

General Optical Council consultation: Hearings and Indicative Sanctions Guidance

Professional Standards Authority response

22 September 2021

General Comments

We welcome the opportunity to comment on this draft Hearing and Indicative Sanctions Guidance. Overall, we found the document clear and comprehensive, with no significant gaps or concerns.

We have made most of our comments in the margins of the guidance, for ease of reference. However, there were some points we wanted to draw your attention to as general points of feedback.

Firstly, the guidance could benefit (at points that we have identified in comments below) from being clearer that decision-makers should take into account *all three limbs of public protection*. For some of our comments, this would just be a helpful reminder that this is what is meant by the shorthand 'public protection'; in other parts, we found that one, or both of the wider public interest limbs appeared to have been overlooked.

Secondly, we were concerned to see the draft suggesting that certain types of allegation, and particularly cases involving sensitive allegations would be eligible to be heard in private. This is not our understanding of the law in this area, and the application of the principles of open justice. There are ways in which hearings involving sensitive allegations can be adapted to ensure that privacy, and the vulnerability of witnesses are respected where necessary, without holding the proceedings behind closed doors.

Finally, we noted a few places where we found more recent case law than that referenced in the draft. We have included these references. We should stress that we have not conducted a comprehensive review of the relevant case law or references in the document.

Hearings and Indicative Sanctions Guidance

For the Fitness to Practise Committee

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1. Introduction

- 1.1 The over-arching objective of the General Optical Council (GOC) in exercising its functions is the protection of the public. The aim of this document is to assist members of the Fitness to Practise Committee (“FtPC”) to understand their individual and collective responsibilities, leading to the making of fair and just decisions.

Commented [PSA1]: We suggest the full objective is set out here.

Commented [PSA2]: This could also refer to consistency, and to decisions that fulfil the over-arching objective.

2. Purpose of this guidance

- 2.1 This guidance has been developed by the Council for use by its FtPC when hearing cases and considering what sanction, if any, to impose following a finding of impairment.
- 2.2 It is not an alternative source of legal advice. When appropriate, the FtPC’s legal adviser will advise the Committee on questions of law, including questions about the use of this guidance and how it should be applied. Each case is different and should be decided on its own facts and merits.
- 2.3 It does not undermine the independence of the FtPC, which should use its own judgement to make decisions, but these decisions must be based on the standards set by the GOC and the contents of this guidance.
- 2.4 The guidance will be made publicly available on the GOC’s website ensuring that participants are aware from the outset of the approach that the FtPC will take to hearings and sanctions.

Commented [PSA3]: It is our understanding that a panel must have regard to the Indicative Sanctions Guidance, but that they are entitled to depart from it so long as they provide reasons and it is evident that the guidance has been considered. (*Doree*). There is no requirement for a panel to adhere to the guidance to the letter as it does not have the force of statute or regulation – it is just guidance. The GOC may wish to consider softening the language in this paragraph so this is clearer.

3. Human rights

- 3.1 The GOC is a public authority for the purposes of the Human Rights Act 1998 (“HRA”). The GOC will seek to uphold and promote the principles of the European Convention on Human Rights (“ECHR”) in accordance with the HRA. In particular, Article 6 of the ECHR provides that *“In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”* The European Court of Human Rights has held that this right applies to FtPC hearings and determinations.

4. Equality and diversity

- 4.1 The GOC has a statutory obligation to make sure that processes for dealing with concerns about registrants are fair. Anyone who is acting for the GOC is expected to be aware of, and adhere to, equality and human rights legislation. Decision making should be consistent, impartial, and comply with the aims of the public sector equality duty.¹

Commented [PSA4]: We suggest this paragraph should make clear that discrimination can undermine the quality of decision-making generally, and not just in relation to the fairness to the registrant. Complainants too should be able to expect a process that is from their perspective impartial, fair, and free from discrimination.

Relatedly, the case of *Yong* [2021] EWHC 52 (Admin) stated that the Public Sector Equality Duty extends to disciplinary proceedings – i.e. in *Yong* it was determined that the panel ought to have had regard to the definition of harassment in the Equality Act when considering an allegation of harassment and the failure to do so was an error of law. It might be helpful to make reference to this here.

5. What standards are registrants expected to meet?

- 5.1 The GOC’s standards for registrants are set out in the Standards framework at <https://standards.optical.org>
- 5.2 Standards of Practice define the standards of behaviour and performance expected of registrant to protect the public and promote high standards of care.

