Consultation: Draft Fitness to Practise Panels Hearings Guidance and Indicative Sanctions

About the GOC

1. The General Optical Council (GOC) is the regulator for the optical professions in the UK. Our purpose is to protect the public by promoting high standards of education, performance and conduct amongst opticians. We currently register around 29,000 optometrists, dispensing opticians, student opticians and optical businesses.

2. Our principal functions include:

    - Setting standards for optical education and training, performance and conduct
    - Approving qualifications leading to registration
    - Maintaining a register of individuals who are qualified and fit to practise, train or carry on business as optometrists and dispensing opticians
    - Investigating and acting where registrants' fitness to practise, train or carry on business is impaired.

3. An important part of our role is dealing with those registrants who fall short of the standards that the public can reasonably expect from healthcare professionals.

Why are we reviewing the hearings guidance and indicative sanctions?

4. When registrants fall short of expected standards, their fitness to practise may be called into question. This can lead to a referral to the GOC, an investigation, and possibly a hearing before a Fitness to Practise (FTP) panel.

5. FTP panels reach their own conclusions about the evidence they hear. However, it is important that the decisions they make uphold confidence in the optical profession, protect the public and maintain and uphold professional standards.

6. In April 2016, the GOC's new Standards of Practice will take effect[1]. These standards set out more clearly the GOC's expectations in respect of its registrants but also include some additional areas with which registrants will be expected to comply. This revised guidance therefore takes into account our new Standards and how Committees will view a registrant's conduct or failing in light of these.

[1] Our Standards can be found at: https://www.optical.org/en/Standards/Standards_for_optometrists_dispensing_opticians.cfm

7. We are also of the view that the revised guidance should improve consistency, lead to greater transparency and improve the quality of committee decisions about sanctions. This will be to the benefit of everyone involved in and affected by the process, and will lead to better public protection.

8. In devising this proposed new guidance, we have liaised with stakeholders, including FTP Committees and Chairs, GOC advocates and other regulators. There was strong support for a better understanding of the hearings process and for clarity in respect of the GOC's approach to candour, raising concerns and consent. The GOC will also be developing further guidance in the afore-mentioned three areas to underpin the Standards which will further assist registrants and the public alike.

A summary of the main changes

9. We are proposing to amend our current guidance to sit in three parts. The key changes in respect of each part are outlined below.

Fitness to Practise Panel Hearings

10. The main changes within the first part of the guidance are:

- A revised structure and tone to make sure the guidance is more accessible to a wider audience, particularly everyone involved in the hearings process
- An outline of the different types of registrants
- An outline of the full process in respect of all hearings (substantive, substantive reviews, interim order / interim order reviews, restoration and registration appeal hearings)
- More context for each section to make it easier for people to understand the process
- Inclusion of additional considerations – in respect of private hearings, bias and proceeding in the absence of the registrant
- More clarity on the process of reaching decisions, including the principles guiding the decisions and relevant case law

Indicative Sanctions

11. The main changes within the second part of the guidance are:

- Outlining specific guidance in respect of the duty of candour, raising concerns and obtaining patient consent – to help committees with their decision-making
- Proposing that the FTP panel should consider a fixed expiry period when imposing a Warning
- Proposing that the FTP panel may consider the stage of a student Registrant's career / training when making decisions
- Proposing that the FTP panel may consider how a business registrant operates in considering sanction

Bank of Conditions

12. The main changes within the third part of the guidance are:

- A revised structure with sub-headings to enable more clarity and better accessibility
- Proposing amending the term “immediately” to consideration of a defined period ie. within 14 days of the Order taking effect.

How to respond

Please send your responses to **Paula Thompson, PA to the Director of Fitness Practise,** no later than **6 April 2016**.

A consultation response cover sheet is attached to this document. You can either complete the first page of the cover sheet and provide a separate written response or you can complete the first page of the cover sheet and respond to the questions as set out on the second page of the cover sheet.

Responses should be sent to:

General Optical Council
10 Old Bailey
LONDON
EC4M 7NG

Email: **pthompson@optical.org**

Please include your contact details so that we can follow up any relevant aspect of your response. Unless you state otherwise (and an automatic disclaimer generated by your IT system will not be taken as such) we will assume you are happy for us to publish your response, including your name, and to share it with other appropriate bodies and stakeholders.

Further information
Where possible, please provide evidence to support your response. If you are a representative group, it would be helpful if you could include a summary of the people and organisations that you represent.

A copy of this consultation has been sent to a large number of stakeholder groups representing our registrants, patients, partner organisations and other groups. If you have any queries about the consultation then please contact: **pthompson@optical.org**

Our commitment to consultation

We believe it is important that the people affected by our work have a say in how we deliver it. We believe it is vital to consult all the groups with an interest in the GOC; patients, the public, our registrants, optical organisations, healthcare organisations, employers, other regulators, staff and other stakeholders.

How we consult with our stakeholders is set out in our *Consultation Framework,* available in the consultation section of our website. Feedback on the consultation process itself would be welcome. If you have any comments then please contact **Simon Grier** on **sgrier@optical.org**

Response cover sheet

Please send your responses to **Paula Thompson** no later than **6 April 2016**.

Please include a copy of this cover sheet with his consultation document. Responses should be sent to:

General Optical Council
10 Old Bailey
LONDON

EC4M 7NG

Email: **pthompson@optical.org**

Your details

Name: Jenny Gowen, Head of Public Affairs

Address: 2 Woodbridge Street, London, EC1R 0DG

Telephone number: 0207 549 2065

Email: jennygowen@opticalconfederation.org.uk

Are you replying on behalf of an organisation? Yes

Name of the organisation:

Optical Confederation, Optometry Scotland, Optometry Wales, Optometry Northern Ireland and Local Optical Committee Support Unit

Your position: Head of Public Affairs, Optical Confederation

Nature of the organisation's work:
Professional and representative bodies in the optical sector.

Keeping in touch

Because we value your input, we would like to contact you occasionally to let you know when we launch consultations and to invite you to future events. We will not pass your data on to any third party. Please tick here if you do not wish to be contacted in this way about the GOC's consultations: ☐

Please include your contact details so that we can follow up any relevant aspect of your response. Unless you state otherwise (and an automatic disclaimer generated by your IT system will not be taken as such) we will assume you are happy for us to publish your response, including your name, and to share it with other appropriate bodies and stakeholders. Please tick here if you are only happy for us to share your responses anonymously: ☐

Which category of respondent best describes you?

☐	**Optical professional body**

Questions

We are particularly interested in your views on the following points, although we welcome comments on any issues that you wish to raise in relation to the draft Fitness to Practise Panels Hearings Guidance and Indicative Sanctions.

In respect of the first part of the document – Fitness to Practise Hearings

1. Do you think the first part of the document 'Fitness to Practise Panels Hearings' clearly sets out the process in respect of each type of hearing?

☐ **Not clear**

Let us know if there are any improvements if you have not found this to be clear.

We would first like to congratulate the GOC on producing this useful guidance and to commend the robust engagement and openness to comment it has demonstrated. We look forward to working together to ensure that the finalised guidance is clear and user friendly. To this end, we include the following comments in response to the consultation questions with further detail in the attached annex.

We are not certain whether this is referring to the whole of the document up to the Indicative Sanctions Guidance ('ISG'), or the second section of the document entitled 'Fitness to Practise Hearings'. There is no 'first part' of the document entitled 'Fitness to Practise Panel Hearings'.

In any event, we have reviewed the whole of the document up to the ISG section. We consider that some sections of that part of the document are clear, whilst some are not clear.

We have set out our views on the major issues we identified below in the annex at the end of the document.

In respect of the first part of the document – Fitness to Practise Hearings

2. Do you think the first part of the document 'Fitness to Practise Panels Hearings' clearly sets out the process in respect of each type of hearing?

Not clear

Let us know if there are any improvements if you have not found this to be clear.

In respect of the second part of the document – Indicative Sanctions

3. Do you think the part called 'Indicative Sanctions Guidance' is useful in helping you to understand how the FTP panel decides upon a sanction?

☐**Useful / Very Useful (In Principle)**

Let us know if there are any improvements if you have not found this helpful.

4. Do you think the part called 'Indicative Sanctions Guidance' gives clear guidance to help FTP panellists to decide which sanction would be appropriate in a given case?

☐ **Not clear**

Let us know if there are any improvements if you have not found this clear.

Questions 2 & 3: In principle, it is useful to have guidance of this nature. However, while we found some sections of the Indicative Sanctions Guidance to be clear and helpful, we found other sections within it to be unclear and unhelpful.

Again, we have set out our detailed views on this in the annex below.

5. Do you agree with the GOC's proposed approach to the following issues?

a. Candour

☐ **No**

Please give your reasons below.

No, for the reasons we have set out below.

b. Raising concerns

☐ **No**

Please give your reasons below.

No, for the reasons we have set out below.

c. Obtaining patient consent

☐ **No**

Please give your reasons below.

Whilst it is fully appreciated that the principle of informed consent is integral to patient care, we do not consider the standard in relation to consent as set out in a civil context (*Montgomery v Lanarkshire Health Board 2015*) to be appropriate when considering the fitness to practise of an individual or business registrant, particularly given that the threshold for misconduct requires a degree of seriousness. There may be instances where a registrant has been negligent in the consenting process but where the threshold for misconduct or impairment is not met.

We also consider it inappropriate for issues relevant to causation (whether the patient would have consented had they been aware of treatment and its material risks) to factor into any consideration of misconduct and impairment.

6. Do you agree with the GOC's proposal that the FTP Committee should consider a fixed expiry period when imposing a Warning?

☐ **Yes (<u>In Principle)</u>**

Please give your reasons below.

In principle, yes. However, no proper guidance is given in the document as to how the FTPC should go about doing this.

7. Do you agree with the GOC's proposal that the FTP Committee may consider the stage of a Registrant's career / training when making decisions?

☐ **Yes (<u>In Principle)</u>**

Please give your reasons below.

In principle, yes. However, we do not think that the ways in which this might be relevant are clearly explained in the document. We have addressed this further below.

8. Do you agree with the GOC's proposal that the FTP Committee may consider how a business registrant operates in consider sanction?

☐ **Yes (<u>In Principle)</u>**

Please give your reasons below.

In principle, yes. However, no proper guidance is given in the document as to exactly what this means or how the FTPC might take this into account.

<u>In respect of the third part of the document – Bank of Conditions</u>

9. Are the conditions sufficiently clear to enable a Registrant to understand what is expected of him/her?

☐ **No**

Please give your reasons below.

A1 – "*…It does not bind Committees, who must always ensure that the conditions are relevant* **and necessary**."

