

# **Case Examiner Guidance Manual (November 2016)**

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## Part 1: Background & introduction

1. The General Dental Council (“GDC”) is the organisation that regulates dental professionals in the United Kingdom. It sets standards of conduct, performance and behaviour that all dental professionals working in the UK are required to adhere to.
2. The GDC has statutory powers under the Dentists Act 1984 (“the Act”)<sup>1</sup> and the General Dental Council (Fitness to Practise) Rules 2006 (“the Rules”)<sup>2</sup> to investigate complaints or concerns that suggest that a dental professional may have failed to meet those standards, and will act, in the public interest, when concerns are raised that a registered dental professional (“registrant”)'s fitness to practise may be impaired.
3. Complaints or concerns about a registrant’s fitness to practise are initially considered by the Registrar, through the GDC’s casework team.
4. On receipt of a complaint or concern about a registrant, the Rules require the Registrar to undertake an initial consideration of the matter. The Registrar must assess whether the complaint or concern amounts to an allegation that the registrant’s fitness to practise is impaired by reason of one of the grounds set out in the Act<sup>3</sup>.
5. The Registrar also, at any time before the Case Examiners have begun to consider the allegation, has the power to refer the allegation to the Interim Orders Committee (“IOC”) if he considers it appropriate to do so.
6. If it is assessed by the Registrar that there is an allegation (or allegations) of impaired fitness to practise, the matter must be referred to the Case Examiners for consideration<sup>4</sup>. Under the Rules, the matter must be considered by two Case Examiners, one of whom must be a lay person, and the other either a registered dentist or a registered dental care professional<sup>5</sup>.
7. The Case Examiners’ role is to consider whether an allegation referred to them by the Registrar ought to be considered by a Practice Committee. They sit in private and consider the allegation based on the documentary evidence which has been gathered.
8. The Case Examiners have a duty to act in accordance with the over-arching objective when exercising their functions. The pursuit of the over-arching objective includes:
  - protecting, promoting and maintaining the health, safety and well-being of the public;
  - promoting and maintaining public confidence in the dental and dental care professions; and
  - promoting and maintaining proper professional standards and conduct for members of the dental and dental care professions<sup>6</sup>.
9. The public interest also includes the need for proportionate decision making with reference to the risks posed by the particular case.

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<sup>1</sup> as amended by the General Dental Council (Fitness to Practise etc.) Order 2016

<sup>2</sup> as amended by the General Dental Council (Fitness to Practise) (Amendment) Rules Order of Council 2016

<sup>3</sup> see section 27(2) and section 36N(2) of the Act

<sup>4</sup> see Rules 3(2)(a) and 5(1) of the Rules

<sup>5</sup> see Rule 2 of the Rules

<sup>6</sup> see section 1(1ZA) and 1(1ZB) of the Dentists Act 1984, as amended by the Health and Social Care (Safety and Quality Act 2015)

## Part 2: Glossary of terms

10. The following definitions, abbreviations and acronyms are used in this guidance:

<i>the Act</i>	the Dentists Act 1984 (as amended);
<i>the Rules</i>	the General Dental Council (Fitness to Practise) Rules Order of Council 2006 (as amended);
<i>the GDC</i>	the General Dental Council;
<i>DCP</i>	Dental Care Professional;
<i>IOC</i>	the Interim Orders Committee, a statutory committee of the General Dental Council which considers, pending the outcome of an investigation or inquiry, whether it is necessary to make an order affecting an individual's registration for the protection of the public or otherwise in the public interest or in the interest of the individual concerned;
<i>Investigating Committee</i>	a statutory committee of the General Dental Council, which, where the Case Examiners fail to agree, considers allegations of impaired fitness to practise and determines whether such allegations should be referred to a Practice Committee for a full inquiry. The Investigating Committee also has residual powers under the Rules to review its own decisions, including in relation to warnings and referral decisions;
<i>informant</i>	the person making the allegation to the GDC;
<i>Practice Committee</i>	the Professional Conduct Committee, Health Committee or Professional Performance Committee, statutory committees of the General Dental Council Practice Committee which investigate allegations referred to them by the Investigating Committee or Case Examiners, and determine whether a registrant's fitness to practise is impaired;
<i>registrant</i>	an individual registered on either the Dentists Register or the Dental Care Professions Register; and
<i>the Registrar</i>	means the person appointed under section 14(2) of the Act.

### Part 3: Principles of decision-making

#### Preliminary issues: conflicts of interest

11. The Case Examiners should, prior to considering an allegation referred to them by the Registrar, satisfy themselves that they do not have any conflict of interest. This is because proceedings are unfair where there is actual bias or where the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker is biased.
12. A conflict of interest may arise where a Case Examiner:
  - has a financial or other personal interest in the outcome of the matter;
  - has a close personal or professional relationship with any individual connected with the case;
  - has had previous acrimonious personal dealings with one of the parties or the representatives in the matter; and/or
  - is active (for example, by making statements, writing articles or being a representative) in an organisation which has declared a particular stance on an issue under consideration by the Case Examiners.
13. Where a Case Examiner has previously considered a case against a registrant, this does not, in itself, create a conflict of interest. Additionally, where a Case Examiner has previously considered a case which is now the subject of a request for review, this also, in itself, does not create a conflict of interest. However, conflicts of interest may on occasion arise in these situations, depending on the individual circumstances of the case.
14. Where a conflict of interest does arise, or when there is a real possibility of the appearance of bias, a Case Examiner should withdraw from considering the case.

#### Preliminary issues: opportunity to comment

15. Rule 4 provides that where the Registrar determines that a complaint or concern amounts to an allegation, he shall send a notification to the registrant and the informant (if any), and the notification sent shall:
  - (i) contain a summary of the allegation;
  - (ii) subject to rule 6(8), be accompanied by a copy of the documents in the Registrar's possession which relate to the allegation;
  - (iii) invite the registrant to respond to the allegation with written representations addressed to the Case Examiners within a period which the Registrar shall specify in the notification; and
  - (iv) where the allegation has been made by a person, inform the registrant that representations received from him may be disclosed to that person for comment.

16. The Rules further provide<sup>7</sup> that the Case Examiners must not make a determination as to whether or not an allegation ought to be considered by a Practice Committee unless they are satisfied that the registrant and the maker of the allegation (if any) have been provided with a reasonable opportunity to submit written representations commenting on the allegation and, subject to Rule 6(8)<sup>8</sup>, the evidence relating to the allegation.
17. The Case Examiners should therefore consider, as a preliminary matter, whether the registrant and the maker of the allegation (if any) have been provided with such an opportunity. If not, the Case Examiners must adjourn their consideration of the allegation so that such opportunity can be provided to the relevant individuals.
18. In addition, for reasons of fairness the Case Examiners must not consider any advice, information or documentation which has not been disclosed to the registrant. If such a situation arises, the Case Examiners must adjourn their consideration of the allegation in order for the registrant to be provided with any advice, information or documentation concerned, and any further representations sought.

#### Substantive consideration

19. The Case Examiners' role is to consider whether an allegation referred to them by the Registrar ought to be considered by a Practice Committee. As such, the Case Examiners essentially conduct a filtering process, closing some cases and referring others for a full hearing.
20. Under the GDC's Rules, the Case Examiners' decision must be unanimous. If the Case Examiners fail to agree whether an allegation ought to be considered by a Practice Committee, they must refer the allegation for consideration by the Investigating Committee under rule 7<sup>9</sup>.
21. The Case Examiners should approach their task by reference to the real prospect test. In considering a case, the Case Examiners will assess:
  - (i) whether there is a real prospect of the facts, as alleged, being found proved (stage 1), and if so,
  - (ii) whether or not there is a real prospect of the statutory ground being established (stage 2), and if so,
  - (iii) whether or not there is a real prospect of a finding of current impairment being made (stage 3).

#### Real prospect test

22. The real prospect test requires the Case Examiners to determine whether there is a genuine, as opposed to a remote or fanciful, possibility of a matter being established before a Practice Committee.

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<sup>7</sup> at Rule 6(3) of the Rules

<sup>8</sup> which provides that any evidence which the registrant or a third party has provided relating to that person's health or private and family life must not be disclosed by the Registrar to the maker of the allegation

<sup>9</sup> see Rule 6(2) of the Rules. The exception is that, once both Case Examiners have determined that an allegation ought to be considered by a Practice Committee, the allegation may also be referred to the IOC if one or both Case Examiners consider it appropriate

## Evidence

23. In considering whether there is a real prospect of the facts being established, the Case Examiners may, subject only to the requirements of relevance and fairness, consider any documentary evidence, whether or not that evidence would be admissible in any proceedings in a court<sup>10</sup>.
24. However, Case Examiners should reach their decision based solely on the material they have been provided with. They must not use the internet or other sources to locate additional information about a registrant, or attempt to themselves “fill in the blanks” where the information or evidence before them is incomplete. Instead, if the Case Examiners consider that further information is required (including any further information of a clinical nature), they should adjourn the matter in accordance with the guidance set out below.
25. Any evidence which the registrant or a third party has provided relating to the health or family life of the registrant or the third party must not be disclosed by the Registrar to the informant<sup>11</sup>.

## Facts (stage 1)

26. The Case Examiners are not required to decide the facts, or determine whether the allegations against the registrant are true or untrue, merely whether they stand a real prospect of being established before a Practice Committee.
27. As such, the Case Examiners should not attempt to resolve substantial conflicts of evidence. The Case Examiners can, however, assess the weight of the evidence. In some cases where there is a factual dispute, there may be very clear and cogent evidence supporting one side of the dispute which is confirmed or supported by other evidence, whereas the evidence to the contrary may be wholly implausible or inherently inconsistent.
28. However, there will also be some cases where there is a significant evidential dispute which it is not possible for the Case Examiners to resolve, bearing in mind that they are working from documents only, and do not have the opportunity of testing the evidence. In such cases, referral of the allegation to a Practice Committee is likely to be required.
29. When considering whether there is a real prospect of the facts being established, the Case Examiners should also bear in mind that a Practice Committee will consider whether the facts have been proved on the balance of probabilities – in other words, a Practice Committee must be satisfied that it is more likely than not that an event occurred.
30. Finally, the Case Examiners should proceed with caution in closing a case where their decision may be perceived as inconsistent with that of another public body in relation to the same or substantially the same facts.

## Statutory ground (stage 2)

31. If the Case Examiners consider that there is a real prospect of some or all of the facts being established, they should go on to consider whether there is a real prospect of the statutory ground being established.

