General Dental Council

GDC consultation response

Professional Standards Authority's consultation on good practice guidance documents:

Guidance on the use of Accepted Outcomes in Fitness to Practise
Guidance on Rulemaking

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Guidance on the use of Accepted Outcomes in Fitness to Practise Guidance on Rulemaking

1. About the GDC

The General Dental Council (GDC) is the UK-wide statutory professional regulator of over 120,000 members of the dental team, including over 44,000 dentists and around 76,000 dental care professionals.

An individual must be registered with the GDC to practise dentistry in the UK. Unlike other health professional regulators, we register the whole professional team, across the four nations of the UK, including dental nurses, clinical dental technicians, dental hygienists, dental technicians, dental therapists, orthodontic therapists and dentists.

Our primary objective is to protect the public, and in doing so to:

- Protect, promote and maintain the health, safety, and wellbeing of the public.
- Promote and maintain public confidence in the professions regulated.
- Promote and maintain proper professional standards and conduct for members of those professions.

All patients should be confident that the treatment they receive is provided by a dental professional who is properly trained, qualified, and meets our standards. To achieve this, we register qualified dental professionals, set standards for the dental team, investigate complaints about dental professionals' fitness to practise, and work to ensure the quality of dental education.

We welcome the opportunity to respond to this consultation. Though there is currently no timetable for GDC reform, we recognise that when it comes, regulatory reform will provide significant opportunities to improve the efficiency and effectiveness of our regulation through – amongst other things - new powers for Fitness to Practise and rulemaking.

In summary, our main concerns around the proposed pieces of guidance are that:

- The Fitness to Practise guidance is based upon the framework of the Anaesthesia Associates and Physician Associates (AAPA) Order being used as a template for the fitness to practise processes of all regulators. While shared principles are a very good start, and we recognise the principles that underpin the guidance, we need to keep in mind the benefits to the profession-specific implementation of any common principles. Regulatory reform should not introduce uniformity to the degree that we cannot effectively regulate particular professions and deliver our statutory responsibilities.

- The rulemaking guidance is centred around the principle of consistency in regulatory practices and effectively recommends that all regulators aspire to standardise their rules. However, it is incorrect to assume that consistency in rules and processes will lead to the right regulatory outcomes in different healthcare contexts with different risks. Post-reform, an inappropriate drive for consistency between regulators must not become a barrier to public protection.

2. How we have responded to this consultation

Section 3 of this document covers our responses to consultation questions on the draft Fitness to Practise guidance. Section 4 covers our responses to consultation questions on the draft rulemaking guidance.

We have indicated where certain responses are relevant to more than one question.

We would be happy to discuss our responses further with the Professional Standards Authority (PSA) and/or provide additional information as this work develops.

3. Responses to consultation questions on the draft Fitness to Practise guidance

Q4: Do you think that our fitness to practise guidance will help regulators to make best use of accepted outcomes, and use them in a way that is fair, transparent and protects the public?

It is encouraging to see that the guidance has drawn upon much of our research and has been informed by the submission we made on the PSA's earlier questionnaire. The principles that underpin the guidance are familiar and sensible and currently guide much of the GDC's Fitness to Practise (FtP) decision making, and the factors that are included are largely things that should be considered.

Further consideration will need to be given to the relative weight given to each of the factors that should be, or are, considered.

Q5: Factor 1: Has the registrant failed to accept the findings and/or impairment? Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome?

Yes.

Q6: Do you have any comments on this factor, or the bullet points listed in our guidance under this factor?

Acceptance of the findings and of impairment is a necessary logical starting point for an 'accepted' outcome. It can also demonstrate insight. However, proportionality still needs to be considered. In some circumstances, it may not be necessary for the registrant to accept all findings. For example, there may be some findings that relate to matters that are less serious or central to the question of impairment.

Q7: Factor 2: Is there a dispute of fact/conflict of evidence that can only be fairly tested at a hearing? Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome?

