

Consultation response: Section 60 – Case Examiners, a General Dental Council consultation

January 2015

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.
- 1.2 As part of our work, we oversee nine health and care professional regulators, including the General Dental Council (GDC), and report annually to Parliament on their performance. We also appeal fitness to practise cases to the courts if outcomes are unduly lenient and it is in the public interest. More information about our work and the approach we take is available at www.professionalstandards.org.uk.
- 1.3 We welcome the opportunity to comment on these changes to the GDC rules. We have repeated here some of the comments we made in our response to the Department of Health consultation on the corresponding section 60 Order, which is available online.¹
- 1.4 Our comments below are made in the interests of patients, service users and other members of the public.

2. General comments

Undertakings

- 2.1 We are concerned that no mention has been made in this consultation document of whether a professional will be required to agree the facts and admit impairment for undertakings to be offered. It is important to establish clear findings before a case is closed or disposed of so that the outcome is clear to the public, employers and registrants themselves, and so that it may be useful to the regulator in any future action against the registrant.
- 2.2 The monitoring of undertakings and the way in which they will be reviewed are essential to ensuring that undertakings are complied with and achieve their desired effect. The GDC has not established within this consultation how it intends to monitor compliance, that it has the capacity to do so robustly, or that the environment in which dentists operate lends itself to such arrangements.
- 2.3 We question whether registrants who fail to comply with undertakings should be given a 'second chance' to comply with them – in our view, this presents a risk

¹ Available at: <http://www.professionalstandards.org.uk/library/document-detail?id=9ff7599e-2ce2-6f4b-9ceb-ff0000b2236b>

to the public, is symptomatic of an unprofessional attitude, and undermines the regulator's authority.

Review powers

- 2.4 As we explained in our response to the Department of Health consultation, in principle, we support the introduction of a power to review decisions not to refer to an Investigating Committee (IC) (or case examiners (CE)), or to a Practice Committee. However, in our view, there is no value in introducing a power for the Registrar to review decisions to refer to an IC/CE. Registrants will have the opportunity to request a review once the IC/CE has decided to refer the case to a hearing or, under the proposed arrangements, once a decision has been made to agree undertakings.²
- 2.5 We are disappointed that the GDC has not published any assessment of the impact on the GDC of the introduction of these review powers, which in our view could result in a significant increase of the GDC's workload.
- 2.6 Our responses to the individual consultation questions can be found on the following pages.

² It is worth noting here that in our response to the consultation on the draft s.60 Order, we questioned whether the draft Order would deliver this stated policy aim.

3. Case examiners

Question 1: Do you agree that the GDC should introduce the role of Case Examiners?

- 3.1 The question of whether case examiners should feature in a professional regulator's process for deciding whether or not to refer a case for a panel hearing is an operational matter and not one that we have a view on. What is important is that the process adopted:
- is transparent, fair, proportionate and focused on public protection
 - ensures all fitness to practise complaints are reviewed on receipt, serious cases are prioritised, and where appropriate an interim order is sought and imposed
 - deals with each case as quickly as possible taking into account the complexity and type of case and the conduct of both sides
 - does not cause delays that result in harm or potential harm to patients and service users
 - keeps all parties to a case updated on progress and supports them to participate effectively in the process
 - produces decisions that are well reasoned, evidence-based (following adequate investigation) consistent, protect the public and maintain confidence in the regulation of the profession.

We would expect the GDC to assure itself that its proposed case examiner arrangements will achieve these standards.

- 3.2 We are pleased to note the plans to introduce a '*robust system of review and appraisal to monitor and support performance to ensure the consistency and appropriateness of decisions*'. This will be particularly important in the early stages of implementation, when staff are being trained to perform the new case examiner role and the processes and guidance are untested. The new Registrar powers to review case examiner decisions not to refer to a hearing might also be of use at this point.
- 3.3 It remains unclear how the GDC plans for pairs of case examiners to reach their decisions. Our understanding is that the General Medical Council (GMC) procedures require GMC case examiners to reach and declare their decisions independently, which appears to be a more robust approach.
- 3.4 As case examiners are staff and are making these investigation-stage decisions, there is a risk of eroding the separation of function between the investigation of a case and any adjudication of it. It would have been helpful if the GDC had explained how it intends to ensure that this important separation is maintained.

