

Response to General Dental Council consultation on guidance on agreeing Undertakings and issuing Warnings for Case Examiners (Amendments to the Fitness to Practise Rules)

March 2016

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk
- 1.2 As part of our work we:
- Oversee nine health and care professional regulators and report annually to Parliament on their performance
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice.

2. General comments on new powers for GDC Case Examiners

- 2.1 We have previously expressed our views on Case Examiners being given powers to agree undertakings, both to the Department of Health in our response to the consultation on the draft Section 60 order in November 2014 and in our response to the GDC consultation on the amendments to their Rules to incorporate the Section 60 order provisions.
- 2.2 Whilst these powers have now been granted to the GDC and will come into effect later this year, we remain concerned that these powers blur the boundary between the investigation and adjudication of a case, as Case Examiners can now agree undertakings for cases where there is a realistic prospect of a panel finding impairment. This is contrary to the principle that all cases with a realistic prospect of a finding of impairment should be disposed of in a public forum by a panel that is independent of the investigation process i.e. a practice panel. We laid out the four principles relating to the disposal of cases that we believe are

necessary for public protection in responses to previous consultations by the Department of Health and the GDC.^{1 2}

- 2.3 As previously highlighted, another principle that we believe is essential to ensure sufficient public protection is that all decisions in relation to cases that meet the real prospect test should be subject to scrutiny by an independent body, currently the Authority. This change will affect our ability to scrutinise the performance of the GDC in this way as we only have power to review decisions that have been signed off by a practice panel. We will therefore not be able to do this if undertakings are agreed by Case Examiners or the Investigating Committee, and the case is not taken to a panel hearing.
- 2.4 To seek to retain public confidence in the GDC's process with these new powers in place, it is important for there to be absolute clarity on the type of case where it may be appropriate for Case Examiners to agree undertakings.
- 2.5 In addition, the process for how cases of this nature will be dealt with must be clear to ensure that there is no negative effect on public protection. This guidance will therefore fulfil an important function in ensuring clarity and maintaining public and professional confidence in the process and we welcome the GDC's work to develop this.
- 2.6 We recognise the reasons why the GDC have sought to introduce Case Examiners to speed up processing of cases and improve consistency of decision-making. However, we also would highlight our point raised in our previous response to the consultation on changes to the GDC rules that these additional powers – not only the agreement of undertakings but also the monitoring of compliance - will entail significantly higher workload for the GDC and therefore the need to plan staffing capacity and sufficient training accordingly.

3. General comments on draft guidance

- 3.1 We welcome the chance to comment on the GDC 'Guidance on agreeing Undertakings and issuing Warnings' for Case Examiners and for the Investigating Committee. In addition to our answers to the questions in the consultation document we have outlined some general points which relate to this guidance.

Undertakings

- 3.2 Allowing Case Examiners to dispose of cases which meet the real prospect test through undertakings is a major change in the Fitness to Practise process. The guidance must therefore be clear about what criteria would need to be met to allow a case to be disposed of in this way. Whilst the guidance does highlight

¹ Professional Standards Authority response to Department of Health consultation on draft section 60 proposals to amend the General Dental Council's governing legislation
<http://www.professionalstandards.org.uk/docs/default-source/psa-library/141118-psa-response-to-dh-gdc-s60-final.pdf?sfvrsn=0>

² Professional Standards Authority response to GDC consultation on amendments to rules - Section 60 – Case Examiners <http://www.professionalstandards.org.uk/docs/default-source/psa-library/150112-psa-resp-to-gdc-rules-final.pdf?sfvrsn=0>

some points to consider in deciding whether undertakings are appropriate (in the section entitled 'Criteria'), as it stands the section is vague e.g. (with use of terms such as "may", "could" and "likely to"), and repetitive (e.g. several mentions of undertakings needing to be workable and of the need for outcomes to declare standards). Its structure and clarity could be improved (e.g. it does not currently describe or follow a decision-making process), and also doesn't pick up on the most important points the Case Examiners should take into account when determining how to dispose of a case (see below).