There are multiple references in the conditions [e.g. A1.3(f), A3.2(c), A3.2(d), A4.4(c)] to the registrant being required to "provide" a document to the GOC from a third party. It would be perverse to oblige the registrant to disclose a document that is not in his/her control, particularly where the failure to do so would render the registrant in breach of his/her conditions and liable to further action under the Fitness to Practise procedures. Instead, the wording of the condition should be amended to require the registrant to "request" or "seek" the relevant document/report for disclosure to the GOC. In those circumstances, where the third party fails to provide the necessary document the registrant can remain compliant with his/her conditions provided they had requested/sought the document appropriately.

ANNEX: Detailed comments on the FTP Hearing Guidance and Indicative Sanctions Guidance

Section 2: Types of Registrant

Paragraphs 2.1-2.17

The only concern we have is in respect of paragraph 2.10, which states that *"Patients will often have the same expectations of students as they would of qualified professionals, and they must always be a student's first concern from the beginning of their studies through to pre-registration training and beyond."*

The guidance given that patients must be a student's first concern throughout their training is obviously both correct and important. However, the first part of the sentence quoted above has the potential to send out the wrong message. Patients may well expect the same of a student as of a fully qualified registrant. But such an expectation may be unrealistic in many respects. No doubt that is why the GOC, in its new guidance document for student registrants, acknowledges that a student will "develop their knowledge, skills and judgment over the period of their training".

The first part of the sentence should be deleted or, at least, amended to make clear what the GOC expects of students, rather than what patients may (unreasonably in some instances) expect.

Section 3: What this guidance is for

Paragraph 3.2

This describes the Indicative Sanctions Guidance (ISG) as an *"authoritative statement of the Council's approach to sanctions issues".*

This is not a description that appears in the ISG published by either the GMC or the GDC, which deal with the position in a much more neutral way as follows:

GMC (ISG in force from 3.8.15)

[1] This document provides guidance to tribunals on imposing sanctions on a doctor's registration, including why the tribunal should impose sanctions and what factors they should consider. It provides a crucial link between two key regulatory roles: setting standards for the medical profession, and taking action when a doctor's fitness to practise is called into question because they have not met the standards.

[2] When serious concerns have been raised about a doctor, the case may be referred to the MPTS for a hearing. Fitness to practise tribunals use the guidance to make sure they take a consistent approach when deciding:

a. whether to issue a warning when a doctor's fitness to practise is not impaired

b. what sanction to impose, if any, when a doctor's fitness to practise is impaired.

[3] The sanctions guidance makes sure that the parties are aware from the outset of the approach that the tribunal will take to imposing sanctions. The tribunal should use their own judgement to make decisions, but must base their decisions on the standards of good practice established in Good medical practice and on the advice provided in this guidance.

[4] In making their decisions on sanction, tribunals must have regard to the overarching objective of protecting the public (see paragraph 13).

[5] The sanctions guidance is also available to GMC decision makers when they are deciding whether to refer a case to the MPTS for a hearing

GDC (ISG in force from 6.4.15)

[1.1] This guidance has been developed by the General Dental Council (GDC) for use by fitness to practise panels in cases which have been referred to them for a hearing. The aim is to provide guidance for panels on exercising their powers in relation to fitness to practise matters and on considering what sanction to impose following a finding that the registrant's fitness to practise is impaired. This guidance outlines the decision-making process and the factors which should be considered when deciding on sanction.

[1.2] This guidance and its appendix are intended to assist the Professional Conduct Committee (PCC) at fitness to practise hearings. It may also be used by the Professional Performance Committee and the Health Committee, insofar as guidance provided in this document is relevant to those committees.

[1.3] This guidance is supplemented by an appendix which covers decision making considerations. The guidance and appendix should be used to support the committee's decision making but does not seek to impose a tariff or to fetter the committee's discretion.

The first sentence of paragraph 3.2 should be deleted as it gives the impression that the ISG is a statement of the GOC's submissions on sanction (which it should not be), rather than guidance that is designed to assist the FTPC in making an appropriate decision as to sanction in line with established legal principles. It also comes close to infringing the principles in Bevan v GMC [2005] EWHC 174 (Admin) regarding the need to make sure that committees are not unduly influenced by submissions from the regulator as to the appropriate sanction to be imposed:

> *[69] However, there is a real difference between these disciplinary proceedings and criminal proceedings, and in my view there is nothing wrong in principle in counsel representing either the complainant, who technically counsel may represent, or instructed by the GMC, in putting forward to the Committee the penalty that is considered to be the appropriate penalty. But I think it is undesirable that it is put in the way that counsel put it in this case, namely that she was instructed by the GMC, particularly as the instructions appear to have come from the deputy registrar off his own bat, subject to consulting the guidance. That is what he appears to be saying in the letter to which I have already referred.*
>
> *[70] No doubt counsel will discuss with those instructing him or her and the relevant representatives of the GMC what sort of penalty, depending of course on what facts are found established, would be considered to be appropriate, and therefore what would be put to the Committee. It clearly would be entirely proper, and in some cases appropriate, to refer to specific cases if in those cases guidance could be obtained that is relevant to the individual case before the Committee. All that is perfectly proper, but it must be made clear that these are merely submissions, and I do not think it is desirable that it should be put in the form that it was put in this case.*
>
> *[71] More importantly, it is in my view essential that the Committee are publicly informed by the legal assessor that this must not be regarded in any way as something which they should be influenced by, beyond knowing that it is a submission. Of course they will take it into account, but they must exercise their own independent judgment, based of course upon such guidance as may be helpful from the various instructions issued by the GMC to doctors so that they know what is required of them and also the guidance to which I have already referred. What concerns me is that that was not done in this case and so there is a real concern expressed on behalf of Dr Bevan that the PCC may have been influenced — and unduly influenced — by the knowledge that it was said that the GMC were desiring that a particular penalty be imposed.*

Section 9: Fitness to Practise and what it means

Paragraph 9.3

This paragraph explains that the Council has powers to take appropriate action against registrants where there may be impairment of fitness to practise, and that *"it is for the Fitness to Practise Committee to determine an appropriate sanction"*.

This is incorrect. The FTPC does not simply *"determine an appropriate sanction"*. It considers whether the registrant's fitness to practise is currently impaired by reason of any of the relevant statutory grounds. Only if fitness to practise is found to be currently impaired may the FTPC impose a sanction.

Paragraph 9.3 ought to be re-drafted to reflect the statutory scheme and the process actually adopted in proceedings before the FTPC.

Section 10: The Public Interest

Paragraphs 10.1 – 10.2

These paragraphs are inconsistent and potentially confusing.

Paragraph 10.1 suggests that the FTPC should consider the public interest *"when determining sanctions"*.

Paragraph 10.2 suggests that the public interest should be considered by the FTPC when *"considering exercising its powers to make interim orders, determining the question of impairment and deciding upon an appropriate sanction"*.

Paragraph 10.2 is correct. The public interest is potentially relevant to decisions in relation to interim orders, impairment of fitness to practise and sanction. Paragraph 10.1 should therefore be amended to reflect this.

Section 12: Misconduct

Paragraph 12.1

This paragraph correctly states that there is no misconduct in the GOC's legislation but goes on to suggest that *"it will be for the FTPC with its own expertise to determine whether an act or omission amounts to misconduct"* (with my emphasis).

It is well established that the question of whether the established facts amount to misconduct is a question of judgment for the professional disciplinary committee (see CHRP v GMC & Biswas [2006] EWHC 464 (Admin) at paras. 40-41, approving the views expressed by Dame Janet Smith in para. 21.32 of the Fifth Shipman Report).

However, the FTPC exercising its judgment to determine an issue is not the same as it using *"its own expertise"* to do so. A FTPC of the GOC will include at least one qualified optometrist or dispensing optician (perhaps more if it is a 5 person committee). The lay members of the committee may hold qualifications in other areas of healthcare or may be legally qualified. Paragraph 12.1 as currently drafted might be read as an invitation for FTPC members to be 'backstage experts' and to provide opinions based on their *"expertise"* to other members of the FTPC during its in camera deliberations. The clear risk is that, in those circumstances, decisions may be made on the basis of an expert view which has not been the subject of evidence or argument during the hearing. This would be a breach of the principles of natural justice and give rise to a potential ground of appeal.

For an example of this, see Lawrence v GMC [2012] EWHC 464 (Admin), where a Fitness to Practise Panel of the GMC stated in its determination on the facts:

> *[…] from its own expertise the panel reasoned that a woman with low self esteem unless encouraged would be unlikely to fantasise that she was attractive to another.*

The High Court allowed the doctor's appeal in part, stating at para. 213 that:

> *[213] In my view that renders the FTPP's finding one which it was not open to it to make without giving Dr Lawrence an opportunity to address it by seeking to adduce evidence and/or making submissions. The failure of the FTPP to afford Dr Lawrence that opportunity and its inclusion of that finding in its Determination was in my view a material procedural irregularity. It was unfair to Dr Lawrence and contrary to a fundamental principle of natural justice that a court or tribunal will only make findings of fact in respect of matters on which the parties have been afforded a fair opportunity to make submissions and/or to seek to adduce evidence as appropriate.*

This paragraph therefore ought to be amended to reflect the position as set out in Biswas, ie: that *"it will be for the FTPC as an exercise of its judgment to determine whether an act or omission amounts to misconduct"*. No mention should be made of the FTPC's *"expertise"* in this context.

Paragraph 12.3

This paragraph relates to the well established principle that 'misconduct' in the new fitness to practise legislation is to be equated with 'serious professional misconduct' under the old law. This is derived from Meadow v GMC [2006] EWCA Civ 1390 at para. 198:

[….] it is inconceivable that 'misconduct' - now one of the categories of impairment of fitness to practise provided by section 35C of the Act, as substituted by article 13 of the 2002 Order - should signify a lower threshold for disciplinary intervention by the GMC.

However, in recent hearings before the FTPC this has been a subject of some confusion, with a suggestion being made that 'misconduct' is not the same as 'serious professional misconduct' and, in fact, is a lower threshold because the word 'serious' does not appear in the statute.

Paragraph 12.3 should make the position absolutely clear for the FTPC by explicitly stating that, although the relevant legislation makes reference to "misconduct" rather than "serious professional misconduct", the meaning is the same. This could be achieved by amending paragraph 12.3 to read *"Although the terminology has changed since the Roylance case (ie: the current fitness to practise legislation now refers to 'misconduct' rather than 'serious professional misconduct'), the courts have been clear ….]".*

Paragraphs 12.4 – 12.5

These paragraphs seek to provide assistance to the FTPC in relation to misconduct in cases where the registrant has been negligent. As presently drafted, they do not properly convey the legal position and may cause confusion.

Of particular concern is paragraph 12.5, which states *"where a registrant may have been negligent misconduct is likely to be constituted by a series of acts"* (my emphasis).

