

COUNCIL

Fitness to Practise: Acceptance Criteria

Meeting: 11 July 2018

Status: for decision

Lead responsibility/Project Director: Lisa Davis (Director of Fitness to Practise)

Project manager/paper author: Kayleigh Allen (Senior Lawyer)

Council Champions: Helen Tilley and David Parkins

Project Board: SMT

Project team members: Keith Watts (Head of Case Progression), Hannah Doherty (Investigations Manager), David Bryan (Investigations Manager).

Purpose

1. To advise Council of the findings from the consultation and seek approval for the Acceptance Criteria guidance.

Recommendations

2. Council are asked to:
 - 2.1 **consider** the consultation findings;
 - 2.2 **approve** the guidance; and
 - 2.3 **delegate authority** to the Chief Executive & Registrar and Chair of the Council (if any changes are required by Council) to finalise the guidance and the consultation findings for publication.

Strategic objective

3. The Acceptance Criteria guidance supports the 2017-20 Strategic Plan objectives of delivering high quality efficient services (Organisational Transformation), and targeting regulatory activities appropriately to reduce risks (Targeted approach to regulation).

Risks

4. The main risk relates to inconsistent application of the guidance which could have an impact on public protection. This will be addressed by the following:
 - 4.1 training of all staff utilising the guidance;
 - 4.2 quality assuring decisions to not open a case made in line with the criteria; and
 - 4.3 extending the review type cases considered by the annual independent fitness to practise audit to include acceptance criteria decisions.

Background

5. Formal Acceptance Criteria will help to ensure that only FTP concerns are investigated and referred to Case Examiners. This Acceptance Criteria is focussed towards fully qualified registrants and student registrants.
6. The Acceptance Criteria documents comprise a case management tool to identify whether a complaint amounts to an allegation as defined in the Opticians' Act 1989 – ie whether the complaint can (if found proved) amount to an allegation that a registrant's FTP is impaired. This could assist with the efficiency and proportionality of the GOC's FTP processes.
7. We drafted two documents: 'Guidance to assist the GOC Registrar and delegates' (staff guidance), which sets out the criteria in full, and 'Guidance to assist members of the public' (public guidance), which explains how the criteria will be used. Draft Acceptance Criteria guidance documents were reviewed by Council at its meeting on 15 November 2017 where plans to consult were approved.
8. The consultation received 11 written responses from a range of stakeholders. The consultation was also discussed at the Defence Stakeholder Meeting¹. The consultation period ran from 14 December 2017- 9 March 2018. The responses are summarised in **annex one** and the draft guidance has been updated in light of the responses and can be found at **annex two**.
9. We also met with the Association of Optometrists to discuss their thoughts on the Criteria prior to them providing a written response. We further met with the PSA and they were encouraged by the proposals of an Acceptance Criteria but did highlight some challenges in applying the criteria. We have considered all responses in detail.
10. We did not receive any responses to the consultation from patients or patient representatives. It is very important to us that patients have the opportunity to input into the implementation of the guidance. We will be developing a method by which to do this and have considered, for example, seeking patient views where their complaints have not resulted in a case being opened.

Analysis

11. The majority of respondents to the consultation were supportive of the principle of using Acceptance Criteria to filter initial complaints.

¹ Members in attendance were: FODO, ABDO, AOP, BLM, Brachers, William Graham Law and Hempsons.

12. Generally, the comments were positive about the introduction of formal Acceptance Criteria. There were some comments about the wording of the draft documents, potential inconsistencies and how the criteria would be used.
13. The GOC has taken into consideration the responses received, and has amended the criteria documents to ensure they are consistent and appropriate. The amendments include:
 - 13.1 only having one guidance document that serves as both a public and internal guidance;
 - 13.2 ensuring the criteria are closely related to the GOC's standards;
 - 13.3 ensuring that clear and transparent training will be provided to decision makers;
 - 13.4 addressing inconsistencies in drafting; and
 - 13.5 ensuring a right to review is available to both complainants and registrants.
14. The project team will continue to work closely together to create:
 - 14.1 revised draft Acceptance Criteria documents;
 - 14.2 a training programme for staff implementing the Acceptance Criteria documents; and
 - 14.3 a system that will ensure decisions are monitored closely and any issues highlighted.