¹ The public sector equality duty is available at: [Public sector equality duty - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

Guidance on Standards

5.3 The GOC has also published position statements on the following areas of practice²:

- Joint statement on duty of candour
- Joint statement on conflict of interest
- FGM mandatory reporting duty
- Contact lenses
- Low vision aids
- Fluorescein
- Sale and supply of optical appliances
- Lissamine green

5.4 The Opticians Act does not impose restrictions or action in all these areas, and none are restricted by the FTP Rules. Please see the guidance at <https://standards.optical.org/supporting-guidance/> for further information.

5.5 The GOC has the power to take appropriate action when it appears that breach of a relevant standard may impair a registrant's fitness to be registered.

5.6 Following a finding of impairment, it is for the FtPC to determine whether to impose a sanction and, if so, which one.

Commented [PSA5]: We suggest using 'fitness to practise' here for consistency of terminology.

6. Types of registrant

Individual registrants

6.1 In the GOC's legislation, and this guidance, the term "individual registrant" refers to a registered optometrist, registered dispensing optician or student registrant. See section below on student registrants.

Student registrants

6.2 A student registrant is a person registered with the GOC as undertaking training as an optometrist or as a dispensing optician.

6.3 The GOC legislation states that only students currently in education or training can remain on the register. If a student is not studying (for example, is taking a gap year) they are not able to remain registered. Students need to apply to be restored to the register when they recommence their studies.

6.4 All registered optometry and dispensing optics students must renew their registration each year. This is called 'student retention'. The GOC sends all existing student registrants a notification of retention in April each year. Applications must be completed, and the retention fee paid, by 15 July.

6.5 Anyone who fails to submit an application and pay their annual fees by the annual

² The GOC position statements are available at: <https://standards.optical.org/supporting-guidance/position-statements>

retention deadline may be removed from the student register. Students who are not registered may be excluded from clinical training and examinations.

- 6.6 The GOC may decline to recognise, or choose to recognise as an exception, qualifications of applicants for full registration who were not registered for all or part of their training.
- 6.7 The GOC has a legal duty to register and set the standards expected of optical students. *The Standards of Practice for Optical Students* define the standards of behaviour and performance the GOC expects of all registered student optometrists and student dispensing opticians. All student optometrists and student dispensing opticians must confirm that they have read, and will abide by, the standards.
- 6.8 The care, well-being and safety of patients are at the heart of being a healthcare professional. Students should recognise that patients will often have the same expectations of them as they would have of qualified healthcare professionals. Patients must always be a student's first concern from the beginning of their studies through to pre-registration training and beyond.
- 6.9 The specific standards for optical students take account of the fact that they will develop their knowledge, skills, and judgement over the period of their training.
- 6.10 Once a student's training is complete, and they register as an optometrist or dispensing optician, they will then be expected to meet the *Standards of Practice for Optometrists and Dispensing Opticians*.

Business registrants

- 6.11 A business registrant is a body corporate registered with the GOC as carrying on business as an optometrist, dispensing optician, or both.
- 6.12 A body corporate is a limited company or limited liability partnership that has been incorporated with Companies House.
- 6.13 The GOC has a legal duty to set the standards expected of optical businesses. *The Standards for Optical Businesses* define the standards that we expect of optical businesses to protect the public and promote high standards of care.

7. Why do we impose sanctions?

- 7.1 The main reason for imposing sanctions is to protect the public. This forms part of the GOC's over-arching statutory duty as set out in section 1 of the Opticians Act 1989:

(2A) The over-arching objective of the Council in exercising their functions is the protection of the public.

(2B) The pursuit by the Council of their over-arching objective involves the pursuit of the following objectives—

- (a) to protect, promote and maintain the health, safety, and wellbeing of the public;*

(b) to promote and maintain public confidence in the professions regulated under this Act;

(c) to promote and maintain proper professional standards and conduct for members of those professions; and

(d) to promote and maintain proper standards and conduct for business registrants.

7.2 Patients must be able to trust the optical profession. Registrants must ensure, therefore, that their conduct justifies their patients' trust in them, and the public's trust in their profession.

Commented [PSA6]: We suggest sticking with 'public confidence' for consistency of terminology. Trust has a subtly different meaning.

7.3 When determining the question of impairment, exercising its powers to make interim orders, and deciding upon an appropriate sanction, the FtPC should consider whether its decision would adequately protect members of the public and maintain public confidence in the optical profession.

