

## **COUNCIL**

### **Fitness to Practise (FTP) Rules Guidance for Case Examiners, the Investigation Committee and the Fitness to Practise Committee**

---

**Meeting:** 12 February 2014

**Status:** for decision

**Lead responsibility:** Mandie Lavin  
(Director of Regulation)

**Contact details:** 020 7307 3454  
mlavin@optical.org

#### **Purpose**

---

1. This paper seeks Council's approval for use of new fitness to practise guidance for case examiners (Annex 1), the Investigation Committee (Annex 2) and the Fitness to Practise Committee (Annex 3). The Guidance is in accordance with the General Optical Council (Fitness to Practise) Rules Order of Council 2013 (No 2537).
2. The Council considered this guidance in October 2013 and approved it for consultation. The consultation period began on 26 November 2013 and ended on 14 January 2014.
3. The approved guidance will support the case examiners, the Investigation Committee and the Fitness to Practise committee.

#### **Strategic Objective**

---

4. The specific purpose of this guidance is to underpin the training and appointment of case examiners; a vital aspect of our strategic aim to 'ensure our systems and processes are efficient and cost effective'. The project sponsor is Mandie Lavin, Director of Regulation.

#### **Background**

---

5. The Council has previously agreed, consulted on and sealed the new Fitness to Practise Rules which will come into force on 1 April 2014.
6. A public consultation took place in accordance with the terms of the GOC's Consultation Framework for 12 weeks between 14 February and 29 April 2011. The consultation was issued to patients, carers, the public and their representative groups, voluntary organisations and charities, seldom-heard groups and their representative organisations, registrants (including students), potential registrants and their professional and representative organisations,

- optical bodies corporate and employers, healthcare organisations, education providers, other regulators, government and staff.
7. The Rules are clear and there is a statutory duty to provide guidance on fitness to practise and, prior to issuing such guidance, there is a need to consult with relevant groups. Full consultation has been undertaken with a positive response.
  8. The consultation was publicised on the GOC's website. The responses were mainly in favour of the proposed changes, although some amendments have been necessary.
  9. The introduction of case examiners, who will take over most of the role and function of the Investigation Committee, represents a significant change to the GOC's FTP procedures.
  10. The guidance is intended to assist the case examiners and the Investigation Committee (in its more limited role) in making decisions on fitness to practise allegations by describing the procedure and criteria used by the GOC.
  11. The guidance is a 'living' document and will be updated regularly to ensure its fitness for purpose.
  12. The guidance has been drafted and amended by solicitors with regulatory expertise and is consistent with current case law, Professional Standards Authority guidance and other regulatory best practice.

### **Analysis**

---

13. Responses to the consultation have been received from:
  - the Nursing and Midwifery Council,
  - the Optical Confederation, and,
  - the Investigation Committee of the General Optical Council.
14. The Nursing and Midwifery Council has made helpful suggestions for expanding the guidance in relation to the meaning of 'the public interest' and in respect of remediation by registrants who are the subject of allegations.
  - *the guidance has been amended to take account of these suggestions.*
15. The Optical Confederation (OC) has made a number of comments and the guidance has been amended accordingly.

- *for example, the word 'strict' has been removed from the guidance on supervision for registrants who are made subject to conditional registration.*
16. The OC has also referred to the GOC's current practice of not particularising allegations.
- *this matter is currently under discussion and we intend to change this practice in the near future.*
17. The OC has proposed that the guidance should specifically state that "the Registrant's professional background will determine whether the registered case examiner is a dispensing optician or an optometrist." They refer to the requirement for quoracy of the Investigation Committee under the 2005 Rules, which must include a member of both professions as well as a lay person.
- *the new Rules make no such requirement and therefore this cannot be incorporated into the guidance. Each case must be considered by a registrant and a lay case examiner. The nature of the allegation will determine whether the registrant needs to be an optometrist or a dispensing optician. In addition, the case examiners will have access to expert opinion.*
18. The Investigation Committee has provided a detailed response to the consultation – of which the following is a summary.
- *a significant number of the IC's comments related to the need for greater clarity in the use of terminology, such as 'allegations' and 'reports'; the need for cross referencing between the three guidance documents and for consistency across the documents; the need for re-ordering certain sections, and some grammatical and typing errors. The guidance has been amended accordingly.*
19. A number of the IC's suggestions concern matters which will be covered in depth in the training programme such as:
- *the need for support for the case examiners in the process of writing up their decisions and detailed reasons.*
  - *self referrals and*
  - *confidentiality and security of information.*
20. The IC has raised the question of how cases will be managed, indicative timescales etc.
- *this is an important element in the FTP Reform programme to demonstrate progression of cases with optimum efficiency through each stage of the FTP processes. This will not be included in the guidance, however, efficient case management is at the heart of the work of FTP and will be*

*dealt with in the training programme. Speedier progression of cases by all healthcare regulators was a key recommendation of the Inquiry into the Mid Staffordshire Hospitals Trust conducted by Robert Francis QC.*

21. The IC commented on the need to update guidance documents, such as that on warnings, 'How to make a complaint' etc.
  - *this work is underway and will be completed before 1 April 2014.*
22. The IC refers to guidance on referrals for health assessments.
  - *the GOC does not currently have written guidance but this will be drafted within the timescale of the FTP reform programme and will be issued for consultation.*
23. The IC suggested improvements to the guidance on voluntary performance assessments.
  - *as these do not form part of the rules they will not be available as an option for case examiners.*
24. The IC questions why the guidance refers to findings from other health and social care regulatory bodies and from the Advertising Standards Authority but not from university disciplinary proceedings, criminal proceedings and other sources.
  - *it is not possible to include everything in the guidance and to make significant amendments at this stage would warrant a further consultation. However, it is understood that the guidance is a 'living' document and it will be evaluated at regular intervals and updated as necessary.*
25. The IC has suggested a number of amendments which cannot be adopted as, either the guidance reflects the wording of the Rules, or the suggested amendment does not reflect the requirements of the Rules.
26. The IC raises the important matter of the availability of legal advice.
  - *the guidance has been amended to clarify that independent legal advice will be available to case examiners, so too regarding advice from other relevant experts.*
27. In the period between now and 1 April 2014, the supplementary guidance will be developed in the light of the consultation responses. For example, the current guidance on warnings and performance assessments will be updated to ensure consistency with the requirements of the new Rules. The training programme will inevitably highlight areas where greater clarity is needed and, again, the guidance will be appended accordingly.

28. A number of responses indicate the need for closer relationships with key stakeholders to ensure greater understanding of the provisions of the new Rules.

### **Update on recruitment of case examiners**

---

29. The recruitment process for case examiners is progressing well. In December 2013, an advertisement was placed on the GOC's website, in Guardian online and in the Law Society Gazette online. In addition, each registrant of the GOC was informed of the recruitment programme. The closing date was 13 January 2014. The response has been overwhelming, with more than 350 applications received.
30. A rigorous shortlisting process has been undertaken, interviews are taking place over 5 days and will be completed on 17 February 2017.
31. Training of case examiners will take place in March 2014. The development of the materials has been commissioned from a leading expert in the field.
32. It is anticipated that a suitable number of case examiners will be ready to accept cases as soon as possible after 1 April 2014.

### **Devolved Nations**

---

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

### **Impact**

---

34. Identify any implications decisions by Council may have on:
- 34.1. GOC's reserves - there will be no impact;
  - 34.2. GOC budget - this programme has been fully budgeted and will be achieved on time and in budget;
  - 34.3. Legislation - the General Optical Council (Fitness to Practise) Rules Order of Council 2013 (No 2537) will come into force on 1 April 2014;
  - 34.4. Resources - all appropriate resources are being directed at the project;
  - 34.5. Equality and Diversity - all requirements of equality and diversity are being met; and
  - 34.6. Human Rights Act (HRA) - the legislation and guidance is complicit with the requirements of the HRA and our guidance is being formulated as part of our duties under this legislation.

### **Communications**

---

35. The guidance agreed by Council will be provided to the case examiners, the Investigation Committee, and the FTP panel, relevant solicitors, representatives

of registrants, defence organisations, professional bodies and all other interested stakeholders.

36. It will be published on the GOC website and the communications team will build on the already successful media coverage in Optometry Today, and in Optician. Recent coverage includes a video interview by the GOC's Chief Executive and Registrar on the Optometry Today website. There are plans for a follow-up article in Optometry Today.

### **Risks**

---

37. The guidance will provide clarity for all parties involved in our procedures, for the public and for the wider profession, including those involved in education.
38. The guidance will ensure greater consistency in decision-making and this will result in a reduced risk of challenge to regulatory decisions.
39. The decisions of the case examiners, the Investigation Committee and the FTP panel will continue to be subject to current quality assurance mechanisms. This includes Professional Standards Authority (PSA) scrutiny, feedback points letters from the PSA and the annual audit of decision making which has, to date, been conducted by Morgan Cole LLP.
40. It will take time for the Rules and guidance to become firmly established and for those regularly involved to become completely familiar with them. The training for case examiners will be filmed and DVDs of the training will be available for case examiners, staff and others for refresher purposes.