- 3.3 We note the point made in the 'Process' section (paragraph 20) about undertakings possibly not being appropriate if the registrant refuses to admit the facts or agree that their fitness to practise is impaired. In our view this is unclear and does not go far enough: the offer of undertakings should only be made if there is agreement from the registrant on both these points. Any refusal on these points suggests that either the facts are contested, or the registrant shows no insight – in both situations, the case should be referred to a Practice Committee. Agreement on facts and impairment is also crucial to provide clarity for the public and employers, and for use in potential future proceedings against the registrant – it should therefore feature in the section on criteria and not just in the section on process.
- 3.4 In addition, there is insufficient information about the type or seriousness of the cases Case Examiners should be disposing of through undertakings, or any guidance on the circumstances in which they might be advised to refer a case to the Practice Committee.
- 3.5 We were also unclear why the section on the criteria for determining whether undertakings are appropriate was so different in both form and content from the parallel section on warnings.

Other comments

- 3.6 As the introduction of Case Examiners involves introducing an additional stage in the Fitness to Practise process, we suggest that the guidance would be improved by the addition of a diagram or flow chart at the front of the document. This would highlight the different stages that a complaint will go through and where this particular part of the process sits. This would also help Case Examiners to understand their relationship to the other parts of the overall process e.g. the Practice Committees and therefore when it might be appropriate to refer a case on.
- 3.7 The guidance could be clearer on the relationship with the Investigating Committee. We note that the GDC already has guidance for its Investigating Committee (IC) which essentially has the same jurisdiction as Case Examiners. The guidance on agreeing undertakings clarifies that in the future, a case will only go to the IC where the two Case Examiners do not agree on a case. However, there currently appears to be inconsistency between this draft guidance and the current guidance for ICs which states that the role of the Practice Committee is to determine whether the facts are proven, whether impairment is proven and what sanction is appropriate. We anticipate that the guidance for Investigating Committees would be updated as soon as possible to

reflect the new powers they have and ensure that they are directed to follow this additional guidance on agreeing undertakings where appropriate.

- 3.8 The wording of some of the guidance makes the process seem more like a complaints procedure when this is in effect a precursor to a fitness to practise procedure, for example the use of ambiguous words like 'may' and 'could'. The GDC's primary role is public protection, as opposed to resolving complaints to the satisfaction of a complainant, therefore it will be important to ensure that this is reflected in the language used.
- 3.9 Since the agreement of warnings or undertakings will not take place in a public forum, there is a need to ensure transparency of decision-making, including accurate recording of decisions by Case Examiners. This is particularly important under these new powers for Case Examiners because undertakings can be applied to cases which would otherwise be heard at a public Panel hearing. It would be helpful for the guidance to clarify whether Case Examiners will be using any kind of template decision document to ensure a clear and consistent record is available.
- 3.10 Although the consultation questions do not cover the process for review of warnings issued, we would highlight that this section is quite unclear about the process for deciding whether to take forward a review of a warning, i.e. whether there is first an application for review and then a decision on whether or not to review a case before carrying out a review. It would also be useful for it to clarify whether the only option following a review is to cancel the warning or if there are other options such as instead referring the allegation for a hearing or agreeing undertakings, and in what sort of circumstances the GDC registrar would seek a review. The reference then to a further review particularly in paragraph 78 is confusing. The guidance would be improved by providing examples of where these reviews might be applied.