Although it attempts to summarise the law as set out in Calhaem v GMC [2007] EWHC 2606 (Admin) and considered in Vali v GOC [2011] EWHC 310 (Admin), this sentence unfortunately implies that:

- A finding of misconduct could properly be made if a registrant *"may have been negligent"*. This is incorrect. The authorities require *"negligence ….] of a high degree"* to be established before misconduct can properly be found;

- Misconduct is *"likely to be"* found where a registrant has committed a *"series"* of negligent acts. Again, this is incorrect. The authorities make it clear that *"a single negligent act or omission is less likely to cross the threshold of 'misconduct' than multiple acts or omissions"*. However, this does not mean that *"multiple acts or omissions"* are therefore likely to amount to misconduct. Whether a *"series"* of negligent acts amounts to misconduct depends on the gravity of the negligence in question. It is possible that even repeated negligent acts or omissions will not be serious enough to meet the high threshold for a finding of misconduct.

These paragraphs should simply quote in full from the judgment in Calhaem at para. 39 as follows:

> *(1) Mere negligence does not constitute "misconduct" ….] Nevertheless, and depending upon the circumstances, negligent acts or omissions which are particularly serious may amount to "misconduct".*
>
> *(2) 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".*

This guidance, which is routinely quoted by Legal Advisors and applied by committees across all healthcare regulators, summarises the law fairly and succinctly. There is no reason why this should not be included in the GOC's document in full (particularly when the second half of para. 39 of Calhaem has been quoted in full at paragraph 13.1 of the GOC's document in relation to Deficient Professional Performance).

There is no objection to the quotation from Vali being included as well, however it does no more than summarise para. 39 of Calhaem and may be thought to be unnecessary if para. 39 were to be included.

Additional Comments

In addition to Calhaem, reference ought to be made to Spencer v General Osteopathic Council [2012] EWHC 3147 (Admin),which establishes that a finding of 'misconduct' carries with it an implication of *"moral blameworthiness"* and a degree of *"opprobrium"*:

> *[23] [….] The critical term is "conduct". Whichever dictionary definition is consulted, the leading sense of the term "conduct" is behaviour, or the manner of conducting oneself. It seems to me that at first blush this simply does imply, at least to some degree, moral blameworthiness. Whether the finding is "misconduct" or "unacceptable professional conduct", there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen. That is an observation not merely about the natural meaning of the language, but about the likely effect of the finding in such a case as this, given the obligatory reporting of the finding under the Act.*

Section 14: Health

Paragraph 14.1

This paragraph states that the FTPC must consider *"the same tests"* when considering impairment by reason of adverse health as with any other kind of impairment.

It is not clear which *"tests"* are being referred to here. If this is a reference to the guidance given in the authorities such as Cohen v GMC [2008] EWHC 581 etc., it is clear that such cases are to be regarded as identifying relevant factors to be considered in determining impairment, rather than laying down a 'test' to be applied, see CHRE v NMC & Grant [2011] EWHC 927, at paras. 87-95:

> *[95] In misinterpreting the decision in **Cohen** as establishing a three-fold test, rather than identifying relevant factors to be considered, the weight of which would vary from case to case depending on the facts, I agree that the Committee appear to have lost sight of the fundamental, public interest requirements that must be factored in at this stage.*

Paragraph 14.2

This refers to a FTPC finding an allegation of *"adverse physical or mental health proved"*.

This has the potential to cause confusion. If this is referring to an allegation that a registrant's fitness to practise is currently impaired by reason of their adverse physical or mental health, no burden or standard of proof applies to the FTPC's consideration of impairment (see Biswas, as above).

Section 15: Interim Orders

General Comments

This section appears to have been cut and paste from legal advice given in a particular case, as it refers in some instances to the FTPC as "the Committee" and in others as "you" – for example:

> *Paragraph 15.2: "There may be other relevant matters which you must consider"*
>
> *Paragraph 15.3: "you should be careful to make such an order"*
>
> *Paragraph 15.4: "you may make the following orders"*

The FTPC should be referred to consistently as "the Committee" throughout the document.

Paragraphs 15.1-15.2

These paragraphs are likely to be confusing because:

- They refer to interim orders being made in *"the public interest"*, but use that term to include orders made in order to protect the public or because it is in the interests of the registrant;
- The final sentence of paragraph 15.2 states that there *"may be other relevant matters which you must consider"*, but nowhere in the guidance is this explained further;
- The final sentence of paragraph 15.2 refers to the FTPC's obligation to *"uphold the good name of the profession of optician"* – apart from being poorly written, opticians and optometrists are of course not the same.

We believe that decision makers are likely to be better assisted with an explanation of the statutory grounds on which an interim order might be made, rather than the kind of vague commentary that appears in these two paragraphs.

Paragraph 15.5

This relates to orders made on the *"otherwise in the public interest"* limb.

It is correct that the word 'necessary' in the legislation applies only to the "necessary to protect the public" limb and that the High Court confirmed this in Sandler v GMC [2010] EWHC 1029. However, further important guidance was given on this issue in Sandler – in particular para. 14 – which should be included in summary form at least:

> *[14] There was some debate at the hearing as to whether the IOP could only suspend Dr Sandler on public interest grounds if this was 'necessary'. In my judgment, the Legal Adviser was plainly right to observe that, while the statute allows suspension on public protection grounds only if this is necessary, there is no such qualification to the public interest limb. In Sheikh at [15] Davis J. thought that nonetheless 'if the public interest is to be invoked in this context under the statute, then that to my mind, does at least carry some implication of necessity; and certainly it at least carries with it the implication of desirability.' He added at [16] 'At all events, in the context of imposing an interim suspension order, on this particular basis, it does seem to me, adopting the words of*

Mr Winter [counsel for the Claimant], that the bar is set high; and I think that, in the ordinary case at least, necessity is an appropriate yardstick. That is so because of reasons of proportionality.' I certainly agree that a doctor could not be the subject of interim suspension unless this was at least desirable in the public interest. I also agree that the Panel must consider very carefully the proportionality of their measure (weighing the significance of any harm to the public interest in not suspending the doctor against the damage to him by preventing him from practising), but I do, with respect, think that the Court must be cautious about superimposing additional tests over and above those which Parliament has set.

Section 16: The Process

Paragraph 16.1

Paragraph 16.1 seeks to address the situation where the facts are in dispute but nowhere in the "FTP Hearings" section is there an explanation of the process for hearings where the facts are admitted in whole or in part. In practical terms the process is the same whether the facts are in dispute or admitted partially or as a whole but it would be helpful if the guidance makes this clear.

Paragraph 16.1 should also specify that a written determination will be prepared and read to the parties in relation to each stage

Paragraph 16.1(c) should make it clear that the issue at this stage is whether the registrant's fitness to practise is currently impaired.

Paragraph 16.1(d) should refer to the issue of immediate orders.

Section 17: Private Hearings

Paragraph 17.3

This paragraph is vague and likely to be unhelpful to decision makers and registrants.

The phrase "considering the registrant's health" is clearly intended to cover a much broader set of circumstances than simply where a committee is considering an allegation of impairment by reason of adverse physical or mental health.

The example given of where a *"registrant raises health evidence in mitigation"* obviously involves a committee *"considering the registrant's health"*. In accordance with the Rules, such evidence must be in private unless the committee considers that it would be appropriate to meet in public.

Guidance to the FTPC on this important issue should not be left in a state of uncertainty. The GOC's position as to the meaning of the words *"considering the registrant's health"* should be made clear and the implications of this expressly stated.

Section 18: Bias

Paragraph 18.2

This paragraph is confusing and is unlikely to assist committees in considering an application for recusal of a committee member based on actual or apparent bias.

The first sentence requires further clarification. In particular:

- It is not clear what is meant by "biases" in this context, ie: of committee members being "aware" of their "biases". Is this referring to facts which might suggest a conflict on interest, such as a connection between a committee member and one of the parties in a case? Or is this a reference to personal feelings and beliefs that a committee member may have about, for example, the subject matter under consideration?

- It is not clear how a committee member is expected to be aware of their "unconscious" bias. By definition, any "unconscious" bias would not be known to the committee member.

- It is not clear how a committee member is supposed to "manage any bias" to ensure an "impartial hearing". The requirement under Article 6 is for an independent and impartial tribunal. If a committee member is actually biased, either for or against the GOC or the registrant, they should not sit as a committee member.

The second sentence correctly states the well-known test from Porter v Magill [2002] 2 AC 357, as quoted in Rasool v General Pharmaceutical Council [2015] EWHC 217 (Admin). However:

- The test in Porter v Magill is not a test for determining "whether a committee member may be biased". It is a test designed to assist in determining whether (in the context of proceedings before the FTPC) a committee member ought to recuse themselves due to an appearance of bias.

- We would suggest that this section would be made more helpful by quoting or summarising the salient points contained in paragraph 25 of Rasool as follows:

  The test for bias can be un-controversially stated as follows. Would a fair-minded observer, having considered the relevant facts, conclude that there was a real possibility that the tribunal was (consciously or subconsciously) biased [….] The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge as biased [….] The appearance of independence and impartiality is just as important as the question of whether these qualities exist in fact. Justice must not only be done, it must be seen to be done.

- The third sentence is correct in the sense that the test in Porter v Magill is focused not on actual bias, but the appearance of bias. However, the guidance should make clear that, while a party applying for recusal of a committee member need not establish actual bias in order to be successful, this does not preclude such an application being made on the basis of actual bias if evidence to support that contention is available. In those circumstances, the committee will have to determine whether there is actual bias or, alternatively, an appearance of bias in accordance with Porter v Magill.

Paragraph 18.3

We do not agree that Mahfouz says this specifically. In that case, the issue was with a number of the committee members who had apparently read a potentially prejudicial newspaper article. It is right that in Mahfouz the committee as a whole considered whether the Porter v Magill test was made out. However, we cannot see that it was stated as a point of principle that the committee as a whole must make the decision and that, for example, if an objection is taken as to a particular committee member that member is not entitled to take a decision to recuse themselves without the whole committee becoming involved.

General Comments

We would like to see added that where an application is made that a committee member should recuse themselves because there is either actual or apparent bias, the subjective views of the committee member in question as to whether they feel able to decide the case with impartiality are to be given limited, if any, weight. See for example R (Mahfouz) v GMC [2004] EWCA Civ 233, at paragraph 32:

> *[32] For my part, I would prefer to avoid the use of the terms "bias" or "apparent bias" (with their overtones of possible impropriety) in a case like this. Such expressions are best reserved for cases where the impartiality or apparent impartiality of the tribunal has been put in question, whether by its own conduct or by the disclosure of a possible apparent connection with one of the parties. In such cases, it is obvious that little weight can be attached to the subjective view of the very tribunal whose impartiality has been put in doubt. Porter v Magill and Lawal v Northern Spirit Ltd [2003] UKHL 35 were examples of such cases [….] In such cases, however strong the decision-maker's own confidence in his ability to decide the case impartially, the decisive issue must be the impression made on the fair-minded observer.*

Section 19: Proceeding in the absence of the registrant

Paragraphs 19.2 – 19.3

These paragraphs accurately summarise that the FTPC must consider a *"two stage test"* when deciding whether to proceed with a hearing in the absence of a registrant and set out some of the important considerations derived from the case of R v Jones [2001] QB 862 (CA) and [2002] UKHL 5.