### **Recommendations**

---

41. It is recommended that Council:
- 41.1. agree the draft guidance for publication and use from 1 April 2014; and
- 41.2. delegate agreement of the final sets of guidance to the Registrar. This will ensure that it is available to all parties from 1 April 2014.

### **Timeline**

---

42. Future timeline for the work:
- Training programme to be completed by mid-March 2014.
  - Case examiners appointed in mid-March 2014.
  - All necessary templates, procedures and documents completed by mid-March 2014
  - Supplementary guidance completed by mid March 2014
  - New guidance comes into force 1 April 2014.
  - Case examiners receive their first cases in April 2014.

**Attachments**

---

Annex 1 - Guidance for the case examiners

Annex 2 - Guidance for the Investigation Committee

Annex 3 - Fitness to Practise Committee panels hearing guidance and indicative sanctions.

## **GUIDANCE FOR CASE EXAMINERS**

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

1. The General Optical Council (GOC) recognises that it is important that patients, registrants, professional and representative organisations, and other stakeholders including the general public are aware of the basis upon which the GOC's case examiners operate and make decisions about reports of fitness to practise.
2. This document contains guidance to be used by the GOC's case examiners when considering reports about a GOC registrant's fitness to practise, train or carry on an optical business. The guidance is intended to encourage consistent decision-making by the case examiners. However, every decision that the case examiners make will be based upon the facts of the case being considered.
3. The new Fitness to Practise Rules define a case examiner as an officer of the Council appointed by the registrar on the Council's behalf for the purposes of exercising the functions of the Investigation Committee (IC), in accordance with these rules, being a registered optometrist or dispensing optician, or a lay person.
4. This guidance is a public document and is available from the GOC's website at:  
[http://www.optical.org/goc/filemanager/root/site\\_assets/stakeholder\\_engagement/consultation\\_documents/november\\_2013\\_ftp\\_guidance/guidance\\_for\\_case\\_examiners - november 2013.doc](http://www.optical.org/goc/filemanager/root/site_assets/stakeholder_engagement/consultation_documents/november_2013_ftp_guidance/guidance_for_case_examiners_-_november_2013.doc)
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 a Fitness to Practise Panel. This guidance contains some references to the roles of those committees. The GOC has 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  
***[Links to be inserted to the Guidance for the Investigation Committee and Fitness to Practise Panels]***
6. The GOC currently registers around 26,000 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and student dispensing opticians who must be registered with the GOC in order to undertake training.



## Definitions

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.

“**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 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) at least one month before the amended guidance will be used by the case examiners.

## 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

---

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

education, conduct and performance among optical professionals in order to protect, promote and maintain the health and safety of the public. The main statutory functions of the GOC are to:

- set standards for optical education and training, performance and conduct;
  - approve qualifications leading to registration;
  - maintain registers of individuals who are qualified and fit to practise or train as optometrists or dispensing opticians;
  - 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:
- [www.optical.org/en/about\\_us/policies\\_procedures\\_and\\_protocols/index.cfm](http://www.optical.org/en/about_us/policies_procedures_and_protocols/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:
- [http://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](http://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)
14. Every year, the GOC publishes both a general report across all its activities and another dedicated to fitness to practise matters, with statistical information about the number and types of complaints that have been considered by the organisation. The GOC's annual reports are available from:
- [http://www.optical.org/en/news\\_publications/Publications/annual\\_reports\\_archive.cfm](http://www.optical.org/en/news_publications/Publications/annual_reports_archive.cfm)
15. Only a minority of the complaints made to the GOC result in a referral to the FTPC<sup>2</sup>. In the majority of cases, the current IC decides that there is no need for any further action to be taken or that the matter can be appropriately dealt with by issuing a business registrant or an individual registrant with a warning or a letter of advice or asking an individual registrant to attend a voluntary performance review.

---

<sup>2</sup> 14.6% of complaints received were considered by the FTP Committee (2012-2013)

### The case examiners

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

### Referral of cases to the case examiners

17. The registrar initially considers all matter(s) reported concerning fitness to practise received by the GOC<sup>4</sup>. Where the registrar considers that the matter(s) reported falls within one of the grounds described at section 13D<sup>5</sup>, (s)he shall refer the allegation(s) to the case examiners for consideration (save for those relating to a conviction which has resulted in the imposition of a custodial sentence, which shall be referred directly to the FTPC).<sup>6</sup> Alternatively, if the registrar does not consider that the matter(s) reported falls within any of the relevant grounds, (s)he shall notify the complainant and the report will be closed. The case examiners will consider the allegation and may decide unanimously whether or not it should be referred to be considered by the FTPC. Before the allegation is considered by the case examiners, further investigation and evidence gathering may have been undertaken by the GOC investigation team.
18. The case examiners will be able to deal with the majority of cases, however, there are limited circumstances in which cases must be referred to the IC for further action. Cases will be referred to the IC (by the case examiners) in two situations: (1) where the case examiners decide to refer an individual registrant for a health and/or performance assessment, which can only be directed by the IC; (2) where the case examiners cannot reach a unanimous decision about the appropriate disposal of the matter. Both of those situations are explained in further detail below.

---

<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

<sup>5</sup> The Opticians Act 1989 (see note 1 above)

<sup>6</sup> The GOC (Fitness to Practise) Rules 2013 – rule 4(5)

## Interim orders

19. 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>7</sup>.

20. 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.

21. 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.

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

1. Take into account the circumstances, specified in the FTPC's Guidance, as being likely to mean that an interim order is necessary. A copy of the FTPC's Guidance is attached; and
2. Have regard to all the factors that will be taken into account by the FTPC when considering such a referral, including:
  - a. the effect which any order might have on the registrant;
  - b. 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;
  - c. 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

---

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

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

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

### **Early disposal of cases**

23. 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, separate guidance in relation to this appears at [\[insert hyperlink\]](#)
  - An allegation which is made by a complainant who wishes to remain anonymous; or
  - Any allegation which the case examiners consider is vexatious in nature.

### **Further investigation**

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

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

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

---

<sup>8</sup> In accordance with Rule 12(a)(iii)

- a health assessment of the individual registrant<sup>9</sup>; or
- a performance assessment of the individual registrant<sup>10</sup>.

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

<http://www.optical.org/goc/download.cfm?docid=F6428249-8F54-4E9C-BCEA6805F470D447>

26. The IC must specify the matter 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>11</sup>.
27. 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.
28. If a registrant fails to co-operate with, or submit to, an assessment (or assessments), the IC shall not refer the allegation back to the case examiners for determination and shall instead proceed to consideration of the case itself. In these circumstances, the case examiners will cease to have any further involvement in the case.

### **Decision-making process**

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

---

<sup>9</sup> In accordance with Rule 6 of the GOC (Fitness to Practise) Rules 2013

<sup>10</sup> As above

<sup>11</sup> In accordance with rules 10(4) and (5) of the GOC (Fitness to Practise) Rules 2013

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

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

32. There are a number of different potential final outcomes arising from the case examiners' consideration of an allegation<sup>12</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**

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

### **Equality and Diversity**

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

[http://www.optical.org/en/about\\_us/equality-and-diversity.cfm](http://www.optical.org/en/about_us/equality-and-diversity.cfm)

### **Allegation of fitness to practise**

35. 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>13</sup>.

---

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

36. 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>14</sup>. Case law has established the following principles regarding the concepts of “misconduct” and “deficient professional performance”:<sup>15</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.

### **Referral of an allegation to the FTPC**

37. When considering whether a case ought to be referred to the FTPC, the case examiners should keep in mind the GOC's' main objective as set out in the legislation<sup>16</sup>:

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

38. When considering whether a fitness to practise report ought to be referred to the FTPC, the case examiners should ask themselves the following question: is there a realistic prospect of establishing that the registrant's fitness to practise is

---

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

<sup>14</sup> Section 13D(2) and (3) of the Opticians Act 1989

<sup>15</sup> Calhaem v GMC [2007] EWHC 2606 (Admin)

<sup>16</sup> Section 1(2A) of the Opticians Act 1989



impaired to a degree that justifies action being taken against their registration (this is known as “**the realistic prospect test**”).