Commented [PSA7]: We were unclear why limb b) had been singled out for explanation here – we suggest the other limbs could also each benefit from an explanatory paragraph.

8. Taking a proportionate approach

8.1 The FtPC should take a proportionate approach in deciding what sanction to impose, if any. This means weighing the interests of the public against the interests of the registrant when deciding whether a sanction is necessary to the protect the public.

Commented [PSA8]: , maintain and uphold standards, and uphold the public interest.

8.2 The Committee should have regard to all the circumstances of the particular case, any aggravating and / or mitigating features that may be present, and any personal mitigation submitted by the registrant.

Sometimes (albeit rarely) we see panels not imposing sanctions because there are no public protection concerns without considering the need to declare and maintain standards and uphold the public interest.

8.3 In deciding what sanction is appropriate, the Committee should start with the least severe and only move on to consider the next sanction if the one under consideration does not sufficiently protect the public having regard to the circumstances of the case.

Commented [PSA9]: Three limbs

Commented [PSA10]: We suggest adding 'And the overarching-arching objective'.

Student registrants

8.4 When considering a proportionate sanction for a student registrant, the Committee may consider the stage of a registrant's career/training when making decisions. Whether they have gained 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, may be a mitigating factor.

8.5 However, any mitigation must be balanced against the nature of the concern raised. In cases involving serious concerns about a student registrant's performance or conduct, or serious dishonesty, the stage of training may be given less weight when considering what action is necessary to protect the public.

Business registrants

8.6 When considering proportionality of sanction for a business registrant, the Committee may need to consider information about how the business operates and is registered. Any sanction should focus on public protection and the public interest.

Part A: Fitness to practise and the decision-making process

9. Purpose of the hearing

- 9.1 At a substantive hearing, once the FtPC has heard the evidence, it must reach its decision and prepare a written determination stating in respect of each decision:
- whether the facts alleged have been found proved;
 - whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance, or that they had adverse physical or mental health. Where the allegation relates to a criminal conviction, stages (a) and (b) are in effect merged as a conviction is itself a ground for impairment;
 - whether the misconduct, conviction, deficient professional performance, or adverse physical or mental health, leads to a finding that the registrant's fitness to practise is currently impaired;
 - what sanction (if any) is to apply; and
 - whether an immediate order should be imposed.

10. Public or private hearing?

- 10.1 Where the FtPC is not considering a health allegation, Rule 25 states that hearings must be held in public, unless it considers it appropriate for the hearing to be held in private. When considering whether to hold the hearing in private, or for part of a hearing to be in private, the Committee must have regard to the interests of the maker of the allegation, any witness or patient concerned and the registrant, as well as the wider circumstances and the public interest.
- 10.2 Where the Committee is considering the registrant's health, the hearing must be in private unless the Committee considers it appropriate to meet in public, again having regard to the interests of the maker of the allegation, any witness or patient concerned and the registrant, as well as the wider circumstances and the public interest.
- 10.3 Considering the registrant's health may be broader than considering allegations of adverse physical or mental health, such as where the registrant raises health evidence in mitigation.
- 10.4 There may be certain types of allegations where the Committee is more likely to consider a private hearing. For example, allegations that are of a particularly sensitive nature or involving sexual allegations. However, the Committee should also consider its powers under Rule 41 regarding vulnerable witnesses.
- 10.5 As with any public hearing, the Committee should be careful to respect the privacy of any patients involved in the allegations and not to refer to the names or personal details of individuals whose details have been redacted from the material being considered. It should be noted that, according to *GMC v BBC [1998] 1 WLR 1573*, a committee hearing cannot be considered in court for the purposes of the Contempt of Court Act 1981.
- 10.6 Journalists may attend public hearings. Journalists are members of the public and should not be treated any differently to any other member of the public.

Commented [PSA11]: The panel do not have a general discretion as to whether or not the hearing should be in private. The GOC might consider making reference to its obligations under the Human Rights Act / ECHR and the 'open justice' principle which applies in the UK. Consideration also ought to be given to The Principles of Good Regulation i.e. – the transparency of FtP hearings being held in public.

The right to a public hearing is protected under Article 6(1) ECHR and is subject to specific exceptions – this should be reflected in this guidance. Article 6(1) states:

'...Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

Commented [PSA12]: This seems too broad brush and could be misleading – as outlined above the panel need to ensure that they have a solid justification for departing from the open justice principle in line with Article 6(1).

The GOC may wish to consider adding a sentence here to advise that panels should also consider whether other steps, such as anonymising information or redaction could be taken to achieve the same aims (i.e. proportionality).