However, the guidance should emphasise the fact that a registrant has a right to attend and be represented (subject to him waiving that right through his or her own conduct); that the FTPC has a discretion as to whether to proceed in a registrant's absence; that this discretion must be exercised with great care; that this discretion should be exercised in favour of proceeding in a registrant's absence only in rare and exceptional circumstances; that in considering whether to proceed in those circumstances fairness to the registrant is paramount but fairness to the prosecution must also be considered; and that the extent to which the registrant may be disadvantaged if unable to give his/her account of events having regard to the nature of the evidence against him/her must be considered. Those points are based on Jones in the Court of Appeal:

> (1) A defendant has, in general, a right to be present at his trial and a right to be legally represented.
>
> (2) Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws ***873*** instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
>
> (3) The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.
>
> (4) That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
>
> (5) In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular: (i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear; (ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings; (iii) the likely length of such an adjournment; (iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation; (v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence; (vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him; (vii) the risk of the jury reaching an improper conclusion about the absence of the defendant; (viii) the seriousness of the offence, which affects defendant, victim and public; (ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates; (x) the effect of delay on the memories of witnesses; (xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

Paragraph 19.5

This paragraph concerns proceeding in the absence of a registrant who is absent due to ill health. It states that it will "usually be appropriate for the Committee to adjourn the hearing" if the registrant is unwell and his/her absence is involuntary.

This should be stated more firmly, in line with Jones where it was stated at para. 13 that:

> *If the absence of the defendant is attributable to involuntary illness or incapacity it would very rarely, if ever, be right to exercise the discretion in favour of commencing the trial, at any rate unless the defendant is represented and asks that the trial should begin.*

General Comments

In addition, the guidance should include reference to the recent case of Lawrance v GMC [2015] EWHC 586 (Admin), which suggests that a committee should consider in certain cases either adjourning proceedings at the close of the prosecution case or, at least, before imposing a severe sanction to allow an absent registrant the opportunity to attend and give evidence or make representations, see paras. 37 – 42. Specific guidance should be included regarding the process for adjournment applications.

> *[37] It would have been open to the panel to have decided to proceed to hear the witnesses but only to decide the facts and to seek to notify the appellant with a view to her attending on the issue of dishonesty. That is what the panel in Tait had done. It is something which in my view should have been considered. It would have meant that the witnesses were able to give their evidence and the appellant, whose behaviour had led to the need to go ahead in her absence, could at least try to show she had not been dishonest.*
>
> *[….]*
>
> *39 I have no doubt that the panel ought to have considered before imposing any sanction, particularly as they clearly had erasure in mind, whether attempts should have been made to contact the appellant to enable her to put forward any mitigation.*
>
> *[….]*
>
> *[42] Since I have decided that the panel erred in its approach to a finding of dishonesty and in failing both before finding dishonesty and particularly before deciding on sanction to contact the appellant to invite her to attend to make representations, I will allow this appeal and send the case back to the panel [….]*

Finally, the guidance should include reference to the recent case of GMC v Adeogba and GMC v Visvardis [2016] EWCA Civ 162, heard in February 2016.

Section 20: Evidence and the standard of proof

The application of the standard of proof

Paragraph 20.6

Reference is made in this paragraph to Re: S-B (Children) [2009] UKSC 17, in which the Supreme Court commented on the House of Lords decision of Re: B (Children) [2008] UKHL 35.

The quotation from Re: SB (Children) explains that the House of Lords in Re: B "reaffirmed" the principles adopted in Re: H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563.

As presently drafted, Paragraph 20.6 is:

- Unnecessary, as it adds nothing to the point correctly made in Para 20.5 that the "standard of proof does not vary depending on the seriousness of the allegations";

- Likely to confuse a reader who is not familiar with the numerous authorities in this area, as reference is made to the judgment of Lord Nicholls in Re: H (Minors), but without any explanation of what he said and what was being "reaffirmed".

If Paragraph 20.6 is to be included, in order for the quotation from Re: SB (Children) to be properly understood and fairly applied the guidance document should set out the relevant passage from Lord Nicholls' judgment in Re: H (Minors) as follows:

> *[p586] The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability [….] Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.*

Paragraph 20.8

This paragraph correctly quotes from Lord Hoffman's judgment in Re: B in order to make the point that there is no *necessary* connection between the seriousness of what is alleged and inherent probability.

However again, in order for this to be properly understood and fairly applied, the guidance document should include the remainder of paragraph 15 of Lord Hoffman's judgment as follows as this provides a helpful example of a situation where there would be no such connection:

> *[15] [….] It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred.*

In many cases, the other evidence will show that it was all too likely. If, for example, it is clear that a child was assaulted by one or other of two people, it would make no sense to start one's reasoning by saying that assaulting children is a serious matter and therefore neither of them is likely to have done so. The fact is that one of them did and the question for the tribunal is simply whether it is more probable that one rather than the other was the perpetrator.

Admissibility of Evidence

Paragraphs 20.11

Paragraph 20.11 does not appear to relate directly to the admissibility of evidence but rather to the FTPC's consideration of the evidence that it has decided to receive. There is no objection to paragraph 20.11 being included somewhere in the guidance, but the stage of the FTPC's consideration of the case that these observations are relevant to should be made clear.

Hearsay

Paragraph 20.13

The first sentence of this paragraph relates to the possibility that a panel may admit hearsay evidence, but give it less weight because the witness' evidence has not been tested. The case of Thorneycroft is relied on in support of this proposition. If this is to be mentioned, the particular paragraph of Thorneycroft should be quoted or summarised, again from para 45:

1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.

Paragraph 20.14

The last sentence suggests that *"particular caution must be exercised if the [hearsay] evidence is also anonymous",* relying on White v NMC [2014] EWHC 520. As in other areas of the guidance document, the GOC's summary does not properly convey the caution urged by the High Court. In fact, the court in White said this at para. 13:

[13] In the context of disciplinary proceedings, it is difficult to conceive of circumstances in which the admission of potentially significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirement of fairness. This is not because the rule in criminal cases applies without more, but because of the underlying principle which it applies and illustrates. It cannot normally be fair for significant evidence about the attitude and conduct of a registrant to be admitted against her which she has no opportunity to test or meet by anything beyond a bare denial. Anonymity prevents her from advancing any informed reason why the informant might be critical of her attitude and conduct, but does permit cross-examination of the informant. The fact that the evidence in hearsay precludes testing by cross-examination but not by other enquiries or conflicting evidence.

There is no reason why this should not be summarised, by saying something to the effect of *"Particular caution must be exercised if the hearsay evidence is also anonymous. The High Court has stated that it is difficult to conceive of circumstances in which the admission of significant evidence about the attitude and conduct of a registrant which is both anonymous and hearsay will not infringe the requirement of fairness".*

Vulnerable witnesses

Paragraph 20.15

This paragraph states that *"When hearing witness evidence, the Committee should be aware that some witnesses before it may be considered vulnerable"*. Obviously, vulnerability must be considered and addressed well before the committee starts hearing from the witness, not simply *"when hearing witness evidence"*. This could be clarified by simply deleting the first four words of the first sentence of the paragraph.

Section 21: Dishonesty

Paragraph 21.1

This paragraph seeks to give *"examples of dishonesty"*.

It is our collective view that these examples are likely to cause confusion, potentially prejudicial to registrants and wholly unnecessary.

As explained in Fabiyi v NMC [2012] EWHC 1141 (Admin) dishonesty relates to the accused's state of mind, not merely his or her conduct, see paras. 47-48:

> *[47] Turning to Lord Lane's introduction* [in R v Ghosh] *to the question of how the jury should have been directed in relation to the allegations of dishonesty, the Lord Chief Justice said this:*
>
> > *"Is "dishonesty" in section 1 of the theft Act 1968e intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think it is the latter, then the knowledge and belief of the accused are at the root of the problem."*
>
> *[48] Thus, in alleging that EF undertook seven external agency shifts dishonestly, the NMC was alleging that she undertook them with a state of mind which she knew was dishonest [….]*

That being so, it is both wrong and misleading to list types of conduct, which may or may not be dishonest depending on the state of mind of the person concerned, but nevertheless state that they are examples of dishonesty.

In relation to sub-paragraphs (a) and (b), it may be that the word *"defrauding"* was intended to imply dishonesty in the sense of obtaining money to which a person was not entitled by deception, ie: with a deliberate intention to deceive. However, it is not made clear in the document that it is the intention that would make the obtaining of money in those circumstances dishonest, rather than simply the act of obtaining monies to which the individual was not entitled. In relation to sub-paragraphs (c) – (f) however, these are examples of conduct that may or may not be dishonest, depending on the intention of the person at the time.

This paragraph should either be deleted in its entirety. The test for dishonesty is adequately summarised in paragraph 21.4 based on the recent cases of Hussain v GMC [2014] EWCA Civ 2246, PSA v HCPC & David [2014] EWHC 4657 and Kirschner v GDC [2015] EWHC 1377.

Paragraph 21.2

This paragraph seeks to provide a definition of "research misconduct".

The definition itself is not in contention. However, the explanation given highlights the problem with categorising *"research misconduct"* as dishonest conduct *per se*, as it states that the term *"is used to describe a range of misconduct from presenting misleading information in publications* [which may or may not be dishonest] *to dishonesty in clinical trials* [which

would obviously be dishonest, although unhelpfully the meaning of this is not explained further]".

It is our collective view that this should be included in the ISG part of the guidance rather than here, as it is focusing on the seriousness of research misconduct rather than on the general principles relating to dishonesty. Including it in this part of the document has the potential to cause confusion.

Paragraph 21.3

This paragraph emphasises how seriously dishonest conduct is viewed in the context of healthcare regulation and, in particular, dishonestly defrauding the NHS.

Again, while this may be relevant to the ISG part of the guidance, it is not relevant to this section. Including it in this part of the document has the capacity to cause confusion.

Section 22: Mitigation

This section has caused us particular concern. It is extremely confusing for decision makers, and it fails to make sufficiently clear at the outset which kinds of evidence favourable to a registrant might be relevant to the different stages of a hearing before the FTPC.