39. 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?
40. 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).
41. 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);
  - 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”);
  - the case examiners are entitled to assess the weight of the evidence. However, the case examiners must not (normally) resolve substantial conflicts of evidence;
  - where there is a plain conflict between two accounts, either one of which may realistically be correct, and on one account the matter would call into question the registrant's fitness to practise, the conflict should be resolved by the FTPC, not the case examiners;
  - if the case examiners are in doubt about whether to refer the matter to the FTPC, they should consider the complainant's version of events at their highest then apply the realistic prospect test;
  - it is not the case examiners' role to refer to the FTPC an allegation that is not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the registrant's fitness to practise could be found impaired by the FTPC;

- there is a public interest in both business registrants and individual registrants not being harassed by unfounded allegations;
- where the realistic prospect test is met, there is a public interest in there being a public hearing before the FTPC;
- they should proceed with caution in reaching a decision not to refer a case where the decision may be perceived as inconsistent with a decision made by another public body (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;
- they should note the statement within the GOC's Protocol on the handling of criminal convictions disclosed by a registrant and, in particular, that the registrar will generally presume against registration, restoration or retention on the GOC Register where an applicant discloses a conviction for an offence (included in Schedule 4 of the Criminal Justice and Court Services Act 2000). A copy of the GOC's Protocol on the handling of criminal convictions disclosed by a business registrant or an individual registrant is attached and also available from:  
<http://www.optical.org/goc/download.cfm?docid=8812D3B1-8400-4770-940FF1EB5A6E7501>
- they should further note the factors identified within the FTPC's Guidance as indicating that (if the case is considered by the FTPC) erasure is likely to be the appropriate sanction, see attached which is also available from:  
[http://www.optical.org/goc/filemanager/root/site\\_assets/policies\\_procedures\\_and\\_protocols/ftp\\_panel\\_members\\_guidance.pdf](http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf)
- they should keep in mind the presence of mitigating factors which might result in a decision by the case examiners not to refer an allegation to the FTPC but only where the mitigating factors:
  - (a) are well-supported by credible evidence;
  - (b) relate to the circumstances of the allegation rather than to matters that are personal to a business registrant or an individual registrant;
  - (c) are so significant that there is no realistic prospect of the FTPC finding that a registrant's fitness to practise is impaired.
- the likely impact on the FTPC's consideration of any evidence showing that:
  - (a) a registrant's admitted failings are capable of being remedied; and/or
  - (b) have already been remedied;

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

- certain types of misconduct may be more capable of being remedied than others, for example, allegations concerning deficient professional performance. Such evidence may not always be available, and where it is available, it may not be clear or persuasive. 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."*

### **Recording decisions**

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

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

43. 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).
44. For example, the case examiners may consider that the facts of the complaint amount to an allegation of "misconduct" under section 13D(2)(a) of the OA, by failing to treat every patient politely and considerately, in breach of paragraph 2 of the GOC Code of Conduct for Individual Registrants.
45. Alternatively, the case examiners may consider that the facts of the complaint amount to an allegation of "misconduct by the business registrant or by one of its directors" under section 13D(3)(a) of the OA, by failing to take reasonable and proportionate steps to ensure that advertising or publicity complies with appropriate advertising codes of practice, in breach of paragraph of the GOC Code of Conduct for Business Registrants.
46. 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**

47. The case examiners will only consider issuing a warning once it has decided that the matter should not be referred to the FTPC.
48. When considering a complaint, the case examiners must ensure that the potential ground for the allegation against a registrant under section 13D has been identified, so that it can assess the prospects of being able to prove the necessary facts against the registrant in order to sustain the allegation.
49. 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.
50. The terms of any warning must be in clear terms, and must not seek to impose on a registrant a more onerous obligation than that required under the terms of the GOC Codes. For example, if a warning is given for a breach of the GOC Code for Business Registrants, it must qualify an instruction as to future conduct to the effect that the registrant must take “reasonable and proportionate steps” to comply with the relevant provisions of the Code, rather than seek to impose an absolute obligation to do so.
51. A warning issued by the case examiners is a record of their concern which, while not requiring referral to the FTPC, is potentially significant. A warning is not shown on the publicly available GOC register, but it is recorded by the GOC for a period of time. The period of time is not set down in legislation but is stated as four years in the current IC guidance dated November 2011. It is proposed that there should be greater flexibility. A warning may be given for a period of up to four years. Proportionality is an important consideration. Independent legal advice is available to the case examiners.
52. 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>17</sup>.
53. The GOC has published separate guidance on warnings, available from:  
[http://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](http://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

---

<sup>17</sup> In accordance with Rule 14 of the GOC (Fitness to Practise) Rules 2013

### **Taking no further action**

54. 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.
55. The case examiners may decide to close a case and take no further action if:
- the report of fitness to practise demonstrates no issue that could call into question a registrant's fitness to practise; or
  - the alleged facts, even if proved, are not serious enough to result in that registrant's fitness to practise being impaired to the extent that would justify action being taken against their registration, and a warning is deemed unnecessary; or
  - the alleged facts, if proved, may demonstrate that a registrant's fitness to practise is impaired, but there is no realistic prospect of being able to prove the alleged facts for evidential reasons, and a warning is deemed unnecessary.
56. The case examiners may direct that a letter of advice be sent to a registrant if the case is to be closed. Such a letter has no formal status, it is simply advice. Such letters may contain (but are not limited to) advice regarding future conduct, including advice about the appropriate handling of dissatisfied patients. Where appropriate, the case examiners may also include positive comments in an advice letter.

### **Notification**

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

### **Other parties**

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

### **Case examiners are unable to reach a unanimous decision**

59. 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<sup>18</sup>. The GOC has published separate guidance for the IC, attached: [\[insert hyperlink\]](#)

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

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

### **Termination of a referral**

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

---

<sup>18</sup> Rule 13 of the GOC (Fitness to Practise) Rules 2013

### Guidance for case examiners on Findings by Other Regulators

63. 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).

64. 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)).

65. 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).**

66. When the case examiner is considering an allegation of impairment by reason of a finding of impairment of fitness to practise by another UK health or social care regulator, it must examine the evidential status of the determination of the other regulator on which the GOC allegation is based. Such a determination does not have the same status as a conviction for a criminal offence, which is normally proved by a certificate of conviction from the court concerned, and cannot

normally be challenged in professional disciplinary proceedings. A criminal conviction may be a ground for impairment under section 13D(2)(c) or 13D(3)(d) of the Act.

67. A determination by another UK health or social care regulator will, save in exceptional circumstances, be strong prima facie evidence of the facts found proved in relation to that determination, but is not conclusive. The registrant must be given a fair chance to explain himself, but a fitness to practise panel is not required to conduct itself as a court of law rehearing all the evidence underlying the original determination.<sup>19</sup>
68. The main test to be applied when examining the status of such a determination is whether the process whereby the determination was reached was fair. In the case of other UK health or social care regulators, the decision will have been reached by the disciplinary panel after a hearing conducted in accordance with due legal process. The regulator will have had the burden of proving the allegations to the required standard of proof. Legal representation of the parties will have been permitted. The panel may have considered and assessed oral evidence tested under cross-examination, and any documentary evidence submitted by the parties. The panel will have received legal advice, from an independent legal advisor or from a member of the panel, before reaching its decision. The determination of the panel will have contained the reasons for its findings.
69. Therefore, in the case of a determination by another UK health or social care regulator, that determination can usually be relied upon by the case examiner to provide a reliable basis for referring the allegation to the FTPC. This is on the basis that there is a realistic prospect of being able to prove the facts as found by the other regulator, and that they are so significant as to indicate that the registrant's fitness to practise is or may be impaired to such a degree that justifies action being taken against their registration.
70. It will be for the FTPC to determine whether there are exceptional circumstances in any particular case to question the determination of the other regulator, or to find that the findings of the other regulator are not sufficient to find impairment of fitness to practise of a GOC registrant.
71. It is possible that a determination by another UK health or social care regulator may be sufficient to justify an allegation of misconduct under section 13D(2)(a) or 13D(3)(a), in addition to an allegation under section 13D(2)(g) or 13D(3)(g). In that case, the principles as to the status of the determination of the other regulator set out above are equally applicable.

---

<sup>19</sup> See *General Medical Council v. Spackman* (1943) AC 627, *Neelu Chaudhari v. General Pharmaceutical Council* (2011) EWHC 3433 (Admin)



**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**

72. 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.
73. 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.
74. 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.
75. 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).
76. 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.

77. 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.
78. 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.
79. 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.
80. In deciding whether to refer an allegation based on an ASA adjudication to the FTPC, the case examiner must consider the representations made by the registrant in response to the allegation under rule 5 of the rules.
81. The case examiner 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.
82. The case examiner may take the view that there is a dispute as to whether the findings of the ASA of breaches of the CAP Codes are justifiable, and/or whether the registrant has taken “reasonable and proportionate steps” to comply with the CAP Codes. In which case, the case examiner may decide to refer the allegation to the FTPC. The case examiner must not make any findings of fact..
83. If the case examiner decides not to refer the allegation to the FTPC, it has the power to issue a warning to the registrant under section 13D(7) of the Act. In deciding to issue a warning, the case examiner must take care to ensure that it does not appear to be making findings of fact on material issues that are in dispute relating to the allegation. If a warning is given, it must not be given in absolute terms, but must reflect the “reasonable and proportionate steps”

qualification in the GOC Code. If a warning is being considered, reference should be made to the separate Guidance regarding Warnings.

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

84. 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 examiner in accordance with the principles set out above in relation to ASA adjudications. In each case, it will be necessary to examine the nature of the decision-making process of the relevant regulator or tribunal, and to decide whether it was fair. A finding by a civil court of law will be strong prima facie evidence of the facts found proved.<sup>20</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.