4. Undertakings

Question 2: Do you agree that we should introduce a power for the GDC to agree undertakings with dental professionals as part of our fitness to practise process?

- 4.1 In our response to the Department of Health consultation, we set out a number of principles relating to the disposal of cases that we believed were necessary for public protection, and relevant to this discussion. They are repeated below:
- i. All cases that meet the real prospect test should be disposed of in a public forum (though not necessarily in public) by a panel that is independent of the investigation process – this includes consensual disposals
 - ii. All cases that meet the real prospect test should result in a finding on impairment (that is a panel finding impairment or not, or an admission by the registrant) as well as on facts
 - iii. Willingness to comply with undertakings does not by itself demonstrate insight into the fitness to practise (FtP) issues in question
 - iv. All disposal decisions relating to cases that have met the real prospect test should be subject to scrutiny by an independent body with the power to refer the case to a higher legal authority.
- 4.2 We support alternative means of disposing of hearings that are in line with these principles – but it appears that the GDC proposals are not.
- 4.3 The proposals to introduce undertakings for cases that have met the real prospect test, do not involve any form of panel sign-off (principle (i)). This means that there are no systematic checks by an independent decision-maker.
- 4.4 Principle (iv) concerns our scrutiny of fitness to practise outcomes, which is currently limited to decisions that are made by a FtP panel. A consequence of undertakings not being signed off by a panel is that we would have no oversight of these decisions, other than through our audits of cases closed at the initial stage, and no means of challenging them if we found them to be insufficient to protect the public, maintain public confidence or uphold professional standards.
- 4.5 In addition, it is of concern to us that the GDC has not explained whether the registrant will be required to agree the facts of the case and admit impairment before undertakings can be agreed (principle (ii)). It is important to establish clear findings before a case is closed or disposed of so that the outcome is clear to the public, employers and registrants themselves, and so that it may be useful to the regulator in any future action against the registrant. If undertakings are to provide comparable levels of public protection to sanctions imposed by a panel, they must be available only under these circumstances.
- 4.6 Finally, there is no mention in the document of seeking the views of complainants before a registrant is offered undertakings. We published a paper in December 2009 which recommended that *'there should be [an] opportunity for complainants to comment on matters of fact in the registrant's response in*

order to improve decision making by the investigating committee'.³ This will become all the more important as an increasing number of cases are disposed of by consensual means.

Question 3: Do you agree that the Case Examiners should, in certain circumstances, be able to invite a dental professional to comply with undertakings instead of referring the case to a Practice Committee for a hearing?

4.7 No.

4.8 Please see our answer to Question 2 which sets out our view.

Question 4: Do you have any comments about how rules 6A and 8A are drafted?

4.9 Perhaps the Rules could make it clear what the GDC's options would be if, during the 28 day period in which the registrant can consider whether to agree undertakings, new information came to light that suggested that the undertakings put forward by the case examiners would not be sufficient or appropriate to protect the public.

4.10 We suggest that in these circumstances, it should be possible for the GDC to withdraw the offer of undertakings.

4.11 Further, we note that the rules impose no limitations on the length or nature of undertakings. This means that the GDC's case examiners would have greater flexibility and greater powers in agreeing undertakings than a fitness to practise panel does when imposing conditions.

Question 5: Do you have any comments on the circumstances where you think undertakings may or may not be appropriate?

4.12 There are a number of circumstances that are not mentioned in the consultation document in which it would not be appropriate to offer undertakings.

4.13 It is not clear why the list of situations in which it is inappropriate to agree undertakings does not include where they fail to declare and uphold professional standards. This is part of the well-established three-fold purpose of fitness to practise as defined in the case law, and should be included in this list.