Impacts

15. An impact assessment has been completed and the following impacts identified:
 - 15.1 Budget – possibly affected if there are legal challenges of the criteria. Implementation of the criteria documents could reduce costs to the GOC and to registrants. The exact figures are not yet known;
 - 15.2 Equality, diversity and inclusion (EDI) –no adverse impact, all sections of society will benefit from increased timeliness;
 - 15.3 Resources – the introduction of the criteria documents would free up staffing resources (although a portion of this will be used to apply the criteria) and it will ensure that the process is streamlined so that matters which could not raise an FTP concern are dealt with through other means. It has been identified that, initially, the GOC will need to invest in training staff;
 - 15.4 Legislation – the criteria documents will improve overall fairness, as registrants would not have to respond to complaints that do not amount to FTP allegations;
 - 15.5 Human Rights Act – no issues, provided the criteria is applied fairly; and
 - 15.6 Sustainability – staff training will need to be provided in due course.

Devolved nations

16. There are no issues regarding devolved nations, as the same FTP processes apply across all four nations of the UK.

Communications

17. The GOC will ensure the introduction of the Acceptance Criteria documents is properly communicated to stakeholders and the project team will work closely with the Communications Department.

Timeline for future work

18. The timeline is as follows:

30 July 2018	<ul style="list-style-type: none"> Finalise Acceptance Criteria document and finalise staff training plan. Publish consultation response summary.
August/September 2018	Provide in-house training
September 2018	Communicate to stakeholders
September 2018	Introduce Acceptance Criteria documents into the FTP workflow.
December 2018	First audit

Attachments

- Annex one – consultation findings
Annex two – Acceptance Criteria Guidance

Summary and analysis of consultation responses

Introduction

1. We received 11 written responses to the consultation from a range of stakeholders including:
 - ABDO
 - AOP
 - Blake Morgan LLP
 - Investigating Committee
 - Four registrants
 - OCCS
 - PSA
 - BLM

Summary

2. Overall, the majority of the respondents were supportive of the principle of an acceptance criteria to filter initial complaints. While most respondents felt the acceptance criteria would assist the FTP process, there were comments in relation to how the criteria would work in practice.
3. There were concerns about how clear the acceptance criteria is and whether it needs clarifying further.

Analysis of each question

Do the acceptance criteria documents properly reflect the overarching objective of the GOC (s.1(2A)).

Responses

4. Most of the respondents felt the acceptance criteria documents properly reflected the overarching objective with the following comments reflecting this:

“Public protection remains the heart of the decision making process. An approach focused on those cases where there is a realistic prospect of a finding of impairment being made is consistent with the overarching objective”

“The proposals concerning Acceptance Criteria do place public protection at the forefront of decision making, and ultimately focus on enabling the GOC to provide effective regulation and protect the public”
5. There was concern from some respondents that the criteria would need further clarification about who the decision maker would be and the process for applying the criteria before they felt satisfied that the public protection element was satisfied.

Actions

6. The Acceptance Criteria document has been amended so that it now begins with a brief introduction about the GOC and ensures that the overarching objective is clearly stated and achieved throughout the document. The application of the overarching objective is considered in the introduction and within the paragraph ‘what is acceptance criteria.’
7. There is a clear process of how the criteria will be applied and this is set out clearly in section two of the Acceptance Criteria document.

Will the acceptance criteria help to achieve consistency in the GOC’s decision making?**Responses**

8. A few respondents felt the decision making framework hasn’t been clearly set out in the acceptance criteria documents. It was felt that further clarification on this could help with consistency of decision making.

“The Acceptance Criteria is extremely wide ranging...”

“One would expect a published framework to promote consistent decision making although individual perceptions will always have the potential to lead to an element of inconsistency”

“... gives the decision making function to staff who already have experience of the GOC’s case examiner function”

“there is potential for the criteria to be applied in different ways by different caseworkers, leading to some cases being considered to be appropriate for investigation and others closed with no further action... we consider it important that those responsible for applying the criteria receive appropriate training and that there is oversight made to ensure that the criteria are being applied in a consistent manner.”