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

<http://www.optical.org/goc/download.cfm?docid=8812D3B1-8400-4770-940FF1EB5A6E7501>

**FTPC's Guidance (November 2013)**

[http://www.optical.org/goc/filemanager/root/site\\_assets/stakeholder\\_engagement/consultation\\_documents/november\\_2013 ftp\\_guidance/guidance\\_for ftp\\_panels\\_-\\_november\\_2013.doc](http://www.optical.org/goc/filemanager/root/site_assets/stakeholder_engagement/consultation_documents/november_2013 ftp_guidance/guidance_for ftp_panels_-_november_2013.doc)

---

<sup>20</sup> See the *Neelu Chadhari* case

## **GUIDANCE FOR THE INVESTIGATION COMMITTEE**

### **The purpose of the 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 Investigation Committee (IC) operates and makes decisions about fitness to practise complaints.
2. This document contains guidance to be used by the GOC's IC when considering complaints about a registrant's fitness to practise/train/carry on an optical business. The guidance is intended to encourage consistent decision-making by the IC. However, every decision that the IC makes will be based upon the facts of the case being considered.
3. The new Fitness to Practise Rules define a case examiner as an officer of the Council appointed by the registrar on the Council's behalf for the purposes of exercising the functions of the 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:  
[http://www.optical.org/goc/filemanager/root/site\\_assets/stakeholder\\_engagement/consultation\\_documents/november\\_2013\\_ftp\\_guidance/guidance\\_for\\_the\\_investigation\\_committee\\_-\\_november\\_2013.doc](http://www.optical.org/goc/filemanager/root/site_assets/stakeholder_engagement/consultation_documents/november_2013_ftp_guidance/guidance_for_the_investigation_committee_-_november_2013.doc)
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 Case Examiners or a Fitness to Practise Panel. This guidance contains some references to their roles. The GOC has also published guidance for the Case Examiners and for Fitness to Practise Panels. These guidance documents are public documents and are available from the GOC's website at  
***[Links to be inserted to Guidance for the Case Examiners and Fitness to Practise Panels]***
6. The GOC currently registers around 26,000 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and student dispensing opticians who must be registered with the GOC in order to undertake training.

## Definitions

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.

“**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 IC 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) at least one month before the amended guidance will be used by the IC.

## The General Optical Council

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

---

<sup>1</sup> [http://www.opsi.gov.uk/acts1989/pdf/ukpga\\_19890044\\_en.pdf](http://www.opsi.gov.uk/acts1989/pdf/ukpga_19890044_en.pdf)

education, conduct and performance among optical professionals in order to protect, promote and maintain the health and safety of the public. The main statutory functions of the GOC are to:

- set standards for optical education and training, performance and conduct;
  - approve qualifications leading to registration;
  - maintain registers of individuals who are qualified and fit to practise or train as optometrists or dispensing opticians;
  - maintain lists of bodies corporate who carry on business as ophthalmic or dispensing opticians; and
  - investigate and act where a business registrant's or an individual registrant's fitness to practise, train or carry on business 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:
- [http://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](http://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:
- [www.optical.org/en/our\\_work/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](http://www.optical.org/en/our_work/Investigating_complaints/How_to_make_a_complaint/index.cfm)
14. Every year, the GOC publishes both a general report across all its activities and another dedicated to fitness to practise matters, with statistical information about the number and types of complaints that have been considered by the organisation. The GOC's annual reports are available from:
- [www.optical.org/en/news\\_publications/Publications/annual\\_reports\\_archive.cfm](http://www.optical.org/en/news_publications/Publications/annual_reports_archive.cfm).
15. Only a minority of complaints that are made to the GOC result in a referral to the Fitness to Practise Committee (FTPC)<sup>2</sup>. In the majority of cases, the current IC decides that there is no need for any further action to be taken or that the matter can be appropriately dealt with by issuing a registrant with a warning, a letter of advice or asking an individual registrant to attend a voluntary performance review.

---

<sup>2</sup> 14.6% of complaints received were considered by the FTP Committee (2012-2013)

## The Investigation Committee's (IC) membership

16. The legislation specifies the membership of the IC and its decision-making procedures<sup>3</sup>.
17. The IC has a mixture of lay and professional members. It has nine members in total, of which three must be registered optometrists, two must be registered dispensing opticians, three must be lay persons, and one must be a medical practitioner<sup>4</sup>.
18. Details of the current membership of the IC are available from:  
[www.optical.org/en/about\\_us/how\\_we\\_work/Investigation\\_Committee.cfm](http://www.optical.org/en/about_us/how_we_work/Investigation_Committee.cfm)
19. There must be a minimum of five<sup>5</sup> IC members present in order for the Committee to make decisions about an allegation (the Committee's "quorum"). This must include at least one optometrist, one dispensing optician and one lay member.
20. The IC meets in private. It is able to obtain independent legal advice. The complainant, registrant and their representatives are not allowed to attend IC meetings. The IC takes its decisions by a simple majority vote (the Chair does not have a casting vote). No Committee member may abstain from voting and where the votes are equal, the legislation states that the Committee must decide in favour of the registrant<sup>6</sup>.

## Referral of cases to the Investigation Committee (IC)

21. All reports of fitness to practise which are received by the GOC are initially considered by the registrar. Where the registrar considers that the allegation falls within one of the grounds described at section 13D of the Opticians Act, the matter shall be referred to the case examiners for consideration (save for those resulting from a criminal conviction which has resulted in the imposition of a custodial sentence; which will be referred straight to the FTP Committee (FTPC))<sup>7</sup>. Alternatively, if the registrar does not consider that the allegation falls within any of the relevant grounds, (s)he shall notify the complainant and the case will be closed.

---

<sup>3</sup> The GOC(committee Constitution Rules) Order of Council 2005 and The GOC (Committee Constitution) Amended Rules Order of Council 2008 – <http://www.opsi.gov.uk/si/si2005/20051474.htm> and [http://www.opsi.gov.uk/si/si2008/uksi\\_20083113\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20083113_en_1)

<sup>4</sup> Rule 9 of the GOC (Committee Constitution Rules) Order of Council 2005 as amended by the GOC (Committee Constitution) Amended Rules Order of Council 2008 (see note 3 above)

<sup>5</sup> Rule 10 of the GOC(committee Constitution Rules) Order of Council 2005 as amended by the GOC (Committee Constitution) Amended Rules Order of Council 2008 (see note 3 above)

<sup>6</sup> Rule 59(4) of the GOC (Fitness to Practise) Rules 2013.

<sup>7</sup> Rule 4(5) of the GOC (Fitness to Practise) Rules 2013.

22. The case examiners will consider the allegation and decide whether or not it should be referred to the FTPC for hearing. The case examiners will be able to deal with the majority of cases, however, there are limited circumstances in which cases must be referred to the IC for further action. Cases will be referred to the IC by the case examiners in two situations; (1) where the case examiners decide to refer an individual registrant for a health and/or performance assessment, which can only be directed by the IC or (2) where the case examiners are not unanimous in their decision about the appropriate disposal of the matter<sup>8</sup>.

### **Assessment (Health and/or Performance)**

23. Where the case examiners decide that they require further information about a registrant's health and/or the standard and 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. Also, if the IC is, itself, considering a case where the case examiners have been unable to reach a unanimous decision about disposal of the allegation and the case has been referred to the IC, it may decide that an assessment (or assessments) are required.
24. In such circumstances, 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):
25. A health assessment of an individual practitioner<sup>9</sup>.
- this may be appropriate if the complaint (or an individual registrant's representations) raises questions as to whether their health (including any health condition relating to substance abuse) is having any impact on their work.
26. A performance assessment of an individual practitioner<sup>10</sup>.
- this may be appropriate if it is considered that the complaint raises broad questions about the adequacy of the individual's standard of work in certain areas of practice, and that the decision-making would be assisted by a formal assessment of the registrant's work in those areas. The GOC has published separate guidance relating to performance assessments, available from: <http://www.optical.org/goc/download.cfm?docid=F6428249-8F54-4E9C-BCEA6805F470D447>

---

<sup>8</sup> Rules 12 and 13 of the GOC (Fitness to Practise) Rules 2013.

<sup>9</sup> Rule 7 of the GOC (FTP) Rules 2013.

<sup>10</sup> Rule 7 of the GOC (FtP) Rules 2013.



27. The IC shall specify the matters on which a registrant is to be assessed. If more than one assessor is appointed to conduct a performance assessment, the assessors must together prepare a joint report for the IC. In respect of health assessments, each assessor will prepare a report. The registrant will be sent a copy of all report(s) prepared and may submit comments on the report(s) to the registrar within 28 days of receipt.
28. If the IC directs, on its own behalf or on referral from the case examiners, that an assessment (or assessments) should be carried out, consideration of the case will be adjourned until the relevant further investigations are completed. Any additional evidence that is obtained as a result of further investigation will be provided to the registrant who will be given an opportunity to make additional written representations, which will be provided to the IC or case examiners, (and, if relevant, to the person making the complaint).
29. Where a registrant co-operates with an assessment (or assessments) requested by the case examiners, the IC must refer the allegation back to the case examiners, with 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.
30. If an individual registrant fails to co-operate with, or submit to, an assessment (or assessments) where the IC has directed an assessment (or assessments) following a referral from the case examiners, the IC shall not refer the allegation back to the case examiners for determination and shall, instead, proceed to consideration of the allegation itself. The IC shall draw such inferences as seems fit, following an individual registrant's failure to co-operate with an assessment.
31. Further details in relation to the IC's decision making process are set out below.

#### **Case examiners are unable to reach a unanimous decision**

32. 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.

