register.

71.3 No evidence of harmful deep-seated personality or attitudinal problems.

71.4 No evidence of repetition of behaviour since the incident.

71.5 The panel is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.

[….]

[79] The operative part of the committee's reasoning is the part in which it ruled out suspension, since that was the exercise which determined that striking-off would necessarily follow. During that part of the committee's reasoning process, there was no evaluation worth the name of the points made in mitigation by Mr Hockley.

80 The error in this approach is contributed to by the way in which the Guidance is drafted. In paragraph 71, the “key considerations” in a suspension case include that set out at 71.2, which in effect asks the question whether suspension is too lenient. That consideration is, in appearance, given equal weight with the other considerations set out in 71.1 and 71.3–7 inclusive.

[81] However, what is set out at 71.2 is, properly appreciated, not a “consideration” at all but the conclusion which either does, or does not, flow from an assessment of the other considerations set out under paragraph 71. Once

paragraph 71.2 is found to be inapplicable, the inexorable conclusion is that suspension is too lenient and striking-off necessarily follows.

[82] It is therefore critical to the fairness of the process that the paragraph 71.2 issue is addressed at the end of the committee's deliberations, not in the middle of them as was done in this case. Here, the committee proceeded straight to paragraph

71.2 when considering suspension, saying it was “of the view that paragraph 71.2 was a particular consideration in this case”.

[83] That was the first statement it made when considering suspension as a possible sanction. There was no mention of the factors set out in 71.3 or 71.4, so heavily relied upon by Mr Hockley.

When considering the paragraph 71.2 issue, the committee simply failed to address the mitigation advanced by Mr Hockley which should have informed its conclusion on that very issue.

[84] Once the committee had concluded that suspension was insufficient, the case was effectively over. No other sanction remained available except striking-off. All others had been ruled out. Thereafter, there was still no evaluation of the points made in mitigation on Mrs O's behalf. They were never properly weighed in the balance against the public interest in maintaining trust in the nursing profession and the regulator.

Further, sub-paragraph (g) should not be part of the list.

Paragraph 34.3

Reference is made in this paragraph to HK v General Pharmaceutical Council [2014] CSIH 61, which is an unusual case in which the Inner House of the Court of Session decided that there was an "intermediate sanction" between suspension for 12 months and erasure, involving a committee suspending for 12 months and indicating that it would expect the suspension to be further extended at a Review Hearing, see para 17:

[17] In such a case we are of opinion that it would be competent for the Committee, when imposing the sanction of 12 months' suspension, to indicate that it considered that the suspension should be extended thereafter, for a further 12 months or longer as the case might be. The power to give such an indication appears to us to be reasonably incidental to the powers conferred by article 54(2)(d) and (3)(a)(ii) ; without it the Committee is faced with a stark dichotomy between one year's suspension and removal from the Register, which is effective for at least 5 years. That is clearly undesirable as in many cases, of which the present appears to us to be an example, some middle course is the correct sanction. Counsel for the respondent submitted that the problem with the power of suspension was that only 12 months can be imposed, and the Committee cannot tie the hands of a later Committee when it comes to consider an extension.

Nevertheless, we are of opinion that it must be assumed that the later Committee will act in a reasonable manner and will respect the decision and findings of the earlier Committee that heard the complaint against the appellant. If an indication as given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional 12 or 24 months, that will not bind the later Committee, but the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so. In our view this provides an intermediate sanction but at the same time respects the freedom of the later Committee to deal with changing circumstances, if that is appropriate.

As the document rightly states, this decision is the subject of an appeal by the GPhC to the Supreme Court. However, for now, it remains persuasive authority as to the powers of a disciplinary committee in these circumstances.

In our view, if it is to be mentioned it should fully explain that HK suggests:

* That an "intermediate sanction" between suspension for 12 months and erasure is available;

* That it would be competent for the Committee, when imposing the sanction of 12 months' suspension, to indicate that it considered that the suspension should be extended thereafter, for a further 12 months or longer as the case might be";

* That "if an indication as given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional 12 or 24 months, that will not bind the later Committee, but the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so".

Section 35: Directing a Review Hearing

Paragraph 35.3

This paragraph properly suggests that the FTPC may wish to give guidance as to the evidence that a Review Hearing committee may find useful.

However, it may be helpful to make clear in this section that any such guidance is not a 'condition' of practice. The FTPC cannot impose both an order for suspension and a condition at the same time. This would be unlawful, as explained in Udom (eg: at para. 33, set out above).

Section 36: Erasure

Paragraph 36.4

While reference to the general principles set out in Bolton v Law Society and Gupta v GMC is unobjectionable, this paragraph goes further and seeks to suggest that erasure will be appropriate where, despite a practitioner presenting no risk, where "the registrant's behavior has demonstrated a blatant disregard for the system of registration". This is based on the outcome in the case in Gupta.

This paragraph is potentially unfair to registrants and should be deleted. Each case turns on its own particular facts. It is not proper for Gupta to be advanced as establishing any general principle of law in this regard.

TYPES OF CASE AND INDICATIVE SANCTIONS

Section 37: Sexual misconduct

Paragraph 37.1

This paragraph suggests that "the misconduct is particularly serious where [….] a registrant has been registered as a sex offender".

This contention is not consistent with paragraph 38.2 of the same document and with the case of Obukofe v GMC [2014] EWHC 498 (Admin), which suggests that it is not the fact of being on the sex offenders register that is a decisive factor in determining sanction, see paras. 55-58:

[55] The next point that is taken is that the Panel erred in law in treating the Fleischmann case as analogous and relying on it in reaching its conclusions on sanction. In the Fleischmann case, Dr Fleischmann, a dentist, had been convicted of possessing indecent images of children on his computer, many at levels 4 and 5. He was convicted on twelve counts and sentenced to a Community Rehabilitation Order for 3 years on each count concurrently and put on the Sex Offenders' Register for a period of 5 years. The Community Rehabilitation Order required him to attend a Sexual Offenders rehabilitation programme. The Professional Conduct Committee of the General Dental Council imposed a sanction of suspension for 12 months and an appeal was brought to this court on the grounds that that sanction was unduly lenient. Newman J allowed the appeal and held that the only proper sanction in that case was erasure from the register.