9. Others felt that criteria itself needed further clarification to ensure consistency and comments included:

“we suggest that ‘low level’ is defined to ensure consistency amongst those using the criteria.”

“we also suggest that using the terms ‘moderate’ or ‘severe’ harm without further definition could be too limiting and raises the threshold...”

10. Further comments included a suggestion to provide a clearer definition of 'harm' and ensure that the two documents were consistent in language and interpretation.

Actions

11. We have removed any ambiguous words from the document and 'low level' is no longer used to define a criminal offence that we will not investigate.
12. The use of 'harm' has also been removed and there is further reference to the Standards and statute to ensure consistent decision making.
13. The document is careful to use words from the legislation but is also reader friendly.

Do the acceptance criteria ensure that FTP allegations will be accepted? How could this aspect be improved?

Responses

14. It was helpfully suggested by some respondents that reference to the standards or conduct will assist with ensuring that FTP allegations will be accepted. Other respondents felt the experience of the staff would be a factor in whether the criteria does ensure FTP allegations are accepted.
15. There were helpful suggestions on how this aspect could be improved including:

"You need to direct complainants whose complaint is rejected to an appropriate channel (OCCS) so they don't feel abandoned. This will also mitigate risk of unnecessary appeals to FtP team"

"The GOC must be mindful that a registrant be informed that no further action will be taken, it would be detrimental to the reputation of the regulator if the same concerns were allowed to re-enter at a later date."

Actions

16. The paragraph headed 'standards of practice for Optometrists and Dispensing Opticians' provides a detailed explanation of how the GOC will consider a complaint against the Standards. The Acceptance Criteria then goes onto explain what complaints amount to an allegation of impaired FTP. This section hasn't been greatly amended since the first draft of the Acceptance Criteria. We have taken comments on board surrounding the application of the Acceptance Criteria and ensured that the document provides for easy, consistent and accurate application.

**What impacts (positive and negative) could the Criteria have for: a. registrants
b. the public**

Responses

17. The respondents were generally positive about the impacts the criteria would have on both registrants and the public with comments such as:

“acceptance criteria allow the GOC to focus on targeted and effective regulation.”

“Where the concerns does not meet the acceptance criteria, the member of the public is informed of this at the earliest possible stage. This manages their expectations.”

“This could also impact on the way in which registrant view the GOC, reducing fear of investigations and perception of over regulation.”

18. There were a few comments on further clarity to assist with ensuring the criteria has a positive impact for both registrants and the public. It was also conveyed that this would assist registrants with understanding the process.

“Publishing guidance on the acceptance criteria should lead to registrant and the public being clear as to the type of issues that will warrant investigation. This will assist with transparency and hopefully fairness to all.”

“In our view the impact of the acceptance criteria will depend on whether the GOC clarifies its guidance and uses appropriately experienced staff to apply the criteria.”

Do you have any further comments on our proposed acceptance criteria which are not captured in your responses to the questions above?

Actions

19. There were comments relating to specific paragraphs within the criteria that would benefit from amendments. These comments were helpful in that they were aimed at ensuring consistency and transparency.

“On review, we suggests that paragraphs 7.2 and 7.3 of the Staff Guidance should be under section 3 – personal and professional conduct, as it seems a little misplaced in section 7.”

20. Generally, the comments received were positive about an introduction of acceptance criteria. There were comments surrounding some concerns about

inconsistencies and some respondents felt we should approach the acceptance criteria differently, widening the rules further.

“We are unsure as to whether or not application of the acceptance criteria is intended to include an assessment of the available evidence, as opposed to merely an assessment of the type of complaint... we are of the view that if the GOC wish to introduce a meaningful filtering process, there should be an assessment of the evidence at the point of deciding whether or not a case should proceed to the Case Examiner stage.”

Actions

21. We have removed any suggestion that we will consider ‘evidence.’ Any inconsistencies have also been addressed and having one document has assisted with this.
22. We have attempted to make the Acceptance Criteria guidance more user friendly and provide information about how the GOC will communicate its findings and the right of review after an assessment has been made. These paragraphs assist with ensuring all the parties are aware of how the GOC works and how we will communicate with them.