The High Court in Campbell v GMC [2005] EWCA Civ 250 found that some such evidence might go to the question of *"culpability"*, whereas some might be *"personal mitigation"* that was relevant only to the question of sanction (see paras. 19-21 and 43-44, some of which are quoted in full below):

> *[21] Notwithstanding some potential difficulties with the language of the rules, as a general proposition it would be surprising if rules governing the disciplinary procedures for the medical professional were to achieve the somewhat startling result that the question whether a practitioner was guilty of serious professional misconduct could be influenced by matters of personal mitigation which went to the appropriate disposal of the complaint. It is in our view elementary that any evidence considered by the committee should be relevant evidence. Mitigation arising from the circumstances in which the practitioner found himself or herself may be relevant to the level of culpability: once serious professional misconduct is proved, personal mitigation will be relevant to possible penalty. In our judgment, these are distinct issues, to be determined separately, on the basis of evidence relevant to them.*
>
> *[….]*
>
> *[44] The complainant in the present case, dissatisfied with the decision of the committee, has argued that its approach was wrong in principle. Having analysed the judgments in the Rao [2003] Lloyd's Rep Med 62 and Silver [2003] Lloyd's Rep Med 333 cases and the misreading of the earlier decision in Preiss's case [2001] 1 WLR 1926, we have respectfully concluded that the personal mitigation advanced in the present case, in particular Dr Birkin's "unblemished medical practice", and the outstanding testimonials which showed that he was a highly committed caring and professional doctor, were not relevant to the question whether his treatment of Michael Boyle and Amy Tasker should properly be described as serious professional misconduct. We respectfully agree with Dame Janet Smith that to the extent that they decided that evidence exclusively relevant to personal mitigation could be considered by the committee when deciding whether serious professional misconduct was proved, the decisions in the Rao and Silver cases were wrong. Although the committee is not to be criticised, it misdirected itself in law, and accordingly, the decision in this case was flawed.*

Campbell was a case under the old legislation and, clearly, some modification was required to take account of the additional consideration of current impairment of fitness to practise implemented after 2005. Further guidance was provided in Cohen and Azzam v GMC [2008] EWHC 2711 (Admin) as follows (with my emphasis):

Cohen:

> *[65] Indeed I am in respectful disagreement with the decision of the Panel which apparently concluded that it was not relevant at stage 2 to take into account the fact that the errors of the appellant were "easily remediable". I concluded that they did not consider it relevant at stage because they did not mention it in their findings at stage 2 but they did mention it at stage 3. That fact was only considered as significant by the Panel at a later stage when it was dealing with sanctions. It must be highly relevant in determining if a doctor's fitness to practice is impaired that first his or her conduct which led to the charge is easily remediable, second that it has been remedied and third that it is highly unlikely to be repeated. These are matters which the Panel should have considered at stage 2 but it apparently did not do so.*
>
> *[….]*
>
> *[67] I have concluded that the decision of the Panel that the fitness to practice of the appellant was impaired was wrong […] There are four significant factors which individually and cumulatively have led me to this conclusion and I will set them out in no*

particular order of importance.

[….]

[69] Second, the reasoning of the Panel which I set out at paragraph 55 above suggests that having found misconduct proved against the appellant, they considered that it automatically followed that his fitness to practice was impaired without looking at the other relevant factors, such as first the appellant's long previous unblemished record, second the references showing his conduct since Mr. B was his patient and third that the misconduct was "easily remediable".

Azzam:

[44] It seems to me that, in the light of the authorities cited, it must behove a FTP Panel to consider facts material to the practitioner's fitness to practice looking forward and for that purpose to take into account evidence as to his present skills or lack of them and any steps taken, since the conduct criticised, to remedy any defects in skill. I accept Miss Callaghan's submission that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at the "impairment" stage (paragraph 54 of her skeleton argument). However, the line is a fine one and it is clear to me that evidence of a doctor's overall ability is relevant to the question of fitness to practice. Even if Miss Callaghan is correct as to the construction of rule 17(2)(j) (which I doubt, but do not have to decide) the rule clearly envisages the admission of relevant further evidence at stage 2. The panel must consider that evidence (in the same manner as any other evidence received) and weigh it up, decide whether to accept it and then to determine whether, in the light of the further evidence that it does accept and the facts found proved at stage 1, the practitioner's fitness to practise is impaired.

Those limited citations above demonstrate that this is not an entirely straightforward area and requires particularly clear guidance to committees to ensure that relevant evidence is properly taken into account at each stage of the hearing process.

As presently drafted, all evidence favourable to a registrant is dealt with together in this section under the heading of *"mitigation"*. However, it is clear that the kinds of evidence outlined in paragraph 22.1 may be relevant to different stages of a substantive hearing in different ways.

Unfortunately, this is not explained at the outset of the section. Rather, the information given is confusing and incomplete. For example:

- Paragraph 22.2 states that *"Certain (limited) types of evidence may be relevant to decisions in the course of Fitness to Practise hearings (see Part 6 below)".* It is not clear why this paragraph suggests only that *"limited"* types of evidence of this kind may be relevant to hearings before the FTPC. This may be seeking to convey that certain kinds of evidence are only relevant to certain stages of proceedings. However (if that was the intention) it does not do so adequately and, in fact, suggests that some of the types of evidence outlined in paragraph 22.1 may not be relevant at all to decisions made in the course of fitness to practise proceedings.

- Paragraph 22.3, within a section entitled 'The relevance of mitigating circumstances', focuses solely on *"evidence of mitigating circumstances surrounding established impairment of fitness to practise"* which might be relevant *"to the evaluation of risk (and hence your choice of sanction)"* (our emphasis). This is confusing, as it might be taken to suggest that evidence of mitigating circumstances is only relevant to the question of sanction. While that may be true for certain aspects of purely personal mitigation, it is certainly not the case for *"mitigation"* in the wider sense as set out in paragraph 22.1.

- Paragraphs 22.7 – 22.10 seek to explain the stages at which evidence of *"personal mitigation and testimonials"* may be relevant. These paragraphs explain that evidence of good character may be relevant where an allegation of dishonesty is made (paragraph 22.8); that evidence establishing remedial steps will be relevant to the issue of current impairment (paragraph 22.9, which includes the quotation from Azzam that we have reproduced above) and that evidence of purely personal mitigation will usually only be relevant to sanction. This is correct. However, the guidance does not address the important question of when evidence going to the context of a registrant's conduct (and therefore the culpability to be attached to it) may be relevant, nor does it explain that evidence of a good character may be relevant to current impairment and sanction in addition to potentially being relevant to the facts stage if a registrant faces an allegation of dishonesty.

- There is, surprisingly, no attempt to address in any detail the question of the practitioner's insight, what kinds of evidence may indicate insight or a lack of insight, the fact that insight may be expressed in different ways and that cultural differences may play a part in how a practitioner expresses insight. These issues are expressly addressed in ISG documents produced by the GMC (paras. 37 – 42) and the GDC (paras. 5.22 – 5.26). By contrast, the term insight is only referred to once in this section in paragraph 22.1, which states that *"a demonstration of insight of those concerns coupled with actions taken to avoid repetition of them may also be regarded as mitigating factors"*.

Overall, in our collective view, there is therefore a lack of clarity in this section as to which kinds of evidence – broadly termed "mitigation" – is relevant and admissible at each stage of the proceedings. This section should be re-drafted to make this clear as it is an important topic in the context of hearings before the FTPC. This could potentially be achieved by addressing the categories of evidence that might arise in turn, providing examples and explaining the stage at which such evidence might be relevant. Those categories might be taken to be:

- Good character
- Evidence of the context in which events occurred
- Remediation evidence
- Insight
- Testimonial evidence
- Personal mitigation
- The absence of evidence

The list of generic aggravating and mitigating factors set out at paragraph 22.3 is non contentious and, indeed, a similar list appears in ISG documents issued by other regulators. However, in our collective view view, it would be better incorporated in the ISG section rather than in this section.

Section 23: Decision Making

Paragraph 23.3

This paragraph correctly states that the amount of detail required in a written determination *"will depend on the complexity of the case"* and goes on to state that the determination should *"set out what the facts of the case are with sufficient detail to enable to reader to understand the nature and seriousness of the allegations"*.

It is not clear why this paragraph gives such importance to the need to include detail to establish the *"nature and seriousness of the allegations"*, while making no mention at all of the crucial requirement that a determination must be sufficiently detailed to ensure that the parties know what has been decided and why. This flows from the decision in Phipps v GMC [2006] EWCA Civ 397, for example at para. 85:

> *[85] [….] In every case, as it seems to me, every Tribunal (including the PCC of the GMC) needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?*

Paragraph 23.5

This paragraph sets out the factors that make a "good determination".

We would suggest that, in addition to the factors set out at sub-paragraphs (a) – (p), reference to the following could be included:

- The need to use clear language and vocabulary so that the registrant, the other parties to the hearing, members of the public and any appellate court will understand the decision and the reasons for it.

- A clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is disputed.

- Confirmation as to whether the FTPC has taken into account any guidance and, if so, the extent to which that guidance has been taken into account.

Paragraph 23.6

The meaning of the first sentence of this paragraph is not clear at all.

Section 27: Fitness to practise not impaired (warning)

General Comments

This section is, overall, relatively fair. However, we believe that much more detailed guidance could be given, in particular on issues such as:

- The effect of issuing a warning on any subsequent fitness to practise proceedings;
- The purpose of issuing a warning;
- How to draft a warning.

The GMC has issued such detailed guidance in a separate document from its ISG, entitled 'Guidance on Warnings' (2015), which can be found at http://www.gmc-uk.org/Guidance_on_Warnings.pdf_25416870.pdf.

Paragraph 27.1

Paragraph 27.1 states: *"When issuing a warning, the Fitness to Practise Committee should consider setting a date of expiry of the warning. If no date is set the Committee should set out clearly its reasons."*

However, there is no guidance to the Committee regarding setting an expiry for a warning including guidance on the appropriate length of time. Since the Committee are not mandated to issue a warning for a specific term e.g. 4 years like in the case of non-public warnings issued by Case Examiners, it is important that clear guidance is given. Furthermore, it appears from the guidance that the Committee may be able to impose a warning without an expiry. If the GOC consider that the Committees have this power then any such action would be extremely unfair.

We consider that there should be no reference to the possibility of issue of a warning with no date set.

Paragraphs 27.1 – 27.3

These paragraphs should make clear that a warning may be given when the fitness to practise of a registrant *"is found not to be currently impaired"* and should refer to *"a finding of 'no current impairment'"*.

Paragraph 27.3

In respect of the list of factors consider, "and/or" is included after sub-paragraph (b) and "and" is included after sub-paragraph (i). This may cause confusion. Is there a reason for these words to be included after those two sub-paragraphs only?

Moreover, we respectfully invite removal of this paragraph in its entirety as the factors listed are essentially those which might provide a reason for *not* imposing a warning at all rather than those indicating that a warning is necessary.