[….]

58 It appears to me that the important element of the reasoning of Newman J in paragraphs 53 and 54 of his judgment relate to the sex offender's treatment programme to which Dr Fleischmann was subject for 3 years rather than his subjection to the notification requirements of the Sex Offenders Register for 5 years. If, in this case the Panel had thought that the Fleischmann case required it to continue the suspension until Dr Obukofe's criminal sentence had been completed

(including the period during which he remained subject to the notification requirements of the Sex Offenders Register) that would, in my view have been an error of law. But it seems clear to me that that was not the way in which this Panel relied on the Fleischmann decision [….]

Reference to “being registered as a sex offender” should be deleted from this paragraph.

Paragraph 37.2

It is not clear where this quotation is from or what it relates to or why it is relevant to this section. In the circumstances it should be deleted.

Section 38: Indecent images of children

In general, the guidance in this section appears reasonable. The only comment we would make is that we are not sure what the basis is for the comment made at the start of paragraph 38.1 that “In most cases where a committee has not imposed the most severe sanction, the PSA has had concerns that the committee has failed to investigate the case sufficiently”. We are not currently aware of any PSA cases concerning indecent images other than the Fleischmann case.

Section 39: Dishonesty
This is reasonable guidance, in line with the case of Hassan v GOC [2013] EWHC 1887. It should however also be mentioned that the High Court has in fact gone further than this and stated that there is no general rule that a practitioner is inevitably to be found to be currently impaired if they have acted dishonestly. In PSA v GMC & Uppal [2015] EWHC 1304 (Admin) Lang J stated that: [26] In its review of the law, the PSA submitted that "the fitness to practice of a doctor who acts dishonestly is impaired by that dishonesty", citing R (CR HCP) v. NMC & Kingdom [2007] EWHC 1806 (Admin) ; Parkinson v. NMC [2010] EWHC 1898 (Admin) ; Hassan v. General Optical Council [2013] EWHC 1887 (Admin) [27] In my judgment, the PSA's submission that a doctor's fitness to practise "is impaired" if he acts dishonestly does not accurately reflect the statutory scheme or the authorities, since, even in cases of dishonesty, a separate assessment of impairment is required, and not every act of dishonesty results in impairment. [….] This should be included at some point in the document.
Section 40 Candour
We note that the GOC in its new Standards of Practice for Optometrists and Dispensing Opticians, which are effective from 1 April 2016, confirms that the professional duty of candour is triggered when the optometrist or dispensing optician has identified that things have gone wrong with a patient's treatment or care which has resulted in them suffering harm or distress or where there may be implications for future patient care [my emphasis]. This is different from the form of words the GOC previously signed up to in conjunction with a number of other regulators. Given the potential ramifications for registrants in not complying with the professional duty of candour, clear guidance is required for both registrants and Committees as to when the professional duty of candour has been breached. Paragraph 40.2 (a)Charging breaches of the duty of candour This paragraph states that a breach of the relevant standards in this regard will "normally be charged as a separate allegation". In our collective view, if it is to be suggested that a registrant has breached his or her duty of candour this must be alleged as a specific factual allegation and adjudicated upon by the FTPC at the facts stage. Only if that is done can such a breach be taken into account at subsequent stages of the hearing. This flows from the following line of authorities: Struthos v London Underground Ltd. [2004] EWCA Civ 402 [12] It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be

precisely framed, and that evidence should be confined to the particulars given in the charge.

[....]

[38] This is not a case, especially as the matter has been raised only during the hearing in this court, in which to attempt to state general principles as to when a disciplinary charge of this kind may be departed from when disciplinary action is taken. However, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.

Chauhan v GMC [2009] EWHC 2093 (Admin)

[6] In so far as the Panel, at stage one of its decision process, makes material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, which however are not within the charges as formulated and particularised in the Notice of Hearing, then those findings in my judgment cannot properly or fairly be used by the Panel to support its findings under the Notice and in so far as the Panel has so used them, then the Notice findings are liable to be held vitiated and set aside. I agree with Silber J. in Cohen v. GMC [2008] EWHC 581 (Admin) 581, paragraph 48 that findings in relation to any particular charge at stage one "must be focussed solely on the heads of the charges themselves". The observations of Pill LJ in Strouthos v. London underground Ltd [2004] EWCA Civ 402 at paragraph 12 that a "it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed and that the evidence should be confined to the particulars in the charge" must be equally apposite to hearings before the FTP of the Respondent.

R (El Baroudy) v GMC [2013] EWHC 2894 (Admin)

[14] As I have said already, in this case there was no allegation that the misconduct either caused death or caused the loss of any realistic chance of survival. Had the GMC wished to pursue those allegations, which would have been highly material, then in my judgment they should have been clearly stated in the charges and, in the absence of being stated, evidence directed to those issues should not have been led and the Panel should not in any way have based a judgment as to whether the fitness to practise was impaired or as to sanction on any question of causation, causation being defined as causing death or indeed causing the loss of any real chance of survival.

Further, an allegation that a registrant has breached his or her duty of candour may well include an allegation of dishonesty. If that is the case, it is particularly important

that such an allegation is properly particularised and adjudicated upon by the committee, see eg: Fish v GMC [2012] EWHC 1269 (Admin):

[69] I do not think that I state anything novel or controversial by saying that it is an allegation (a) that should not be made without good reason, (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it. [….]

[70] At the end of the day, no-one should be found to have been dishonest on a side wind or by some kind of default setting in the mechanism of the inquiry. It is an issue that must be articulated, addressed and adjudged head-on.