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<sup>10</sup> see Rule 5(2) of the Rules

<sup>11</sup> see Rule 6(8) of the Rules

32. The statutory grounds are set out in section 27(2) of the Act. Under that section, a person's fitness to practise shall be regarded as impaired by reason only of the nine stated grounds, the principal of which are:
- misconduct;
  - deficient professional performance;
  - adverse physical or mental health; and
  - conviction or caution.
33. When considering whether there is a real prospect of the statutory ground being established, the Case Examiners should consider the factors set out below. The Case Examiners should also bear in mind that any evidence as to mitigation or remediation is unlikely to be relevant at this stage of the process, but should instead be examined in the event that they proceed to stage 3 and are required to consider whether there is a real prospect of current impairment.

### *Misconduct*

34. Case law<sup>12</sup> has established that misconduct is of two principal kinds. First, it may involve sufficiently serious misconduct in the exercise of professional practice, such that it can properly be described as misconduct going to fitness to practise. In those circumstances:
- (i) misconduct denotes serious acts or omissions, suggesting a significant departure from what would be proper in the circumstances;
  - (ii) in respect of clinical matters, mere negligence does not constitute misconduct. Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to misconduct;
  - (iii) a single negligent act or omission is less likely to cross the threshold of misconduct than multiple acts or omissions. Nevertheless, and depending upon the circumstances, a single negligent act or omission, if particularly grave, could be characterised as misconduct;
  - (iv) misconduct need not arise in the context of clinical practice, but must be in the exercise of a registrant's calling as a dental professional. Such misconduct may properly be described as linked to the practice of dentistry, even though it involves the exercise of administrative or managerial functions, where they are part of the day to day practice of a registrant, and where, depending on the nature of the duties, a continuing obligation to focus on patient care may exist<sup>13</sup>; and
  - (v) misconduct may also fall within the scope of a registrant's calling as a dental professional where there is no direct link with clinical practice at all – for example, acting as an expert witness, or being involved in education or research where the registrant's skills are directly engaged.
35. Secondly, misconduct can involve conduct of a disreputable, morally culpable or otherwise disgraceful kind which may, and often will, occur outside the course of professional practice itself, but which brings

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<sup>12</sup> see *Calhaem v General Medical Council* [2007] EWHC 2606 (Admin) and *R (on the application of Remedy UK Ltd) v General Medical Council* [2010] EWHC 1245 (Admin)

<sup>13</sup> the case of *Remedy v General Medical Council* (supra) confirms that usually a failure adequately to perform these functions will fall within the scope of deficient performance rather than misconduct, but in a sufficiently grave case, where the negligence is gross, there is no reason in principle why a misconduct charge should not be sustained

disgrace upon the registrant and thereby prejudices the reputation of the profession. In those circumstances:

- (i) it does not matter whether such conduct is directly related to the exercise of professional skills; and
- (ii) action taken in good faith and for legitimate reasons, however inefficient or ill-judged, is not capable of constituting misconduct merely because it might damage the reputation of the profession.

36. Misconduct can also be assessed against Guidance produced by the GDC, which registrants are expected to keep up to date with and to adhere to the principles it contains. That Guidance includes [Standards for the Dental Team](#) (effective from 30 September 2013)<sup>14</sup>, which sets out the standards of conduct, performance and ethics that govern dental professionals, and which specifies the principles, standards and guidance which apply to all members of the dental team.

37. Other Guidance produced by the GDC and which may assist the Case Examiners in assessing whether a registrant's conduct has fallen far short of what would be expected in the circumstances, includes:

- [Guidance on advertising](#);
- [Guidance on commissioning and manufacturing dental appliances](#);
- [Guidance on indemnity](#);
- [Guidance on prescribing medicines](#);
- [Guidance on reporting criminal proceedings](#);
- [Guidance on using social media](#);
- [Guidance on child protection and vulnerable adults](#); and
- [Scope of Practice](#).

#### *Deficient Professional Performance*

38. In terms of deficient professional performance, case law<sup>15</sup> has also established that:

- (i) it suggests a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the registrant's work;
- (ii) a single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute deficient professional performance;

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<sup>14</sup> prior to 30 September 2013, the relevant document was *Standards for Dental Professionals*

<sup>15</sup> see *Calhaem v General Medical Council* and *R (on the application of Remedy UK Ltd) v General Medical Council*, supra

- (iii) poor judgment cannot of itself constitute gross negligence or negligence of a high degree, but it may in an appropriate case, and particularly if exercised over a period of time, constitute seriously deficient performance;
- (iv) deficient performance may in principle arise from the inadequate performance of any function which is part of a registrant's calling as a dental professional. Which charge is appropriate depends on the gravity of the alleged incompetence. Incompetence falling short of gross negligence but which is still seriously deficient will fall under deficient professional performance rather than misconduct.

#### *Adverse physical or mental health*

- 39. When the Case Examiners are considering an allegation that a registrant's fitness to practise is impaired on grounds of adverse physical or mental health, they will usually be provided with a health assessment report commissioned by the casework team (or, on occasion from the registrant's employers or treating clinicians) which will detail the adverse physical or mental health condition which it is alleged the registrant is suffering from.
- 40. The report will usually express a view as to whether the specified condition impairs the registrant's fitness to practise. Otherwise, the Case Examiners will need to consider whether a risk to patients, or to the wider public interest, arises from the registrant's health condition.

#### *Criminal convictions and cautions*

- 41. The Case Examiners should not seek to go behind the fact of a conviction. Where a registrant has been convicted of a criminal offence, a copy of the certificate of conviction (or in Scotland, an extract conviction) is conclusive proof of the conviction. The only evidence which may be presented by the registrant in rebuttal of a conviction proved as above is evidence that the registrant is not the person referred to in the certificate or extract<sup>16</sup>.
- 42. In terms of cautions, these are only offered when a person admits the offence, and if the decision-maker (i.e. the police or CPS) consider that there is sufficient evidence to provide a realistic prospect of conviction if the person concerned were to be prosecuted.
- 43. As a result, submissions by the registrant that they are not in fact guilty of the offence in question, or that they did not realise what they were agreeing to, should not be given any weight by the Case Examiners. This does not, however, prevent the Case Examiners from considering the background facts and circumstances surrounding the conviction, which are likely to be of relevance in considering current impairment.

#### Current impairment (stage 3)

- 44. There is no definition in the GDC's Act or Rules of what amounts to impairment of fitness to practise, and not every case of misconduct, deficient professional performance etc. will mean that a registrant's fitness to practise is impaired.
- 45. In determining whether there is a real prospect of impairment being established before a Practice Committee, the Case Examiners should be aware that a Practice Committee must consider whether a practitioner's fitness to practise is *currently* impaired.

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<sup>16</sup> see Rule 57(5) and (6) of the Rules

46. Although the GDC's Rules, unlike those of some other regulators, do not contain a "five year rule"<sup>17</sup>, as a general principle the older the allegation, the more carefully the Case Examiners will need to consider whether there is a real prospect of *current* impairment being established.
47. An assessment of current impairment will involve consideration of whether the reason by which fitness to practise is said to be impaired is easily remediable, whether it has been remedied and whether it is highly unlikely to be repeated in the future.
48. Factors which may be relevant to the assessment of whether a registrant's fitness to practise is currently impaired include:
- any remedial action taken by the registrant (i.e. identifying and put in place measures that will prevent a recurrence such as attending relevant training courses; reflective writing; formulating a personal development plan);
  - demonstrations of insight and remorse (including whether the registrant recognises that they should have behaved differently in the circumstances, and whether that insight has been displayed at an early stage); and
  - the risk of recurrence.
49. These factors should, however, be weighed against the public interest in upholding proper professional standards and maintaining public confidence in the professions, which are of fundamental importance in assessing impairment of a registrant's fitness to practise. Case Examiners should be slower to halt a complaint against a practitioner who continues to practise than against one who does not.
50. Case Examiners should bear in mind that where there is a public interest in medical practitioners not being harassed by unfounded complaints, there is also a public interest in the ventilation in public of complaints which do have a real prospect of establishing impaired fitness to practise.
51. In particular, the Case Examiners should bear in mind that a Practice Committee will consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.
52. In that regard, there are some types of case where the allegations are so serious that, if proven, a finding of impairment is likely to follow. The Case Examiners should bear in mind that the following are viewed as particularly serious:
- serious departure(s) from the relevant professional standards;
  - where serious harm to patients or other persons has occurred, either deliberately or through incompetence;
  - where a continuing risk of serious harm to patients or other persons is identified;

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<sup>17</sup> i.e. a rule limiting the ability of the regulator to consider allegations which have come to its attention more than five years since the most recent events giving rise to the allegation

- abuse of a position of trust or violation of the rights of patients, particularly if involving children or other vulnerable persons;
- convictions or findings of a sexual nature, including involvement in any form of child pornography;
- serious dishonesty, particularly where persistent or covered up;
- violent conduct.

Fitness to practise history

53. Knowledge that a registrant has previous fitness to practise history with the GDC is an important factor in the Case Examiners' decision making process.
54. In reviewing any fitness to practise history, the Case Examiners should consider whether it is adverse. In terms of what amounts to adverse fitness to practise history, the following may be used as a guide:

Case stage	Outcome	Adverse/not adverse?
Triage	Close at triage	Not adverse
Assessment	Close at assessment	Not adverse
Investigating Committee/ Case Examiners	Close – NFA	Not adverse
Investigating Committee/ Case Examiners	Close – advice	Adverse
Investigating Committee/ Case Examiners	Close – warning (published or unpublished)	Adverse
Practice Committee	Facts not found	Not adverse
Practice Committee	Facts found, no misconduct (etc.)	Not usually adverse, but will need to be assessed on a case-by-case basis
Practice Committee	Finding of misconduct (etc.), no impairment	Adverse
Practice Committee	Impairment found: no action	Adverse
Practice Committee	Reprimand	Adverse
Practice Committee	Conditions	Adverse
Practice Committee	Suspension	Adverse
Practice Committee	Erasure	Adverse

55. The Case Examiners should then examine the relevance of the previous history to the current allegation. For example, the history may reveal a pattern of similar behaviour, but even if there are no common themes, a registrant who has significant previous fitness to practise history may have demonstrated a persistent lack of regard for their obligations as a registered dental professional.
56. The Case Examiners should, however, proceed with caution, bearing in mind that where the fitness to practise history relates to a warning or an advice issued by the Investigating Committee or the Case Examiners, no findings of fact or judgment on impairment will have been made.
57. Having considered Stages 1, 2 and 3, the Case Examiners must conclude whether or not there is a real prospect of a finding of current impairment before a Practice Committee.