#### **Further investigation**

33. At any stage, prior to making their final decision, the IC 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 IC with all additional evidence, together with any further comments. The IC will resume its consideration of the matter.

### **Decision-making process**

34. When making any decision about a particular allegation, the IC 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. 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 IC considers the allegation(s).
35. The IC will also consider any comments received from the complainant, made once the complainant has seen any written representations made by the registrant. Any comments from the complainant are also copied to the registrant.
36. There may be cases that involve concerns about a number of aspects of a registrant's fitness to practise. In making a decision, it is the cumulative effect of all impairing factors that must be taken into account. Health and performance assessments are part of the process of collecting evidence (for individual registrants), but there may also be other evidence that the IC will need to consider when reaching a decision.

### **Potential outcomes of the IC's consideration of an allegation**

37. There are a number of different potential final outcomes arising from the IC's consideration of an allegation:
  - referral of the case to the FTPC;
  - the issue of a warning to the registrant<sup>11</sup>;
  - a decision to take no further action, including issuing the 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 below.

### **The public interest**

38. The IC 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.

---

<sup>11</sup> In accordance with sections 13D(7) of the Opticians Act 1989 (see note 1 above)

## Equality and Diversity

39. The IC must be aware of and apply the GOC's Equality and Diversity Scheme: [http://www.optical.org/en/about\\_us/equality-and-diversity.cfm](http://www.optical.org/en/about_us/equality-and-diversity.cfm)

## Allegation of fitness to practise

40. An allegation that an individual registrant's fitness to practise is, or may be, impaired may relate to acts or omissions which occurred outside the United Kingdom or at a time when that registrant was not registered<sup>12</sup>.
41. A registrant's fitness to practise may be impaired only on certain grounds which are set out at Section 13D (2) and (3) of the Opticians Act 1989. Those grounds vary, depending on whether it is a business registrant, a student registrant or an individual practitioner. Case law has established the following principles regarding the concepts of "misconduct" and "deficient professional performance"<sup>13</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.

## Referral of an allegation to the FTPC

42. When considering whether an allegation ought to be referred to the FTPC, the IC should keep in mind the GOC's main objective as set out in the legislation<sup>14</sup>:

---

<sup>12</sup> Section 13D(4) of the Opticians Act 1989.

<sup>13</sup> Calhaem v General Medical Council [2007] EWHC 2606 (Admin)

<sup>14</sup> Section 1(2A) of the Opticians Act 1989 (see note 1 above)

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

43. When considering whether a case ought to be referred to the FTPC, the IC should ask itself 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**”).
44. 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?
45. It is **not** the role of the IC 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).
46. When considering the realistic prospect test, the IC should have regard to the following:
- it should proceed with caution (given that, among other considerations, the IC is working from documents alone and the evidence before them may be untested);
  - it is not the IC’s role 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”)<sup>15</sup>;
  - the IC is entitled to assess the weight of the evidence. However, the Committee 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 a registrant’s fitness to practise, the conflict should be resolved by the FTPC, not the IC;

---

<sup>15</sup> Rule 38 of the GOC FTP Rules 2013.

- if the IC is 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 IC's role to refer to the FTPC an allegation that is not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the registrant's fitness to practise could be found impaired by the FTPC;
- there is a public interest in both business registrants and/or individual registrant's 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 IC 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 Committee does reach such a decision, it should give detailed reasons in writing for any apparent inconsistency;
- the IC 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 Business Registrants and/or Individual Registrants is attached and also available from:  
<http://www.optical.org/goc/download.cfm?docid=8812D3B1-8400-4770-940FF1EB5A6E7501>
- the IC 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 for relevant guidance which is also available from:  
[http://www.optical.org/goc/filemanager/root/site\\_assets/policies\\_procedures\\_and\\_protocols/ftp\\_panel\\_members\\_guidance.pdf](http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf)

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

- (a) are well-supported by credible evidence;

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

### **Recording decisions**

47. All decisions made by the IC shall be recorded (in writing) setting out full and detailed reasoning for the decision made.

### **Guidance regarding warnings issued by the IC**

48. Before considering giving a warning, the IC will ensure that it has 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).
49. For example, the IC may consider that the facts of the complaint amount to an allegation of "*misconduct*" under section 13D(2)(a) of the OA, by failing to treat every patient politely and considerately, in breach of paragraph 2 of the GOC Code of Conduct for Individual Registrants.

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

52. The IC will only consider issuing a warning once it has decided that the matter should not be referred to the FTPC.
53. When considering an allegation, the IC 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.
54. In giving reasons for issuing a warning, the IC must avoid giving the impression that it has made a finding or determination of matters of fact on substantive issues arising from the complaint.
55. The terms of any warning must be in clear terms, and must not seek to impose on a registrant a more onerous obligation than that required under the terms of the GOC Codes. For example, if a warning is given for a breach of the GOC Code for Business Registrants, it must qualify an instruction as to future conduct to the effect that the registrant must take *“reasonable and proportionate steps”* to comply with the relevant provisions of the Code, rather than seek to impose an absolute obligation to do so.
56. A warning issued by the IC is a record of a concern on the part of the IC which, while not requiring referral to the FTPC, is potentially significant. A warning is not shown on the publicly available GOC register, but it is recorded by the GOC for a period of time. The period of time is not set down in legislation but is stated as four years in the current IC guidance dated November 2011. It is proposed that there should be greater flexibility. A warning may be given for a period up to four years. Proportionality will be an important consideration. Independent legal advice is available to the IC.
57. Warnings are only issued by the IC once a registrant has been given an opportunity to make further written representations to the IC, having been advised of the nature of the warning being considered. The IC shall consider any

representations made by the registrant and decide whether or not to give a warning in the particular circumstances.

58. The GOC has published separate guidance on warnings issued by the IC, available from

[http://www.optical.org/goc/filemanager  
/root/site\\_assets/policies\\_procedures\\_and\\_protocols/c\\_37\\_08\\_annex\\_1.pdf](http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/c_37_08_annex_1.pdf)

### **Taking no further action**

59. If the IC decides 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.

60. The IC 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.

### **Notification**

61. Following the IC meeting, the complainant(s), the registrant(s) concerned and, in the case of individual registrant's, their employer, receive a letter from the GOC setting out the IC's decision and the reasons for that decision.

### **Other parties**

62. The IC 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.

### **Interim orders**

63. The registrar and the IC are also required to consider whether the FTPC should consider making an interim order suspending or placing conditions on the



registration of a registrant who is the subject of an allegation<sup>16</sup>. An interim order can:

- suspend a registrant from practice completely;
- 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.

64. If the IC is of the opinion that the FTPC should consider making an interim order, it will have regard to the legislation. In particular, Section 13L of the Opticians Act 1989, which states that the FTPC may only make an interim order where it is 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 Business Registrant or an Individual Registrant.

65. In order to reach a decision about whether the FTPC should consider making an interim order the Committee will:

- take into account the circumstances, specified in the FTPC's Guidance, as being likely to mean that an interim order is necessary. A copy of the FTPC's Guidance is attached and is also available at:  
[http://www.optical.org/goc/filemanager/root/site\\_assets/policies\\_procedures\\_and\\_protocols/ftp\\_panel\\_members\\_guidance.pdf](http://www.optical.org/goc/filemanager/root/site_assets/policies_procedures_and_protocols/ftp_panel_members_guidance.pdf)
- have regard to all the factors that will be taken into account by the FTPC when considering such a referral, including:
  - (a) the effect which any order might have on a registrant;
  - (b) the requirement on the FTPC to balance the need for an order against the consequences which an order would have for that registrant, in order to satisfy it that the consequences are not disproportionate to the risk to the public.
  - (c) 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

---

<sup>16</sup> Section 13D(9) of the Opticians Act 1989 – see note 1 above.

order to be made only on the ground that it is in the public interest (for example, to maintain public confidence in the profession).

- (d) 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.

### Guidance for IC on Findings by Other Regulators

66. 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).

67. 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)).

68. 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)**

69. When the IC is considering an allegation of impairment by reason of a finding of impairment of fitness to practise by another UK health or social care regulator, it must examine the evidential status of the determination of the other regulator on which the GOC allegation is based. Such a determination does not have the same status as a conviction for a criminal offence, which is normally proved by a certificate of conviction from the court concerned, and cannot normally be challenged in professional disciplinary proceedings. A criminal conviction may be a ground for impairment under section 13D(2)(c) or 13D(3)(d) of the Act.
70. A determination by another UK health or social care regulator will, save in exceptional circumstances, be strong prima facie evidence of the facts found proved in relation to that determination, but is not conclusive. The registrant must be given a fair chance to explain himself, but a fitness to practise panel is not required to conduct itself as a court of law rehearing all the evidence underlying the original determination.<sup>17</sup>
71. The main test to be applied when examining the status of such a determination is whether the process whereby the determination was reached was fair. In the case of other UK health or social care regulators, the decision will have been reached by the disciplinary panel after a hearing conducted in accordance with due legal process. The regulator will have had the burden of proving the allegations to the required standard of proof. Legal representation of the parties will have been permitted. The panel may have considered and assessed oral evidence tested under cross-examination, and any documentary evidence submitted by the parties. The panel will have received legal advice, from an independent legal advisor or from a member of the panel, before reaching its decision. The determination of the panel will have contained the reasons for its findings.
72. Therefore, in the case of a determination by another UK health or social care regulator, that determination can usually be relied upon by the IC 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.