(b) Procedure for adjudicating on such charges

This paragraph goes on to state that "In these situations [we take this to mean when a separate allegation of a breach of the duty of candour has been alleged] the Committee should consider whether the registrant complied with the standard of candour as part of determining the facts, and any breach of the standards that might amount to misconduct".

The second part of this sentence may mean that the FTPC should consider whether any breach of the duty of candour that has been established at the fact stage amounts to misconduct. If so, that is correct. However, its meaning is unclear at present.

It may be more helpful for this part of the document to explain that an allegation that a registrant has breached the duty of candour should be treated in the same way as any other allegation.

(c) Aggravating feature

This paragraph states that "It [which we take to be referring to an established breach of the duty of candour which amounts to misconduct and which gives rise to current impairment of fitness to practise] should be considered as an aggravating feature by the committee in determining sanction".

This terminology is likely to cause confusion. If a registrant is found to have breached the duty of candour, this is not an "aggravating feature" in the sense that it makes any other established misconduct more serious. It the proper procedure has been followed, a specific allegation will have been particularised and adjudicated upon. That allegation may, depending on the circumstances, lead to a finding of misconduct, of current impairment and the imposition of a sanction.

However, it is not an "aggravating feature". It is an allegation in itself, which must be considered as such by the FTPC.

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

Paragraph 41.2

This paragraph suggests that "it is likely that conditions or suspension may not be sufficient" in clinical cases where a practitioner does not have insight, or does not have the potential to develop insight. The cases of Ghosh v GMC [2000] and Garfoot v GMC [2001] are relied on in support of this proposition.

The sentence "it is likely that conditions or suspension may not be sufficient" is confusing and contradictory.

Further, the cases of Ghosh and Garfoot do not support the general proposition made in this paragraph. They were decisions that turned (in relation to the sanctions imposed) on their own particular facts.

Ghosh was a case in which a doctor had been made subject to a period of conditional registration, which she had failed to comply with. In particular, she had failed to attend appropriately and at one stage left the country without warning for 2 ½ months. At a resumed hearing the committee, unsurprisingly, erased the doctor's name from the register. The Privy Council declined to interfere, stating that:

Their Lordships have themselves reviewed the evidence, and are satisfied that this was a bad case. Dr Ghosh never acknowledged the seriousness of her original misconduct, and patently failed to attend, let alone successfully complete, the programme that had been arranged for her. Her conduct in leaving the country for 2½ months without prior warning or subsequent explanation was unprofessional and in the highest degree irresponsible. On the evidence before it and without seeing Dr Ghosh and hearing her in person the committee had no material on which it could be satisfied that Dr Ghosh would be any more likely to comply with the terms of a further period of conditional registration than she had in the past.

Their Lordships recognise, as the committee must have done, that erasure will effectively bring Dr Ghosh's career as a doctor to an end. But they consider that, in all the circumstances, the committee had no real alternative but to order her name to be erased from the register

Garfoot was a case involving the irresponsible prescribing of addictive controlled drugs (including injectable methadone and benzodiazepines) to vulnerable patients over a period of years. The committee erased the doctor's name from the registered. The Privy Council declined to interfere, stating:

[15] Turning to the question of erasure their Lordships have concluded that, although the ultimate sanction, it was neither excessive, disproportionate, inappropriate nor unnecessary in the public interest. The evidence and the conclusions of the Committee indicated a very serious state of affairs. Their Lordships cannot accept the argument that the patients did not suffer harm. Where there was no attempt at stabilisation on oral preparations and no attempt to engage patients other than by maintenance prescribing there was inevitable harm to such

patients. [….]

[….]

[16]The Committee considered carefully and at length the option of imposing conditions but concluded that no appropriate conditions could be devised so as to enable him to continue practising in his chosen specialty. The Board has re-considered the situation in the light of the proposal that he will depart from this

field, undertake general practice and that he has no intention of treating drug users again. Even if their Lordships had been persuaded that this was a practical proposition, they would nevertheless have come to the conclusion that the circumstances of the case were so serious that the order of erasure was entirely appropriate and, inevitable and that there was no basis to justify setting it aside.

In our collective view, this paragraph should be amended and reference to Ghosh and Garfoot removed. We would not object to the paragraph stating something along the lines of "A particularly important consideration is whether or not a registrant has insight, or the potential to develop insight, into these failures. Where this is not evident, conditions or suspension may not be appropriate or sufficient".

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

General Comments

This section makes no mention of The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 and protected convictions/cautions. It would be helpful to committees to be given some assistance on this topic.

Paragraph 42.1

The last sentence of this paragraph states "If a registrant has accepted a police caution, the registrant will have admitted committing the offence".

This paragraph does not explain what a caution is and is poorly drafted. The issue is dealt with in the following way in the GDC's ISG document at para. 8 of Appendix A, which is more helpful:

[8] In England and Wales, a caution may be given by the police when there is sufficient evidence for a conviction but it is not considered to be in the public interest to pursue criminal proceedings. The registrant must have admitted guilt and consented to a caution in order to have been given one.

Paragraph 42.4

This paragraph suggests that a committee may form its own view of the gravity of the case before it, relying on RCVS v Samuel [2014] UKPC 13.

This is correct, but it is important that this paragraph makes it clear that this could apply not only in circumstances where it is considered that there were "particular

circumstances which led [the] court or regulatory body to be lenient", but also where it appears that the court or regulatory body has been too harsh in sentencing see Samuel at para. 33, where the Privy Council considered that the offences in question should not have been held to cross the custody threshold:

[33] It is apparent from the reasons given by the Committee, both on the question of fitness to practice and on the question of sanction, that it was considerably influenced by the fact that the magistrates imposed a suspended prison sentence [….] In all the circumstances, it is hard to conceive that the court would have considered that the offences truly passed the custodial threshold for a person of good character, if it had not had the power to suspend the sentence. The Board is therefore not greatly influenced in its assessment of the gravity of the case by the fact that the magistrates imposed a suspended sentence of imprisonment.