Further comments

23. All responses to the consultation were broadly in favour of the introduction of an Acceptance Criteria.
24. A detailed training plan will be introduced to ensure the staff using the Acceptance Criteria have the sufficient knowledge and skills to apply it.

Changes to the Acceptance Criteria following the consultation response

25. We have taken into consideration all comments made during the consultation process and concluded that the Acceptance Criteria should:
 - consist of one document;
 - make more reference to the Standards;
 - Improve readability by removing references to case law, including clearer headings and numbered paragraphs;
 - Include a section on interim orders;
 - provide clear examples; and
 - illustrate a clear process for applying the criteria.

ACCEPTANCE CRITERIA

1. Introduction

About us

- 1.1 The General Optical Council “GOC” is the regulator for the optical professions in the UK. We currently register around 29,000 optometrists, dispensing opticians, student opticians and optical businesses.
- 1.2 We have four core functions:
 - 1.2.1 setting standards for optical education and training, performance and conduct;
 - 1.2.2 approving qualifications leading to registration;
 - 1.2.3 maintaining a register of individuals who are qualified and fit to practise, train or carry on business as optometrists and dispensing opticians; and
 - 1.2.4 investigating and acting where registrants’ fitness to practise, train or carry on business is impaired.
- 1.3 Our overarching objective is the protection of the public. We take action when it is necessary to in order to protect patients and/or maintain the public’s confidence in the optical professions.

Purpose of this document

- 1.4 The purpose of this document is to provide guidance to FTP staff members, registrants, complainants and members of the public. It has been designed to clarify those matters where we can open an investigation into whether a complaint in relation to a registrant amounts to an allegation of impaired fitness to practise.
- 1.5 In line with our overarching objective, the fitness to practise procedures of the GOC are designed to protect the public. They are not intended to serve as a general complaints resolution process, nor are they designed to resolve civil disputes between registrants and patients.
- 1.6 There will be some complaints that are better dealt with by other bodies including consumer matters that are better dealt with by the Optical Consumer Complaints Service (OCCS)¹. Equally, there may be matters referred to us from the OCCS which will then need to be assessed as against the criteria.
- 1.7 A detailed explanation of our fitness to practise procedures, including decision-making at the end of an investigation can be found on our website, https://www.optical.org/en/Investigating_complaints/index.cfm

¹ <https://www.opticalcomplaints.co.uk>

Equality and diversity

1.8 The GOC are committed to ensuring that in exercising all of our functions we operate in a fair and transparent manner and in a way that is free from discrimination, harassment or victimisation. We strive to promote equality, value, diversity and inclusion regardless of age, disability, race, religion or belief, gender, gender identity, sexual orientation, marriage and civil partnership, pregnancy and maternity.

What is Acceptance Criteria?

1.9 Acceptance Criteria is a case management tool used by the GOC to decide whether to accept a complaint as an allegation of impaired FTP as defined by section 13D Opticians Act 1989. That section states that a registrant can be impaired by any or all of the following:

- a. misconduct;
- b. deficient professional performance;
- c. conviction or caution;
- d. acceptance of a conditional offer or agreement to pay a penalty;
- e. Scottish proceedings (where registrant is the subject of an order discharging him/her absolutely);
- f. adverse physical or mental health; and/or
- g. determination of another body .

1.10 If a complaint meets the Acceptance Criteria, we will open an investigation into whether the registrant's FTP is impaired. The Acceptance Criteria applies to registered optometrists, dispensing opticians, student optometrists and student dispensing opticians.

1.11 FTP means that a registrant shows they have the skills, knowledge, character and health to do their job safely and effectively and also maintain the reputation of the profession.

1.12 In performing this task, the GOC is always mindful of:

- 1.12.1 its overarching objective: the protection of the public;
- 1.12.2 the GOC's Standards of Practice and Standards for Students; and
- 1.12.3 the public interest.

1.13 We will regularly review the criteria to take account of changes to legislation and case law, to make sure it is consistent with other associated guidance documents. We will make sure it is fit for purpose and accessible to all who use it.