4.14 We agree that cases that are likely to result in erasure should not be disposed of through undertakings. However nor should those where suspension is the likely outcome, as this is a more serious 'sanction' than undertakings, and cases that are sufficiently serious to result in suspension if referred to a panel are very unlikely to be appropriate for undertakings.

4.15 If the facts are contested, or if the registrant disagrees that the facts amount to impairment (which raises questions about their level of insight) the case should be referred to a hearing.⁴

³ CHRE, December 2009. *Handling complaints: Sharing the registrant's response with the complainant*. Available at: <http://www.professionalstandards.org.uk/library/document-detail?id=d5fb76f2-aaa7-4465-9e63-8fb9c773028a>

4.16 Finally, we urge the GDC to look back at Dame Janet Smith's comments in the Shipman Inquiry report on the dangers of using undertakings outside a panel forum for misconduct and conviction cases:

*'[in a case of misconduct] insofar as there is a dispute about the facts, there is a real danger that the factual issues will be 'fudged' by the GMC accepting the doctor's account of events, including all the mitigation.'*⁵

Question 6: Do you agree with the intended process for agreeing undertakings with a dental professional?

4.17 No.

4.18 Please see our answer to Question 2.

Question 7: What are your views on the information that should be made publicly available about undertakings? For how long do you think that undertakings should be published?

4.19 It follows from principle (i) above that any consensual disposals where cases have met the real prospect test should involve the same level of transparency as cases that are referred to a hearing.

4.20 This means that the nature and duration of the undertakings must be made public. Ideally, information about the nature of the registrant's impairment, and the allegations and factual findings/admissions would also be made available to the public⁶ – something that will not be possible if the GDC decides not to require registrants to agree to facts and admit impairment.

4.21 Undertakings should also form part of the registrant's fitness to practise history, and the policy about publication on the register should be the same as that for conditions.⁷

Question 8: Do you have any comments on how rules 6A(3) and 8A(3), or 6A(4) and 8A(4) are drafted?

4.22 Yes.

4.23 Please see our answer to Question 4.

Question 9: Do you agree with how we intend to deal with dental professionals who do not comply with undertakings?

⁴ Provided the matter is in itself serious enough to have the potential to impair the registrant's fitness to practise.

⁵ The Shipman Inquiry. 2004. *The Shipman Inquiry: Fifth Report - Safeguarding Patients: Lessons from the Past - Proposals for the Future*. Paras 25.252 and 25.253. Available at:

http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/5r_page.asp?ID=4801

⁶ Unless they related to health matters or other matters that cannot be disclosed to the public.

⁷ In 2010, we published a report on the contribution of registers to public protection. We recommended that decisions to strike off should be published for at least five years, but stopped short of recommending a minimum time period for the publication of other decisions.