58. Overall, any doubt about whether the matter ought to be considered by a Practice Committee should be resolved in favour of referral.

### Reasons

59. Although there is no obligation under the GDC's Act or Rules for the Case Examiners to give reasons for their decision (save where they are considering whether to review a warning), fairness requires that clear and adequate reasons are given in every case.

60. Those reasons do not need to be elaborate or lengthy, and the Case Examiners do not have to identify each individual piece of information taken into account. The reasons given should, however, tell the parties in broad terms why the decision has been reached.

### Adjournments

61. Where the Case Examiners consider it necessary, they may adjourn their consideration of an allegation and direct the Registrar to carry out such enquiries as they may specify. These may include:

- (i) undertaking specific factual enquiries;
- (ii) commissioning of medical or other expert reports;
- (iii) obtaining legal advice;
- (iv) commissioning an assessment of the registrant's professional performance (which may be a full assessment, or a more limited record card audit)<sup>18</sup>; or
- (v) directing the Registrar to consider amending the allegation. This may be necessary in circumstances where the Case Examiners consider that:
  - there is a material error in the allegation referred to them; or
  - the documents before them raise concerns about additional issues which have not been included in the allegation referred to them (including where issues of dishonest or sexually motivated conduct are raised by the evidence but have not been specifically alleged).

62. In those circumstances, the Case Examiners should clearly state the further information or evidence they require. It will then be for the Casework team (on behalf of the Registrar) to obtain the information or evidence requested, and re-assess the matter as appropriate, before returning the matter to the Case Examiners.

63. The Case Examiners do not have the power to adjourn consideration of parts of a case i.e. if further enquiries are needed, the whole case must be adjourned.

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<sup>18</sup> in such cases, the Case Examiners should explain why they have decided that the enquiries are necessary and proportionate - as with other enquiries directed by the Case Examiners, a performance assessment or record card audit should be linked to the allegation before the Case Examiners and must not amount to a fishing expedition

64. Any enquiries that the Case Examiners direct the Registrar to undertake should be necessary for the purpose of helping them to decide whether a matter ought to be considered by a Practice Committee.
65. Once the Registrar has considered the Case Examiners' direction, and has obtained any information requested (or has considered amending the allegation if that is the Case Examiners' request), the Registrar will then share the information with the registrant and, if appropriate, the informant.
66. Depending on the circumstances, the registrant and any informant may then be afforded further opportunity to comment before the matter is returned to the Case Examiners for further consideration. Such an opportunity to comment is particularly important where, as a result of the enquiries undertaken, the Registrar is referring additional grounds of allegation to the Case Examiners, or has amended the existing grounds of allegation.

## Part 4: Ought to be considered by a Practice Committee

### Undertakings

67. Undertakings are an agreement between the GDC and a registrant about that person's future conduct or practice.
68. The Act and the Rules provide the GDC's Case Examiners and Investigating Committee with the power to agree undertakings with a registrant, with effect from 1 November 2016.
69. The Act and Rules provide that, where the Case Examiners have determined that an allegation ought to be referred to a Practice Committee they may, as an alternative to making an immediate referral, agree with the registrant concerned that they will comply with such undertakings as the Case Examiners consider appropriate<sup>19</sup>.
70. Undertakings may be agreed to restrict a registrant's practice, for example by preventing them from practising in certain circumstances, from carrying out certain treatments, or from treating particular categories of patient. Undertakings may also make positive requirements of a registrant, such as a requirement to undergo training in a particular area of practice.
71. By inviting a registrant to agree undertakings, the GDC is able to address concerns about that registrant's fitness to practise and still deal effectively with particular types of case in a proportionate way.
72. This guidance sets out the factors to be considered by the Case Examiners when considering whether undertakings may be appropriate, and the process to be followed should any issues arise once those undertakings are in place.

### *Criteria*

73. In considering whether undertakings are appropriate, the Case Examiners will have regard to the GDC's duty to act in accordance with the over-arching objective, which includes protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the dental and dental care professions, and promoting and maintaining proper professional standards and conduct for members of the dental and dental care professions<sup>20</sup>.
74. In particular, the Case Examiners should consider whether in any individual case undertakings are proportionate and effective in protecting the public and maintaining public confidence in the professions and their regulation.
75. Undertakings are not available to the Case Examiners where there is a realistic prospect that, if the allegations were referred for consideration by a Practice Committee, the registrant's name would be erased from the register<sup>21</sup>.
76. Erasure is not available where a registrant's fitness to practise is impaired solely on grounds of adverse physical or mental health<sup>22</sup>, and undertakings may be particularly suitable in such cases.

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<sup>19</sup> see section 27A(4)(za) and section 27A(6)(za) of the Act (for dentists) and section 36O(4)(za) and section 36O(6)(za) (for DCPs)

<sup>20</sup> see section 1(1ZA) and 1(1ZB) of the Dentists Act 1984, as amended by the Health and Social Care (Safety and Quality Act 2015)

<sup>21</sup> see Rule 6(7) of the Rules

<sup>22</sup> see section 27B(7)/36P(8) of the Act

77. Erasure may, however, be appropriate where the allegations relate to the registrant's conduct or performance, including where behaviour is fundamentally incompatible with being a registered dental professional. Further guidance as to when erasure may be appropriate can be found in paragraph 7.34 of the GDC's *Guidance for the Practice Committees including Indicative Sanctions Guidance*, available [here](#).
78. Undertakings must also be workable, and are therefore likely to be appropriate where:
- (i) it is possible to fully address the issues of impairment of fitness to practise by agreeing actions which are specific, unambiguous, and can be objectively assessed (for example, by completing a training course and providing evidence and reflection on what was learned); and
  - (ii) a registrant is likely to accept and agree to comply with them.
79. In that context, insight on the part of the registrant is likely to be an important factor in considering whether undertakings are appropriate in a particular case. A registrant who demonstrates insight into their shortcomings, recognises that steps need to be taken to protect the public, for example by limiting their practice, and undertaking remediation may be more likely to accept and comply with undertakings.
80. When assessing whether the registrant has demonstrated insight, the Case Examiners should consider whether there is credible evidence that the registrant:
- has reflected upon their performance or conduct;
  - recognises that they should have behaved differently in the circumstances; and
  - has displayed insight prior to the Case Examiners considering the matter, for example by identifying and putting in place measures that will prevent a recurrence of the issues, even if they have not been able to fully remediate the deficiencies in their performance or conduct.
81. The GDC's *Standards for the Dental Team* requires registrants to give patients who complain a prompt and constructive response. This includes offering an apology and a practical solution where appropriate<sup>23</sup>. If a complaint has been made locally prior to being raised with the GDC, the Case Examiners should take into account any attempts which the registrant has made at resolving the complaint, including any expression of apology made at that stage, as evidence of insight.
82. However, for the purposes of determining whether undertakings are appropriate in an individual case, the fact that a registrant has recognised that corrective action needs to be undertaken is more important than the manner in which any apology is expressed.
83. Undertakings may, as a matter of general principle, be inappropriate where:
- (i) it is not possible to formulate workable undertakings to address the potential issues;
  - (ii) there remains a substantial (rather than minor) dispute over the facts alleged, or a dispute as to whether those facts alleged amount to impairment of fitness to practise;
  - (iii) any deficiencies identified are such that patients may be put at risk directly or indirectly, even with undertakings in place;
  - (iv) they would fail to maintain public confidence in the professions and their regulation and/or would fail to declare and uphold proper professional standards, and as a result it may be in the

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<sup>23</sup> see Standards 5.3 and 5.3.8

wider public interest for the issues engaged by the case to be examined by a Practice Committee (this may occur where the case raises concerns about dishonesty, abuse of trust, serious violence, sexually motivated conduct, or financially motivated conduct to the detriment of the patient). There may, however, be circumstances where undertakings would still be appropriate if they fully addressed the risk of any harm to the public and/or to the public interest; and/or

- (v) there is reason to believe that the registrant will not comply with them (for example, if the respondent has limited or no insight into their shortcomings, or has in the past failed to comply with undertakings or conditions of practice, imposed by the GDC or otherwise). Undertakings can only be considered to provide adequate public protection if the Case Examiners can reasonably be confident in the registrant's capacity and intent to comply with them.

84. In the circumstances outlined in paragraph 83 above, referral to a Practice Committee is likely to be appropriate.

#### *Process*

85. An assessment of whether undertakings are appropriate will be made by the Case Examiners, when considering an allegation of impairment referred to them by the Registrar.

86. As set out above, undertakings are an alternative to referral of an allegation to a Practice Committee. They are therefore available where the Case Examiners consider that the allegation ought to be considered by a Practice Committee. This will arise where the Case Examiners determine, having considered all the available information (including any admissions made by the registrant as referred to below) that there is a real prospect of the facts, statutory ground and current impairment being established.

87. In those circumstances, the Case Examiners will consider, in line with the criteria set out above, whether undertakings are appropriate.

88. The Rules provide<sup>24</sup> that the Case Examiners must not make their determination unless they are satisfied that the registrant and the maker of the allegation (if any) have been provided with a reasonable opportunity to submit written representations commenting on the allegation and the evidence relating to the allegation<sup>25</sup>.

89. As such, when the Case Examiners consider whether an allegation ought to be considered by a Practice Committee, the information available to them will include any representations which the registrant has chosen to make, by means of which the registrant may confirm whether they admit the facts as alleged, and whether they admit that their fitness to practise is impaired as a result.

90. The registrant may also, as part of that process, proactively offer to accept undertakings. If so, the Case Examiners should give careful consideration to the registrant's offer.

91. If, however, there is a substantial (rather than minor) dispute as to the facts alleged, or a dispute as to whether those facts alleged amount to impairment of fitness to practise, that will be a factor that the Case Examiners should consider, and may militate against undertakings being offered to the registrant.

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<sup>24</sup> see Rule 6(3) of the Rules

<sup>25</sup> Subject to Rule 6(8) of the Rules, which provides that any evidence which the registrant or a third party has provided relating to that person's health or private and family life must not be disclosed by the Registrar to the maker of the allegation

In such circumstances, it may be more appropriate for the matter to be considered by a Practice Committee, where any substantial disputes of fact and/or regarding impairment can be resolved.