Actions the GOC can take at this stage

1.14 When applying the Acceptance Criteria to complaints, there are a number of different actions we can take:

- 1.14.1 open an investigation;
 - 1.14.2 open an investigation and refer to the Interim Orders Committee;
 - 1.14.3 close with no further action; and/or
 - 1.14.4 close and refer on to another body.
- 1.15 In some cases, it is clear from the outset that there is no need for us to investigate because the complaint is about matters that cannot raise an issue of impaired fitness to practise. We will normally close these cases without taking any further action.
- 1.16 The types of cases that will usually be closed without any further action include:
- 1.16.1 minor motoring offences – that resulted in a fixed penalty notice being issued;
 - 1.16.2 minor clinical concerns – If a patient receives a prescription from Optometrist A and receives another prescription from Optometrist B within a short timeframe and they differ very slightly, we will usually consider that such a complaint, in relation to either optometrist, would not be accepted as an allegation of impaired fitness to practise; and
 - 1.16.3 minor non-clinical matter – such as one incident of poor complaint handling, if not deliberate or dishonest.
- 1.17 If the complaint is closed, it will remain on the registrant's internal file in line with the GOC's retention policy. The complaint may be reconsidered later on in light of any new/ further complaints being raised against the registrant.
- 1.18 If the GOC is unable to make an assessment about whether or not to open a case on receipt of the initial information, it will ask for further information from the complainant to assist with the assessment. The complaint may also be closed because there is not sufficient information to substantiate the allegation.

2 What complaints will be accepted by the GOC

- 2.1 In some cases, the complaint about a registrant presents a serious or immediate risk to public protection such that an interim order referral might be needed.
- 2.2 These complaints will need to be prioritised and relevant information sought in order to progress the matter on to an interim order hearing. The types of complaints which may lead to such a referral include:
 - 2.2.1 where a registrant is involved in a series of failures to provide a proper standard of care, or one particularly serious failure such as a failure to detect signs of a serious optical condition;
 - 2.2.2 where the registrant is under investigation or charged with very serious alleged offences including murder, attempted murder, human trafficking, rape, sexual assault or indecency and sexual abuse of children;

- 2.2.3 where the registrant has breached the guidance in respect of maintaining professional boundaries in respect of patients;
 - 2.2.4 where the registrant is suffering from a health condition that is affecting their fitness to practise and for which they are not managing; and/or
 - 2.2.5 sexually inappropriate conduct towards patients.
- 2.3 There may be other cases that whilst serious, may or may not engage an interim order application but would clearly meet the acceptance criteria. Such cases include:
- 2.3.1 the registrant's behaviour was such that public confidence in optometrists or dispensing opticians generally might be undermined;
 - 2.3.2 where a registrant works outside of their limits of competence;
 - 2.3.3 where a registrant does not obtain valid consent before examining a patient;
 - 2.3.4 where a registrant is not open and honest after something has gone wrong; and/or
 - 2.3.5 where a registrant is dishonest or fraudulent.
- 2.4 GOC staff will assess risk in respect of the complaint received to determine whether there are risks to the public, risks to maintaining public confidence in the profession and risks to declaring and upholding standards of conduct and behaviour should a matter not be opened.
- 2.5 In respect of all complaints, the GOC will first consider whether there may have been a breach of the relevant standards. If so, the GOC will then go onto consider whether the breach would amount to an allegation under s.13D Opticians Act 1989 (as set out in para 1.8 above).

Standards of Practice for Optometrists and Dispensing Opticians

- 2.6 There are 19 standards that optometrists and dispensing opticians must have regard to (*Standards of Practice for Optometrists and Dispensing Opticians*) and 18 standards that Optical Students must have regard to (*Standards for Optical Students*).
- 2.7 An optometrist and dispensing optician will need to use their professional judgment in deciding how to meet the standards.
- 2.8 The GOC considers whether a complaint indicates a departure from the standards and/or the registrant has now acted in the best interests of the patient and if so whether the complaint amounts to an allegation.

