

## **GUIDANCE FOR CASE EXAMINERS**

### **The purpose of this guidance**

1. The General Optical Council (GOC) recognises that it is important that patients, registrants, professional and representative organisations, and other stakeholders, including the general public, are aware of the basis upon which the GOC's case examiners operate and make decisions about reports of fitness to practise.
2. This document contains guidance to be used by the GOC's case examiners when considering complaints about a GOC registrant's fitness to practise, fitness to undertake training or fitness to carry on an optical business. The guidance is intended to encourage consistent decision-making by the case examiners. However, every decision that the case examiners make will be based upon the facts of the case being considered.
3. The Fitness to Practise Rules (2013) define a case examiner as an officer of the Council appointed by the Registrar on the Council's behalf for the purposes of exercising the functions of the Investigation Committee (IC), in accordance with these rules, being a registered optometrist or dispensing optician, or a lay person.
4. This guidance is a public document and is available from the GOC's website at:  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)
5. A report about the fitness to practise of a GOC registrant may also, at different stages of the GOC's process, be considered by the Investigation Committee or the Fitness to Practise Committee (FTPC). This guidance contains some references to their roles. The GOC has also published similar guidance for the Investigation Committee and for Fitness to Practise Panels. These guidance documents are public documents and are available from the GOC's website at:  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)
6. The GOC currently registers around 29,000 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and

student dispensing opticians who must be registered with the GOC in order to undertake training.

## Definitions

7. Throughout this document:

“**Allegation**” refers to a complaint about:

- a business registrant’s fitness to conduct business;
- an individual registrant’s fitness to practise; or
- a student registrant’s fitness to undertake training.

“**Business registrant**” refers to a body corporate that is registered with the GOC.

“**Factual particular**” refers to the alleged facts that amount to an allegation.

“**Fitness to practise**” refers to the fitness to:

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

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

## Revision of the guidance

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

9. The GOC will highlight any significant amendments to this guidance by publishing the amended version on the GOC’s website [www.optical.org](http://www.optical.org).

## The General Optical Council (GOC)

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

11. The constitution, purposes and functions of the GOC are set out in the Opticians Act 1989<sup>1</sup>. The GOC is responsible for promoting high standards of professional education, conduct and performance among optical professionals in order to protect the public. The main statutory functions of the GOC are to:

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

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

[https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)

13. Information about the GOC's complaints process is set out in the leaflet entitled "How to complain about an optician" which is available from:

[https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)

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

[https://www.optical.org/en/news\\_publications/Publications/index.cfm](https://www.optical.org/en/news_publications/Publications/index.cfm)

Only a minority of the complaints that are made to the GOC result in a referral to the FTPC<sup>2</sup>. In the majority of cases, case examiners decide that there is no need for any further action to be taken or that the matter can be appropriately dealt with by issuing a registrant with a warning or advice.

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<sup>1</sup><http://www.legislation.gov.uk/ukpga/1989/44/contents>

<sup>2</sup> In 2016-17, 27% of cases were referred to the FTPC

## The case examiners

15. The rules specify who can be a case examiner and their decision-making procedures. A case examiner is an officer of the Council appointed by the Registrar on the Council's behalf. A case examiner will be a registered optometrist or a registered dispensing optician or a lay person.
16. The decision at the end of the investigation stage is to be taken by one registered case examiner and one lay case examiner. The decision of the case examiners must be unanimous and where the case examiners do not agree, the matter will be decided by the IC.
17. The case examiners will be able to obtain independent legal advice. Case examiners will also be able to obtain expert advice, for example, from an ophthalmologist.
18. The consideration of cases by the case examiners shall take place in private. The case examiners powers are set out in the GOC's (Fitness to Practise) Rules 2013<sup>3</sup>.