92. If the Case Examiners consider that undertakings should be offered to the registrant as an alternative to referral to a Practice Committee, they will invite the registrant to comply with such undertakings as they consider appropriate<sup>26</sup>.
93. The Case Examiners will draw the proposed undertakings from the GDC's bank of undertakings<sup>27</sup>, or will draft them on a bespoke basis if standard undertakings are not suitable in the circumstances of the case. In preparing undertakings, the Case Examiners will ensure that they are clear, relevant to the identified shortcomings, proportionate, workable, capable of being monitored by the GDC, and addressed only to the registrant and not to a third party.
94. The Case Examiners will then write to the registrant regarding their decision. That letter should:
  - (i) set out the reasons for their decision, so that registrants can understand why undertakings are being proposed;
  - (ii) specify the proposed undertakings, including their intended duration and the form in which they are to be published, making clear which, if any, undertakings or (or information contained within them) are not to be published;
  - (iii) include a copy of the proposed public-facing summary of the issues as referred to in paragraph 100 below; and
  - (iv) invite the registrant to respond within 28 days of the date of the letter (or such further period as the Case Examiners may allow) to confirm whether they are prepared to comply with the specified undertakings<sup>28</sup>.
95. In terms of duration, the GDC's Rules do not provide for any specific limit on the time period for which undertakings may be agreed. However, undertakings would not ordinarily be agreed for a period exceeding three years (which will ordinarily be sufficient to protect the public and maintain public confidence in the professions and their regulation, whilst allowing any necessary remedial action to be taken)<sup>29</sup>.
96. As set out above, undertakings must be workable and the registrant's input into the process is likely to be useful in assessing whether this is the case. In particular, a registrant may wish to explain why a proposed undertaking may not be appropriate in the circumstances, or clarify any misunderstanding which may have arisen.
97. However, ultimately the Rules provide that the undertakings offered are such undertakings as the Case Examiners consider appropriate; if the registrant is not willing to accept the invitation offered (and he or she is under no obligation to do so), or does not respond within the specified timeframe, then under the Rules, the Case Examiners must refer the allegation to a Practice Committee<sup>30</sup>.

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<sup>26</sup> see Rule 6(6)(b) of the Rules

<sup>27</sup> see [insert hyperlink to bank of undertakings]

<sup>28</sup> in accordance with Rule 6A(1) of the Rules

<sup>29</sup> further information about timescales for fitness to practise investigations can be found on the GDC's website, [here](#)

<sup>30</sup> in accordance with Rule 6A(2) of the Rules

98. In the event that undertakings are agreed, the Case Examiners must cease consideration of the allegation and revoke with immediate effect any interim order which has been made in respect of the allegation<sup>31</sup>.

### *Publication*

99. Where undertakings have been agreed with a registrant as an alternative to referral to a Practice Committee, the Act and Rules provide the Case Examiners with discretion to decide whether those undertakings should be published on the GDC's online register<sup>32</sup>. However, as a matter of policy, and save as set out below, the GDC considers that undertakings should ordinarily be published for the duration of the period for which they are in force against the individual registrant's entry on the online register. In the event that an undertaking is varied (see below), the online register will be updated accordingly.
100. The online register entry will also include, alongside the undertakings, a public-facing summary of the issues, prepared by the Case Examiners, which explains the background to the agreement of the undertakings, and how undertakings will protect the public in the future. The summary should include details of the grounds of allegation which have been admitted or stand a real prospect of being established, brief reference to the evidence supporting those grounds, as well as a short explanation as to why the Case Examiners have determined that it would be appropriate to offer undertakings in the circumstances of the particular case.
101. Including such a summary in the register will maintain public confidence in the process of agreeing undertakings, and will ensure that members of the public are able to make an informed decision about commencing treatment with a particular registrant.
102. The GDC will not publish any information which directly relates to the health or private and family life of the registrant concerned, or which relates to any identifiable third party. This is because that information is considered to be confidential and publishing it may breach the individual's right to private and family life<sup>33</sup>. The Case Examiners should, however, consider whether it is possible in such cases to publish a version of the undertakings with any confidential elements redacted, to preserve the confidentiality of the individuals concerned whilst providing information about any conduct or performance aspects of the case<sup>34</sup>. At a minimum, it should be a matter of public record that undertakings have been agreed, even if the undertakings themselves or reasons for them are not disclosed.
103. In other circumstances, it will be for the Case Examiners to consider, on a case by case basis and balancing the public interest against the interests of the registrant, any reason(s) why undertakings should not be published.
104. Undertakings form part of a registrant's fitness to practise history with the GDC. As such, they may be considered by GDC decision makers in the event that a further complaint or information is received in the future, and, even after the period of publication has expired, details will be made available on request to relevant enquirers, including prospective employers, overseas authorities, and otherwise where it is in the public interest for such information to be disclosed<sup>35</sup>.

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<sup>31</sup> as per Rule 6A(3) of the Rules. See paragraphs 182 - 184 below for further guidance as to how the Case Examiners should deal with circumstances in which a registrant's interim order relates to more than one allegation

<sup>32</sup> see Rule 6A(4) of the Rules

<sup>33</sup> see <https://www.gdc-uk.org/about/who-we-are/committees/case-examiners>

<sup>34</sup> as set out at paragraphs 99 and 100 above

<sup>35</sup> sections 33C(3)/36Z(3) of the Act state that the Council or the Registrar may disclose to any person any information relating to a person's fitness to practise as a dentist, including information relating to an allegation of impairment, where they consider it to be in the public interest for the information to be disclosed

## *Monitoring*

105. Once in place, undertakings are monitored by the GDC's Case Review Team. Each case will be allocated to a Case Review Officer, who will monitor the registrant's compliance with undertakings by conducting regular reviews.
106. Where undertakings are in place, the GDC may carry out any investigations that are appropriate to the consideration of whether the registrant has complied with all their undertakings, or the registrant's fitness to practise<sup>36</sup>. This may include (but is not limited to) obtaining information from the registrant (including any information which the registrant is required by his or her undertakings to provide), contacting the registrant's employer, medical supervisor, workplace supervisor, educational supervisor or mentor to request further information, or requesting that the registrant undergo medical tests.
107. Where it appears that the registrant has failed to comply with any undertaking or varied undertaking, the matter should be dealt with as an issue of non-compliance in accordance with the guidance below

## *Non-compliance - undertakings unworkable*

108. Failure to comply with undertakings may be the result of the undertakings proving unworkable. For example, a registrant may change job or move to another area.
109. In those circumstances, the registrant is likely to be in a position to assess whether their undertakings are likely to become unworkable, or whether there is any additional information that ought to be taken into account by the GDC. As such, an application for variation (or termination) of undertakings should be made by the registrant before a breach of undertaking occurs. The matter should then be referred promptly by the Case Review Team to the Case Examiners.
110. If, in all the circumstances, the Case Examiners consider that any undertaking should be varied, they must<sup>37</sup> direct the Registrar to write to the registrant inviting them to agree in writing, within 28 days, to comply with such varied undertakings as the Case Examiners consider appropriate.
111. The letter sent to the registrant should include the reasons for the Case Examiners' decision, details of the varied undertakings including their duration and the elements intended for publication, and should also confirm whether any amendment or addition is proposed to the public facing summary of the issues which is published on the GDC's website (and if so, what the proposed amendments or additions are).
112. Agreement of varied undertakings may be appropriate where suitable alternative undertakings are available. However, in circumstances where:
  - there are no suitable alternative undertakings;
  - the registrant's undertakings have already been varied on one or more previous occasions;
  - an undertaking has become unworkable, but has been breached without the registrant making any prior attempt to contact the GDC; or
  - the registrant has not accepted the invitation to agree to all of the varied undertakings<sup>38</sup>,

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<sup>36</sup> in accordance with Rule 6B(1) of the Rules

<sup>37</sup> as per Rule 6B(2)(a) of the Rules

<sup>38</sup> see Rule 6B(3)(c) of the Rules

there may be a need for further scrutiny of the case at a hearing, in which case referral of the original allegation to a Practice Committee is likely to be appropriate<sup>39</sup>.

### *Breach of undertaking*

113. Failure to comply with undertakings (or varied undertakings) may, also or alternatively, be the result of the registrant's own choices or actions, rather than the undertakings (or varied undertakings) themselves being or becoming unworkable.
114. In those circumstances, the matter should be referred promptly by the Case Review Team to the Case Examiners. The Rules then provide<sup>40</sup> that where it appears to the Case Examiners that a registrant has failed to comply with undertakings (or varied undertakings), the Case Examiners may either refer the original allegation to a Practice Committee, or may direct the Registrar to write to the registrant inviting them to confirm in writing, within 28 days, that they will comply with the undertaking.
115. Immediate referral of the original allegation to a Practice Committee is likely to be appropriate where there is a significant breach of one or more undertakings, or where the undertaking (or undertakings) concerned have been breached on one or more previous occasions.
116. In other circumstances, the Case Examiners may wish to give the registrant concerned an opportunity to confirm that they will comply with the undertaking. This may include where the breach is trivial, outside the control of the registrant, or where the registrant is suffering from a health condition, and the breach of undertaking is related to a lapse in abstinence. In respect of the latter, if there is no risk to patient safety it may be appropriate for the Case Examiners to seek to work with the registrant rather than make an immediate referral of the original allegation to a Practice Committee.
117. However, if, within 28 days, the Registrar has not received written agreement from the registrant to comply with all of the Case Examiner undertakings or varied undertakings, the Case Examiners must refer the original allegation to a Practice Committee.
118. The Rules also provide that, where the Registrar considers that failure to comply with undertakings (or varied undertakings) amounts to an allegation in its own right, the Registrar must refer that new allegation to the Case Examiners<sup>41</sup>.
119. Whether a breach of undertakings (or varied undertakings) amounts to an allegation in its own right will be a question of fact and degree in each case. The Registrar will make an assessment of the seriousness of the breach, with factors pointing towards referral of a new allegation of non-compliance including where:
  - there has been an intentional or reckless (as opposed to inadvertent) breach of undertaking (or varied undertaking);
  - there are probity concerns surrounding the breach of undertaking (or varied undertaking) (for example, denial or other failure to declare that undertakings are in place or about their extent);
  - breach of the undertaking (or varied undertaking) has put patients or the wider public at risk; and/or

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<sup>39</sup> in accordance with Rule 6B(4)(a) of the Rules

<sup>40</sup> see Rule 6B(4) of the Rules

<sup>41</sup> see Rule 6B(6) of the Rules

- the breach of undertaking (or varied undertaking) has undermined, or has the potential to undermine, public confidence in the professions or their regulation.