If this type of guidance is considered appropriate, the proper way forward would be to identify factors relevant to whether the concerns raised are sufficiently serious to require a formal response from the Fitness to Practise Committee. We refer to paragraphs 19 and 20 to the GMC's Guidance on Warnings by way of example. Factors listed within the GMC guidance include, in summary:

a. A clear and specific breach of *Good medical practice* or the supplementary guidance.
b. That the particular conduct, behaviour or performance approaches, but falls short of the threshold for the realistic prospect test or in a case before a tribunal, that the doctor's fitness to practise had not been found to be impaired. Concerns sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise.
c. A warning will be appropriate when the concerns are sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise.
d. There is a need to record formally the particular concerns (because additional action may be required in the event of any repetition).

Section 28: Impaired fitness to practise etc.

Paragraph 28.1

Rather than referring to a conclusion that *"the registrant remains fit to practise and does not require any restriction on his/her registration"*, which may cause confusion, this paragraph should simply read *"Where you conclude that the registrant's fitness to practise is not currently impaired, none of the [….]"*.

Section 29: Available sanctions

Paragraph 29.1

This paragraph should refer to where fitness to practise is *"found to be currently impaired"*.

Paragraph 29.2

This paragraph deals with the possible sanctions available to the FTPC.

Taking no action following a finding of current impairment is just as much an option for the FTPC as the sanctions listed at sub-paragraphs (a) – (e). In our collective view, this paragraph should set out the options open to the FTPC if it finds that a registrant's fitness to practise is currently impaired. This includes "Take no action", which should be listed as sub-paragraph (a). This could be achieved by the paragraph reading *"Where a committee finds that a registrant's fitness to practise is currently impaired, it can (a) Take no action, (b) [….]"*.

Section 30: Proportionality

Paragraph 30.1

This paragraph does not clearly explain the concept of proportionality. It should include an explanation to the effect that proportionality requires that any sanction imposed must:

- Strike a proper balance between the interests of the registrant and the public interest;
- Be the least severe sanction that deals adequately with the issues identified in the particular case.

Further, this paragraph must make clear that the FTPC must consider the sanctions *"in ascending order, starting with the least severe"* and must only move on to the next sanction if the one under consideration is not sufficient.

Paragraph 30.2

This paragraph addresses the stage of a registrant's career/training and its potential relevance to determining the proportionate sanction for a student registrant. It follows quite closely the guidance issued by the GMC in its ISG document at paras. 26-29, which read as follows:

> *The stage of a doctor's UK medical career*
>
> *[26] When a doctor graduates from medical school and begins working in the UK, they may well experience a steep learning curve as they take on new responsibilities. As a doctor's medical career progresses, the tribunal would expect the doctor to gain increased understanding of the social and cultural context of their work, appropriate standards, and national laws and regulations that apply to their area of work.*
>
> *[27] Many doctors joining the medical register have previously worked, lived or were educated overseas, where different professional standards and social, ethnic or cultural norms may apply. Doctors are expected to familiarise themselves with the standards and ethical guidance that apply to practising in the UK before taking up employment, although experience of working as a doctor in the UK plays a key role in their development.*
>
> *[28] In some cases, the tribunal may consider the stage of a doctor's UK medical career, and whether they are new to the UK medical register, when making decisions. Evidence that the doctor has gained insight (see paragraphs 37–42), once they have had an opportunity to reflect on how they might have done things differently with the benefit of experience, may be a mitigating factor.*
>
> *[29] In cases involving serious concerns about a doctor's performance or conduct – for example, predatory behaviour to establish a relationship with a patient (see paragraphs 105–106), or serious dishonesty (see paragraphs 129–137) – the stage of the doctor's UK medical career will have limited influence on the tribunal's decision about what action to take. Serious poor practice or misconduct is not acceptable simply because the doctor is inexperienced.*

We think that it is entirely proper for a FTPC to take the stage of a student registrant's career into account in determining the appropriate sanction, in cases where a finding of current impairment has been made. However:

- The only factor specifically stated is that it may be a mitigating factor if a student gains insight *"once they have had an opportunity to reflect on how they might have done things differently, with the benefit of experience and/or further training"*. This is perhaps obvious and, in any event, is not much different from the relatively common

situation seen by the FTPC of a fully registered optometrist or dispensing optician who has allowed his or her knowledge/skills to deteriorate over time due to isolation, lack of training etc. In our collective view, the guidance document should provide for clarity to committees as to how the stage of a student registrant's career may be relevant.

- This paragraph deals only with sanction. However, the stage of a student registrant's career may also be relevant to other stages of the fitness to practise process as well. The guidance document should explain how, perhaps in a separate section on this issue rather than in a single paragraph in the ISG.

- The final sentence of this paragraph should read *"[….] the stage of a registrant's training <u>may</u> have a more limited influence [….]"*. The extent to which the stage of a student registrant's career will be relevant will vary, depending on the facts of the case. It will ultimately be a matter for the FTPC to determine how much weight should be attached to it. As currently drafted, the last sentence may act so as to fetter the FTPC's discretion.

Section 31: No further action

General Comments

On our view the guidance should simply highlight the fact that the FTPC may take no action and say nothing more. This is because action should only be taken when it is required to protect the public or public confidence in the profession and there should not be a presumption in any case that a FPTC will take action.

However, we recognise that given the contents of the GMC's and GDC's ISG documents which do specifically address this issue, we anticipate that the GOC will wish to publish some guidance on the subject.

Overall, our impression is that this section is seeking to persuade committees away from taking no action in any case – in particular the use of the word *"very"* in paragraphs 31.2 and 31.4 (*"very rare"* and *"very carefully"*) and the use of bold in paragraphs 31.2 ("***Exceptional***") and 31.3 ("considerable insight into his/her behavior ***and*** *has already embarked on [….]*"). We did not note this kind of language/formatting being used in any other section of the document.

We think that the section should be written in a much more natural way, which conveys that it will be only in exceptional cases that it will be proper to take no action but without going too far.

Further, we think that this section goes too far in seeking to limit taking no action to *"very rare"* cases. Paragraph 31.2 is contradictory, as *"exceptional circumstances"* does indeed mean in some contexts circumstances that are *"not routinely or normally encountered"* (relying on R v Kelly [2000] QB 198). However, this is not the same as saying that the circumstances must be *"very rare"*. In our view the word "very" in paragraph 31.2 should be deleted for this reason as well.

Section 32: Conditional registration

Paragraph 33.1

This paragraph states that, because the primary purpose of conditional registration is to protect the public, *"the conditions should normally impose a requirement for the registrant to be under strict supervision in either his practice or other places of work"*.

This statement is not based on any authority or other established guidance that we are aware of and is, in our collective view, wrong. There could be no requirement to *"normally impose"* any form of supervision, let alone *"strict supervision"*. Each case is different and, as a result, the requirements of each case will be different. We note that the GMC's ISG deals with the issue in a far more neutral way (para 61, with our emphasis):

> *[61] The purpose of conditions is to help the doctor to deal with their health issues and/or remedy any deficiencies in their practice or knowledge of English, while protecting the public. In such circumstances, conditions might include requirements to work under supervision.*

In our collective view, the relevant sentence may have the effect of fettering the FTPC's discretion. It should be deleted in its entirety.

Paragraph 33.3

This paragraph suggests that the FTPC may decide that *"further training, in additional to conditional registration, is required [….]".*

The meaning of this is unclear. There is no reason why *"further training"* cannot form the basis of a condition imposed as part of a conditional registration order. The GOC may be assisted by referring to the GDC's ISG in this regard, which states at para. 7.10 (with our emphasis):

> *[7.10] A Conditions of Practice Order ("conditions") may be imposed to restrict a dental professional's practice, for example by preventing him or her from: practising in certain circumstances; from carrying out certain treatments; or from treating particular categories of patient. Conditions may also make positive requirements of a dental professional, such as a requirement to undergo training in a particular area of their practice.*

Paragraph 33.4

It is suggested in this paragraph that the FTPC would *"need to consider objective evidence submitted on behalf of the registrant, or such evidence that is available to them about the registrant's practice"* when assessing the *"potential of using conditions"*.

Without further clarification, this paragraph as currently worded has the capacity to cause confusion, potentially to the detriment of registrants. It is not clear why *"objective evidence submitted on behalf of the registrant"* has been separated out from the *"other evidence that is available"*. It will often be the case that a registrant explains their practice to the FTPC in oral

evidence at the impairment stage. Is this classed as *"objective evidence"*? If not, what kind of *"objective evidence"* is anticipated?

Paragraph 33.5

This paragraph suggests that the objectives of any conditions should be made clear to assist any future committee considering the case.

This is true, but the primary reason for making the objectives of conditions clear is to ensure that the registrant understands what is expected of him or her. Reference to this should be included. Similar wording to that used in the GMC's ISG could be adopted (see para. 70):

> *"[70] The tribunal should clearly set out the objectives of the conditions so the doctor knows what is expected of them. This is also important to help tribunals at future review hearings understand the original concerns and the exact proposals to resolve them, and to evaluate whether the concerns have been resolved".*

Paragraph 33.9

This paragraph suggests that conditions may be appropriate when most or all of the following factors are apparent and at sub-paragraph (d) *"no evidence of general incompetence"* is suggested as a relevant factor.

It is not clear what *"general incompetence"* means. The phrase is not defined anywhere in the ISG. Nor is this a phrase mentioned, to our knowledge, in any authority on the subject of fitness to practise. Further, it is not clear why conditions could not be appropriate in circumstances where a practitioner displays *"general incompetence"* (whatever the phrase means), but the FTPC considers that his or her performance could be improved by further supervision and training.

In our collective view, the use of such loose language is likely to cause confusion. Sub-paragraph (d) should be deleted.

General Comments

It may also be helpful for committees to know that it would be unlawful for a condition to be imposed that is tantamount to an order for suspension (a condition that the registrant must not practise optometry, for example). This arises from the case of Udom v GMC [2009] EWHC 3242 (Admin), at paras. 31-33:

> *[31] In my judgment, the Panel did err in law in their approach to section 35D(2) of the 1983 Act. As I have said, subsections (b) and (c) are based on different and mutually exclusive premises. The former (suspension) is based upon the premise that in substance registration, and hence the ability to practise cease, at least temporarily. The latter (the imposition of conditions) is based upon the premise that in substance registration, and hence the ability to practise, continue, but are restricted. They are alternatives - hence the word "or" that joins them - precisely because they are mutually exclusive. It is logically impossible to have conditions limiting the ability to practise medicine attaching to a registration that is of no effect. If conditions are such that they divest registration of all effect, then that cannot properly be called a "conditional registration". In substance, it is no registration at all.*
>
> *[32] And in my judgment, it is a matter of substance, and not simply form. I do not consider that a panel can undermine this statutory structure by bringing to an end the ability to practise through the imposition of conditions under subsection (c), rather than suspension under subsection (b). It cannot have been the intention of the provisions that a panel could do that because, if registration could be brought to an end for a period of time by way of a conditions, then subsection (b) would be otiose and empty - and it is a tenet of statutory construction that some substance should be given to each provision. Still less could it have been the*

intention of Parliament, in the face of the clearly disjunctive subsections (b) and (c), that conditions could be used to emasculate registration and impose yet further obligations on the relevant doctor. Leaving aside the practical difficulties that this may impose upon that doctor, to which Miss O'Rourke referred, it is simply not a construction open on the face of the statutory provisions.