Yes.

Q8: Do you have any comments on this factor, or the bullet points listed in the guidance under this factor?

Similarly to Q6, proportionality needs to be considered – i.e. the degree to which the evidence is disputed, whether the disputed evidence critical to the case, and so on. However, in general, probing questions from the panel and cross-examination that is available at a hearing, can help test contested evidence or disputed facts.

Q9: Factor 3: Does the complexity of the case suggest that a hearing may be beneficial? Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome?

Yes.

Q10: Do you have any comments on this factor, or the bullet points listed in the guidance under this factor?

We agree that probing questions from the panel and cross-examination available at a hearing can help develop an understanding of complex evidence and might also lead to a fuller understanding of relevant context.

Q11: Factor 4: Would it be beneficial and proportionate to test insight at a hearing? Do you agree that regulators should consider this when deciding whether to resolve a case using an accepted outcome?

Yes.

Q12: Do you have any comments on this factor or the bullet points listed in the guidance under this factor?

It might be beneficial to test insight at a hearing where there is reason to doubt the genuineness of the insight (e.g. there is witness evidence that casts doubt or there is concern that a statement of insight may have been generated by artificial intelligence or by a third party).

Again, proportionality needs to be considered in terms of the extent of any insight shown, and the seriousness of the allegations.

There may be some cases where the registrant demonstrates insight but might, nonetheless, be more appropriately considered by a panel. These include cases that are so egregious that evidence of insight and remediation may be contested. Such cases may include allegations of:

- Sexual misconduct.
- Bullying and discrimination.
- Dishonesty e.g. fraud.
- Pre-meditation.
- Allegations that fall within the ‘Listed Offences’ but were not charged by the Crown Prosecutions Service (e.g. rape).

Q13: Factor 5: Lay representation in decision-making. Do you agree that regulators should continue to ensure lay representation at some point in the fitness to practise decision-making process?

Yes.

Q14: Factor 6: The use of single decision-makers. Do you agree that some fitness to practise cases may benefit from more than one decision-maker?

Yes.

Q15: Do you have any comments on the bullet points listed in the guidance relating to the composition of decision makers? (See paragraph 7.29)

There are strong arguments for there to be a lay component of any final decision – to do otherwise defeats the purpose of modern regulatory models which have moved beyond pure professional self-regulation. Equally though, there are strong arguments for there being a professional component final decision, not least because that provides both an important professional perspective and considerable assurance to the subjects of fitness to practise proceedings.

That fundamental dualism of decision making in professional regulation means that there should be considerable caution in moving away from approaches in which both perspectives are represented. That doesn't altogether rule out the possibility of there being a single decision maker in appropriate cases, but it is essential that is not allowed to undermine confidence in the decisions the system produces.

Q16: Factor 7: publishing case examiner decisions. Do you agree that the bullet points in the guidance under this factor are the right ones?

No.

Q17: Do you have any comments on the bullet points listed in the guidance under this factor?

Part of the point of the accepted outcomes process is to avoid the detailed exploration of the issues that occurs at a hearing, where the facts are accepted. It is that detailed exploration by a panel that allows for a detailed determination, including the reasoning for reaching a conclusion to be published. If we are seeking to avoid the detailed exploration of issues where facts are accepted, we would question the necessity or ability, and the public interest in, publishing detailed decisions.

If the system is sufficiently well understood, public confidence should be supported by the fact that there is an effective regulatory system.

We'd also suggest that in addition to the need to be sufficiently detailed, any published decisions should be sufficiently clear. Sometimes too much detail can sacrifice clarity.

Q18: Factor 8: Promoting a fair and effective accepted outcomes process. Do you agree that the bullet points listed under this factor in the guidance are the right ones?

Yes.

Q19: Do you have any comments on the bullet points listed in the guidance under this factor?