Criteria and process

- 4. **Question 1 - We would welcome your comments on the criteria and process as set out at 1- 28 in the proposed guidance document:**
 - 4.1 As highlighted in our general comments, the guidance on the criteria and process for agreeing undertakings is extremely important to ensure transparency and public confidence in the use of these new powers. Currently the guidance does not appear to be clear enough on these areas and we have highlighted key points below.
 - 4.2 *Structure of these sections* – we are concerned that the section on criteria does not appear to describe or follow a clear decision-making process. We note, by way of example, that the consultation document on the rule changes that was published by the GDC in 2014 suggested undertakings might not be appropriate if:
 - “A. The matter under consideration is such that it is not possible to formulate a set of workable undertakings that would:*
 - (i) protect the public;*

- (ii) maintain public confidence in the profession, and*
- (iii) maintain public confidence in professional regulation; or*

B. There are compelling reasons why the matter should be considered by a Practice Committee. Compelling reasons include:

- (i) the public interest;*
- (ii) the dental professional's own interest;*
- (iii) the maintenance of public confidence in the profession and in the regulator."*

- 4.3 This is much more clearly presented than in the draft guidance and, unlike the guidance, describes a decision-making process. Point B does not feature in the criteria at all and we would be interested to know why.
- 4.4 The guidance currently doesn't provide anything to link the different criteria, such as a hierarchy or sequence of considerations. In addition, there is repetition of some criteria, such as whether conditions are workable, and whether they declare professional standards; inconsistency in others – for example, why does paragraph 16 not refer to protecting the public or maintaining public confidence when it mentions declaring standards; and contradiction (see the point about the public interest in hearings below).
- 4.5 Across both sections, there is a lack of distinction between the criteria for considering whether undertakings are appropriate and the process for doing so once this decision has been made. Within the criteria it would be helpful to more clearly group together those for deciding whether agreement of undertakings might be a possibility and those factors which would suggest when this might be inappropriate e.g. if there is a realistic prospect that allegations might lead to a registrant being struck off, or if there is a clear public interest in the case being dealt with by a Panel hearing. As mentioned in our general comments, we also suggest that the reference in the section on process to a registrant not agreeing the facts or admitting impairment should be included upfront in the criteria section.
- 4.6 *Record of decision making* - There isn't currently a reference to any record of decision document used by Case Examiners to make and record their decisions. If decisions on whether to agree undertakings are made without a firm view of the 'summary of fact' referred to in paragraph 29, cases could result in plea bargaining if the factual basis for the agreement is finalised after the decision on undertakings is made. It therefore may be useful to signpost to a decision document of this nature.
- 4.7 *Need for facts and impairment to be established before undertakings can be agreed* – As highlighted in our comments above, if a registrant does not admit facts and impairment, undertakings should not be offered. The statement in paragraph 20 on this is very vague on this point, with the use of 'may', 'unlikely' etc.
- 4.8 *Public interest in a hearing* - The guidance suggests some circumstances in which it would not be appropriate to offer undertakings, for example if allegations have a realistic prospect of leading to a registrant being struck off. Some parts of this section appear to contradict this and suggest that

undertakings are always an alternative to a hearing in cases of impairment. For example, it would be useful for paragraph 21 to stress that there are clearly some cases where undertakings are not appropriate and refer back to the earlier criteria relating to cases where a hearing is in the public interest. There may be cases where it is in the wider public interest (maintaining public confidence in the profession, or upholding professional standards as opposed to only protecting the public), for a case to be referred to a panel. We would suggest that this should be explicitly set out in the guidance.

5. Question 2 - The guidance specifically highlights that when agreeing undertakings, insight on the part of the registrant is an important factor. Do you agree with this approach? Yes/No - please comment on why you agree or disagree.

5.1 Yes

5.2 We agree that insight is a key consideration, however given the limited opportunity Case Examiners will have to assess this, this must be approached with caution. Judgement of insight is difficult without an assessment of the registrant in person, and Case Examiners will have to make their decisions on the papers only.

5.3 We note that the GDC covers this issue within its general guidance for its Practice Committees. However, we suggest that this draft does not provide sufficient guidance on how to assess insight to the same degree. Given the new responsibilities of both the Investigating Committee and Case Examiners in this area, we suggest that this section should be expanded and made consistent with the guidance for Practice Committees, or should signpost to alternative guidance. We are aware that other regulators have separate guidance on assessing insight in registrants which the GDC might be able to make use of.