[33] That proper construction does not allow for a suspension of a registration, coupled with further obligations imposed upon the doctor. I do not consider that it is any answer for the GMC to say (as the Panel in this case did, and as Miss Griffin submitted) that one reason for the imposition of the conditions was that they were for the Appellant's own good in terms of rehabilitation. In other words, he was more likely to be rehabilitated as a doctor if he were made to pursue clinical attachments subject to the obligations set out in the conditions imposed by the sanctions determination. The Appellant happens to disagree in this case - he considers he would stand a better chance of rehabilitation if he were suspended and had more freedom to arrange clinical attachments etc - but in any event the focus of this regime is not paternalism for doctors, but rather for the protection of the public and the integrity of the profession, which can equally be maintained by a suspension of the relevant doctor. In the face of the clear provisions of the statute, there is no room for a construction that allows a panel effectively to suspend a doctor and also impose conditions upon him that arguably may assist his own rehabilitation. If that were the true construction, then all cases in which a panel intended to take from a doctor the ability to do what registration authorises him to do in terms of clinical practice, could and would be done by way of conditions that could both take away the effects of registration completely, whilst imposing upon the doctor a regime that would (in the panel's view) maximise that doctor's opportunities to rehabilitate and return to practise. Indeed, if that were the true construction, they could do so and effectively suspend the registration of a doctor for a period of 3 years, rather than 12 months. Paternal and good as the intentions of the GMC might be, that is simply not the statutory scheme.

Section 34: Suspension

Paragraph 34.1

Sub-paragraph (b) suggests that suspension may be appropriate when the conduct concerned is *"not fundamentally incompatible with continuing to be a registered professional".*

In our collective view this sub-paragraph should be removed as it may lead to confusion for the reasons given in O v NMC [2015] 2949 (Admin) – see below. Simply removing the words "*in that the public interest can be satisfied by a less severe outcome than permanent removal from the register"* from the end of the guidance criticised in that case does not remove the real possibility of an error in decision-making:

> *[37] In relation to suspension, paragraph 71 sets out a non-exhaustive list of factors indicating that suspension may be appropriate. They include the following, so far as relevant to this case:*
>
> *71.1 A single instance of misconduct but where a lesser sanction is not sufficient.*
>
> *71.2 The misconduct is not fundamentally incompatible with continuing to be a registered nurse or midwife in that the public interest can be satisfied by a less severe outcome than permanent removal from the register.*
>
> *71.3 No evidence of harmful deep-seated personality or attitudinal problems.*
>
> *71.4 No evidence of repetition of behaviour since the incident.*
>
> *71.5 The panel is satisfied that the nurse or midwife has insight and does not pose a significant risk of repeating behaviour.*
>
> *[….]*
>
> *[79] The operative part of the committee's reasoning is the part in which it ruled out suspension, since that was the exercise which determined that striking-off would necessarily follow. During that part of the committee's reasoning process, there was no evaluation worth the name of the points made in mitigation by Mr Hockley.*
> *80 The error in this approach is contributed to by the way in which the Guidance is drafted. In paragraph 71, the "key considerations" in a suspension case include that set out at 71.2, which in effect asks the question whether suspension is too lenient. That consideration is, in appearance, given equal weight with the other considerations set out in 71.1 and 71.3–7 inclusive.*
>
> *[81] However, what is set out at 71.2 is, properly appreciated, not a "consideration" at all but the conclusion which either does, or does not, flow from an assessment of the other considerations set out under paragraph 71. Once paragraph 71.2 is found to be inapplicable, the inexorable conclusion is that suspension is too lenient and striking-off necessarily follows.*
>
> *[82] It is therefore critical to the fairness of the process that the paragraph 71.2 issue is addressed at the end of the committee's deliberations, not in the middle of them as was done in this case. Here, the committee proceeded straight to paragraph 71.2 when considering suspension, saying it was "of the view that paragraph 71.2 was a particular consideration in this case".*
>
> *[83] That was the first statement it made when considering suspension as a possible sanction. There was no mention of the factors set out in 71.3 or 71.4, so heavily relied upon by Mr Hockley. When considering the paragraph 71.2 issue, the committee simply failed to address the mitigation advanced by Mr Hockley which should have informed its conclusion on that very issue.*
>
> *[84] Once the committee had concluded that suspension was insufficient, the case was effectively over. No other sanction remained available except striking-off. All others had been ruled out. Thereafter, there was still no evaluation of the points made in*

mitigation on Mrs O's behalf. They were never properly weighed in the balance against the public interest in maintaining trust in the nursing profession and the regulator.

Further, sub-paragraph (g) should not be part of the list.

Paragraph 34.3

Reference is made in this paragraph to HK v General Pharmaceutical Council [2014] CSIH 61, which is an unusual case in which the Inner House of the Court of Session decided that there was an "intermediate sanction" between suspension for 12 months and erasure, involving a committee suspending for 12 months and indicating that it would expect the suspension to be further extended at a Review Hearing, see para 17:

> *[17] In such a case we are of opinion that it would be competent for the Committee, when imposing the sanction of 12 months' suspension, to indicate that it considered that the suspension should be extended thereafter, for a further 12 months or longer as the case might be. The power to give such an indication appears to us to be reasonably incidental to the powers conferred by article 54(2)(d) and (3)(a)(ii) ; without it the Committee is faced with a stark dichotomy between one year's suspension and removal from the Register, which is effective for at least 5 years. That is clearly undesirable as in many cases, of which the present appears to us to be an example, some middle course is the correct sanction. Counsel for the respondent submitted that the problem with the power of suspension was that only 12 months can be imposed, and the Committee cannot tie the hands of a later Committee when it comes to consider an extension. Nevertheless, we are of opinion that it must be assumed that the later Committee will act in a reasonable manner and will respect the decision and findings of the earlier Committee that heard the complaint against the appellant. If an indication as given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional 12 or 24 months, that will not bind the later Committee, but the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so. In our view this provides an intermediate sanction but at the same time respects the freedom of the later Committee to deal with changing circumstances, if that is appropriate.*

As the document rightly states, this decision is the subject of an appeal by the GPhC to the Supreme Court. However, for now, it remains persuasive authority as to the powers of a disciplinary committee in these circumstances.

In our view, if it is to be mentioned it should fully explain that HK suggests:

- That an *"intermediate sanction"* between suspension for 12 months and erasure is available;
- That "*it would be competent for the Committee, when imposing the sanction of 12 months' suspension, to indicate that it considered that the suspension should be extended thereafter, for a further 12 months or longer as the case might be"*;
- That *"if an indication as given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional 12 or 24 months, that will not bind the later Committee, but the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so".*

Section 35: Directing a Review Hearing

Paragraph 35.3

This paragraph properly suggests that the FTPC may wish to give guidance as to the evidence that a Review Hearing committee may find useful.

However, it may be helpful to make clear in this section that any such guidance is not a 'condition' of practice. The FTPC cannot impose both an order for suspension and a condition at the same time. This would be unlawful, as explained in Udom (eg: at para. 33, set out above).

Section 36: Erasure

Paragraph 36.4

While reference to the general principles set out in Bolton v Law Society and Gupta v GMC is unobjectionable, this paragraph goes further and seeks to suggest that erasure will be appropriate where, despite a practitioner presenting no risk, where *"the registrant's behavior has demonstrated a blatant disregard for the system of registration"*. This is based on the outcome in the case in Gupta.

This paragraph is potentially unfair to registrants and should be deleted. Each case turns on its own particular facts. It is not proper for Gupta to be advanced as establishing any general principle of law in this regard.

Section 37: Sexual misconduct

Paragraph 37.1

This paragraph suggests that *"the misconduct is particularly serious where [….] a registrant has been registered as a sex offender"*.

This contention is not consistent with paragraph 38.2 of the same document and with the case of Obukofe v GMC [2014] EWHC 498 (Admin), which suggests that it is not the fact of being on the sex offenders register that is a decisive factor in determining sanction, see paras. 55-58:

> *[55] The next point that is taken is that the Panel erred in law in treating the Fleischmann case as analogous and relying on it in reaching its conclusions on sanction. In the Fleischmann case, Dr Fleischmann, a dentist, had been convicted of possessing indecent images of children on his computer, many at levels 4 and 5. He was convicted on twelve counts and sentenced to a Community Rehabilitation Order for 3 years on each count concurrently and put on the Sex Offenders' Register for a period of 5 years. The Community Rehabilitation Order required him to attend a Sexual Offenders rehabilitation programme. The Professional Conduct Committee of the General Dental Council imposed a sanction of suspension for 12 months and an appeal was brought to this court on the grounds that that sanction was unduly lenient. Newman J allowed the appeal and held that the only proper sanction in that case was erasure from the register.*
>
> *[….]*
>
> *58 It appears to me that the important element of the reasoning of Newman J in paragraphs 53 and 54 of his judgment relate to the sex offender's treatment programme to which Dr Fleischmann was subject for 3 years rather than his subjection to the notification requirements of the Sex Offenders Register for 5 years. If, in this case the Panel had thought that the Fleischmann case required it to continue the suspension until Dr Obukofe's criminal sentence had been completed (including the period during which he remained subject to the notification requirements of the Sex Offenders Register) that would, in my view have been an error of law. But it seems clear to me that that was not the way in which this Panel relied on the Fleischmann decision [….]*

Reference to "being registered as a sex offender" should be deleted from this paragraph.

Paragraph 37.2

It is not clear where this quotation is from or what it relates to or why it is relevant to this section. In the circumstances it should be deleted.

Section 38: Indecent images of children

In general, the guidance in this section appears reasonable. The only comment we would make is that we are not sure what the basis is for the comment made at the start of paragraph 38.1 that *"In most cases where a committee has not imposed the most severe sanction, the PSA has had concerns that the committee has failed to investigate the case sufficiently"*. We are not currently aware of any PSA cases concerning indecent images other than the Fleischmann case.

Section 39: Dishonesty

This is reasonable guidance, in line with the case of Hassan v GOC [2013] EWHC 1887.