## Initial consideration of cases

19. The Registrar initially considers all matters concerning fitness to practise received by the GOC<sup>4</sup>. The Registrar must consider whether or not to refer the matter to the FTPC for consideration as to whether an interim order should be made.
20. Where the Registrar considers that the allegation does **not** fall within one of the grounds described in section 13D of the Opticians Act, (s)he shall notify the complainant and the case will be closed.
21. Where the Registrar considers that the allegation falls within one or more grounds described in section 13D of the Opticians Act, s/he must refer the allegation to the case examiners for consideration under Rule 12.
22. The Registrar must refer an allegation relating to a conviction which has resulted in a custodial sentence, whether immediate or suspended, to the FTPC.
23. Before the allegation is considered by the case examiners, further investigation and evidence gathering may have been undertaken by the GOC investigation team.

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<sup>3</sup> Created by a delegation of the functions of the IC under section 13E(i) of the Opticians Act 1989

<sup>4</sup> In accordance with Rule 4 of the GOC (Fitness to Practise) Rules 2013

## Early disposal of cases

24. When considering an allegation, the case examiners may unanimously determine to close certain categories of case which, in the public interest, ought not to proceed through the fitness to practise procedure. The categories of case are as follows:
- An allegation which arises from events which occurred more than five years before the matter was brought to the attention of the GOC, (except in exceptional circumstances).
  - An allegation which is made by a complainant who wishes to remain anonymous or has indicated that they do not wish to co-operate further (although case examiners must bear in mind the GOC's own powers of investigation as set out in section 13D); or
  - Any allegation which the case examiners consider is vexatious in nature.

## Interim orders

25. If either of the case examiners is of the opinion that the FTPC should consider making an interim order in relation to a registrant, that case examiner must direct the Registrar (in accordance with s13D(9)) who will refer the matter to the FTPC and notify the involved parties<sup>5</sup>.
26. An interim order can:
- suspend any registrant from practice completely; or
  - temporarily remove an entry relating to a specialty or proficiency, or
  - make their registration conditional on compliance with requirements imposed by the FTPC.
- An interim order can last for a maximum of 18 months, unless extended by the relevant court, and will be subject to regular reviews during that period.
27. Section 13L of Opticians Act 1989 states that the FTPC may make an interim order where they are satisfied that it is:
- necessary for the protection of members of the public; or
  - otherwise in the public interest; or
  - in the interests of a registrant.

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<sup>5</sup> In accordance with Rule 12(7) of the GOC (Fitness to Practise) Rules 2013 and S13D(9) of the Opticians Act 1989

28. In order to reach a decision about whether the FTPC should consider making an interim order the case examiners will:
- (a) Take into account the circumstances, specified in the FTPC's guidance, as being likely to mean that an interim order is necessary. A copy of the FTPC's Guidance can be found at:  
  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)
  - (b) Have regard to all the factors that will be taken into account by the FTPC when considering such a referral, including:
    - (i) the effect which any order might have on the registrant;
    - (ii) the requirement on the FTPC to balance the need for an order against the consequences which an order would have for the registrant, in order to satisfy themselves that the consequences are not disproportionate to the risk to the public;
    - (iii) that the primary purpose of an interim order is to protect the public from a real present or likely future risk. It will be relatively rare for an interim order to be made only on the ground that it is in the public interest (for example, to maintain public confidence in the profession); and
    - (iv) that an interim order might be made at an early stage of the investigation and, therefore, although the allegation ought to have been made in writing, it may not yet be supported by formal witness statements.

### **Further investigation**

29. At any stage, prior to making their final decision, the case examiners may adjourn their consideration of a case pending further investigation and inform the Registrar who will undertake that investigation. The Registrar will provide any additional evidence obtained to the registrant and, where appropriate, to the maker of the allegation, giving them a reasonable opportunity to respond. The Registrar will then provide the case examiners with all additional evidence, together with any further comments. The case examiners will resume their consideration of the matter.
30. If, during the course of considering the allegations, the case examiners consider that there may be evidence (either from the complaint made to the GOC or from any further investigation) of allegations not included by the Registrar, or that the allegations should be amended, the case examiners should adjourn their consideration of the case and inform the Registrar. The Registrar may then consider the matters raised and whether additional or alternative allegations should be drafted for consideration by the case examiners. The case examiners may then, after the registrant has had an opportunity to respond to any new or amended allegations/evidence (Rule 12), resume their consideration of the matter.