120. In the event that the Registrar refers a new allegation to the Case Examiners, that allegation should be considered by the Case Examiners who should then determine, in accordance with the Act and Rules (i.e. having first sought written representations from the registrant and the maker of the allegation, if any), how to dispose of the new allegation.

#### *Variation*

121. There may be circumstances where a registrant has not breached their undertakings, but where it may be appropriate for the content or duration of the undertakings to be varied. This may include where the registrant's health or performance has deteriorated to the extent that varied undertakings are necessary in order to protect patients or the wider public, or, conversely, that the registrant's health or performance has improved such that the previous undertakings can safely be relaxed.

122. In those circumstances, the matter (including any new information available) will be considered by the Case Examiners with a view to the previously agreed undertakings being varied. This may be as a result of information provided to the Case Examiners by the Case Review Team, or the registrant may themselves wish to make an application to the Case Examiners via the Case Review Team.

123. If the Case Examiners consider that any undertakings should be varied, they must direct the Registrar to write to the registrant inviting him or her to agree in writing within 28 days to comply with the varied undertakings. The letter sent to the registrant should include the reasons for the Case Examiners' decision, details of the varied undertakings including their duration and whether they are intended for publication, and should also confirm whether any amendment is proposed to the public facing summary of the issues which is published on the GDC's website (and if so, what the proposed amendments are).

124. If the registrant does not accept the invitation to agree to all of the varied undertakings, the Case Examiners may either:

- immediately refer the allegation to a Practice Committee; or
- direct the Registrar to write again to the registrant, inviting him or her to agree in writing within 28 days to comply with the varied undertakings<sup>42</sup>.

#### *Termination*

125. If, on the other hand, the Case Examiners receive information such that they consider that the undertakings should cease to apply, they must direct the Registrar that the undertakings should no longer apply and that the allegation should not be considered further<sup>43</sup>. This may arise in circumstances where the Case Examiners are satisfied that the registrant has remedied the concerns such that there is no longer a real prospect of their fitness to practise being found to be impaired by a Practice Committee.

126. Otherwise, prior to the end of the period for which the undertakings (or varied undertakings) are in force, a registrant's case will be reviewed by the Case Examiners. Where the Case Examiners are satisfied that there is no longer a real prospect of the registrant's fitness to practise being found to be

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<sup>42</sup> see Rule 6B(4) of the Rules

<sup>43</sup> see Rule 6B(2)(b) of the Rules

impaired by a Practice Committee, the Case Examiners may direct that the undertakings should no longer apply and that the allegation should not be considered further.

127. Where, however, the Case Examiners consider that there remains a real prospect of a Practice Committee finding that the registrant's fitness to practise is impaired, the Case Examiners may either agree varied undertakings, or may determine that the original allegation should be considered by a Practice Committee.

#### Which Practice Committee?

128. The Act provides for the referral of single allegations as follows<sup>44</sup>:

- an allegation of deficient professional performance should be referred to the Professional Performance Committee;
- an allegation of adverse physical or mental health should be referred to the Health Committee;
- any other allegation should be referred to the Professional Conduct Committee (this will include an allegation of misconduct, caution or conviction, or the finding of another regulatory body).

129. For the most part, the GDC's Practice Committees have identical functions and powers, with some minor exceptions as follows:

- Only the PCC can deal with applications for restoration onto the Register.
- The 2006 Rules identify the PCC as the appropriate PC to deal with matters relating to fraudulent entries on the Register.
- Under Rule 25 of the 2006 Rules, only the PCC and PPC can hear cases against more than one registrant at the same time.

130. Where multifactorial allegations relating to the same registrant have been referred to the Case Examiners, and the Case Examiners determine that two or more different allegations ought to be considered by a Practice Committee, as follows:

- deficient professional performance and any other ground;
- adverse physical or mental health and any other ground,

the Case Examiners shall, if they do not agree undertakings, refer those allegations to whichever one of the Practice Committees they consider most appropriate<sup>45</sup>. The Practice Committees have the power to hold all or part of a hearing in private where the circumstances in Rule 53 are made out.

131. Factors which the Case Examiners may wish to consider when deciding which Practice Committee to refer two or more allegations to, include:

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<sup>44</sup> see section 27A(4)(a)/36O(4)(a) of the Act

<sup>45</sup> see section 27A(6)(a)/36O(6)(a) of the Act

- what the dominate element of the case is;
- whether another case regarding the same registrant has already been referred to a particular Practice Committee, such that it may be possible for all cases to be heard by the same committee at the same time.

132. In making this decision the Case Examiners will have regard to the over-arching objective to protect the public, taking into account: the benefit of a Practice Committee having a holistic view of the registrant’s practice; the interest of registrants and the public in proceedings being pursued expeditiously and in a proportionate manner. Accordingly, the Case Examiners may wish to refer any new allegations to the Practice Committee that is already seized of allegations concerning the registrant, provided the Case Examiners are content that the particular Practice Committee is best placed to deal with dominant element of the allegations.

### Interim Orders

133. An IOC can make an order suspending a registrant’s registration, or imposing conditions upon their registration, for a period of up to 18 months<sup>46</sup>.

134. Any interim order imposed by the IOC must be reviewed within 6 months of the order being made and after that every 6 months. A registrant may however request an earlier review, once 3 months has elapsed since the last review. In addition, any IOC order which has been amended from an interim suspension order to an interim conditions of practice order or vice versa, or where an extension of the order has been obtained (as per paragraph 134 below), may need to be reviewed within 3 months, rather than the usual 6 months<sup>47</sup>. An order may also be reviewed where new evidence relevant to the order becomes available.

135. If it wishes to extend the interim order beyond the period initially set by the IOC, the Council may apply to the High Court (in England and Wales) or the Court of Session (in Scotland) for the order to be extended.

136. The power for the Case Examiners to refer an allegation or allegations to the IOC arises:

- where they have determined that an allegation or allegations ought to be considered by a Practice Committee<sup>48</sup>;
- where they have adjourned consideration of an allegation for further enquiries to be conducted by the Registrar<sup>49</sup>;
- where they fail to agree and refer the allegation (or allegations) to the Investigating Committee;
- where they are conducting a Rule 6E review<sup>50</sup>; and

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<sup>46</sup> See sections 32 (*dentists*) and 36V (*dental care professionals*) of the Act

<sup>47</sup> Sections 32(11) (*dentists*) and 36V(11) (*dental care professionals*) of the Act set out when the interim order must be reviewed within 3 months, rather than 6 months.

<sup>48</sup> in accordance with section 27A(4A)/(6A) or section 36O(4A)/(6A) of the Act

<sup>49</sup> In accordance with Rule 5(3) of the Rules. NB the Act and Rules are silent as to the threshold test and as per *Perry v Nursing and Midwifery Council* [2013] EWCA Civ 145 the IOC may make an order where a decision has not yet been made that there is a case to answer

<sup>50</sup> in accordance with Rule 6E(4) of the Rules

- otherwise at any time between the referral of a case to a Practice Committee and the hearing of that case commencing<sup>51</sup>.
137. In those circumstances, if one or both of the Case Examiners consider it appropriate<sup>52</sup>, the Case Examiners may refer an allegation or allegations to the IOC, which can consider whether it is necessary to impose an interim suspension order or an interim conditions of practice order as an emergency measure pending investigation and determination of the case.
138. However, the Case Examiners do not have the ability to refer an allegation or allegations to the IOC where they have determined that the allegation or allegations ought to be considered by a Practice Committee and they agree undertakings, or, if they do not agree undertakings, where the hearing before a Practice Committee has commenced (or, where there is not to be a hearing, the Practice Committee have begun to consider written statements or representations).
139. In addition, the Case Examiners should be aware that the Registrar also has the power to refer a matter to the IOC<sup>53</sup> and should take into account:
- whether an interim order is already in place and, if so, the nature and likely duration of that order;
  - whether the IOC has previously considered the matter but has declined to impose any interim order. If so, in the absence of any new information, it would be highly unusual for the allegation to be referred to the IOC for a second time; and
  - that the IOC can only impose an interim order when it 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.
140. As set out above, the test for the Case Examiners to refer a case to the IOC is simply whether it considers it *appropriate* to do so in all the circumstances. However, in considering whether it is appropriate to refer a case the Case Examiners should bear in mind that, as set out below, the IOC will apply a different test.

#### *Public protection*

141. For example, before the IOC can impose an order on the basis that it is necessary for the protection of the public, it must be satisfied on the information before it that there is a real risk of significant harm (actual or potential) to the health, safety or well-being of a patient, visitor, colleague or other member of the public if the practitioner is allowed to practise without restriction. In assessing the risk to members of the public, the IOC will consider the seriousness of the matter, and the cogency and weight of the evidence, including evidence about the likelihood of recurrence while the matter is investigated.
142. As such, when considering whether to refer a matter to the IOC, the Case Examiners should take into account the seriousness of the risk of harm (actual or potential) if the registrant were to continue to hold unrestricted registration.
143. In those circumstances, delay may be fatal to the application, and the longer the regulator takes to apply for an interim order without good reason, the less likely it is that an order based on public protection will be made by the IOC<sup>54</sup>. The IOC will also consider the *current* risk posed by the registrant, and, bearing in

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<sup>51</sup> in accordance with section 27A(4A)/(6A) and section 36O(4A)/(6A) of the Act and section 27A(6B)/36O(6B) of the Act. This power is explained in more detail at paragraphs 149 - 152 below

<sup>52</sup> see Rule 5(4) of the Rules

<sup>53</sup> section 27(5)(b) of the Act provides that the Registrar may, at any time before the Case Examiners have begun to consider an allegation, refer the allegation to the IOC

<sup>54</sup> *Bradshaw v General Social Care Council* [2010] UKFTT3 (HESC)

mind the principle of proportionality, will balance the need to protect the public against the needs of the registrant, considering the impact of the order on the registrant both professionally and financially<sup>55</sup>.

#### *Public interest*

144. The IOC may also impose an order where it is otherwise in the public interest to do so i.e. in order to maintain public confidence in the profession and to declare and uphold proper professional standards. However, it will be a relatively rare case where an order is made solely in the public interest and the standard is a high one<sup>56</sup>.
145. In deciding whether to impose an interim order, the IOC will consider whether serious damage will be caused to public confidence in the profession and the maintenance of good standards if an order is not imposed, and whether an informed member of the public looking on would be surprised if the IOC did not make an order in respect of a matter that was later found proved.
146. Although the word “necessary” is not used for this ground, it does at least carry some implication of necessity and desirability, because the imposition of any order must be proportionate.
147. Again, the IOC must balance the need to protect the wider public interest against the Registrant’s own interests, including the impact of any order on the Registrant both professionally and financially<sup>57</sup>. The IOC will take the minimum necessary and appropriate steps to address the concerns identified.
148. In cases where there are criminal proceedings, the IOC will consider the seriousness of any police charges as well as the acceptability of a decision either to make or not make an order, should the Registrant later be convicted or acquitted (including the requirement to maintain public confidence in the profession).