While we agree that undue pressure to meet targets can affect decision-making, we also recognise that the PSA itself assesses the performance of regulators in terms of the timeliness of decision making. Therefore, there will always be some pressure to make timely decisions. We need to ensure that sufficient time is allowed for decision makers to consider all the factors that they need to consider when coming to a decision.

As the PSA is aware, the FtP process is not designed to resolve complaints and 'complainants' have no role or status in this process. Informants should be treated with dignity and respect but there is no process by which they make representations to panels, and it is unclear what representations they might make (or should be provided for making) to case examiners.

Q20: Please set out any impacts that the guidance would be likely to have on you and/or your organisation, or considerations that we should take into account when assessing the impact of our proposals.

We understand the intent to use the framework set out in the AAPA Order as a template, however, the timeframe for regulatory reform and the adoption of new approaches remains unknown for the GDC. It is not possible to comment in detail on the impacts of any change, or this guidance, until we are certain about the final form any eventual reforms might take and when they might be implemented. Any consideration of such will need to be based on the specific reforms applied to the GDC's governing legislation.

However, as stated above, we do not object to the principles that underpin the guidance and consider that many of the factors to consider have value.

Q21: Are there any aspects of our proposals that you feel could result in different treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010:

- **Age**
- **Disability**
- **Gender reassignment**
- **Marriage and civil partnership**
- **Pregnancy and maternity**
- **Race**
- **Religion or belief**
- **Sex**
- **Sexual orientation**
- **Other (please specify)**

We don't know.

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this.

Representation is likely to be a factor in whether accepted outcomes are agreed in individual cases. Those professionals who are not supported by qualified and expert representation may

find it more difficult to demonstrate that their case is suitable for an accepted outcome, for example by providing detailed evidence of engagement, insight and remediation. Their cases may therefore be more likely to proceed to a hearing.

Dental nurses are much less likely to be represented than dentists and are predominantly female. So, whilst it is primarily a product of their registration type it is possible that some groups that share protected characteristics may be disproportionately represented at hearings. Any changes should be monitored to avoid unintended consequences on particular groups.

We note that you have recognised this and referred to our seriousness research in the evidence to support your guidance.

4. Responses to consultation questions on the draft rulemaking guidance

Q22: Do you think our guidance will help regulators exercise their rulemaking powers effectively?

The rulemaking guidance is based on the premise that the standardisation of rules across all regulators will confer benefits to regulation, when in fact, similar regulatory approaches may lead to inappropriate outcomes in different contexts.

At the time of GDC reform, our ambition will be to ensure that we use our new rulemaking powers to build a right-touch regulatory model which appropriately accounts for the nature and scale of risks to public protection in dentistry. This means that GDC's regulatory practices may need to look different to those of other regulators, to result in the most appropriate regulatory outcomes for registrants and the public. While we recognise that consistency of approach can have benefits, it should not be an overriding consideration in the development of the regulatory model, and regulators must be provided with the powers and autonomy to regulate effectively.

Q23: Do you think that the principles outlined are the right ones?

No.

We consider most of the proposed principles to be the right ones and ones which we already use to guide our approach to developing the GDC's regulatory model. However, there is one important exception, as explained in our response to Q24.

Q24: Do you have any comments to make on the principles listed or any additional principles to suggest?

We are concerned about the principle that good rules and a good rulemaking process should result in regulation which supports consistency of regulatory practice between regulators, justifying disparity where appropriate.

Consistency in practice and process will have different outcomes in different regulatory contexts, some of which may be unsafe or inappropriate – for example, because the unique risks of the specific context are not addressed, or because risks are not addressed in a proportionate way for that context. Therefore, it is much more important for regulators to consistently apply right-touch approaches in rulemaking, and for rules to support consistency in fair and proportionate regulatory outcomes.

Whilst consistency in practice and process may be the *consequence* of rules made in alignment with right-touch principles, it should not itself be an overarching principle of rulemaking, especially when it could cause tensions with a right-touch approach.