5.4 In particular, it is important to highlight that an admission, including an agreement to undertakings or a warning, may lead to an outcome that is beneficial for the registrant, therefore this should not on its own be taken as a demonstration of insight. In line with our earlier point, agreement to the facts and admitting impairment is a necessary, but not a sufficient component of insight.

Publication

6. Question 3 - Do you agree the proposed guidance on our publication policy will support transparency and patient choice? Yes/No - please comment on why you agree or disagree.

6.1 Yes

6.2 The issue of transparency is key to ensuring public confidence and therefore we agree that undertakings should always be published except where there would be a breach of confidentiality. We welcome the GDC's statement to this effect in the draft guidance.

- 6.3 We suggest that it is in the public interest for some record to be published for every case, even if redacted in cases of confidentiality. 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.

Monitoring and non-compliance

7. Question 4 - Is the proposed guidance clear on what will happen in the event of non - compliance? Yes/No - please comment on why you agree or disagree.

- 7.1 No
- 7.2 We welcome the clear statement that compliance with undertakings by the registrant will be monitored by the GDC's case review team, as clarity on procedure for monitoring is a point that we had raised in our response to the previous GDC consultation on changes to rules.
- 7.3 However, there is a lack of clarity around the different circumstances in which a breach of undertakings might occur. The section on non-compliance currently suggests that a registrant may legitimately be non-compliant if the undertakings are unworkable, which can lead to a variation. In our view sub-dividing the 'non-compliance' section in this way is misleading. Applications for variation or termination should be made by a registrant before a breach of the undertakings occurs. Undertakings are agreed with the registrant and therefore they should be in a position to assess whether they believe they have become unworkable or whether there is any additional information that should be taken into account and they should have a responsibility to inform the GDC of this. If no application from the registrant is received, the case should be treated as a breach. We would like to see the guidance made clearer on this point.
- 7.4 We have also previously expressed concern about whether registrants who fail to comply with undertakings should be given a second chance to do so and the guidance remains unclear on the circumstances in which this would be appropriate. We would suggest that the guidance should express caution about reducing the length or changing the original requirements of undertakings (by variation or termination) without proper basis, because this has the potential to undermine the original decision.
- 7.5 In addition, we would like to see a stronger recommendation that in the case of a breach, the Case Examiner should consider referring the case to a practice panel. This is particularly important in cases of multiple variations of undertakings or breaches, as this could demonstrate the need for further scrutiny of the case in a public hearing.

Changes to our powers to give warnings

8. Question 5 - Do you agree that the proposed guidance will support Case Examiners in their decision making on issuing warnings and reviewing

their decisions to issue a warning? Yes/No - please comment on why you agree or disagree.

- 8.1 A warning is appropriate where there is no realistic prospect of impairment being established although facts and misconduct are likely to be proven. In these cases the registrant should have provided sufficient information to the Case Examiners on insight and risk of repetition and there will be no public interest requiring a finding of impairment (or in a public hearing). However paragraph 59 refers to remedial action which is required to be taken. This is confusing because the need for further remedial action would indicate the need for a finding of impairment or for the remedial action to be the subject of undertakings. We would suggest that this is clarified.
- 8.2 In addition, the majority of factors in paragraph 62 should be present to justify a decision to impose a warning in the first place and therefore it is difficult to see why these factors then also justify a shorter warning. Most of the aggravating factors listed in paragraph 63 would tend to establish current impairment rather than the need for a longer warning and, therefore, we would suggest that the guidance is amended on this point.
- 8.3 If impairment is established, then a warning is not sufficient and the case should either be referred to a practice committee or dealt with via undertakings if appropriate.

9. Further information

- 9.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

Professional Standards Authority for Health and Social Care
157-197 Buckingham Palace Road
London SW1W 9SP

Email: daisy.blench@professionalstandards.org.uk
Website: www.professionalstandards.org.uk
Telephone: 020 7389 8013