#### *Registrant’s own interests*

149. This ground may apply where the Registrant is ill and does not recognise it, or if there are other factors suggesting lack of insight where the Registrant needs to be protected from him or herself. The IOC will look at the risk of harm in the future if there is no restriction on registration.

#### *Power to make a referral to the IOC after the Case Examiners have considered a matter, but prior to the commencement of a Practice Committee hearing*

150. As set out at paragraph 135 above, the Act allows the Case Examiners to make an IOC referral at any time after their consideration of the matter, until the Practice Committee hearing has commenced.
151. In practice, the Council (i.e. the GDC’s in-house prosecutions team or external solicitors) will provide the Case Examiners with the relevant information and will ask the Case Examiners to consider whether to make an IOC referral based on that information.
152. It should however be noted that, in contrast to the provisions for notification of the registrant and informant and the opportunity for them to provide observations when the Case Examiners initially consider an allegation or allegations, there is no such similar provision in the Act or Rules allowing the registrant or informant opportunity to comment in advance of a potential IOC referral at this stage of the proceedings.

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<sup>55</sup> *Houshian v General Medical Council* [2012] EWHC 3458

<sup>56</sup> *Sheikh v General Dental Council* [2007] EWHC 2972 (Admin)

<sup>57</sup> *Houshian v General Medical Council*, supra

153. In such circumstances, if a decision is made to refer the case to the IOC, the Case Examiners must explain carefully how that decision was reached, including identifying the basis (or bases) upon which referral is considered appropriate, so that the registrant can fully understand the reasons for their decision.

## Part 5: Ought not to be considered by a Practice Committee

154. Where the Case Examiners determine that the allegation ought not to be considered by a Practice Committee, they may:
- issue the registrant with a warning regarding his or her future conduct, performance and practice; or
  - give advice to the registrant regarding his future conduct, performance and practice; or
  - take no further action.
155. The Case Examiners may also issue advice on any issue arising in the course of the investigation to any other person involved in that investigation.
156. If the Case Examiners determine that the allegation ought not to be considered by a Practice Committee, they should consider the available disposal options. The Case Examiners may be assisted in that regard by the decision making tool, which can be found at Annex A to this Guidance.

### No further action

157. If the Case Examiners determine that there is no real prospect of the allegation being established before a Practice Committee, they may conclude that it is appropriate to close the case without a warning or advice.
158. Examples of matters that may be appropriate to be closed without a warning or advice include cases where the Case Examiners have determined that there is no real prospect of any of the facts being established, or that any breach of Standards or other falling short identified was so minor as to justify no further action being taken.

### Advice

159. Where the Case Examiners determine that an allegation ought not to be considered by a Practice Committee, they may issue to the registrant advice regarding his or her future conduct, performance and practice<sup>58</sup>.
160. Advice does not affect a registrant's registration status, but the fact that advice was issued will become part of his or her fitness to practise history, and may need to be declared to current and prospective employers, insurers and other bodies. Accordingly, careful consideration should be given prior to issuing advice.
161. Advice should, usually, be issued where there is some evidence in support of the facts alleged. If the allegations are disputed the Case Examiners should clearly identify both why and how they have reached their conclusion, and their reasons for issuing advice.
162. Advice should be designed to ensure future compliance with *Standards for the Dental team* and associated guidance, and should clearly identify where the registrant needs to reflect on his or her future conduct, performance and practice.

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<sup>58</sup> as per section 27A(2)(a)/36O(2)(a) of the Act and Rule 6(2)(a) of the Rules

### Third party advice

163. Where the Case Examiners determine that an allegation ought not to be considered by a Practice Committee, they have the power under the Act and the Rules<sup>59</sup> to issue advice on any issue arising in the course of the investigation, to any other person involved in that investigation.
164. By virtue of the Interpretation Act 1978, a “person” is taken to include a body of persons corporate or unincorporate. This means that as well as giving advice to an individual (whether registered with the GDC or otherwise), the Case Examiners can give advice to a company or unincorporated association.
165. The Case Examiners should, however, proceed with caution bearing in mind that the third party concerned is unlikely to have had the opportunity to comment on any issues arising. In some circumstances, fairness may require the Case Examiners to adjourn to enable the third party concerned to provide representations on the issues before the Case Examiners make their final decision.

### Warnings

166. The Act and Rules provide that, if the Case Examiners determine that an allegation ought not to be considered by a Practice Committee, they may issue a warning to the person who is the subject of the allegation regarding their future conduct, performance and practice<sup>60</sup>.
167. The issuing of a warning allows the Case Examiners to indicate to a registrant that, whilst not requiring referral to a Practice Committee, their conduct, practice or behaviour represents a departure from the standards expected of the profession and should not be repeated.
168. Warnings, where published, also have the effect of highlighting to the wider profession that particular conduct or behaviour is unacceptable.

### *Criteria*

169. The issue of what is serious enough to require a warning is a matter for the Case Examiners. A warning may be appropriate where the Case Examiners consider:
- (i) there is a real prospect of the facts alleged being found proved;
  - (ii) there is a real prospect of the statutory ground (misconduct, deficient professional performance, etc.) being established;
  - (iii) there is no real prospect of a Practice Committee finding the registrant’s fitness to practise is currently impaired; but
  - (iv) there is evidence to suggest that the registrant’s conduct, practice or behaviour has fallen below the standard expected to a degree warranting a formal response by the GDC.
170. The GDC publishes Indicative Outcomes Guidance which provides decision makers with specific scenarios where a warning may be the most appropriate disposal for a case. These include (but are not limited to) where there has been a clear breach of, or departure from, the GDC’s Standards, but not a breach which is so significant that the case ought to be referred to a Practice Committee; or where there is a serious failing which has been remedied, and where there is a low risk of reoccurrence.

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<sup>59</sup> see section 27A(2)(b)/36O(2)(b) of the Act and Rule 6(2)(b) of the Rules

<sup>60</sup> see section 27A(2)(a)/36O(2)(a) of the Act and Rule 6(4)(a) of the Rules

171. The fact that the allegations are disputed does not preclude the Case Examiners from issuing a warning. In particular, case law establishes that there are circumstances where the issuing of a warning is appropriate, even where the factual basis of the allegation is disputed. However, a warning should only be issued where there is some evidence in support of the factual allegations, and if the alleged issues are disputed, the Case Examiners should clearly identify why they have preferred one person's evidence over another and both why and how they have reached their conclusion<sup>61</sup>.

#### *Process*

172. The GDC's Investigating Committee has had a longstanding power to issue a warning, without prior consultation, where they determined that an allegation ought not to be considered by a Practice Committee.

173. However, with effect from 1 November 2016, where both Case Examiners have considered a matter, and one or both are minded to give a warning, the registrant must be notified in writing. The registrant must also be informed that he or she is entitled to make written representations about the issuing of the warning, which must be received by the Case Examiners within the period of 28 days beginning with the date of the notice<sup>62</sup>.

174. The notification to be sent to the registrant will also include:

- (i) the reasons why the Case Examiners consider that a warning is appropriate in the circumstances of the particular case;
- (ii) details of the warning which the Case Examiners are minded to issue<sup>63</sup>;
- (iii) whether the Case Examiners are minded that the warning, if issued, should be published;
- (iv) a summary of the facts and particular concerns which led to the warning<sup>64</sup>; and
- (v) the duration of the warning that they are minded to issue.

175. In respect of the latter, a warning will be ordinarily be issued for a period of up to 24 months; however, ultimately, the duration of a warning will be for the Case Examiners to consider and decide, on a case by case basis, balancing the public interest against the interests of the registrant.

176. Factors which may lead the Case Examiners to consider that a warning should be issued for a shorter period (of up to 12 months) include where:

- the registrant has no previous fitness to practise history with the GDC i.e. is of previous good character;
- the incident was isolated and has not been repeated;
- a significant period of time has elapsed since the issues arose;

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<sup>61</sup> *Lutton v General Dental Council [2011] CSIH 62*

<sup>62</sup> see Rule 6C(1) of the Rules

<sup>63</sup> in drafting a warning the Case Examiners must ensure that they clearly state why the registrant's conduct or practice has, on balance, been identified to be deficient, and that they clearly set out any remedial action which is required to be taken. Further guidance on warnings in this context can be found in the case of *Lutton v General Dental Council [2011] CSIH 62*

<sup>64</sup> to be published alongside a published warning, or to be kept on file if the warning is unpublished

- the registrant has demonstrated appropriate insight into the shortcomings identified;
- the registrant has taken appropriate steps to remediate any issues raised, to avoid risk of repetition; and/or
- the conduct is not such that it liable to undermine public confidence in the profession.

177. Aggravating factors which may lead the Case Examiners to consider that a warning should be issued for a longer period (of between 12 and 24 months) include where:

- the registrant has previous fitness to practise history with the GDC<sup>65</sup>;
- the incident cannot be described as isolated, or there is evidence of subsequent repetition;
- there is limited insight on the registrant's part; and/or
- there has been disregard of the role of the GDC or other regulators with a public protection function.

178. The Case Examiners must then consider any representations made by the registrant before deciding whether or not to issue a warning<sup>66</sup>. Ultimately, however, a decision as to whether to issue a warning is at the discretion of the Case Examiners, and, under the GDC's Rules, a warning may be issued even if the registrant objects.

#### *Publication*

179. The Rules provide the Case Examiners with discretion to decide whether a warning should be published on the GDC's online register<sup>67</sup>. However, as a matter of policy, the GDC considers that a warning should be published save as set out in paragraph 180 below.

180. This is because publishing a warning will ordinarily be necessary in order to:

- (i) declare and uphold proper professional standards (i.e. in order to highlight to the wider professions that particular conduct is not acceptable);
- (ii) protect the public (for example, where a registrant has practised whilst unregistered, without appropriate indemnity insurance, or beyond scope of practice); and/or
- (iii) otherwise uphold the public interest (including in order to maintain public confidence in the professions and their regulation).

181. The GDC will not publish, as part of a warning, any information which directly relates to the health or private and family life<sup>68</sup> of the registrant concerned, or which directly relates to any identifiable third party. Otherwise, however, it will be for the Case Examiners to consider, on a case by case basis and balancing the public interest against the interests of the registrant, any exceptional circumstances giving rise to reason(s) why a warning which they are minded to issue should not be published.