## Decision-making process

31. When making their decision about a particular allegation, the case examiners will consider not only the original allegation, and any evidence that has been gathered by the GOC, but also any written representations that have been received from the registrant concerned and the maker of the allegation where appropriate. The rules state that a registrant must be given copies of any information or documents received in support of the allegation and allowed 28 days in which to make any written representations before the case examiners consider the allegation(s).
32. The case examiners will also consider any comments received from the complainant, made once he/she has seen any written representations made by the registrant. Any comments from the complainant are also copied to the registrant.
33. Case examiners must not be influenced by the type, or volume, of evidence that has been gathered by the GOC, except where that evidence is relevant to their consideration of a particular allegation. In wider terms, the overall volume of evidence gathered is only relevant to the decision-making process if case examiners agree that it is insufficient for them to reach a decision and that they need to adjourn their consideration. The volume/type of evidence, in isolation, is not relevant to whether or not an allegation is likely to pass the realistic prospect test.
34. There may be cases that involve concerns about a number of aspects of a registrant's fitness to practise. In making a decision, it is the cumulative effect of all potentially impairing factors that must be taken into account. Health and performance assessments are part of the process of collecting evidence (for individual registrants), but there may also be other evidence that the case examiners will need to consider when reaching a decision. Where the factual particulars relate to a number of aspects of a registrant's fitness to practise, the case examiners should include in their decision references to any specific representations or evidence they have considered that relate to their decision.
35. Where the case examiners' decision discounts, either fully or partially, an undisputed expert opinion, they must provide very clear reasons for this. The case examiners must also remember that their role is not to make decisions on the facts, but only to determine whether the realistic prospect test has been met.

## Potential outcomes of the case examiners' consideration of an allegation

36. There are a number of different, potential outcomes arising from the case examiners' consideration of an allegation<sup>6</sup>:

- referral of the case to the FTPC;
- referral to the IC where the case examiners are unable to reach a unanimous decision;
- the issue of a warning to the registrant;
- a decision to take no further action including issuing a registrant with advice about their future conduct; or
- a decision to take no further action

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

## The public interest

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

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<sup>6</sup> In accordance with Rule 12(1) of the GOC (Fitness to Practise) Rules 2013

## Equality and diversity

38. The case examiners must be aware of and apply the GOC's Equality and Diversity Scheme. The GOC is committed to promoting equality and valuing diversity and to operating procedures and processes which are fair, objective, transparent and free from discrimination. 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.

## Allegation of impaired fitness to practise

39. An allegation that an individual registrant's fitness to practise is, or may be impaired, can relate to acts or omissions which occurred outside the United Kingdom or at a time when that registrant was not registered<sup>7</sup>.
40. A registrant's fitness to practise may be impaired only on certain grounds which are set out at Section 13D (2) and (3) of the Opticians Act 1989. Those grounds vary, depending on whether it is a business registrant, a student registrant or an individual practitioner<sup>8</sup>. Case law has established the following principles regarding the concepts of “misconduct” and “deficient professional performance”:<sup>9</sup>
- “misconduct” does not mean any breach of the duty owed by a business registrant or an individual registrant to their patient; it connotes a serious breach which indicates that the business registrant's or an individual registrant's fitness to practise is impaired;
  - mere negligence does not constitute “misconduct” but negligent acts or omissions which are particularly serious may amount to “misconduct”;
  - a single negligent act or omission is less likely to cross the threshold of “misconduct” than multiple acts or omission. However, there may be some circumstances in which a single negligent act or omission, if particularly grave, could be characterised as “misconduct”; and
  - “deficient professional performance” connotes a standard of professional performance which is unacceptably low. A single instance of negligent treatment would be unlikely to constitute “deficient professional performance” unless it was very serious indeed. Except in exceptional circumstances, “deficient professional performance” should be based on consideration of a fair sample of work.

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<sup>7</sup> Section 13D(4) of the Opticians Act 1989

<sup>8</sup> Section 13D(2) and (3) of the Opticians Act 1989

<sup>9</sup> Calhaem v GMC [2007] EWHC 2606 (Admin)

## Referral of an allegation to the FTPC

41. When considering whether a case ought to be referred to the FTPC, the case examiners should keep in mind the GOC's' over-arching objective as set out in the legislation<sup>10</sup>:

“The over-arching objective of the Council in exercising their function is the protection of the public.