Please also see our comments in response to Q25 and Q26.

Q25: Do you think that the guidance on consistency between regulators (avoiding unjustifiable difference) is helpful?

No.

Despite the recognition of justifiable differences in regulatory practice, we consider that the guidance on consistency between regulators could have the unintended effect of hindering right-touch rulemaking approaches that lead to fair and proportionate regulatory outcomes which are appropriate to particular professional contexts. Please see our comments in response to Q24 and Q26 for our reasoning.

Q26: Do you have any comments to make on this section of the guidance?

Whilst we recognise that there may be benefits to consistency in regulatory practice and processes and in some instances working towards this sort of consistency will be the right thing to do, there are also clear reasons why an aspiration to develop standardised rules is inappropriate. The key reasons are as follow:

- The specific contexts in which the different healthcare professions work pose different sets of risks and thus have implications for how each profession is regulated. There are significant differences between the regulatory models of the GDC and General Medical Council (GMC), for example, which arise from the fact that much more medical treatment takes place within structured environments (such as hospitals within NHS trusts) and with governance mechanisms (such as responsible officers) which are largely absent in dentistry. This means that a standardised approach will not necessarily work well. For example, regarding mechanisms for the ongoing assurance of registrants - the medical revalidation model would be extremely challenging to implement in dentistry, given that a much greater proportion of dental professionals than medics work in single practice or exclusively in private care, without the same clinical governance structures.

- Regulatory reform is intended to give regulators more autonomy to decide how they operate. Reformed legal frameworks will be broadly similar across all regulators, creating a high level of consistency in operations (though in our response to the Department of Health and Social Care's consultation Regulating anaesthesia associates and physician associates we also highlighted the risks of a template approach to reform and areas where the legislation would need to diverge from the template for the GDC). However, each regulator will be able to use the flexibility afforded by rulemaking powers to ensure that its regulatory model is as effective as possible for, and continuously adapts to, the unique healthcare context in question. This flexibility is vital to enable regulators to adhere to right-touch principles, in order to achieve safe, fair and proportionate regulatory outcomes in properly addressing the full range of applicable risks. The flexibility will already be bound by the generally consistent requirements of the overarching legal frameworks and should not be restricted further. Please see our related comments at Q24.

- We recognise that for differently regulated professions working in the same teams or environment, consistency of the approach to regulation is important for the public and professionals. For example, there is obvious potential for unfairness arising from different regulatory approaches in acute hospital settings where professionals with different regulators may be involved in aspects of the same incident (for example, a GMC-registered doctor and a Nursing and Midwifery Council-registered nurse working together to provide care for a particular patient who subsequently raises a concern about that care). However, this is much less of an issue for the GDC because we regulate all seven professions making up the dental team, the vast majority of whom work in dentistry-specific settings. There is, therefore, already a common and consistent approach to professional regulation.

  With that regulatory consistency already in place for the sector, the real opportunity of reform for dentistry is to ensure we have processes in place which address the risks associated with a diverse range of services and providers, working under different business configurations, that push at the boundaries of the current model of regulation and public protection. To optimise that opportunity will require us to take full advantage of flexibilities afforded to us by rulemaking powers.

Q27: Do you think that the guidance on consultation is helpful?

We don't know.

Section 7.8 and parts of other sections of the draft guidance seem to be based on the mistaken premise that regulators have a choice as to whether to consult on rulemaking. Regulators must consult on all rules (to the extent that the regulator considers appropriate) under Schedule 4 Paragraph 15(2) of the AAPA Order 2024. This is consistent with the similar requirement in GDC's current legislation.

Given that consultations are legally mandated, it is unclear whether the PSA's intention is actually for the guidance to help regulators with decisions around the extent to which they should consult – in which case the guidance would require significant reframing.

Q28: Do you have any comments to make on this section of the guidance?

In relation to our earlier concerns around consistency in rule-making, we also make the following points.