It should however also be mentioned that the High Court has in fact gone further than this and stated that there is no general rule that a practitioner is inevitably to be found to be currently impaired if they have acted dishonestly. In PSA v GMC & Uppal [2015] EWHC 1304 (Admin) Lang J stated that:

> *[26] In its review of the law, the PSA submitted that "the fitness to practice of a doctor who acts dishonestly is impaired by that dishonesty", citing R (CR HCP) v. NMC & Kingdom [2007] EWHC 1806 (Admin) ; Parkinson v. NMC [2010] EWHC 1898 (Admin) ; Hassan v. General Optical Council [2013] EWHC 1887 (Admin)*
>
> *[27] In my judgment, the PSA's submission that a doctor's fitness to practise "is impaired" if he acts dishonestly does not accurately reflect the statutory scheme or the authorities, since, even in cases of dishonesty, a separate assessment of impairment is required, and not every act of dishonesty results in impairment. [….]*

This should be included at some point in the document.

Section 40: Candour

We note the background narrative in paragraph 40.1 as to how and why reference to the duty of candour has been introduced into this guidance and its potential relevance to FTP hearings. However, we would point out note that the GOC in its new Standards of Practice for Optometrists and Dispensing Opticians, which are effective from 1 April 2016, confirms that the professional duty of candour is triggered when the optometrist or dispensing optician has identified that things have gone wrong with a patient's treatment or care which has resulted in them suffering harm or distress or where there may be implications for future patient care [our emphasis]. This is different from the form of words contained in the statement the GOC previously signed up to in conjunction with a number of other regulators. Given the potential ramifications for registrants in not complying with the professional duty of candour, and GOC guidance, including this, should replicate the joint regulator statement, already signed up to, and provide clear guidance for both registrants and Committees as to when the professional duty of candour has been breached. This may be best done in a separate stand alone document.

Paragraph 40.2

(a) Charging breaches of the duty of candour

This paragraph states that a breach of the relevant standards in this regard will *"normally be charged as a separate allegation"*.

In our collective view, if it is to be suggested that a registrant has breached his or her duty of candour this must be alleged as a specific factual allegation and adjudicated upon by the FTPC at the facts stage. Only if that is done can such a breach be taken into account at subsequent stages of the hearing. This flows from the following line of authorities:

Struthos v London Underground Ltd. [2004] EWCA Civ 402

> *[12] It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.*
>
> *[....]*
>
> *[38] This is not a case, especially as the matter has been raised only during the hearing in this court, in which to attempt to state general principles as to when a disciplinary charge of this kind may be departed from when disciplinary action is taken. However, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged.*

Chauhan v GMC [2009] EWHC 2093 (Admin)

> *[6] In so far as the Panel, at stage one of its decision process, makes material findings of fact adverse to the practitioner which could themselves have been the subject of a charge of professional misconduct, which however are not within the charges as*

formulated and particularised in the Notice of Hearing, then those findings in my judgment cannot properly or fairly be used by the Panel to support its findings under the Notice and in so far as the Panel has so used them, then the Notice findings are liable to be held vitiated and set aside. I agree with Silber J. in Cohen v. GMC [2008] EWHC 581 (Admin) 581, paragraph 48 that findings in relation to any particular charge at stage one "must be focussed solely on the heads of the charges themselves". The observations of Pill LJ in Strouthos v. London underground Ltd [2004] EWCA Civ 402 at paragraph 12 that a "it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed and that the evidence should be confined to the particulars in the charge" must be equally apposite to hearings before the FTP of the Respondent.

R (El Baroudy) v GMC [2013] EWHC 2894 (Admin)

[14] As I have said already, in this case there was no allegation that the misconduct either caused death or caused the loss of any realistic chance of survival. Had the GMC wished to pursue those allegations, which would have been highly material, then in my judgment they should have been clearly stated in the charges and, in the absence of being stated, evidence directed to those issues should not have been led and the Panel should not in any way have based a judgment as to whether the fitness to practise was impaired or as to sanction on any question of causation, causation being defined as causing death or indeed causing the loss of any real chance of survival.

Further, an allegation that a registrant has breached his or her duty of candour may well include an allegation of dishonesty. If that is the case, it is particularly important that such an allegation is properly particularised and adjudicated upon by the committee, see eg: Fish v GMC [2012] EWHC 1269 (Admin):

[69] I do not think that I state anything novel or controversial by saying that it is an allegation (a) that should not be made without good reason, (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it. [….]

[70] At the end of the day, no-one should be found to have been dishonest on a side wind or by some kind of default setting in the mechanism of the inquiry. It is an issue that must be articulated, addressed and adjudged head-on.

(b) Procedure for adjudicating on such charges

This paragraph goes on to state that *"In these situations* [we take this to mean when a separate allegation of a breach of the duty of candour has been alleged] *the Committee should consider whether the registrant complied with the standard of candour as part of determining the facts, and any breach of the standards that might amount to misconduct"*.

The second part of this sentence may mean that the FTPC should consider whether any breach of the duty of candour that has been established at the fact stage amounts to misconduct. If so, that is correct. However, its meaning is unclear at present.

It may be more helpful for this part of the document to explain that an allegation that a registrant has breached the duty of candour should be treated in the same way as any other allegation.

(c) Aggravating feature

This paragraph states that *"It* [which we take to be referring to an established breach of the duty of candour which amounts to misconduct and which gives rise to current impairment of fitness to practise] *should be considered as an aggravating feature by the committee in determining sanction".*

This terminology is likely to cause confusion. If a registrant is found to have breached the duty of candour, this is not an *"aggravating feature"* in the sense that it makes any other established misconduct more serious. It the proper procedure has been followed, a specific allegation will have been particularised and adjudicated upon. That allegation may, depending on the circumstances, lead to a finding of misconduct, of current impairment and the imposition of a sanction. However, it is not an *"aggravating feature"*. It is an allegation in itself, which must be considered as such by the FTPC.

Section 41: Failing to provide an acceptable level of patient care and persistent clinical failure

Paragraph 41.2

This paragraph suggests that *"it is likely that conditions or suspension may not be sufficient"* in clinical cases where a practitioner does not have insight, or does not have the potential to develop insight. The cases of Ghosh v GMC [2000] and Garfoot v GMC [2001] are relied on in support of this proposition.

The sentence *"it is likely that conditions or suspension may not be sufficient"* is confusing and contradictory.

Further, the cases of Ghosh and Garfoot do not support the general proposition made in this paragraph. They were decisions that turned (in relation to the sanctions imposed) on their own particular facts.

Ghosh was a case in which a doctor had been made subject to a period of conditional registration, which she had failed to comply with. In particular, she had failed to attend appropriately and at one stage left the country without warning for 2 ½ months. At a resumed hearing the committee, unsurprisingly, erased the doctor's name from the register. The Privy Council declined to interfere, stating that:

> *Their Lordships have themselves reviewed the evidence, and are satisfied that this was a bad case. Dr Ghosh never acknowledged the seriousness of her original misconduct, and patently failed to attend, let alone successfully complete, the programme that had been arranged for her. Her conduct in leaving the country for 2½ months without prior warning or subsequent explanation was unprofessional and in the highest degree irresponsible. On the evidence before it and without seeing Dr Ghosh and hearing her in person the committee had no material on which it could be satisfied that Dr Ghosh would be any more likely to comply with the terms of a further period of conditional registration than she had in the past. Their Lordships recognise, as the committee must have done, that erasure will effectively bring Dr Ghosh's career as a doctor to an end. But they consider that, in all the circumstances, the committee had no real alternative but to order her name to be erased from the register*

Garfoot was a case involving the irresponsible prescribing of addictive controlled drugs (including injectable methadone and benzodiazepines) to vulnerable patients over a period of years. The committee erased the doctor's name from the registered. The Privy Council declined to interfere, stating:

> [15] Turning to the question of erasure their Lordships have concluded that, although the ultimate sanction, it was neither excessive, disproportionate, inappropriate nor unnecessary in the public interest. The evidence and the conclusions of the Committee indicated a very serious state of affairs. Their Lordships cannot accept the argument that the patients did not suffer harm. Where there was no attempt at stabilisation on oral preparations and no attempt to engage patients other than by maintenance prescribing there was inevitable harm to such patients. [….]
>
> […]
>
> [16]The Committee considered carefully and at length the option of imposing conditions but concluded that no appropriate conditions could be devised so as to enable him to continue practising in his chosen specialty. The Board has re-considered the situation in the light of the proposal that he will depart from this field, undertake general practice and that he has no intention of treating drug users again. Even if their Lordships had been persuaded that this was a practical proposition, they would nevertheless have come to the conclusion that the circumstances of the case were so serious that the order of erasure was entirely appropriate and, inevitable and that there was no basis to justify setting it aside.

In our collective view, this paragraph should be amended and reference to Ghosh and Garfoot removed. We would not object to the paragraph stating something along the lines of *"A particularly important consideration is whether or not a registrant has insight, or the potential to develop insight, into these failures. Where this is not evident, conditions or suspension may not be appropriate or sufficient".*

Section 42: Cases involving a conviction, caution or determination by another regulatory body

General Comments

This section makes no mention of The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013 and protected convictions/cautions. It would be helpful to committees to be given some assistance on this topic.

Paragraph 42.1

The last sentence of this paragraph states *"If a registrant has accepted a police caution, the registrant will have admitted committing the offence"*.

This paragraph does not explain what a caution is and is poorly drafted. The issue is dealt with in the following way in the GDC's ISG document at para. 8 of Appendix A, which is more helpful:

> *[8] In England and Wales, a caution may be given by the police when there is sufficient evidence for a conviction but it is not considered to be in the public interest to pursue criminal proceedings. The registrant must have admitted guilt and consented to a caution in order to have been given one.*

Paragraph 42.4

This paragraph suggests that a committee may form its own view of the gravity of the case before it, relying on RCVS v Samuel [2014] UKPC 13.

This is correct, but it is important that this paragraph makes it clear that this could apply not only in circumstances where it is considered that there were *"particular circumstances which led* [the] *court or regulatory body to be lenient",* but also where it appears that the court or regulatory body has been too harsh in sentencing – see Samuel at para. 33, where the Privy Council considered that the offences in question should not have been held to cross the custody threshold:

> *[33] It is apparent from the reasons given by the Committee, both on the question of fitness to practice and on the question of sanction, that it was considerably influenced by the fact that the magistrates imposed a suspended prison sentence [….] In all the circumstances, it is hard to conceive that the court would have considered that the offences truly passed the custodial threshold for a person of good character, if it had not had the power to suspend the sentence. The Board is therefore not greatly influenced in its assessment of the gravity of the case by the fact that the magistrates imposed a suspended sentence of imprisonment.*

Section 44: Raising concerns

Paragraph 44.2

This paragraph suggests that a failure to raise concerns should be treated as *"an aggravating factor" in* determining sanction.

As with the duty of candour, an allegation that a registrant has failed to raise concerns must be properly particularised and adjudicated upon for the reasons set out above.

Further, a failure to raise concerns should not be regarded as an *"aggravating factor"* for the reasons set out above. It is an allegation in itself, which must be considered as such by the FTPC.