Section 44: Raising concerns

Paragraph 44.2

This paragraph suggests that a failure to raise concerns should be treated as "an aggravating factor" in determining sanction.

As with the duty of candour, an allegation that a registrant has failed to raise concerns must be properly particularised and adjudicated upon for the reasons set out above.

Further, a failure to raise concerns should not be regarded as an "aggravating factor" for the reasons set out above. It is an allegation in itself, which must be considered as such by the FTPC.

General responses

1. It is pretty clear and logical in its approach and will be more helpful than the current – nicely broken into paras so it is easy to find the bit in question
2. Lots of Legal Advisers refer to the Dame Janet Smith advice on what constitutes impairment arising from the Shipman report – the criteria are quite helpful. Might they be referred to?
3. I know that there is probably nothing you can do about it but I have always thought the power to impose a Caution for up to 5 years was an important power
4. Dishonesty is always a tricky subject and one feature of the guidance is that the sanction element really gives little guidance as what should be done. I realise why it is difficult to set out criteria without appearing too dogmatic and constraining FTP panel's discretion but my fear is that lack of guidance will lead to individual panels making very different decisions depending on personal views. Not sure I have an answer to this but some more guidance would be helpful e.g. if the consequences were significant in terms of financial loss or deceit of a particularly reprehensible nature then a high level sanction would be justified but low level deception with minimal consequences would not justify higher level sanctions

5. Fleischman and Sexual offences. I do tend to think that a person cannot be on both the Optical Council Register and the Sex Offenders Register. If a person is on the latter and is not able to be removed for a number of years, then he/she should be removed from the former. I would go quite strongly on this but you might want to use a word like "normally" as a get out.

I appreciate that I may be well out of time on responding but at least I read the consultation document and it will be much better in its present form and at the end of the day, such a document cannot cover every eventuality and judgement in applying will be needed.

The Professional Standards Authority welcomes the opportunity to respond to the consultation document relating to 'Fitness to Practise panels hearings and indicative sanctions guidance'. We have some minor comments:

. The document is long and could be enhanced by separating the general guidance from indicative sanctions guidance (we note the previous combined GOC guidance was significantly shorter in length than this current guidance).

We welcome the addition of guidance relating to the duty of candour. There is though no indication given to panels as to how seriously candour should be treated – i.e. explaining that being open and honest with patients is a patient right and is central to professionalism. Additionally, there is little guidance on how to assess the seriousness of cases (for example that covering up is worse than an omission). We also found it unhelpful that lack of candour is described both as a stand-alone charge and an aggravating feature.

. We have nothing to add about setting the length of a warning: it has the potential to be more nuanced than a warning with no expiry (expiry dates can be tailored according to the severity of a registrant's contravention). However, some guidance should be given to panels on how to set the length, possibly with reference to a benchmark.

While we think it is relevant to consider the stage of a student registrant's career (e.g. long previously unblemished career), there is no established legal position on this in relation to sanctions. The guidance provided doesn't really say anything different than would apply in the case of a normal registrant and therefore provides little assistance to panels. It is important to consider that while some registrants will have the benefit of a long and previously unblemished career, others (in particular students) will not. More information would be helpful to assist with this problem. A suggestion would be for panels to consider whether the registrant would have been admitted to the register had the allegation predated registration.

	Page	Section	Comment
1	18	16.1(a) & (b)	We do not agree with the statement that in the case of a criminal conviction stages (a) and (b) are merged as a conviction is ground for impairment. We think they are merged because the conviction is taken as proof that the criminal behaviour happened, and so the facts are proven. The current wording may be misleading and we suggest to rephrase it as below: *16.1 (a) 'Whether the facts alleged have been found proved. Where the allegation relates to a criminal conviction the conviction itself is taken as satisfying this point.* *(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'.*
2	21	20.6	It would be clearer if the case names were italicized (as is the convention, and happens elsewhere in the document).
3	23	21.2	We suggest splitting the second sentence into two. The new sentence should begin *'Because it has the potential to have far reaching consequences....'*
4	23	21.4	It would be clearer if the case names were italicized (as is the convention, and happens elsewhere in the document).
5	30	24.6	It would be clearer if the case names were italicized (as is the convention, and happens elsewhere in the document).
6	41	37.2	We suggest including a reference and more details to explain where it came from and what it is referring to. There also appears to be inconsistency in the presentation of quotes. Some (like in 37.2) are not in italics, but others (as in 43.1) are.
7	42	40.1	Typo - in first sentence *'should BE open and honest'.*
8	42	41.2	It would be clearer if the case names were italicized (as is the convention, and happens elsewhere in the document).
9	46	46.4	It would be clearer if the case names were italicized (as is the convention, and happens elsewhere in the document).

2.11 should read “The specific standards for optometric skills, knowledge and understanding (this defines confidence) and clinical judgement”.

6. Human Rights – Query: inconsistency in headings, eg. should this be Human Rights and the above Responsibility for Decisions like Equality and Diversity below.

7.2 Should this be “……. Without prejudice….. because we do discriminate positively”.

9.2 Could delete …….. and indeed…… and reward.

10.2 Different font.

11. Query: Title case…… consistency.

12.2 Should conduct read misconduct?

12.4 The w of where is in a different font…. It appears that all w are not in a bold format like the other letters.

12.5 May need a comma after negligent to flow better or re-word.

15.2 Is the term "….the good name of the profession of optician". Correct? Consider changing to "the good name of the optical professions".

15.4(c) Consider changing "think" to "deem".

15.13 Could consider reducing the font here to fit heading onto one line.

19.2 Consider inserting comma, ie. Firstly, whether…..

21. Dishonesty. The Council's Standards of Practice for Optometrists and Dispensing Opticians and the associated Standards for Students of these professions both state……..

22.7 Consider rewording……. to consider the appropriate stage to take account……..

24.6 Format: Under aligned just before other first words in para. The format is inconsistent throughout the document.

25.1 Add s to case to become cases.

Indicative Sanctions Guidance (Heading) – would it be useful to provide a case example for each of these headings?

