

Optical Confederation and Optometry Wales response

General Optical Council consultation on consensual disposal

The Optical Confederation represents the 13,000 optometrists, 6,000 dispensing opticians, 7,000 optical businesses and 45,000 ancillary staff in the UK, who provide high quality and accessible eye care services to the whole population. The Confederation is a coalition of the five optical representative bodies: the Association of British Dispensing Opticians (ABDO), the Association of Contact Lens Manufacturers (ACLM), the Association of Optometrists (AOP), the Federation of Manufacturing Opticians (FMO) and the Federation of Opticians (FODO). As a Confederation we work with others to improve eye health for the public good. The Local Optical Committee Support Unit (LOCSU) provides quality, practical support to Local Optical Committees (LOCs) in England to help them to develop, negotiate and implement local objectives in respect of primary ophthalmic services.

We broadly welcome the introduction of consensual disposals as part of the fitness to practise (FTP) approach employed by the GOC. As the GOC has stated consensual disposal can if appropriately implemented encourage registrant engagement with the FTP process, allow a flexible and appropriate response to each case, enable a proportionate response, avoid the need for witnesses to attend hearings, and allow a better management of hearing time. We do have concerns, set out in the responses below, as to how many cases might be disposed in this way within the GOC's stated criteria.

We welcome the fact that the GOC is proposing a pilot period, which should allow the consensual disposal policy to be refined and improved. Further input from stakeholders would be useful to this learning process.

We would also urge the GOC to look at other approaches that can proportionately reach case disposal and uphold public protection. The GMC for example allow voluntary undertakings to be considered after the FTP investigation has taken place. Where appropriate, and in the public interest, this can lead to disposal of cases without the need for a case to proceed to hearing or tribunal¹. Cases with a component relating to registrant health or when the registrant or when the registrant is seeking to retire would be examples of suitable types of case. Alongside consensual disposal this would better enable the GOC to deal appropriately with cases to the benefit of all parties.

This would also be consistent with the Professional Standard Authority's view that regulators should reform FTP to operate in a proportionate and flexible way, maintains public protection and that is

¹ GMC. [Doctors under investigation - undertakings](#)

consistent and transparent. The GMC achieves this through disclosure of voluntary undertakings to relevant parties, appropriate to the case. A system that allows pre-hearing disposal would also realise more benefit in terms of required hearing days. We understand that such pre-trial disposal may not be possible without FTP rule changes requiring secondary legislation. We would still urge the GOC to look at how such a system could go forward.

Consultation questions

Consultation question 1: What are your views on our proposals about when consensual disposal should be considered?

The referral routes listed seem correct.

However, we have concerns that the requirements set out in the proposed GOC policy may lead to very few cases being eligible for consensual disposal. In a paper to the GOC Council in June 2017 it was stated that in about a third of cases reaching the hearing stage the registrant admitted all the facts of the allegation. The GOC believes therefore that this proportion of cases may be appropriate for consensual disposal if the recommended action or sanction could be agreed. However, a registrant may agree to the facts of an allegation without necessarily agreeing that misconduct (or one of the other provisions under Section 13D of the Opticians Act) or FTP impairment is involved. The requirement for the registrant to admit to misconduct and FTP impairment therefore seems to be unnecessarily restrictive and not in the public interest. It would seem more appropriate, as is set out at 4.1 (of the GOC consultation document), for these to be considered as factors to be taken into account, rather than requirements, when evaluating the appropriateness of cases for consensual disposal.

For the consensual disposal system to work well it is important that case examiners are given appropriate guidance about case referral. Their training overall could be improved as many cases are still in our view being referred inappropriately to FTP hearing. This is important to ensure that they understand the mechanics of the consensual disposal process and that allegations are framed in an appropriate way. The case examiners should also ensure that cases, that previously would have reached closure without reaching the hearing stage (through 'no further action'), are not in future considered for consensual disposal.

Consultation question 2: What factors should be taken into account when deciding whether a case is suitable for consensual disposal?

Two factors missing from the list are 'mitigating factors' and remedial or reparative steps the registrant might have taken. These should be taken into account when making case decisions about consensual disposal.

One of the factors that the GOC has said should be considered as part of an assessment about the suitability of a case for consensual disposal is whether the registrant has indicated an intention to cease or restrict their practice (4.1.f). This is a form of undertaking voluntarily provided by the

registrant. The GOC could therefore consider this as providing a suitable basis, and with consideration of other factors, to enable a disposal that does not require a hearing to take place (as we have set out above following the GMC model). If necessary the GOC has the power in an FTP case to impose restrictions on practice through an interim order. Registrants facing an allegation would therefore not normally expect to cease or restrict their practice. The GOC should therefore communicate to all registrants, and individual registrants facing an allegation, that this is a factor that will be considered in reaching decisions about consensual disposal.