The over-arching objective encompasses the following aims –

- (a) To protect, promote and maintain the health, safety and well-being of the public;
- (b) To promote and maintain public confidence in the professions regulated under the 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

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

43. This involves consideration of two issues:

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

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

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

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

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<sup>10</sup> Section 1(2A) of the Opticians Act 1989

- it is not the role of the case examiners to make any findings of fact. It is for the FTPC to make factual findings;
- the FTPC will only find facts disputed by the registrant proved if, having heard the evidence, the Committee considers it more likely than not to have happened (the “civil standard of proof”);

However, the case examiners must not (normally) resolve substantial conflicts of evidence;

- where there is a plain conflict between two accounts, either one of which may realistically be correct, and on one account the matter would call into question the registrant's fitness to practise, the conflict should be resolved by the FTPC, not the case examiners;
- if the case examiners are in doubt about whether to refer the matter to the FTPC, they should consider the complainant's version of events at their highest then apply the realistic prospect test;
- it is not the case examiners' role to refer to the FTPC an allegation that is not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the registrant's fitness to practise could be found impaired by the FTPC;
- when determining whether the realistic prospect test is met in relation an allegation of culpable omission (i.e. that the registrant failed to do something that they should have done), the case examiners must consider whether i) there is a realistic prospect of proving that the registrant had a duty to do the specified thing AND ii) that there is a realistic prospect of proving that the registrant failed to do the specified thing. If the realistic prospect test is not met for both i) and ii), it will not be met for the allegation overall;
- there is a public interest in both business registrants and individual registrants not being harassed by unfounded allegations;
- where the realistic prospect test is met, there is a public interest in there being a public hearing before the FTPC;
- the case examiners should proceed with caution in reaching a decision not to refer a case where the decision may be perceived as inconsistent with a decision made by another public body (for example, a decision where there has been input from optical professionals, or a decision of an NHS body), in relation to the same or substantially the same facts. If the case examiners do reach such a decision, they should give reasons for any apparent inconsistency;
- the case examiners are entitled to assess the weight of the evidence.

- the presence of an interim order or previous interim orders is not relevant to considering whether the realistic prospect test has been met. The test and considerations for the imposition of an interim order is different in many regards. The presence of an interim order should not be a factor in considering whether to refer an allegation to the FTPC, as the presence of an interim order does not constitute a factual finding.
- the case examiners should note the statement within the GOC's protocol on the handling of criminal convictions disclosed by a registrant and, in particular, that the Registrar will generally presume against registration, restoration or retention on the GOC Register where an applicant discloses a conviction for an offence (included in Schedule 4 of the Criminal Justice and Court Services Act 2000). A copy of the GOC's Protocol on the handling of criminal convictions disclosed by a business registrant or an individual registrant is available from:

[https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)

- the case examiners should further note the factors identified within the FTPC's guidance as indicating that (if the case is considered by the FTPC) erasure is likely to be the appropriate sanction, see attached which is also available from:

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

The case examiners should keep in mind the presence of mitigating factors which might result in a decision by the case examiners not to refer an allegation to the FTPC but only where the mitigating factors:

- are well-supported by credible evidence;
  - relate to the circumstances of the allegation rather than to matters that are personal to a business registrant or an individual registrant; and
  - are so significant that there is no realistic prospect of the FTPC finding that a registrant's fitness to practise is impaired.
- the likely impact on the FTPC's consideration of any evidence showing that:
    - a registrant's admitted failings are capable of being remedied; and/or
    - have already been remedied;
    - the level of any risk of repetition;
 as well as the weight that can reasonably be given to that evidence.
  - certain types of misconduct may be more capable of being remedied than others, for example, allegations concerning deficient professional performance. Such evidence may not always be available, and where it is available, it may not be clear or persuasive. Examples of types of misconduct which by their nature may be less capable of remediation include sexual misconduct or dishonesty.