28.1 I don't understand this. There appears to be no sanction for the impaired fitness to practise. A case example may help clarify this…. Ok this explained later.

30.2 On this matter of (student) experience would this apply to an entry level optometrist? For example, performance assessors are comparing performance to a reasonable optometrist – can an entry level optometrist perform to the level of an

entry level optometrist or is the reasonable optometrist at the level of an entry level optometrist?

36.5(a) Now renamed as the Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students.

44.1 Should be “off” not “or”.

Q1 should read focused not focused.

Q4 4th bullet – should read GOC (not GOsC).

General Optical Council

FOR FITNESS TO PRACTISE COMMITTEE

HEARINGS AND INDICATIVE SANCTIONS GUIDANCE

Contents

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 dhenley@optical.org

1. Introduction

1.1 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 has established.

1.2 This guidance is in ~~two~~ 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 the 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 ~~is~~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 ~~P~~patients will often have the same expectations of ~~students~~ them as they would of qualified healthcare professionals~~., and they~~ As such, ~~P~~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. ~~On 1 April 2016 the Code of Conduct for business registrants will change to reflect changes to the GOC Standards for Individuals.~~

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 guidance[1] to assist registrants in applying their professional judgement to meet the standards:

- Sight test
- Sale and supply of optical appliances
- Fitting of contact lenses

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

- Cosmetic (zero-powered) contact lenses
- Low vision aids
- 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 (i.e. a director), although the actions of an individual director may lead to fitness to practise allegations against the business registrant.

3. What 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 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 publically 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 Council 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 Council 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 and the Code of Conduct for Business registrants (~~or~~ and from 1 April 2016 the Standards of Practice for Optometrists and Dispensing Opticians and the Code of Conduct for business registrants), 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 At present the Council's objective is to protect, promote and maintain the health and safety of members of the public. In 2016, the Council's objective is due to change to '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 powers 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 ~~an appropriate sanction.~~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. ~~Definition~~ 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 or 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 or 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 ~~with its own expertise~~ 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 ~~is likely to~~ 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. ~~When determining whether a registrant's fitness to practise is impaired for health reasons, the Fitness to Practise Committee must consider the same tests as with any other kind of impairment (see Part 3 below).~~

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 (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 ~~The Fitness to Practise Committee may feel that the public interest requires that an interim order be made.~~ 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).

~~15.1~~

~~15.2 The circumstances which may lead the Committee to the view that interim measures are necessary are likely to involve allegations which show a real present or likely future risk to a member or members of the public. The public interest may also require that the registrant themselves be protected from future practice and the Committee may consider that ground as sufficient to make either order. There may be other relevant matters which you must consider bearing in mind the interests of the registrant and weighing the Committee's obligation to protect the public, and to uphold the good name of the profession of optician.~~

~~15.3 These orders may be made without the registrant present. In such a case the Committee should bear in mind that the registrant has not been present to defend his/her position and you should be careful to make such an order only where there is clear evidence of real risk to the public and/or to the registrant or some other strong public interest requires the action in question.~~

~~15.4 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, you may make the following orders:~~

~~(a) Suspension of registration;~~

~~(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).~~

~~15.5~~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 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).*

~~15.6~~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.

~~15.7~~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)*).

~~15.8~~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.

~~15.9~~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*).

~~15.10~~15.8 Where an order is to be made, the Committee should direct that a review ~~and ensure that a date for a~~ be undertaken before the expiry of the six month period~~review is always included in the determination~~.

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 Panel (see 0).

15.10 Upon a review, the Committee may:

(a) revoke the order

(b) vary conditions

(c) 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 ~~In cases where there are facts in dispute,~~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 ~~of impaired fitness to practise.~~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 a 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 ~~their unconscious and conscious biases, so that they are able to manage any bias and~~ 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 ~~a~~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 ~~is not whether the Committee member is biased, but whether there may be an~~ appearance of ~~bias~~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. ~~(see *R(Mahfouz) v GMC [2004] EWCA Civ 233*)).~~

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.

~~19.2~~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; and that in considering whether to proceed in those circumstances fairness to the registrant is paramount but fairness to the prosecution must also be considered.

~~19.3~~19.4 ~~When considering whether to proceed, r~~Relevant factors ~~to proceed~~ 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.

~~19.4~~19.5 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.

~~19.5~~19.6 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 General Optical Council 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 is used in Fitness to Practise proceedings by GOC from 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 Lady Hale said in S-B Children [2009] UKSC 17, "All are agreed that Re B reaffirmed the principles adopted in Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 while rejecting the nostrum "the more serious the allegation, the more cogent the evidence needed to prove it", which had become commonplace but was a misinterpretation of what Lord Nicholls had in fact said".~~

~~20.7~~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 a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

~~20.8~~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*".

~~20.9~~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

~~20.10~~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)).

~~20.11 When considering evidence, the Committee may need to form a view as the credibility of evidence and the weight to be given to it. This may include considering the circumstances in which a witness has given evidence, any connection the witness may have to the registrant and any gaps or conflicts in their evidence.~~

Hearsay

~~20.12~~20.10 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."

~~20.13~~20.11 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)*.

~~20.14~~20.12 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

~~20.15~~20.13 ~~When hearing witness evidence, t~~The Committee should be aware that some witnesses before it may be considered vulnerable. This might include children, 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.

~~20.16~~20.14 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 Council'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~~are~~:

(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 dishonest[2].

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

(2) Whether the registrant realised (again on the balance of probabilities) that what they were doing was, by those standards, dishonest.

21.5 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.

21.6 [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 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 ~~(limited)~~ 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).