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<sup>65</sup> see paragraphs 51 - 54 above

<sup>66</sup> see Rule 6C(2) of the Rules

<sup>67</sup> see Rule 6C(3) of the Rules

<sup>68</sup> i.e. the registrant's right to live his or her life privately, and to enjoy family relationships, without interference

182. A warning forms part of a registrant's fitness to practise history with the GDC. As such, it may be considered by GDC decision makers in the event that a further complaint or information is received in the future, and, even after the period of publication has expired, details will be made available on request to relevant enquirers, including prospective employers, overseas authorities, and otherwise where it is in the public interest for such information to be disclosed<sup>69</sup>. Where, however, a warning has been revoked in accordance with the review provisions below, it will be removed from the register. The GDC's records will indicate that the warning was issued but was revoked, including the reasons for revocation.

#### Revocation of interim orders

183. Where a registrant is subject to an interim order, and the Case Examiners determine that the allegation or allegations which they are considering ought not to be referred to a Practice Committee, they must revoke, with immediate effect, any interim order imposed in respect of the allegation or allegations that are not being referred<sup>70</sup>.

184. A difficulty arises where a registrant has an interim order in place owing to a number of different issues, some of which may still be under investigation or awaiting a Practice Committee hearing. In those circumstances, the Case Examiners should indicate in their determination that the interim order remains in effect in relation to any outstanding matters but **not** in relation to the allegation or allegations being closed.

185. It is then a matter for either party to consider whether it wishes to make representations that new evidence relevant to the making of the order has become available such that an early review of the interim order is appropriate.

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<sup>69</sup> sections 33C(3)/36Z(3) of the Act state that the Council or the Registrar may disclose to any person any information relating to a person's fitness to practise as a dentist, including information relating to an allegation of impairment, where they consider it to be in the public interest for the information to be disclosed

<sup>70</sup> See section 27A(10)/36(10) of the Act

## Part 6: Review of decision to refer to a Practice Committee

186. Under Rule 6E of the Rules, the Case Examiners may review, and if they consider it appropriate revise a determination made by them that an allegation or allegations ought to be considered by a particular Practice Committee, on an application made by:

- (i) the Council (i.e. the GDC's prosecutions team or external solicitors);
- (ii) the Registrar (for these purposes, the Registrar's powers are generally exercised by the GDC's Casework team);
- (iii) the registrant; or
- (iv) the informant<sup>71</sup>.

187. In addition, where (pursuant to section 27B(4) or section 36P(5) of the Act) a Practice Committee considers that any allegation (or allegations) should not have been referred to it by the Case Examiners, it may refer that allegation (or allegations) back to the Case Examiners<sup>72</sup>.

### Preliminary issues

188. Before considering an application, the Case Examiners must be satisfied that the decision is one which they have the power to review. In particular, the Case Examiners may only review a decision:

- that an allegation ought to be considered by a Practice Committee<sup>73</sup>;
- which has been made by them (and not a decision made by the Investigating Committee);
- where there is to be a hearing before a Practice Committee, that hearing has not yet commenced<sup>74</sup>, or, alternatively, where there is not to be a hearing, the Case Examiners may only carry out a review before the Practice Committee have begun to consider written statements or representations<sup>75</sup>.

189. In addition, as a preliminary matter, the Case Examiners must be satisfied that any other person entitled to make a review application has been provided with a reasonable opportunity to submit written representations in response to the application for review<sup>76</sup>.

190. What amounts to a "reasonable opportunity" is likely to depend on all of the circumstances of the case, but may include,

- the length and complexity of the application for review;
- the number and complexity of the allegations to which the application for review relates; and

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<sup>71</sup> see Rule 6E(1)(b) of the Rules

<sup>72</sup> see Rule 6E(1)(a) of the Rules

<sup>73</sup> the IOC is not a "Practice Committee" within the meaning of the Act, and therefore the Case Examiners are unable to review an IOC referral decision on a stand-alone basis; in addition, they are unable to review a determination that a matter should be closed with a warning, advice, or no further action, for which separate powers of review exist

<sup>74</sup> see Rule 6E(b)(i) of the Rules

<sup>75</sup> see Rule 6E(b)(ii) of the Rules

<sup>76</sup> in accordance with Rule 6E(5) of the Rules

- the quantity of documentary evidence in the case.
191. As a general rule, all those entitled to comment will be provided with 14 days in which to submit written representations in response to the application. The Case Examiners may consider that in general, this is a reasonable opportunity, but that there may be exceptional circumstances in which an extended period should be provided to a relevant person or persons, or on occasion (including where the scheduled Practice Committee hearing of the case is imminent) where a shorter period may be appropriate.
  192. Any written representations received will, with limited exceptions, be circulated for information purposes to those other persons entitled to make a review application. On occasion, this will result in further comments being received regarding the review application. Any such “comments upon comments” which are received will be circulated and will then be provided to the Case Examiners, who will decide whether to take them into account, giving reasons for that decision.
  193. In that regard, the Case Examiners may also wish to note that what is required by the Rules is that those entitled to comment must have a reasonable opportunity to submit written representations in response to **the application for review**. Any “comments upon comments” are not responses to the application for review and therefore the Case Examiners are not strictly required to consider them.
  194. If, however, such “comments on comments” are received before the application is allocated to the Case Examiners and those comments would be likely to have an impact on the outcome of the application, and there is good reason why the point relied on was not raised previously, the Case Examiners should consider them.
  195. In practice, a situation may arise whereby further material, prepared in connection with the Practice Committee hearing, is served by the Council or the registrant as part of their comments on the application, and the other party to the proceedings wishes to respond to that further material. On such occasions, the Case Examiners may consider that such comments should be taken into account when reaching their decision.
  196. Finally, the Case Examiners do not, when considering an application under Rule 6E, have their usual powers of adjournment and are therefore unable to adjourn the case for further investigations to be conducted. However, the Case Examiners may adjourn for legal or administrative reasons, which may include where they wish to seek legal advice, or require clarification on particular evidence or submissions.

#### Substantive considerations

197. Once they are satisfied that they have jurisdiction to consider the matter, and that all relevant persons have been provided with a reasonable opportunity to submit written representations in response to the application, the Case Examiners should go on to consider whether to review and, if appropriate, revise, their previous determination that an allegation (or allegations) ought to be referred to a Practice Committee.
198. In those circumstances, the Case Examiners are considering whether they should maintain the referral of the allegation (or allegations) or revise the determination of the original referring Case Examiners by determining that the allegation (or allegations) ought to be referred to a different Practice Committee<sup>77</sup>, or that the allegation (or allegations) ought not to be referred to a Practice Committee.
199. The Case Examiners should approach this by determining:

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<sup>77</sup> in that regard, the Case Examiners do not have the power, upon a Rule 6E review, to agree undertakings

- (i) whether or not, on the basis of the information before them, there is a real prospect of the facts supporting the allegation (or allegations) of misconduct, deficient professional performance etc. (as set out in the Notice of Hearing or draft charges if the case has reached that stage, or as originally referred if not) being established;
  - (ii) (if so) whether there is a real prospect of a Practice Committee finding the statutory ground or grounds (misconduct, deficient professional performance etc.) to be established; and
  - (iii) (if so) whether or not there is a real prospect of a finding of current impairment being made.
200. In making that assessment, the Case Examiners should not re-open any particulars of allegation which the initial referring Case Examiners did not consider met the real prospect test. Instead, one of the aspects which the Case Examiners should consider is the current state of the case as identified within the Notice of Hearing (if issued) or draft charges (if available) and the evidence collated since the original referral, as this will have a bearing on whether or not there is a real prospect of the facts supporting the allegation (or allegations) of misconduct, deficient professional performance etc. being established.
201. Proximity of a Practice Committee hearing may prevent a Rule 6E application from being put before the Case Examiners. However, once a case is before the Case Examiners, proximity of the Practice Committee hearing will not ordinarily be a relevant consideration in whether the Case Examiners should review, and if appropriate, revise their original decision.
202. Where the Case Examiners determine that the allegation (or allegations) of misconduct, deficient professional performance etc. ought not to be considered by a Practice Committee, they may conclude the case with no further action, or they may issue a warning or advice to the person who is the subject of the allegation regarding his future conduct, performance and practice (and may also or alternatively issue advice to any other person involved in the investigation on any issue arising in the course of the investigation).

#### Interim Orders

203. If, upon review, the Case Examiners determine that an allegation (or allegations) ought not to be referred to a Practice Committee, they must at the same time, revoke with immediate effect any interim order which has been made in respect of that person in consequence of that allegation (or allegations)<sup>78</sup>.
204. If, on the other hand, the interim order was imposed as a consequence of a different allegation or allegations, or on the basis of the current allegation or allegations in conjunction with another separate (and as yet unresolved) allegation or allegations, which is/are not also being closed by the Case Examiners, the Case Examiners should not revoke the interim order. Instead, the order may be reviewed at the next IOC hearing<sup>79</sup>.
205. Alternatively, where the Case Examiners determine that the referral should be maintained, or that the allegation ought to be considered by a different Practice Committee, they may also refer the allegation (or allegations) to the IOC. When considering whether such a referral is appropriate, the Case Examiners should consider the guidance set out in paragraphs 132 - 152 above.

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<sup>78</sup> see Rule 6(5) of the Rules

<sup>79</sup> in accordance with the provisions of Section 32(5)/36V(5) of the Act

## Part 7: Review of warnings

206. Under the Act and Rules, the Case Examiners have a power to review a determination made by them to issue a warning<sup>80</sup>.
207. The power of review will enable the Case Examiners to review a warning where an application is made by the person to whom the warning was issued (i.e. the registrant) or by the Registrar (i.e. by the GDC itself). That application must be made within two years of the date on which the original determination was made.
208. If, upon review, the Case Examiners consider it appropriate to do so, they may revoke the warning and direct the Registrar to remove details of the warning from the entry in the register relating to the person to whom the warning was issued.