- even if the case examiners are satisfied that there is evidence that a registrant has remedied their failing, they may still decide that it is in the public interest for the case to be referred to the FTPC. In *CHRE 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.*" The existence of an interim order must not influence the decision as to whether it is in the public interest to refer the allegation to the FTPC as an interim order does not involve making any factual findings.

### **Guidance regarding warnings issued by the case examiners**

46. Before considering giving a warning, the case examiners will ensure that they have correctly identified the grounds for the allegation that a registrant's fitness to practise is impaired under section 13D(2) or (3) of the Optician's Act 1989 (OA). The ground of impairment will usually arise as a result of a breach of the standards of behaviour and performance expected of optical professionals, students and businesses. Until 31 March 2016 these standards were contained in the "Code of Conduct for optometrists, dispensing opticians and optical students" and the "Code of Conduct for business registrants". Although there may be occasions where it is necessary to make reference to externally-produced guidance (for example, College of Optometrist guidance), case examiners will, wherever possible, apply GOC produced guidance, standards and competencies to their decision-making process.

From 1 April 2016 the existing Code of Conduct relating to fully qualified individuals and students has been replaced by new Standards of Practice for Optometrists and Dispensing Opticians and Standards of Practice for Optical Students. This means that where the case examiners are considering a matter where the conduct complained of occurred after 1 April 2016, the Standards will apply. For matters prior to that date, the Code will be applicable but the case examiners should make reference to the new Standards where they consider that this will help to inform the registrant's future practice. The Code of Conduct for Business Registrants remains in force.

47. For example, the case examiners may consider that the facts of the complaint amount to an allegation of "misconduct" under section 13D(2)(a) of the OA, by failing to respect a patient's dignity and privacy in breach of Standard 1 of the Standards of Practice.
48. Alternatively, the case examiners may consider that the facts of the complaint amount to an allegation of "misconduct by the business registrant or by one of its directors" under section 13D(3)(a) of the OA, by failing to take reasonable and proportionate steps to ensure that advertising or publicity complies with appropriate advertising codes of practice, in breach of paragraph 7 of the GOC Code of Conduct for Business Registrants.

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

### **The issue of a warning to a business or individual registrant**

50. The case examiners will only consider issuing a warning once it has decided that the matter should not be referred to the FTPC.
51. When considering an allegation, the case examiners must ensure that the potential ground for the allegation against a registrant under section 13D has been identified, so that it can assess the prospects of being able to prove the necessary facts against the registrant in order to sustain the allegation.
52. In giving reasons for issuing a warning, the case examiners must avoid giving the impression that it has made a finding or determination of matters of fact on substantive issues arising from the complaint.
53. The terms of any warning must be in clear terms, and must not seek to impose on a registrant a more onerous obligation than that required under the terms of the current GOC Code or Standards. For example, if a warning is given for a breach of the GOC Code for Business Registrants, it must qualify an instruction as to future conduct to the effect that the registrant must take "reasonable and proportionate steps" to comply with the relevant provisions of the Code, rather than seek to impose an absolute obligation to do so.
54. A warning issued by the case examiners is a record of their concern which, while not requiring referral to the FTPC, is potentially significant. The period of time is not set down in legislation but it has been decided that warnings will be for four years, the same as those currently issued by the Investigation Committee.
55. A warning is not shown on the publicly available GOC Register, but it is recorded against the registrant's entry in the relevant register for four years from the date of the warning letter.
56. Warnings are only issued by the case examiners once the registrant has been given an opportunity to make further written representations to them, having been advised of the nature of the warning being considered. The case examiners must consider any representations made by a registrant and decide whether or not to give a warning in the particular circumstances<sup>11</sup>.
57. The GOC has published separate guidance on warnings, available from:  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

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<sup>11</sup> In accordance with Rule 14 of the GOC (Fitness to Practise) Rules 2013