~~Generic m~~Mitigating ~~and aggravating~~ factors~~eatures~~

The following are examples of mitigating factors:

- No ~~I~~impact on victim – to include both harm and potential harm*;
- ~~Whether offence at work or outside work;~~
- ~~Whether the actions involved an abuse of trust;~~
- Evidence that ~~Whether or not~~ the registrant has shown insight and remorse (taking into account, where relevant, their attitude and behaviour at the hearing). ~~Expressing insight involves demonstrating reflection and remediation.~~ 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.~~;~~

- ~~Whether or not the registrant has taken steps to remedy their actions, to prevent recurrence or to make reparation;~~
- 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 this 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.
- ~~Whether t~~The incident was ~~premeditated or~~ spontaneous;
- ~~Whether t~~The conduct was a one-off event ~~or of a repeated nature~~;
- The conduct has been remediated which can take a number of forms, including coaching, mentoring or training.
- ~~Whether the registrant attempts to conceal wrongdoing;~~
- ~~Whether the registrant has been candid with the patient when things have gone wrong (see 40);~~
- ~~Whether the registrant has raised concerns where patient safety is at risk (see 44);~~
- ~~Whether the incident has occurred in the light of previous warnings; or~~
- ~~Whether the registrant has complied with any previous assessment or conditions.~~

* 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 health care 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 (i.e. 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.~~the nature and seriousness of the allegations.~~

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 ~~you~~the Committee has~~ve~~ accepted any legal advice ~~you have been~~ given by the legal adviser (it is particularly important to give a full explanation of ~~your~~the Committee's position in relation to any advice ~~you have~~it has not accepted);

~~(d)~~(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) ~~Your~~ The Committee's conclusions on the main submissions made to ~~you~~it by the parties or their representatives;

~~(e)~~(g) A clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is in dispute;

~~(f)~~(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;

~~(g)~~(i) Whether the fitness to practise of a registrant is currently impaired, and if so, why and, if not, why not;

~~(h)~~(j) Why and what sanctions are being imposed and how the sanction imposed protects the public;

~~(i)~~(k) Why ~~you~~ the Committee rejected the other sanctions available;

~~(j)~~(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.

~~(k)~~(m) Make mention of any details of good character that have been submitted;

~~(l)~~(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;

~~*(m)*~~*(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;

~~*(n)*~~*(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;

~~(o)~~(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;

~~(p)~~(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.

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.

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 speciality 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.

24.6 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 case are governed by the General Optical Council (Registration Appeals Rules) Order of Council 2005 which sets 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 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 (i.e. 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. ~~[If no date is set the Committee should set out clearly its reasons]~~. 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) ~~Evidence that the proven or admitted behaviour of the registrant would not have caused patient harm~~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;~~Early admission of facts alleged and/or:~~

(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~~Insight into failings~~;

~~(d)~~ There is a need to record formally the particular concerns ~~Isolated incident which was not deliberate;~~

27.4 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 ~~remains fit~~ to practise is not currently impaired and ~~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 ~~In addition to not imposing a sanction (see 31 below), the sanctions available to the Committee are~~ Where a Committee finds that a registrant's fitness to practise is currently impaired, it can direct:

(a) That no further action be taken

~~(a)~~(b) ~~F~~Financial penalty (except in a health case) (which may be imposed in conjunction with another sanction);

~~(b)~~(c) ~~C~~Conditions (ordinarily to be followed by a review) for up to three years;

~~(c)~~(d) ~~S~~A period of suspension (ordinarily to be followed by a review) for up to 12 months; or

~~(d)~~(e) ~~E~~Erasure (except in a health case).

~~(e)~~(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 ~~you~~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. ~~This means that the conditions should normally impose a requirement for the registrant to be under strict supervision in either his practice or other places of work.~~ 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. ~~In~~

~~some cases, the Committee may decide that further training, in addition to conditional registration, is required and which may assist in rectifying the problem.~~

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.~~when a review hearing takes place the Committee will be able to ascertain the original shortcomings and the exact proposals for their correction.~~ 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) No evidence of general incompetence;~~

~~(e)~~(d) Potential and willingness to respond positively to retraining;

~~(f)~~(e) Patients will not be put in danger either directly or indirectly as a result of conditional registration itself;

~~(g)~~(f) The conditions will protect patients during the period they are in force; or

~~(h)~~(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) Not fundamentally incompatible with continuing to be a registered professional;~~

~~(c)~~(b) No evidence of harmful deep-seated personality or attitudinal problems;

~~(d)~~(c) No evidence of repetition of behaviour since incident;

~~(e)~~**(d)** Panel is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour;

~~(f)~~(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

~~(g) When imposing a period of suspension it is also normally appropriate to direct a review hearing (see section below on Review Hearings).~~

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.

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.

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

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 ~~where,~~ despite a practitioner presenting no risk.~~:~~

~~"…the appellant's behaviour had demonstrated a blatant disregard for the system of registration which is designed to safeguard the interests of patients and to maintain high standards within the profession."~~

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 ~~code of conduct~~Standards of Practice for registrants and 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 ~~In such cases~~ erasure, is likely to be ~~has been judged~~ appropriate in such cases.

~~37.2 "The public and in particular…patients, must have confidence in the [optical] profession whatever their state of health might be. The conduct as found proved…undoubtedly undermines such confidence and a severe sanction was inevitable. Their Lordships are satisfied that [removal from the register] was neither unreasonable, excessive or disproportionate but necessary in the public interest."~~

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.~~In most cases where a committee has not imposed the most severe sanction, the PSA has had concerns that the committee has failed to investigate the case sufficiently. It may well be that there is a natural reluctance to wish to know the full details in light of the distressing nature of the evidence. However, o~~

~~38.1~~ 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)).

38.2 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.