Engagement by the registrant is also given as a factor for consideration for consensual disposal. This may be reasonable but also requires that the GOC engage actively and early with the registrant and fully inform them about the process. If the GOC is to consider admissions of misconduct and FTP impairment as a pre-requisite or factorial to a consensual disposal, then it should also offer the registrant and their representatives sufficient opportunity and information to provide such admissions. Effective communications will be especially important in the case of registrants that are unrepresented. A possible suggestion, to protect both parties, in relation to unrepresented registrant would be an arrangement to provide independent legal advice at the final sign off to the consensual disposal, similar to that which is provided in employment compromise agreement. It is anticipated that would be extremely few of these cases and therefore not amount to onerous costs.

Consultation question 3: What are your views as to whether discussions between the registrant and the GOC about consensual disposal should take place on a “without prejudice” basis?

It is right that discussions between the GOC and the registrant take place on a ‘without prejudice’ basis. Without this in place, the registrant’s engagement with the FTP process, which the GOC has identified as a benefit, would be reduced as would the likelihood of consensual disposal being reached. The purpose of discussions with the registrant about consensual disposal would be to inform them about the potential for consensual disposal and explore whether this could be agreed. This would not serve an investigative function and there would therefore be no public interest in making the discussions admissible as evidence.

It is important that the GOC makes clear to the registrant when discussions take place on a ‘without prejudice’ basis, and when they are not. The GOC should also ensure that the registrant is aware of what ‘without prejudice’ discussion means within the context of the FTP process.

Consultation question 4: To what extent does consensual disposal represent a fair and proportional way of protecting the public?

Consensual disposal in principle represents a proportionate and fair approach.

The GOC has understandably built in several safeguards and checks in the system to ensure public protection, transparency and consistency. We support the achievement of these aims but would also encourage the GOC to be more flexible and appropriate in the resolution of cases, so that the application of the consensual disposal policy does not create unnecessary pre-hearing processes that could offset these benefits.

We understand the reason that the maker of the allegations is given an opportunity, allowing them input to process. This seems fair and proportionate if their comments do not unduly affect the application of the consensual disposal.

Consultation question 5: What are the likely impacts of consensual disposal for

- a) Registrants**
- b) The public**
- c) The GOC**

Registrants

Consensual disposal could offer benefits to individual registrants if they are appropriately engaged in the process and their expectations are managed through provision of timely information and consistency in the application of the policy. Registrants in general, facing allegations, would benefit from a better managed hearing schedule as they would individually if their case were dealt with by consensus without the need for a contested hearing.

To reduce unnecessary stress and mismanagement of expectations, the GOC should limit the proportion of case in which a registrant is offered consensual disposal which is later withdrawn, for reasons other than the registrant's consent not being forthcoming. It would be right for the GOC to retain this option at the pre-hearing stage but, where an agreement has already been reached only to exercise it in exceptional cases.

The GOC should take care to ensure that registrants without legal representation are not unfairly effected by the implementation of the consensual disposal policy.

The public

The process the GOC has set out provides adequate safeguards to ensure public protection. As we have mentioned the GOC could operate a more flexible and proportionate FTP system whilst still fully maintaining public protection and confidence.

If working successfully, consensual disposal should bring public benefit by removing the need for witnesses to appear in some cases, bringing cases to earlier resolution and ensuring that hearing time and regulator costs are better managed.

The GOC

If the consensual disposal system can be operated successfully then the GOC would benefit from an improved ability to manage the hearings schedule which could allow it to reduce the average time to complete FTP cases (which is currently too high (as has been identified by the Professional Standards Authority (PSA) in reviewing the GOC's performance).

For these benefits to be realised the GOC should:

- limit unnecessary pre-hearing processes do not result from the consensual disposal, whilst actively engaging the registrant in the process and seeking comments from the party making the allegation
- not limit the application of the consensual disposal, and when it can be offered to the registrant, by requiring that the registrant make admissions to all elements currently listed in the GOC policy at 3.3. (all of the alleged facts, misconduct and FTP impairment). Instead these should be considered simply as factors, not pre-requisites, in considering whether the case is suitable for consensual disposal
- consider other options such as voluntary undertakings that could lead to pre-hearing disposal in cases where this would be fair, proportionate and in the public interest.
- ensure effective communications with all parties

Consultation question 6: Do you have any further comments on our proposed policy for consensual disposal which are not captured in your responses to the questions above?

Yes.

- The GOC should also develop appropriate communication to enable all registrants and the public to understand the consensual disposal process. Early and appropriate engagement with individual registrants facing allegations will be important to ensure the consensual disposal works
- In light of the PSA's assessment of the NMC's practice in consensual disposal and voluntary removal, it is important that the GOC properly document comments provide by the party making the allegation as part of the consensual disposal process²
- We would query the implication throughout that consensual disposal should always include an agreed sanction. There may well be cases where this is not appropriate and there be an attached 'action' rather than sanction.

September 2017

² [Professional Standards Authority. \(2017\) Review of Professional Regulation 2016-17](#)