### Application

209. In order for an application to review a warning to be valid under the terms of the Act, it must:
- (i) be made either by the registrant or the Registrar (i.e. the GDC itself);
  - (ii) be made before the end of the period of two years beginning with the date on which the original determination was made; and
  - (iii) relate to a determination to issue a warning made by the Case Examiners rather than by the Investigating Committee.
210. The Act does not require an application for review of a warning to be made in any specific format. However, an application should be made in writing to the Case Examiners (c/o the caseworker who was previously responsible for the matter) and should set out the basis on which review is requested.
211. When an application for a review of a warning is received from the registrant to whom the warning was issued, it will, provided that it meets the requirements set out in paragraph 208 above, be placed before the Case Examiners for consideration.
212. Under the Act, an application to review a warning may also be made by the Registrar. In those circumstances, the registrant who is the subject of the warning should be informed of the application and should be invited to comment, prior to the matter being considered by the Case Examiners.
213. The GDC will, depending on the particular circumstances of the case, endeavour to ensure the review is conducted by different personnel to those who made the original decision; however this may not always be necessary depending on the particular circumstances of the case, or possible for operational reasons.

### Factors to be considered by the Case Examiners: initial consideration

214. The Case Examiners will consider the application (including any supporting documents provided by the applicant, together with any comments made by the registrant, if the application is being made by the Registrar), the original determination, and the bundle of documents available to the original Case Examiners.
215. At this initial consideration stage, the Case Examiners are not considering whether or not the original decision to issue a warning should be revoked, but the preliminary question of whether to conduct a full

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<sup>80</sup> see section 27A(11)/36O(11) of the Act and Rule 6D of the Rules

review. The Case Examiners should bear in mind that, at this early stage, they will be considering relatively limited information, in that comments have not yet been sought from any potentially interested parties, and nor has the Registrar had the opportunity to conduct any further relevant enquiries.

216. As such, the threshold for considering whether to conduct a review is relatively low, and the Case Examiners should, at the initial stage, examine whether the application has some merit in that:

- there is evidence that there *may have been* a material flaw in the original decision to issue a warning, and/or
- there is new information, either immediately available or potentially available to the GDC upon enquiry<sup>81</sup>, which now indicates that it *may not have been* appropriate to issue a warning.

217. If so, the Case Examiners may consider that it is appropriate to conduct a review of the original decision.

#### *Material flaw*

218. The reviewing Case Examiners should not conclude that the original decision was materially flawed simply because they would have made a different decision.

219. The reviewing Case Examiners should also bear in mind that not every identifiable defect in the process followed to date, or in its the previous decision, will necessarily amount to a *material* flaw in the original decision.

220. Ultimately, in order for the Case Examiners' original decision to be considered to be *materially* flawed, the flaw or flaws identified must be capable of having made a difference to the ultimate outcome i.e. the issuing of the warning. In other words, the reviewing Case Examiners should consider whether the flaw or flaws identified may have had an impact on the original Case Examiners and may have influenced their judgment.

221. Some examples of what may amount to a material flaw are set out at paragraph 224 below.

#### *New information*

222. The Act does not define what amounts to "new" information. However, in order for information to be considered "new" information, it must not have been in the possession of the GDC at the time the original decision was made. If the information was in the hands of the GDC at that time, but was not provided to the Case Examiners, the failure to provide the information to the Case Examiners may instead be considered under the "material flaw" ground referred to above.

223. New information may be information of a factual nature, or further expert evidence. The new information should, however, be relevant to the specific allegation of impairment which formed the basis of the Case Examiners' original decision.

#### Overlap with judicial review

224. Decisions of the Case Examiners, including a decision to issue a warning (published or unpublished) may be subject to challenge by way of judicial review. However, judicial review is a remedy of last resort and the claimant must generally demonstrate that they have exhausted all alternative remedies.

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<sup>81</sup> see paragraph 227 below

225. As such, it is likely that in the Case Examiners' power to review a warning will be used as an alternative to judicial review. In practice, many of the grounds for judicial review can also be said to be grounds for considering that the decision was materially flawed, for example that:

- the original Case Examiners misinterpreted the law governing the decision;
- the original Case Examiners took into account irrelevant considerations, or failed to take into account relevant considerations;
- the decision was so unreasonable that no reasonable decision-maker could have come to it i.e. it was outside a reasonable range of decisions;
- the GDC did not comply with its own Rules during the decision-making process (for example, in failing to allow the registrant adequate opportunity to comment upon the allegation as required by Rule 6(3));
- there was failure to provide all relevant evidence to the Case Examiners, for example observations provided by the registrant (or informant) or records;
- inaccurate information was provided to the Case Examiners, for example in relation to the registrant's fitness to practise history;
- there are allegations of actual bias, or the appearance of bias;
- there was failure to give adequate reasons; and/or
- the case proceeded on an erroneous basis, for example upon the assumption that the registrant has been convicted of a criminal offence (or has an adverse finding from another Regulator) when this is not in fact the case<sup>82</sup>.

#### Review process

226. Having given the request for review initial consideration, the Case Examiners must prepare a written determination, setting out the reasons for their decision to review or not to review the original decision, and must notify the Registrar (i.e. the GDC's casework team) accordingly.

227. The GDC's casework team will then inform the applicant (and registrant, if the application is made by the Registrar) of the Case Examiners' decision and the reasons for it. If the Case Examiners decide not to review their original decision, the applicant (and registrant, if the application is made by the Registrar) will be informed of the outcome and no further action will be taken.

228. If, on the other hand, the Case Examiners decide to review their original decision, the Registrar will notify:

- (i) the registrant;
- (ii) the maker of the allegation (if any); and

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<sup>82</sup> this potential ground for review overlaps with the principle established in *Fajemisin v General Dental Council* [2013] EWHC 3501 (Admin) i.e. that in addition to correcting 'slips', a regulatory body can revisit a decision that was made in ignorance of the true facts when the factual basis on which it proceeded amounted to a fundamental mistake of fact

- (iii) any other person who in the opinion of the Case Examiners has an interest in the decision to issue a warning,

of the decision to review and the reasons for that decision.

- 229. The Registrar will, at the same time as notifying the above individuals of the Case Examiners' decision to conduct a review, provide any new information which is available, and will seek representations from them regarding the review of the decision.
- 230. The Registrar may also carry out any investigations which the Registrar considers are appropriate to facilitate the making of the Case Examiners' ultimate decision. This may include obtaining further factual or expert evidence, or obtaining legal advice on any of the issues raised.
- 231. After any appropriate investigations have been carried out, the matter will be considered again by the Case Examiners.

#### Review decision

- 232. The decision as to whether the original decision *was* materially flawed, or that there is new information which now indicates that it *was not appropriate* to issue a warning, is ultimately a question of judgment for the reviewing Case Examiners, taking into account all the relevant information, including representations provided by those entitled to comment, and material obtained during the course of any further investigations conducted by the Registrar.
- 233. Where the reviewing Case Examiners, taking account of all relevant material, conclude that the original decision was materially flawed for any reason, or that there is new information which now indicates that it was not appropriate to issue a warning, the reviewing Case Examiners must:
  - (i) revoke the decision to issue a warning; and
  - (ii) if the warning has been published, direct the Registrar to remove details of the warning from the entry in the register relating to the registrant.
- 234. Where, on the other hand, the reviewing Case Examiners conclude that the original decision was not materially flawed, or that there is no new information which now indicates that it was not appropriate to issue a warning (as relevant), they must decide that the original decision to issue a warning should stand.
- 235. The reviewing Case Examiners' power of review under the Act is limited to revoking the warning, or determining that it should stand; the reviewing Case Examiners do not have the power to amend the warning issued, or to substitute it with advice.
- 236. A situation may therefore arise where a warning based on two elements has been issued, but after the review process, one of those elements may have fallen away. Such a situation is more likely to arise where there is new information in relation to one element of the original case.
- 237. In those circumstances, the reviewing Case Examiners should consider carefully whether or not the warning should be rescinded. The test under the Rules, and therefore the key question for the reviewing Case Examiners, is whether the new information now indicates that it was not appropriate to issue the warning.
- 238. In considering the question of appropriateness, the reviewing Case Examiners will wish to consider all the facts and circumstances of the case, using as a starting point the reasons given by the original Case Examiners for imposing a warning.

239. Having considered all the facts and circumstances, the reviewing Case Examiners may, in particular, wish to examine whether the element that remains, post review, would be insufficient to amount to misconduct (bearing in mind that misconduct denotes *serious* acts or omissions, suggesting a significant departure from what would be proper in the circumstances), or is otherwise insufficiently serious for a warning to have been imposed.
240. The reviewing Case Examiners should also bear in mind that there is an issue of fairness in leaving a warning in place which contains reference to matters which have now fallen away. In considering fairness, the reviewing Case Examiners should take into account any submissions made by the registrant, and also that, as a matter of general principle, there is a degree of censure implicit in a warning, which can have a significant professional impact upon a registrant, and which is unlikely to be justified where an element of the warning can no longer be supported.
241. Overall, if the reviewing Case Examiners consider that the new information now indicates that it was not appropriate to issue a warning, the warning must, under the terms of the Rules, be revoked in its entirety.

#### Outcome

242. Where the reviewing Case Examiners have reviewed a decision, they must notify in writing and as soon as reasonably practicable, the registrant, the maker of the allegation (if any) and any other person who in the opinion of the reviewing Case Examiners has an interest in receiving the notification. The notification should include the decision made and the reasons for it.

## Part 8: Rule 9 review

243. From 1 November 2016, the Registrar will have the power to review decisions, made by the Registrar, the Case Examiners, or the Investigating Committee, to close cases without referring them to a Practice Committee<sup>83</sup>. That process is known as the “Rule 9 review” process, and further information about the grounds for review is contained in the GDC’s *Guidance on the Registrar’s Rule 9 power of review*.
244. As set out in the Guidance, if the Registrar’s decision is that the allegation should be referred back to the Case Examiners, the matter will be listed for reconsideration by them as soon as possible.
245. When the matter is reconsidered by the Case Examiners, they will be provided with the bundle supplied to them originally and their original determination, together with the application for review, any new information gathered as part of the review process, any comments on the review application and the Registrar’s final determination as provided under Rule 9(10).
246. The Case Examiners should then consider the matter afresh in accordance with the GDC’s Act and Rules. The Case Examiners will have open to them all the options which would have been open to them originally, i.e. referral to a Practice Committee (with or without referral to an Interim Orders Committee), agreement of undertakings, or closure of the case with a warning, advice or no further action.
247. At the fresh consideration stage, the registrant and informant will not be routinely provided with a further opportunity to comment, but if any further observations are received which would be likely to have an impact on the matter under reconsideration, and there is good reason why the point relied on was not raised previously, the Case Examiners should consider them.

## October 2016

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<sup>83</sup> see section 27(6A)/36N(6A) and section 27AB/36OB of the Act and Rule 9 of the Rules