Allegations under section 13D Opticians Act 1989Misconduct

2.9 An allegation of misconduct can be brought against a registrant. The following will be considered in turn to decide whether a complaint amounts to an allegation of misconduct:

- 2.9.1 is there a complaint about a registrant's conduct? If so,
- 2.9.2 the misconduct complained of must be serious, this could include:
 - i. conduct which would be regarded as reprehensible/ deplorable/ of sufficient concern by fellow practitioners.
 - ii. a course of conduct or a particularly grave one-off incident.

2.10 This will be considered on a case by case basis and examples of misconduct include:

- 2.10.1 amending records after receiving a complaint;
- 2.10.2 failing to declare a caution/conviction; and
- 2.10.3 failing to take all reasonable steps to prevent harm to patients arising from the actions of those being supervised.

Deficient Professional Performance

2.11 An allegation of deficient professional performance can be brought against a registrant (except in the case of a student registrant).

2.12 The following will be considered in turn to decide whether a complaint amounts to an allegation of deficient professional performance:

- 2.12.1 is there a complaint about the registrant's professional performance?
- 2.12.2 the performance is unacceptably low and has been demonstrated by reference to a fair sample of the practitioner's work.

2.13 This will be considered on a case by case basis and examples of deficient professional conduct include:

- 2.13.1 multiple record keeping failures; and
- 2.13.2 patient failings over a 6 month period on more than 2 occasions.

A Conviction or Caution

2.14 An allegation can be brought against a registrant if they have accepted a caution and/or been convicted of an offence.

2.15 A certified copy of a conviction shall be 'conclusive evidence' of the offence.

2.16 There are categories of conviction/ caution that are unlikely to amount to fitness to practise being impaired and might therefore not be investigated further.

These will be considered carefully on a case by case basis having regard to all the circumstances, and could include:

- 2.16.1 penalty notices;
- 2.16.2 reprimands;
- 2.16.3 youth cautions;
- 2.16.4 conditional cautions;
- 2.16.5 warnings; and/or
- 2.16.6 community protection warnings.

Acceptance of a conditional offer or agreement to pay a penalty

2.17 An allegation can be brought against a registrant if: '*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)*'.

Scottish proceedings

2.18 An allegation can be brought against a registrant if: '*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.*'

Adverse Physical or Mental Health

2.19 An allegation of adverse physical or mental health can also be brought against a registrant. The following will be considered in turn:

- 2.19.1 is the registrant alleged to be suffering from a physical or mental health complaint?
- 2.19.2 does the initial health complaint pose a risk to the safety of the public/ patients and /or the registrant?

2.20 Examples of situations when a case will be opened include:

- 2.20.1 there are serious performance and/or conduct concerns where health is likely to have been a contributory factor;
- 2.20.2 the registrant has been recently convicted, cautioned or was the subject of a determination for an offence where health may be a contributory factor (eg. Drugs, alcohol, violence);
- 2.20.3 the registrant lacks insight, has failed to seek appropriate treatment, or has ceased to engage with support

Determination of another body

2.21 By virtue of s.13D(2)(g), an allegation can be brought against a registrant if: '*a determination by a body in the United Kingdom responsible under any enactment for the regulation of 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.'

3 Communication of GOC's findings

- 3.1 After an assessment is made the GOC will notify both the Complainant and Registrant in writing.
- 3.2 We aim to make sure that we make appropriate and consistent assessments and these will be covered by our internal quality assurance processes.

4 Right of review after an assessment is made

- 4.1 Any person who is dissatisfied by the decision **not** to investigate their complaint further may request a review of the decision.
- 4.2 Any person who is dissatisfied by the decision **to** investigate a complaint may also request a review of the decision.
- 4.3 Requests should be made, in writing with reasons, within 28 days of the date of the decision. The decision will be reviewed by the Director of Fitness to Practise and a formal review decision issued within 21 days of receipt of the request for a review.

Requests should be sent to:
Head of Case Progression
Fitness to Practise
General Optical Council
10 Old Bailey
London EC4M 7NG

Or by email to ftp@optical.org

Useful Links

Optical Consumer Complaints Service
Web: <http://www.opticalcomplaints.co.uk/>
Email: enquiries@opticalcomplaints.co.uk
Tel: 0344 800 5071

Citizens Advice Bureau –
Web: <https://www.citizensadvice.org.uk/>
Helpline: 03454 04 05 06