Noting the caveat regarding section 7.8 in our response to Q27, at section 7.8 of the proposed guidance, one of the factors listed to consider when regulators are deciding whether consultation is appropriate is the potential for rule changes to duplicate or conflict with activity by any other regulatory bodies, including other professional regulators.

We seek clarification around the meaning of, and thinking behind, this point on duplication and conflict - particularly in relation to other professional regulators.

Professionals are usually registered with a single regulator and thus affected by a single model of professional regulation. The small group who are registered with multiple regulators will necessarily be affected by multiple models, each designed to be applicable to the associated area of professional practice. If duplication means that an individual registrant is affected by similar requirements or processes of different professional regulators, and conflict means that they are affected by dissimilar requirements or processes by different professional regulators –

duplication and conflict will be rare and likely to be a reasonable consequence of individuals being regulated in their different professional capacities by different professional regulators.

If the point around the potential for duplication and conflict is taken more broadly, it could imply that rule changes which align with those of other regulators are more likely to be the correct course of action than rule changes which are different to those of other regulators. We emphasise that this will not always be the case, for the reasons around consistency given in our responses to Q24-26.

Q29: Do you think that the guidance on governance is helpful?

We don't know.

The governance guidance broadly aligns with our high-level views on how we intend to implement internal governance mechanisms to underpin rulemaking once our legislation has been reformed.

However, it appears not to recognise that regulators will already have processes in place for their Councils to approve their rules. Currently, Privy Council approval is not a universal or consistent requirement for rulemaking, and even when it is a requirement, that does not change the responsibility of the relevant regulator for the rules concerned.

We note that the government has not yet shared proposals for the reformed governance and operating framework for regulators.

Q30: Do you have any comments to make on this section of the guidance?

The GDC already has powers to make some of its own rules without Privy Council oversight. When we make such rules, we have robust internal governance procedures in place to steer and support the process. There is no reason why we could not replicate, or take the relevant learnings from, these procedures when we revise our governance arrangements under reform.

Section 8.3 of the guidance implies there may be discretion around the role of the Council/Unitary Board and the governance pathway for rulemaking. Taking the AAPA Order 2024 as the template for future reform, the delegation of rulemaking powers is forbidden under Schedule 1 Paragraph 2(2). In light of that legal requirement, it is unclear what the guidance is suggesting here with regards to governance decisions.

Q31: Please set out any impacts that our guidance would be likely to have on you and/or your organisation, or considerations that we should take into account when assessing the impact of the proposals.

Guidance which suggests that good practice for making rules - as well as, potentially, setting standards and guidance – involves aiming for them to be as consistent as possible with other regulators, could lead to unreasonable pressure on the GDC to conform to positions and processes that would actually reduce regulatory effectiveness in dentistry.

An expectation that regulators should go through the proposed three-step process for inter-regulatory consistency and formally justify and record the rationale for any differences in their rules compared to other regulators could create a burden of work with limited value. Whilst the rules of other regulators may sometimes usefully be taken into consideration as part of the

rulemaking process, it is the rationale for how and why rules lead to appropriate outcomes in line with a right-touch approach which is much more significant to develop and record.

Q32: Are there any aspects of these proposals that you feel could result in different treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010:

- **Age**
- **Disability**
- **Gender reassignment**
- **Marriage and civil partnership**
- **Pregnancy and maternity**
- **Race**
- **Religion or belief**
- **Sex**
- **Sexual orientation**
- **Other (please specify)**

We don't know.

If you have responded 'yes' about any of the above, please provide further details, explain why and what could be done to change this.

We do not consider that the proposals pose any equality issues in relation to people with protected characteristics. However, we stress that a drive for consistent rules and processes which does not properly account for important differences between the professions may increase the likelihood of inappropriate regulatory outcomes experienced by a whole profession(s) regulated by a particular regulator and/or the patients of that professional group(s).