## **Taking no further action**

58. If the case examiners decide that an allegation does not need to be referred to the FTPC, or result in the issue of a warning, it may decide to close a case without taking any further action.
59. The case examiners may decide to close a case and take no further action if:
- the allegation demonstrates no issue that could call into question a registrant's fitness to practise; or
  - the alleged facts, even if proved, are not serious enough to result in that registrant's fitness to practise being impaired to the extent that would justify action being taken against their registration, and a warning is deemed unnecessary; or
  - the alleged facts, if proved, may demonstrate that a registrant's fitness to practise is impaired, but there is no realistic prospect of being able to prove the alleged facts for evidential reasons, and a warning is deemed unnecessary.
60. The case examiners may decide to issue advice to a registrant if the case is to be closed. Such advice has no formal status, it is simply advice. Such decisions may contain (but are not limited to) advice regarding future conduct, including advice about the appropriate handling of dissatisfied patients. In such situations case examiners should draft the advice carefully so as to be clear that they are not issuing a warning. A warning is a formal response from the GOC to an allegation under Section 13D of the Opticians Act which is recorded against a registrant's entry in the register, whereas advice is an informal comment on the matter from the case examiners. Clear wording will also prevent any misinterpretation of the decision by a third party who is unfamiliar with the GOC's procedures. Where appropriate, the case examiners may also include positive comments in their advice.

## **Recording decisions**

61. All decisions made by the case examiners shall be recorded in writing setting out full and detailed reasoning for the decision made. Case examiners must always ensure that their reasoning is clear, and must take particular care, for example:
- where they are referring some but not all of the factual particulars to the FTPC, or where more than one ground of impairment has been alleged, in order to be clear which factual particulars and allegations are being referred and on which ground of impairment;
  - where numerous documents have been submitted to support the allegation, the decision should be clear that these have been read. The decision should refer to specific document(s)/section(s) and set out how these relate to that part of the decision;
  - where the case examiners agree that there is a realistic prospect of finding the factual particulars proved but decide not to refer the allegations due to evidence of insight and remediation. The case examiners should set out why the

evidence is so compelling as to decide not to refer the allegation of impairment;

- where the decision of the case examiners, which will not have resolved disputes of fact, appears to discount the findings of an expert opinion (see paragraph 35).

62. The case examiners should also remember that their decision may be read by third parties who may be unfamiliar with the GOC's role or procedures. As such their reasons need to be clearly written in plain English to explain what decisions are being taken and why.

### **Notification**

63. Following the case examiners' decision, the complainant(s) and the registrant(s) concerned receive a letter from the GOC setting out the case examiners' decision and the reasons for that decision. In the case of individual registrants, their employer will be informed of the case examiners' decision but they will not be provided with the full decision.

### **Other parties**

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

### **Referral of cases from case examiners to the IC**

65. The case examiners will be able to deal with the majority of cases, however, there are two situations where cases must be referred to the IC by the case examiners;

(1) where the case examiners decide to refer an individual registrant for a health and/or performance assessment, which can only be directed by the IC;

(2) where the case examiners are not unanimous in their decision about the appropriate disposal of the matter<sup>12</sup>. Both of those situations are explained further below.

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<sup>12</sup> Rules 12 and 13 of the GOC (Fitness to Practise) Rules 2013.

## Assessments (health and/or performance)

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

- a health assessment of the individual registrant<sup>13</sup>; or
- a performance assessment of the individual registrant<sup>14</sup>

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

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

67. The IC must specify the matters on which the registrant is to be assessed. If more than one assessor is appointed in respect of a performance assessment, the assessors must together prepare a joint report for the IC. In respect of a health assessment, each assessor will prepare a report. The registrant will be sent a copy of all reports prepared and may submit comments on the report(s) to the Registrar within 28 days of receipt<sup>15</sup>.

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

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

<sup>13</sup> In accordance with Rule 6 of the GOC (Fitness to Practise) Rules 2013

<sup>14</sup> As above

<sup>15</sup> In accordance with rules 10(4) and (5) of the GOC (Fitness to Practise) Rules 2013

## **If case examiners are unable to reach a unanimous decision**

70. Cases will be considered by a lay case examiner and a registrant case examiner. The case examiners must be unanimous in their decision about the disposal of an allegation. In the event that they are unable to reach a unanimous decision in a particular case, they must inform the Registrar and the Registrar will refer the matter to the IC. The IC will then determine how to dispose of the case following the decision making process which is set out in this guidance.