~~38.3~~38.5

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 by open and honest with patients when something goes wrong with their treatment or case which causes or has the potential to cause harm or distress. This professional duty of candour is now expressed in the Council's ~~From April 2016 the~~ Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students, which ~~r~~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 health care sector since the findings of the Francis Inquiry in 2013. Similarly, registrants are expected to raise any concerns they may have about the actions of 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. Be~~r~~ing 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 ~~separate~~ 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. ~~It should be considered as an aggravating feature by the Committee in determining sanction.~~

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. ~~(Dr Purabi Ghosh v GMC (Privy Council Appeal No. 69 of 2000 and Dr John Garfoot v GMC (Privy Council Appeal No. 81 of 2001).~~

~~*41.2*~~*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.~~If a registrant has accepted a police caution, the registrant will have admitted committing the offence.~~

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. ~~Failure to obtain~~ 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~~r~~ 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 ~~Similar to candour, such a breach will be charged as a separate specific factual allegation. and it is to be considered an aggravating feature by the Committee in determining sanction.~~

CONSIDERATIONS AFTER SANCTION

45. Immediate orders (where direction made for conditional registration, suspension or erasure) (s13l)

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/registrant'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 Council 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	**Standard conditions** This section lists conditions that will commonly be relevant to all cases before the Fitness to Practise Committee. Its purpose is to assist Committees and encourage consistency. It does not bind Committees, who must always ensure that the conditions are relevant.
A1.1 Informing others	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. 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	You must inform the GOC if: 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. 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.

A1.3 Supervision of Conditions	You must: 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, ~~provide~~ request ~~the GOC with~~ 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.
A1.4 Other proceedings	You must inform the GOC within 14 days if you become aware of any criminal investigation or formal disciplinary investigation against you.
A1.5 Registration requirements	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:- a) Fulfil all CET requirements; or b) Renew your registration annually.
A2	**Health Conditions (impairment by reason of ill-health)** This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health. Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about his/her health.

A2.1	You must:- 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. [NOT TO BE PUBLISHED]
A3	**Conditions for inclusion in all determinations of substance misuse** This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health. Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about his/her health.
A3.1	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. [NOT TO BE PUBLISHED]
A3.1	You must abstain completely from the consumption of: a) Any alcohol. b) Any drugs other than those prescribed for you, unless agreed in advance by your GP or medical supervisor. [NOT TO BE PUBLISHED]

A3.2	You must: 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]. [NOT TO BE PUBLISHED]
A3.3	You must: 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. [NOT TO BE PUBLISHED]
A3.4	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. [NOT TO BE PUBLISHED]
A4	**Deficient Performance** This section lists conditions that will commonly be relevant to cases concerning deficient professional performance.

A4.1 Restriction on practice	You must: 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).
A4.2 Observation of procedure	You must: 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.
A4.3 Tuition	You must: 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.

A4.4 Assessment of records	You must: 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.
A4.5 Personal Development plan	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

Equality Impact Assessment

Step 1: Scoping the EIA

Name of the policy/function:	**For Fitness to Practise Committee: Hearings and Indicative Sanctions Guidance**
Assessor:	Philippa Mann, Compliance Manager (Governance)
Date EIA started:	January 2016
Date EIA completed	To be finalised
Date of next EIA review:	July 2016 (after consultation)
Purpose of EIA: This EIA is being undertaken because we are amending a current set of guidance, which involves our registrants, members and employees and impacts on public safety. This review forms part of the Standards Review project.	

Q1. **Has a screening assessment been used to assess which of the equality groups the policy is relevant to?** No screening has been completed as the guidance is focussed on all protected characteristics.

The GOC are required to consider changes to be made to its guidance as it has an impact upon registrants. Further, through a Guidance workshop session at the Fitness to Practise Committee training in November 2015, it was noted that there were concerns regarding what were considered as 'gaps' within the guidance. The revised guidance aims to deal with those concerns whilst also ensuring that the guidance reflects the various changes that the new Standards will bring about. It is intended to be able to provide a decision making framework for the panel as opposed to being overly prescriptive as to their role.

Q2. What are the main aims, purpose and outcomes of the policy? You should be clear about the policy proposal: what do you hope to achieve by it? Who will benefit from it?

Aims: 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 has established.
Purpose and Outcome: This document gives guidance to all individuals when sitting on the Fitness to Practise Committee. This document is required to ensure consistency is achieved when carrying out their function and as a reference tool for best practice.

This guidance has been developed by the Council for use by its Fitness to Practise Committee when undertaking hearings and considering what sanction to impose following a finding of impaired fitness to practise. 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 unique facts and merits.
Who will benefit: The FTPC and any registrants subject to FTP. Others may find the guidance a useful information source.

Q3. Which aspects/activities of the policy are particularly relevant to equality?
At this stage you do not have to list possible impacts, just identify the areas.

Activity/Aspect
Content
Failure to use the policy
Composition and behaviour of FTPC
Accessibility

Q4. Gathering the evidence
List below available data and research that will be used to determine impact on the different equality groups

Available evidence- used to scope and identify impact
Current guidance for FTP Panel Hearings and Indicative Sanctions. FTP Database – used to review different types of cases, such as fitness to practise impairments due to medical conditions (disabilities). Input from a number of employees with different specialisms has shaped the new guidance, with focus being on accuracy, clarity, relevance and input. Indicative Sanctions guidance of other healthcare regulators (GMC, GPHC, NMC, GDC, GOsC for example). Code of Conduct for Members GOC Standards for Practice for Optometrists and Dispensing Opticians and the former Code of Conduct for Fully Qualified Registrants

Q5. Evidence gaps

Do you require further information to gauge the probability and/or extent of impact?

Yes: please explain how you will fill any evidence gaps**.**

Evidence gap	**How will the evidence be collated**	**Individual or team responsible and timeframe**
Diversity of individuals subject to FTP and outcomes of their investigations. This is being considered within the Equality monitoring strand however there has been delay. There is currently an action underway to implement an interim monitoring process, which will help to identify potential bias in complaints about registrants and FTPC decisions.	FTPC outcomes should be analysed with protected characteristics.	Head of Case Progression, Director of FTP, IT, Compliance Manager December 2016

Q6. Involvement and consultation

Consultation that has taken place, who with, when and how: Consultation will be taking place between 12 February 2016 and 6 April 2016. It will be advertised on our website, in email communication, at meetings and through direct communication with key stakeholders.
Consultation has taken place with the following stakeholders: To be completed on review.
Summary of the feedback from consultation: To be completed on review.
Link to any written record of the consultation to be published alongside this assessment: To be completed on review.
How engagement with stakeholders will continue: This guidance will be reviewed in three years' time or upon changes in legislation. We will discuss this guidance at training with new FTPC members. Feedback collected will be considered at the review.