- 4.24 No.
- 4.25 It is not clear, from either the consultation document or the draft Rules, what would trigger a review by the Registrar of compliance with undertakings.
- 4.26 No information has been provided about how the GDC intends to monitor compliance with undertakings. We had hoped this consultation would cover this topic in some detail. Monitoring and review are essential to ensuring that undertakings are complied with and achieve their desired effect. The GMC has a Case Review Team, whose role is to monitor compliance with undertakings and conditions. Often, they call on the registrant's employer and supervisors to support them in this task. It is not at all clear from this consultation that the GDC has established how it will monitor compliance, that it has the capacity to do so robustly, and that the environment in which dental professionals operate lends itself to such arrangements.
- 4.27 We would have liked to see assurances that reviews will be undertaken for all registrants reaching the end of the period of undertakings, to determine both whether they have been complied with, and whether the registrant is fit to practise.
- 4.28 Failures to comply with undertakings can fall into two categories:
- i. Where failure to comply is the result of the professional's own choices or actions, or
 - ii. Where failure to comply is the result of the undertakings proving unworkable.
- 4.29 Scenario (ii) can be divided into two further scenarios:
- a. Suitable alternative undertakings are available, or
 - b. No suitable alternative undertakings are available.
- 4.30 In our view, failures to comply with undertakings as described in (i) present a risk to the public, are symptomatic of an unprofessional attitude, and undermine the regulator's authority. The regulator must respond, and be seen to respond robustly to such breaches. The process described in rules 6AB and 8AB (4) and (5) – giving the registrant a second opportunity to comply – is not appropriate as these cases should always be referred to a Practice Committee.
- 4.31 We agree, however that if undertakings prove unworkable, a referral to a Practice Committee may not be appropriate, and the GDC should have the power to vary undertakings if there are suitable alternatives. This is scenario (ii)(a) which is covered by rule 6AB and 8AB (2).
- 4.32 However, the rules do not appear to provide for a situation in which the original undertakings have not been workable, and there are no suitable alternatives. In this situation, we would expect a referral to be made to a Practice Committee, which can impose a sanction that will achieve the outcome of protecting the public, upholding professional standards and maintaining public confidence in the profession.
- 4.33 We therefore suggest that rules (4) and (5) are superfluous and should be removed. Rules (2) and (3) could be amended to make it clear both that:

- variations are not suitable for situations in which a professional has ‘voluntarily’ not complied with undertakings, and
 - cases where undertakings have proved unworkable where there are no suitable alternative undertakings should be referred to a hearing.
- 4.34 We also suggest that further clarification may be needed in (2) to explain when new information should lead to the variation of undertakings, and when it should trigger a new investigation.
- 4.35 If rules (4) and (5) remain, they should be amended to limit the number of times a registrant can be given a further opportunity to comply following a breach.

Question 10: Do you have any comments on how rules 6AB and 8AB are drafted?

- 4.36 Yes.
- 4.37 Please see our response to Question 9.

Question 11: Do you have any suggestions about how we might ensure the openness and transparency of the process for agreeing undertakings with dental professionals?

- 4.38 The term ‘undertakings’ is unlikely to be widely understood. It is therefore important that the GDC provides clear information in particular about what lies behind a decision to agree them, and how they compare, as a means of disposing of cases, to other disposals and sanctions.
- 4.39 Page five of the consultation document draws parallels with conditions imposed by a panel – these parallels will not apply if undertakings do not involve findings on facts or impairment, and it will be important for the GDC to acknowledge this if it takes this approach.
- 4.40 The GDC should also consider making the decision-making framework that is used to determine which cases are eligible for undertakings publicly available.

5. Seeking the views of dental professionals before issuing warnings

Question 12: Do you agree that if Case Examiners are minded to issue a dental professional with a warning, that we should notify the dental professional of this and seek their representations before the warning is confirmed?

5.1 We do not have a view.

Question 13: Do you have any suggestions about how we might ensure that the issuing of warnings by the GDC is open and transparent?

5.2 As with undertakings, clear guidance should be issued for the public, employers, and registrants on the meaning of warnings, in particular how they compare to other fitness to practise outcomes.

Question 14: Do you have any suggestions about the approach we should take to the publication of warnings?

5.3 Alongside or as part of the warning itself, the GDC should publish any information that can be made available about the events and concerns that have led to them issuing a warning.

6. Interim Orders

Question 15: Do you think that the Registrar should be able to refer a matter to the Interim Orders Committee at any point between referring the allegation to the Case Examiners, and it being considered by the Case Examiners?

6.1 Yes.

6.2 Without these powers, the public could be exposed to risks that suitable interim orders would mitigate.

Question 16: Do you think that the Case Examiners should be able to refer an allegation to the Interim Orders Committee at any point before it is considered by a Practice Committee?

6.3 Yes. As above, this is an important public protection measure.

Question 17: Do you have any comments about how rules 3(2)(b), 5(5) and 7(1) are drafted?

6.4 No.

7. Decision review powers

Question 18: Do you think that it should be possible to review a decision by the Registrar that complaint or information does not amount to an allegation of impaired fitness to practise?