[http://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/The\\_investigation\\_process.cfm](http://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/The_investigation_process.cfm)

## **Review of decision not to refer**

71. At any time within five years of a decision not to refer having been made, the case examiners may review the original decision. However, a review can only take place if the case examiners consider that there is new evidence or information which makes a review necessary for the protection of the public, necessary for the prevention of injustice to a registrant, otherwise necessary in the public interest. Alternatively, information is available to indicate that the GOC erred in its administrative handling of the case, and it is necessary in the public interest to review.
72. If a review is to be undertaken, the Registrar will inform the registrant (and, in the case of individual practitioners, their employer) and the complainant that new information is available and, if appropriate, provide the same. The registrant and the complainant (if any) may provide representations. Thereafter, the case examiners will consider all the available information. The case examiners may determine:
- that the original decision should stand;
  - that a warning may be given;
  - to refer the matter to the FTPC; or
  - to remove from a registrant's record, any previous warning that has been issued.

## **Termination of a referral**

73. Where an allegation has been referred to the FTPC, the case examiners may review the referral. If a review is to be undertaken, the Registrar will write to the complainant and give them the opportunity to provide comment. It is good practice to seek the respondent's comments also (both should be given 28 days within which to comment). The case examiners will then consider the available information and, if they decide that the case should not be considered by the FTPC, they will give a direction to the Registrar who will notify the relevant parties.
74. If the case examiners are reviewing a referral on the basis of a witness or complainant no longer co-operating with the investigation, the case examiners should remember the GOC's own powers of investigation under Section 13B of the Opticians Act. If the case examiners consider that it would be in the public interest, the referral may continue without the co-operation of the witness/complainant, although the case examiners will need to consider the weight of the available evidence and therefore whether the realistic prospect test can still be met.

## Guidance for case examiners on findings by other regulators

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

76. By section 13D(2) of the Act, the only grounds on which the fitness to practise of an individual registrant, or the fitness to undertake training of a student registrant, can be “impaired” for the purposes of the Act are as set out in section 13(2)(a)-(g). These grounds include “misconduct” (section 13(2)(a)), and

*“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect”* (section 13D(2)(g)).

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

*“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that-*

*(i) the business registrant’s fitness to carry on business as a member of that profession is impaired; or*

*(ii) the fitness of a director of the business registrant to practise that profession is impaired,*

*or a determination by a regulatory body elsewhere to the same effect”* (section 13D(3)(g)).

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

78. A determination about the fitness to practise of person by another UK health or social care regulator will be conclusive evidence of the facts found proved in relation to that determination. The only evidence which may be adduced in rebuttal of such a certified determination is evidence proving that the person is not the person referred to in the certificate.

79. This is because in the case of other UK health or social care regulators, the decision will have been reached by the disciplinary panel after a hearing conducted in accordance with due legal process. The regulator will have had the burden of proving the allegations to the required standard of proof. Legal representation of the parties

will have been permitted. The panel may have considered and assessed oral evidence tested under cross-examination, and any documentary evidence submitted by the parties. The panel will have received legal advice, from an independent legal advisor or from a member of the panel, before reaching its decision. The determination of the panel will have contained the reasons for its findings.

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

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

81. The ASA is the independent body responsible for regulating advertisers in the United Kingdom. Upon receipt of a complaint it will consider and determine whether an advertiser has acted in breach of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Advertising (CAP Codes). Its decision is published as an adjudication. An ASA adjudication can be reviewed at the request of the advertiser by the Independent Reviewer of ASA Adjudications.
82. It is not unusual for an ASA adjudication against a registrant of the GOC, normally a business registrant, to be sent to the GOC for consideration as to whether any disciplinary action should be taken against the registrant. If an ASA adjudication is sent to the case examiner for investigation and consideration, the case examiner must examine the status of that adjudication in relation to any allegation against the registrant on one of the grounds under section 13D(2) or (3) of the Act.
83. In the following paragraphs, the guidance will deal with ASA adjudications against a GOC business registrant, but similar principles will apply to adjudications against individual registrants.
84. Unlike a determination by another UK health or social care regulator, an adjudication by the ASA against a GOC registrant does not, of itself, constitute a ground for impairment under section 13D(2) or (3) of the Act. Therefore, it is important for the case examiner, at the outset, to identify the potential ground under section 13D for an allegation against the registrant. In most cases, the only potential ground will be "misconduct by the business registrant or one of its directors" under section 13D(3)(a), by reason of a potential breach of the GOC Code of Conduct for Business Registrants (the GOC Code).
85. In the case of an ASA adjudication, the allegation of misconduct will normally have to be based on a potential breach of paragraphs 7 and/or 11 of the GOC Code, which provide as follows:

*"...a business registrant will take reasonable and proportionate steps to:*

7. *Ensure that advertising or publicity complies with the appropriate advertising codes of practice; .....*
11. *Ensure that financial and commercial practices do not compromise patient safety.”*

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

86. The case examiner must not assume that an ASA adjudication, without more evidence, will prove itself in the same way as a conviction, or that the mere fact of an ASA adjudication will prove an automatic breach of the GOC Code.
87. The evidential status of an ASA adjudication is that it is likely to be admissible at a hearing of the FTPC as prima facie evidence that the registrant has acted in breach of the CAP Codes. However, that finding may be rebutted by the registrant, who may seek to adduce evidence to go behind the ASA adjudication. The reason for this is that the ASA adjudication process is very different from that adopted in disciplinary hearings before other UK health or social care regulators. The ASA has no power to consider impairment of fitness to practise. No hearings are held, and the whole process is conducted on paper, with the advertiser submitting written representations. Thus, there is no oral evidence tested by cross-examination. The burden of proof rests with the advertiser to prove that it has not acted in breach of the CAP Codes (i.e. the ASA applies the reverse burden of proof to that applied by the GOC and other UK health or social care regulators). The adjudication body does not receive independent legal advice before making its adjudication. Thus, it may be possible for a registrant to argue that the ASA adjudication process should carry little weight.
88. Even if breaches of the CAP Codes are proved, or admitted, that is not enough to prove a breach of the GOC Code which requires registrants to take “reasonable and proportionate steps” to comply with the CAP Codes. The position will depend on the evidence of the steps taken by the registrant.
89. In deciding whether to refer an allegation based on an ASA adjudication to the FTPC, the case examiners must consider the representations made by the registrant in response to the allegation under rule 5 of the rules.
90. The case examiners may take the view that the material indicates that the registrant has taken sufficient steps to comply with the findings, in which case, the case examiner may decide to take no action.
91. The case examiners may take the view that there is a dispute as to whether the findings of the ASA of breaches of the CAP Codes are justifiable, and/or whether the registrant has taken “reasonable and proportionate steps” to comply with the CAP Codes. In which case, the case examiners may decide to refer the allegation to the FTPC. The case examiners must not make any findings of fact.
92. If the case examiners decide not to refer the allegation to the FTPC, they have the power to issue a warning to the registrant under section 13D(7) of the Act. In deciding to issue a warning, the case examiners must take care to ensure that they do not

appear to be making findings of fact on material issues that are in dispute relating to the allegation. If a warning is given, it must not be given in absolute terms, but must reflect the “reasonable and proportionate steps” qualification in the GOC Code. If a warning is being considered, reference should be made to the separate guidance regarding warnings.

**This guidance will assist in deciding upon the evidential status of findings by other non-healthcare regulators or tribunals**

93. The case examiners may take the view that there is a dispute as to the evidential status of any findings against a GOC registrant by another non- healthcare regulator or tribunal. It is possible that this will have to be examined by the case examiners in accordance with the principles set out above in relation to ASA adjudications. In each case, it will be necessary to examine the nature of the decision-making process of the relevant regulator or tribunal, and to decide whether it was fair. A finding by a civil court of law will be strong prima facie evidence of the facts found proved.<sup>16</sup> A finding by another regulator with no power to consider fitness to practise, and operating a reverse burden of proof, will be more susceptible to challenge and rebuttal.

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<sup>16</sup> See the *Neelu Chadhari* case