---

<sup>17</sup> See *General Medical Council v. Spackman (1943) AC 627*, *Neelu Chaudhari v. General Pharmaceutical Council (2011) EWHC 3433 (Admin)*

73. It will be for the FTPC to determine whether there are exceptional circumstances in any particular case to question the determination of the other regulator, or to find that the findings of the other regulator are not sufficient to find impairment of fitness to practise of a GOC registrant.
74. It is possible that a determination by another UK health or social care regulator may be sufficient to justify an allegation of misconduct under section 13D(2)(a) or 13D(3)(a), in addition to an allegation under section 13D(2)(g) or 13D(3)(g). In that case, the principles as to the status of the determination of the other regulator set out above are equally applicable.

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

75. 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.
76. 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 IC for investigation and consideration, the IC 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.
77. 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.
78. 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 IC, 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).
79. 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.

80. The IC 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.
81. 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.
82. 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.
83. In deciding whether to refer an allegation based on an ASA adjudication to the FtPC, the IC must consider the representations made by the registrant in response to the allegation under rule 5 of the rules.
84. The IC may take the view that the material indicates that the registrant has taken sufficient steps to comply with the findings, in which case, the IC may decide to take no action.
85. The IC 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 IC may decide to refer the allegation to the FTPC. The IC must not make any findings of fact (see the IC Guidance).

86. If the IC decides not to refer the allegation to the FTPC, it has the power to issue a warning to the registrant under section 13D(7) of the Act, and rule 14 of the rules. In deciding to issue a warning, the IC must take care to ensure that it does not appear to be making findings of fact on material issues that are in dispute relating to the allegation. If a warning is given, it must not be given in absolute terms, but must reflect the “reasonable and proportionate steps” qualification in the GOC Code. If a warning is being considered, reference should be made to the separate Guidance regarding Warnings.

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

87. The IC 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 IC 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>18</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.

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

<http://www.optical.org/goc/download.cfm?docid=8812D3B1-8400-4770-940FF1EB5A6E7501>

**FTPC’s Guidance (November 2013)**

[http://www.optical.org/goc/filemanager/root/site\\_assets/stakeholder\\_engagement/consultation\\_documents/november\\_2013\\_ftp\\_guidance/guidance\\_for\\_ftp\\_panels\\_-\\_november\\_2013.doc](http://www.optical.org/goc/filemanager/root/site_assets/stakeholder_engagement/consultation_documents/november_2013_ftp_guidance/guidance_for_ftp_panels_-_november_2013.doc)

---

<sup>18</sup> See the *Neelu Chadhari* case.



# **FITNESS TO PRACTISE PANELS HEARINGS GUIDANCE AND INDICATIVE SANCTIONS**

<b>CONTENTS</b>	<b>PAGE</b>
Introduction	4
Human Rights	4
Equality and diversity	4
Fitness to practise and what it means	4
The public interest	5
What this guidance is for	5
Who this guidance is for	5
Responsibility for decisions	6
Standard of proof	6
• The process	6
• The application of the standard of proof	7
Decision-making	8
• Giving reasons in determinations	8
• How detailed does a determination have to be?	8
• Findings of fact	9
• What makes a good determination?	9
• Interim order review determinations	11
Mitigation	11
• What counts as mitigation and when to take it into account?	11
• Generic mitigating and aggravating features	11
• Absence of evidence	12
• Personal mitigation and testimonials	12
• The relevance of mitigating circumstances	12
• At what stage should the Committee receive personal mitigation?	12
Interim orders	14
• Revocation of interim orders	16
Fitness to practise not impaired	16
Impaired fitness to practise	17
Definition of impaired fitness to practise	17
• Registered individuals (including students)	17
• Business Registrants	18
Available sanctions	19
Proportionality	20
The sanctions	20
Financial penalty orders	20
Conditional registration	20



• Conditions – educational	22
Suspension	22
Review hearing	23
Erasure	24
• Sexual misconduct	25
• Cases involving child pornography	25
• Dishonesty	26
• Failure to provide an acceptable level of patient care and persistent clinical failure	26
• Immediate orders (conditional registration/suspension/erasure	27
Cases involving a Conviction, Caution or Determination by another regulatory body	27
No further action	28
Costs and expenses	29
Annex A – Conditional registration – Bank of Conditions	30

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 David Henley, Hearings Manager, at [dhenley@optical.org](mailto:dhenley@optical.org)

## **Introduction**

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.

Throughout this document reference is made to “Registrants”. The term “Registrants” relate to optometrists, dispensing opticians, student optometrists, student dispensing opticians and business Registrants.

### **Human rights**

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.

### **Equality and Diversity**

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, the attitudes and behaviours expected of the optometrist and dispensing optician. Promoting equality is also a requirement under current and emerging equality legislation – everyone who is acting on behalf of the Council is expected to adhere to the spirit and letter of this legislation.

Members of the profession are required to treat both patients and colleagues fairly to the best of their ability and without discrimination.

### **Fitness to practise and what it means**

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 should not continue to work in unrestricted practice.

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.

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.

### **The Public Interest**

When determining sanctions in relation to the registration of an optometrist or a dispensing optician, the Fitness to Practise Committee should consider whether their decision would adequately protect members of the public or the wider public interest: they are both closely linked i.e. the particular need to protect the patient or another individual(s) and the collective need to maintain confidence of the public in their professional.

Public interest includes: protection of patients; maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour and therefore a Fitness to Practise Committee should bear those factors in mind when considering an appropriate sanction regarding an optometrist's or a dispensing optician's registration.

### **What this guidance is for**

This guidance has been developed by the Council for use by its Fitness to Practise Committee when 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 you on questions of law, including questions about the use of this guidance and the approach you should take to it. Each case is different and should be decided on its unique facts and merits.

### **Who this guidance is for**

Although this guidance is addressed to the members of the Fitness to Practise Committee, it will be useful to others involved personally or professionally in fitness to practise cases, including:

- Patients who are considering making a complaint to the regulatory body about a Registrant
- Registrants who are subject to fitness to practise procedures
- Organisations and agencies which are considering making a referral to the regulatory body, or whose own procedures interact with the regulatory body's
- Factual and expert witnesses
- Organisations, firms and advocates representing complainants and respondent professionals
- Assessors and examiners (medical, legal, professional)
- Other regulatory bodies, including the Professional Standards Authority
- The Courts

## **Other guidance**

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 Case Examiners or the Investigation Committee. This guidance contains some references to their roles. The GOC has also published guidance for the Case Examiners and for the Investigation Committee. All three guidance documents are public documents and are available from the GOC's website at

***[Links to be inserted to Guidance for the Case Examiners, Investigation Committee and Fitness to Practise Panel]***

## **Responsibility for decisions**

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.

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 in 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.

## **Standard of proof**

The rules establish the standard of proof to be applied by the Fitness to Practise Committee when making findings of fact.

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 has been used in Fitness to Practise proceedings by GOC from 3 November 2008 when Rule 50A came into force.

It is only in relation to findings of fact that the standard of proof has any relevance.

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 process

In cases where there are facts in dispute, the following process is to be followed. Once the Fitness to Practise Committee has heard the evidence, it must decide:

- (1) Whether the facts alleged have been found proved;
- (2) Whether, on the basis of the facts found proved, the Registrant's actions amount to misconduct, deficient professional performance, or that he or she has adverse physical or mental health (where the allegation relates to a criminal conviction, stages 1 and 2 are in effect merged as a conviction is itself a ground for impairment)<sup>1</sup>;
- (3) Whether the misconduct, conviction, deficient professional performance, or adverse physical or mental health, leads to a finding of impaired fitness to practise<sup>2</sup>;
- (4) What sanction (if any) is to apply.

The application of the civil standard of proof applies to (1) only. 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 has 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.

## The application of the standard of proof

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).

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".

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

<sup>1</sup> Where the Registrant is a business Registrant, the Committee must judge whether there is misconduct by the business Registrant or one of its directors, or whether there were practices or patterns of behaviour occurring of which the Registrant knew or ought reasonably to have known, which amount to misconduct or deficient professional performance.

<sup>2</sup> In the case of business Registrants, the judgement to be made is whether the Registrant's fitness to carry on business as an optometrist or dispensing optician is impaired. For student Registrants, the judgement is whether the student's fitness to undertake training is impaired.

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.”

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*"

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.

## Decision-making

**Giving reasons in determinations.** 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”*.

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?** 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 the nature and seriousness of the allegations.

**Findings of fact.** 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?** 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 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;
- e. Confirmation or otherwise that you have accepted any legal advice you have been given by the Legal Adviser (it is particularly important to give a full explanation of your position in relation to any advice you have not accepted);
- f. Your conclusions on the main submissions made to you by the parties or their representatives;
- g. Whether, on the basis of the facts found proved, the Registrant's actions amount to misconduct, deficient professional performance or that he or she has adverse physical or mental health, and why ;

- h. Whether the fitness to practise of a Registrant is currently impaired, and if so, why and, if not, why not;
- i. Why and what sanctions are being imposed and how the sanction imposed protects the public;
- j. Why you rejected the other sanctions available;
- k. The Professional Standards Authority 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.
- l. Make mention of any details of good character that have been submitted;
- m. 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;
- n. 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;
- o. 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;
- p. 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;
- q. Where a matter has been adjourned and an interim order imposed, quote the powers under which the order has been made.