- 7.1 Yes.
- 7.2 We believe that a regulator should be able to review a decision to close down a case, if it is in the public interest to do so – that is where the decision is materially flawed, or where new information that might have led to a different decision has come to light.
- 7.3 However, we note that the intention is also for the Registrar to have the power to review decisions that a complaint or information does amount to an allegation. It would have been helpful if the consultation document had included a question on this proposal.
- 7.4 As with the s.60 consultation, no clear rationale has been given for introducing this power, beyond it '*enhancing the fairness of the process by enabling a dental professional to apply for a decision taken against them to be reviewed*'. In our view, this new review route would complicate the process with no discernible benefits to the public.
- 7.5 Clearly the fitness to practise process must be fair to the registrant, but there are other ways in which this can be achieved. The registrant can apply for a review later in the process, once the IC has decided to refer the case to a hearing or, under the proposed arrangements, once a decision has been made to agree undertakings.⁸ Judicial Review is also an option.
- 7.6 The introduction of this new power could lead to large numbers of requests for review by registrants keen to shut the case down at an early stage. We had hoped to see an evaluation of the impact on the GDC, and assurances that it can absorb this additional workload and cost without causing unnecessary delays in the FtP process.

Question 19: Do you think that it should be possible to review a decision by the Case Examiners/Investigating Committee that a case ought not to be considered by a Practice Committee, including a decision to close the case with a warning or to issue advice?

- 7.7 Yes.
- 7.8 For public protection and confidence reasons, we have previously advised the Department of Health to prioritise requests for the power to review no case to answer decisions from those regulators who do not already have them.⁹
- 7.9 We would like to know if there is a clear rationale for giving the power to review a decision *not to refer* to a Practice Committee to the Registrar, when it is the IC/CE that has the review power for decisions *to refer* to a Practice

⁸ In our response to the consultation on the draft s.60 Order, we questioned whether the draft Order would deliver this stated policy aim.

⁹ Most recently in 2013.

Committee.¹⁰ Giving this power to the Registrar further infringes the separation of the investigation and adjudication functions because it means that the Registrar (in whose name the case has been investigated) could ultimately be the decision-maker who decides that a referral should be made to a Practice Committee.

7.10 In our response to the Department of Health consultation on these measures, we suggested that the Order might not fulfil the policy intention in this area, because it did not clearly identify a determination not to refer to a Practice Committee.

Question 20: Do you think that the review process, as set out in the draft rules, is appropriate?

7.11 We have no comments on the review process.

Question 21: Do you have any comments on how rule 9 has been drafted?

7.12 No.

Question 21: Do you think that the changes described are likely to cause disadvantage to any dental professionals or members of the public as a result of one or any of the above characteristics?

7.13 We do not have a view.

¹⁰ Currently, Article 27A(8) and 36O(8)1 of the Dentists Act 1984 (the Act) and Rule 10 of the General Dental Council (Fitness to Practise) Rules 2006 (the Rules) give the GDC a power for the Investigating Committee to review decisions to refer to a Practice Committee

8. Review of warnings

Question 22: Do you think that it should be possible to review a decision by the Case Examiners and the Investigating Committee to issue warning?

- 8.1 As we explained in our response to the s.60 consultation, we have no objections to there being an option for review of decisions to issue a warning, or of decisions to publish a warning on the register. The reviews will need to be robustly quality assured to ensure consistency.
- 8.2 The overall impact on resourcing should have been assessed and carefully planned for. We would have expected to see as part of the consultation, an evaluation of the impact and assurances that the GDC can absorb this additional workload and cost.

Question 23: Do you think that the review process, as set out in the draft rules, is appropriate?

- 8.3 We have no comments on the review process.

Question 21: Do you have any comments on how rule 10 has been drafted?

- 8.4 No.

9. Further information

- 9.1 We hope you find our comments helpful. Please get in touch if you would like to discuss this response further. You can contact us at:

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