<u>Step 2: Assessing impact and opportunities to promote equality</u>

Look at the areas identified in question 3 as being relevant to equality (and any others identified during the evidence gathering or consultation stages) and document in the table below.

Q7: Using the evidence you have gathered what if any impacts can be identified. Please use the table below to document your findings and the strand(s) affected.

Topic *- Strand*	**Potential/Actual Impact**
Content	Unclear guidance could result in misinterpretation and allow for bias. Language and terminology used could be out-dated or inappropriate. Possibility that the guidance limits a fair and/or reasonably flexible approach, for example it may not acknowledge the effects that the additional stress of the FTP process may have on health.
Failure to use the guidance	Poor understanding of the implications of this policy could result in its inadequate implementation or misuse of the guidance. Risk that fair, evidence-based decision making does not happen. Risk that there is inconsistency in decision-making.
Composition and behaviour of FTPC	Risk that bias of FTPC members is not managed appropriately and results in detrimental treatment for someone because of this, for any of the protected characteristics. Risk that the FTPC is not diverse which could impact the breadth in their decision-making. Risk that the FTPC members do not have the required skill or competence to use the guidance.
Accessibility	Risk that individuals do not use the guidance because it is not accessible. Risk that individuals will not know about the guidance. Risk that the guidance or its language is too complex to understand or use effectively.

Q8: What can you do further to maximise opportunities to further promote equality. Please document below.

Step 3: Strengthening your policy

What can be done to remove or reduce any impact identified?

Topic *- Strand*	**Potential/Actual Impact**	**Strengthening actions to remove or reduce impact. For actions, include timeframes.**
Content	Unclear guidance could result in misinterpretation and allow for bias. Language and terminology used could be out-dated or inappropriate. Possibility that the guidance limits a fair and/or reasonably flexible approach, for example it may not acknowledge the effects that the additional stress of the FTP process may have on health.	Different departments have contributed and changes to terminology have been made to make the document more inclusive and up-to-date. **Completed.** There are specific sections for Human Rights and Equality Expectations in the guidance for FTPC. **Completed.** Equality, Diversity and Inclusion refresher training to be facilitated for all FTPC. **By July 2016.** Chairs of FTPC have recently received unconscious bias training. **Completed.** Unconscious Bias training to be facilitated for all FTPC members and Chairs who have not yet received the training **by October 2016.** Training should also be considered for FTPC members about how stress can affect health or speech conditions and may impact on someone's representation in a Hearing. **To be considered by Director of FTP.** The content of the guidance is written in line with the Code of Conduct for members, which details the expectations of them within their role.

Topic *- Strand*	**Potential/Actual Impact**	**Strengthening actions to remove or reduce impact. For actions, include timeframes.**
		It includes the Nolan principles as well as the GOC values including Objectivity, Consistency. There is also a specific statement about Equality and Diversity. **Complete.**
Failure to use the guidance	Poor understanding of the implications of this policy could result in its inadequate implementation or misuse of the guidance. Risk that fair, evidence-based decision making does not happen. Risk that there is inconsistency in decision-making.	New and existing Fitness to Practice Committee members will be expected to use this guidance – a briefing to be completed. **After consultation closes and final guidance is signed off.** Existing Fitness to Practice Committee members will receive a briefing and a copy of the final guidance. **After consultation closes and final guidance is signed off.** A section on bias and unconscious bias has been included in the guidance. **Completed.**
Composition and behaviour of FTPC	Risk that bias of FTPC members is not managed appropriately and results in detrimental treatment for someone because of this, for any of the protected characteristics. Risk that the FTPC is not diverse which could impact the breadth in their decision-making. Risk that the FTPC members do not have the required skill or	Every member signs up to the Code of Conduct, which details the expectations of them within their role. It includes the Nolan principles values as well as the GOC values including Objectivity, Consistency. There is also a specific statement about Equality and Diversity. **Complete.** All members on the FTPC are appointed through an interview process, which assesses their competency and skill in the required areas. There is on-going diversity monitoring from application to appointment to assess the fairness of this process, and these results are

Topic *- Strand*	**Potential/Actual Impact**	**Strengthening actions to remove or reduce impact. For actions, include timeframes.**
	competence to use the guidance.	published in line with our Equality Scheme. **Complete.**
Accessibility	Risk that individuals will not know about the guidance. Risk that the guidance or its language is too complex to understand or use effectively Risk that individuals do not use the guidance because it is not accessible.	The policy will be available on the GOC website, and the intranet. **After consultation.** The length of the document has been reduced, to make it more accessible. **To review again after consultation.** The guidance will be made available in different formats on request and appropriate font size will be used. **Completed.** Consultation will provide feedback from potential service users. **In progress.** Ensure FTP employees and members knows where the guidance is kept. **After consultation closes and final guidance is signed off.** The Optical Professional bodies will be made aware of the amended guidance, so that they can support any registrants subject to FTP, including those who may not be able to access the document easily (for reasons of disability for example). **After consultation.** Our FTP Executive teams will also be able to provide advice about the contents of the guidance for individuals who may not be able to access the document easily. **In place.**

Step 4: Monitoring and review

Q10. What monitoring mechanisms do you have in place to assess the actual impact of your policy?

Regularly monitor both the implementation and outcomes of the FTP process. This analysis will be reported to the Senior Management Team and in the annual report. This EIA will be reviewed in twelve months' time when it will be clearer what the actual impact of this policy has been and how actions implemented as a result of this assessment have supported the successful implementation of this policy. We will use the review to assess any further risks or actions required.

Please provide a review date to complete an update on this assessment.
Date: After consultation (June 2016)