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 Professional Standards Authority or the Courts, that matters were not considered or that there was no reasonable basis for the decision.



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.

### **Interim Order Review determinations**

A determination of an interim order review hearing must contain as much detail as possible and in such a way that the reader may 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:

- Details of the initial allegations against the Registrant;
- A brief summary of the initial findings;
- Any actions taken by the Registrant since the last hearing.
- Any decisions reached by the Committee and its reasons for them.

(For further information on original interim order determinations, please see the section below on Interim Orders).

## **Mitigation**

### **What counts as mitigation and when to take it into account**

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.

### **Generic Mitigating and Aggravating features**

- 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
- Whether or not the Registrant has shown insight and remorse (taking

into account, where relevant, their attitude and behaviour at the hearing)

- Whether or not the Registrant has taken steps to remedy their actions, to prevent recurrence or to make reparation
- Whether the incident was premeditated or spontaneous
- Whether the conduct was a one off or repeated
- Whether the Registrant attempts to cover up wrongdoing
- Whether the incident has occurred in the light of previous warnings
- Whether Registrant has complied with any previous assessment or conditions

### **Absence of evidence**

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

- there may be cultural or other reasons why a Registrant would not or could not solicit testimonials from colleagues or patients, and
- 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.

### **Personal mitigation and testimonials**

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 Fitness to Practise Committee should consider the relevance of testimonials, mitigating circumstances, remorse 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.

### **The relevance of mitigating circumstances**

Evidence of mitigating circumstances surrounding proven misconduct 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).

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

The Committee will need to consider what is the appropriate stage for them to take account of personal mitigation and testimonials.

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))

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"*

## Fitness to Practise Committee

### Interim Orders (s13L)

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

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 practitioner 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 practitioner and weighing the Committee's obligation to protect the public and to uphold the good name of the profession of optician.

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 or 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.

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 eighteen months (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 eighteen months with such requirements as the Committee think fit to impose (an order for interim conditional registration).

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*).

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.)

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. 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).

An Interim Order determination does not need to be lengthy but it should identify any of the relevant factors as listed above and 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.

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*).

Where an order is to be made, the Committee should ensure that a date for a 6-month review is always included in the determination.

### **Revocation of Interim Orders**

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

### **Fitness to practise not impaired (warning) (s13F(5))**

A warning may be given in a case where the fitness to practise of a Registrant is found **not** to be impaired. When issuing a warning, the Fitness to Practise Committee will need to consider whether a date of expiry of the warning should be set. 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.

It should be borne in mind that a warning has no direct effect on practice rights. This might be appropriate if the Registrant's character and circumstances are such that, whatever the history, you are confident that there is no risk to the public or to patients which require practice rights to be restricted.

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 impairment' and the mitigating factors that may therefore be present.

Factors when a warning may be appropriate:

- Evidence that the behaviour of the Registrant would not have caused patient harm;
- Early admission of facts alleged and/or:
  - insight into failings;
  - isolated incident which was not deliberate;
  - genuine expression of regret/apology.
- Acting under duress;

- Previous good history;
- No repetition of behaviour since incident;
- Appropriate rehabilitative/corrective steps have been taken; and
- Relevant and appropriate references and testimonials.

### **Impaired fitness to practise or undertake training**

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 remains fit to practise and does not require any restriction on his or 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.

### **Definition of impaired fitness to practise (s13D(2-3))**

#### **Registered individuals (including students)**

A finding of impaired fitness to practise against a registered individual can be based on any of the following:

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

## Business Registrants

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:
  - The Registrant knew or ought reasonably to have known of; and
  - 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:
  - The business Registrant's fitness to carry on business as a member of that profession is impaired; or
  - 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).

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 or her fitness to practise is not impaired.

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.

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 bad, 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. 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.

When considering impairment of fitness to practise, the Committee must have regard to public interest considerations. 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 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 *CHRE v Nursing and Midwifery Council (Grant)* [2011] EWHC 927).

### **Available Sanctions (s13F(3) (a)-(c) and s13H)**

Where fitness to practise is found to be 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 section on the Public Interest above).

The Committee may decide in exceptional circumstances to take no further action where it has made a finding of impairment. This is explained in more detail at pages 28-29, below.

The sanctions available to the Committee in ascending order starting at the least severe are:

- Financial penalty (except in a health case)
- Conditions (ordinarily to be followed by a review) for up to 3 years
- Suspension (ordinarily to be followed by a review) for up to 12 months
- Erasure (except in a health case)

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 3 years, removed temporarily (for up to 12 months) or removed (s13F(4))).

### **Proportionality**

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 decide 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 Professional Standards Authority 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.

### **The Sanctions**

The following section of this guidance sets out the basis of each of the sanctions in turn.

#### **Financial penalty orders (s13H)**

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. However, for a case where the events occurred before 1 July 2005, the penalty must not exceed £1600 (this being the maximum financial penalty available to the Disciplinary Committee prior to the inception of the amended Act).

When making a financial penalty order the Committee must specify the period or date within which the sum is to be paid.

Where the Committee is considering making such an award against an individual Registrant, the Registrant's ability to pay should be taken into account.

#### **Conditional registration (maximum three years)**

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

The primary purpose of conditions should be to protect the public. 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*).

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.

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 – no longer being able to carry out certain procedures, for example. 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.

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.

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 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.

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.

A bank of conditions which can be considered by a committee is shown in Annex A to this section.

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

- No evidence of harmful deep-seated personality or attitudinal problems.
- Identifiable areas of Registrant's practice in need of assessment or retraining.
- Evidence that Registrant has insight into any health problems and is prepared to agree to abide by conditions on medical condition, treatment and supervision.

- No evidence of general incompetence.
- Potential and willingness to respond positively to retraining.
- Patients will not be put in danger either directly or indirectly as a result of conditional registration itself.
- The conditions will protect patients during the period they are in force.
- 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**

Before imposing educational conditions the panel should satisfy itself that:

- The problem is amenable to improvement through education.
- The objectives of the conditions are clear.
- 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.

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

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)).

### **Suspension (maximum 12 months) (s13F)**

**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?**

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

- A serious instance of misconduct but where a lesser sanction is not sufficient.
- Not fundamentally incompatible with continuing to be a registered professional.
- No evidence of harmful deep-seated personality or attitudinal problems.
- No evidence of repetition of behaviour since incident.
- Panel is satisfied the Registrant has insight and does not pose a significant risk of repeating behaviour.
- 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.

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

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) (s13l)).

### **Review hearing**

The Fitness to Practise Committee should direct that there be a review of an interim order.

The Committee should also 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).

The Committee will also need to satisfy itself that the Registrant has fully appreciated the gravity of the offence, has not re-offended and has maintained his or 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.

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.

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.

**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**

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)).

A substantive review hearing will always be treated as a substantive hearing and will commence at the impairment stage.

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). Where such orders are made at a review hearing, the Committee will therefore need to consider the need to protect the public until those orders can take effect.

### **Erasure (s13F)**

**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?**

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.”*

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.”*

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.”*

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):

- Serious departure from the relevant professional standards as set out in the code of conduct for Registrants and business Registrants.
- Doing serious harm to individuals (patients or otherwise), either deliberately or through incompetence and particularly where there is a continuing risk to patients.

- Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients.
- Offences of a sexual nature, including involvement in child pornography.
- Offences involving violence.
- Dishonesty (especially where persistent and covered up).
- Persistent lack of insight into seriousness of actions or consequences.

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))

**Sexual misconduct.** 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. In such cases erasure has been judged appropriate:

*"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."*

**Cases involving child pornography.** 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, offences of this sort vary considerably according to the sort of material possessed and the Committee need to know exactly what the Registrant did possess. There is considerable difference between possession of pictures at the different levels of the Oliver scale (*R v (1) Oliver (2) Hartrey (3) Baldwin - [2003] EWCA Crim 2766*) and the committee should know how many pictures would be classified at each level (graded from 1 (lowest level) to 5 (highest level)).

In the *Fleischmann* case the judge ruled that the sanction of 12 months suspension in a matter involving a conviction for possession of a large collection of child pornography 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.

The judge also expressed concern about the Committee taking account of the Registrant's defence that he 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.

**Dishonesty.** The Council's code of conduct for individual Registrants states that the Registrant must '*be honest and trustworthy*'. Dishonesty is particularly serious as it may undermine trust in the profession. Examples of dishonesty are:

- Defrauding an employer, a colleague or an insurance company;
- \*Defrauding the NHS;
- Improperly amending or changing the detail on patient records;
- Submitting or providing false references and information on a CV;
- Research misconduct;
- Failure to disclose to the Council or employer or PCT criminal convictions and cautions.

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.

\* *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.'*

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; and the registrant's state of mind and evidence of this. (Recent cases relating to dishonesty include *Fish v General Medical Council [2012] EWHC 1269*, *Fabiyi v Nursing and Midwifery Council [2012] EWHC 1441*, *Uddin v General Medical Council [2012] EWHC 2669 (Admin)*).

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)* )



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

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).

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

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.

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.

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.

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.

**Cases involving a Conviction, Caution or Determination by another regulatory body**

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. If a Registrant has accepted a police caution, the Registrant will have admitted committing the offence.

Impairment may also be based on a determination by a body in the United Kingdom 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.

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.

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. 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.

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.

**No further action.** 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).

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.

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.

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.

### **Costs and expenses**

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.

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).

Before making an order for costs against the Council, the Fitness to Practise Committee should take into account the following:

- 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;
- 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;
- The "event" is a factor to consider but is not the starting point;
- 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).

### Conditional Registration - Bank of Conditions

A1	<b>Standard conditions (you should consider including each of these conditions in any conditions determination)</b>
A1.1	You must place yourself and remain under the supervision of a specified workplace/learning supervisor, with the agreement of the GOC and who would be prepared to monitor your conditions [if appropriate, the FTP Committee to set frequency of contact between supervisor and registrant] and provide reports to the Registrar every [six] [three] months providing details of any progression or regression in the specified areas ( <b><i>the Committee must specify exactly what areas the supervisor must report on</i></b> ). You must advise the Registrar of the nominated supervisor's contact details within 21 days of the hearing and of any change to the specified workplace/learning supervisor. <sup>3</sup>
A1.2	If the condition (above) cannot be complied with due to you being a sole practitioner or locum across multiple practices, you must furnish the Registrar with the full contact details within 21 days of the hearing of a professional colleague who would be prepared to monitor your conditions and provide reports to the Registrar every [six] [three] months providing details of any progression or regression in the specified areas ( <b><i>the Committee must specify exactly what areas the nominated professional colleague must report on</i></b> ).
A1.3	The GOC will enter these conditions against your name in the register save any conditions which relate to your health. You must allow the Registrar to share any information, including confidential information, with any employer, supervisor, professional colleague or any organisation for which you provide ophthalmic services for the duration of your conditional registration.  You must also allow the Registrar to share this information with other regulatory bodies and the Department of Health.
A1.4	You must notify the Registrar within 14 days of commencement of any professional appointment you accept whilst you are subject to these conditions (this includes any teaching posts) and provide contact details of your employer and if providing NHS ophthalmic services, the NHS Body on whose ophthalmic performer or contractor list you will be included (this includes any equivalent employer in the EC).
A1.5	You must inform the Registrar within 14 days of any criminal convictions, police cautions or formal disciplinary proceedings taken against you from the date of this determination.

<sup>3</sup> A supervisor appointed for this purpose may already be carrying out a similar role in relation to that student's pre-registration supervision. The objectives of a condition imposed by the Fitness to Practise Committee are different and are to enable the Committee to satisfy itself as to the registrant's fitness to practise or train.

A1.6	<p>You must inform the Registrar:</p> <ul style="list-style-type: none"> <li>a. If you cease working;</li> <li>b. If your work takes you out of the UK for a significant period of time; or</li> <li>c. Of any employment you apply for outside of the UK (and in which countries)</li> </ul> <p>as conditions of registration only apply to practice undertaken in the UK (you must consider whether your time out of work or out of the UK will allow you to fulfil the conditions during the period of conditional registration). The Registrar may inform the relevant competent authorities in that country of your current conditions of UK registration.</p>
A1.7	<p>You must continue to fulfil the CET requirements under the GOC CET scheme to secure appropriate points for continued inclusion on the GOC register.</p>
A1.8	<p>You must inform the following parties that your registration is subject to conditional registration:</p> <ul style="list-style-type: none"> <li>a. Any organisation or person employing or contracting with you to undertake ophthalmic services (to include any locum agency);</li> <li>b. Any prospective employer (whether within the UK or EC);</li> <li>c. Chairman of the Local Optometric Committee;</li> <li>d. The NHS Body in whose ophthalmic performer or contractor list you are included or seeking inclusion.</li> </ul>
A1.9	<p>You must ensure that your GOC registration is renewed by [15 March annually (for optometrists and dispensing opticians)] [31 August annually (for student registrants)] while you are subject to the GOC FTP conditional registration procedures. Should you fail to renew your registration a review hearing will be arranged immediately.</p>
<b>A2</b>	<b>Health Issues (impairment by reason of ill-health)</b>
A2.1	<p>[Mental health issues only] You must place yourself under the medical supervision of a consultant psychiatrist (details to be passed to the Registrar), attend upon him regularly, follow his advice and comply with his recommended treatment and permit him to report to the Registrar [annually] [six] [three] months.</p>
A2.2	<p>You must register and remain under the care of a general practitioner (name and contact details to be passed to the Registrar and your consultant psychiatrist) and inform that GP that you are subject to supervision and conditions under the GOC FTP procedures. Your GP and anyone else who is responsible for your care and treatment should also be informed about your impairing condition.</p>
A2.3	<p>You must allow the Registrar to exchange information with your consultant psychiatrist on your progress under medical supervision, your fitness to practise and your compliance with these conditions and also allow the Registrar to exchange information about your health and any treatment you are receiving, with your GP and any other registered medical practitioner responsible for your medical care.</p>

A2.4	You must keep your professional commitments under review and limit your ophthalmic practice in accordance with your medical supervisor's advice.
A2.5	You must cease work immediately on the orders of your consultant psychiatrist, GP or any individual who is responsible for your medical supervision and inform the Registrar within 24 hours while under the GOC FTP conditional registration procedures.
<b>A3</b>	<b>Conditions for inclusion in all determinations of alcohol and/or drug abuse</b>
A3.1	You must abstain immediately from the [consumption of all forms of alcohol] [taking of illegal substances].
A3.2	You must establish and continue support involvement with [Alcoholics] [Narcotics] Anonymous throughout the period of conditional registration evidenced by a register of attendance counter signed by an Officer or organiser of [AA] [NA]. The register to be brought to your review hearing as evidence of continued attendance.
A3.3	You must register with the relevant regional Drugs Action Team (DAT) ( <a href="http://www.drugs.gov.uk/dat/directory/">www.drugs.gov.uk/dat/directory/</a> ) for [alcohol abuse (via requested referral from your GP)] [substance misuse] to obtain appropriate treatment and forward three monthly reports from the service provider to the Registrar within 7 days of receiving the report.
A3.4	On a monthly basis, by the end of each calendar month, you must undertake a programme of random [alcohol] [drug] tests by the relevant regional Drugs Action Team (DAT) while under the GOC FTP conditional registration procedures. Such evidence must be provided to the Registrar within 7 days of the test.
	<b>Personal drug misuse</b>
A3.5	You may only take drugs which have been prescribed for you by your medical supervisor or your GP (you should be cautious regarding non-prescription, over the counter drugs and the possibility of these affecting your testing under A3.4 above and seek appropriate advice from your GP in this respect).
A3.6	You must not possess any drugs listed in Schedules 1-3 of the Misuse of Drugs Regulations 2001 (as amended from time to time).
<b>A4</b>	<b>General conditions of practice (any one or more can be combined with those listed in A1-A3 as appropriate)</b>
A4.1	You must work with your nominated supervisor to formulate a personal development plan, specifically designed to address the deficiencies in the following areas of your practise: <ul style="list-style-type: none"> <li>a. [name of area of concern]</li> <li>b. [name of area of concern]</li> </ul>
A4.2	You must submit a copy of your personal development plan to the Registrar for approval within [number] of weeks of the date of this

	hearing.
A4.3	You must meet with your nominated supervisor on a [weekly] [monthly] basis to discuss progression of your personal development plan.
A4.4	You must allow the Registrar to exchange information regarding progress towards achieving the aims set out in your plan.
A4.5	While in daily practice you must: <ul style="list-style-type: none"> <li>a. Not carry out [name of procedure] <b>unless</b> directly supervised;</li> <li>b. Maintain a log detailing every case where you have undertaken [name of procedure] which must be signed by the supervisor; and</li> <li>c. Provide a copy of the log to the Registrar on a [monthly] [three monthly] [six monthly] basis or confirm that there have been no cases where such procedures have been necessary.</li> </ul>
A4.6	You must attend a [name of procedure] clinic in a hospital eye department as an observer for [number] sessions. Where an opportunity presents itself, you should discuss the procedure with the [hospital optometrist] [medical practitioner]. A record of attendances is to be maintained and a progress report from the [consultant optometrist] [medical practitioner] to be submitted to the Registrar on completion of the [number] attendances.
A4.7	You must attend a university optometry department for [number] x [number] hour sessions of one-to-one tuition in clinical skills including [name of procedure(s)]. A report from the [consultant optometrist] [medical practitioner] to be submitted to the GOC on completion of the [number] attendances.
A4.8	You must consult with the Chairman of your local optometric committee (not applicable to students) to nominate an independent assessor who will review a random selection of [number] of your patient records. A report from the independent assessor to be submitted to the Registrar following scrutiny of the random selection of patient records.
A4.9	You must not undertake any locum work in any form unless advised to do so by your supervisor and with prior agreement of the Registrar.