Commented [PSA13]: The GOC might make it explicit that the panel should invite the parties to make representations on whether or not the hearing should be held in private. The decision made should also be recorded in writing and given to the parties.

Commented [PSA14]: We found this sentence a little unclear.

Commented [PSA15]: We do not think this is accurate – a panel will need a compelling reason for deciding that such cases should be heard in private. The fact that an allegation is sensitive and there may be facts which are desirable to be kept secret or potential reputational damage to a Registrant is not in and of itself a reason to hear a case in private.

The way this paragraph is currently drafted is problematic and could lead to decisions which are contrary to the open justice principle. For example, an allegation of sexual misconduct made against a Registrant could fall into this category where there is clearly a very strong public interest for such hearings to be held in public.

11. Bias

11.1 Registrants are entitled to a fair and impartial hearing. It is the responsibility of FtPC members to bring to the attention of the parties any potential conflict, about which only they might know, (for example, in relation to proposed witnesses or some other interest in or knowledge of the facts which are to be considered).

11.2 The long-established principle in *Porter v Magill [2001] UKHL 67* has been confirmed in *Rasool v General Pharmaceutical Council [2015] EWHC 217*, that the test for whether a committee member may be biased relates to actual bias as well as the appearance of bias:

"a fair-minded observer, having considered the relevant facts, would conclude that there was a real possibility that the [Committee] was, consciously or subconsciously biased. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge is 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".

11.3 Whether a committee member should recuse themselves is a decision to be taken by the Committee as a whole and not the individual member. 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 weight. The Committee should be mindful that, "judicial discomfort at continuing with the case is not the test." *Akers v Kirkland [2019]*.

12. Adjournments and proceeding in the absence of the registrant

12.1 Rule 22 states that:

"Where the registrant is neither present nor represented at a hearing, the FtPC may nevertheless proceed if:-

- a. *It is satisfied that all reasonable efforts have been made to notify the registrant of the hearing in accordance with section 23A and rule 61; and*
- b. *Having regard to any reasons for absence which have been provided by the registrant, it is satisfied that it is in the public interest to proceed."*

12.2 This must be considered as a two-stage test. Firstly, whether all reasonable efforts have been made to notify the registrant of the hearing and then, whether, in all the circumstances, it is appropriate to proceed in the absence of the registrant and any representatives.

12.3 *R v Jones [2002] UKHL* sets out that the discretion to proceed in the absence of the registrant should be done with great care; that this discretion should be exercised in favour of proceeding in a registrant's absence only in rare and exceptional circumstances.

12.4 Relevant factors to consider may include:

- a. The nature and circumstances of the registrant's absence, in particular, whether they have voluntarily waived their right to attend;
- b. The seriousness of the allegation;

Commented [PSA16]: It might be helpful to label this section more clearly to explain that it is about bias as relates to conflicts of interests.

We do recommend that the GOC consider including a further section and/or perhaps additional guidance on cognitive biases, looking more broadly at ways in which these sorts of biases might affect the quality of decision-making and ways of minimizing and mitigating their effects. Please see the paper we published on bias in decision-making: https://www.professionalstandards.org.uk/docs/default-source/publications/research-paper/advice-on-biases-in-fitness-to-practise-decision-making.pdf?sfvrsn=b0154920_8.

Commented [PSA17]: As with the E&D point, this can cut both ways. Complainants too should be able to expect impartiality and fairness.

- c. Whether an adjournment has been requested, the likely length of any such adjournment and whether an adjournment might result in the defendant attending future proceedings;
- d. The risks of reaching the wrong conclusion about either the registrant's absence or the wrong conclusion in the substantive case; and
- e. The general public interest and the interests of witnesses in ensuring that hearing should take place without undue delay.

12.5 *General Medical Council v Adeogba [2016] EWCA Civ 162* expanded on the criminal factors and assists with principles to be applied in the context of professional regulation. The High Court acknowledged that the main statutory objective of the regulator must also be considered in such circumstances. The fair, economical, expeditious and efficient disposal of allegations made against practitioners is, therefore, of very real importance. Further, the High Court recognised that it would *"run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process."*

12.6 The Committee may also wish to consider practical steps such as the Hearings Officer contacting the registrant to confirm if they are attending and whether they are represented.

12.7 If the registrant is absent due to ill health, the Committee should consider the registrant's supporting evidence, if any, and any challenges to this evidence. Case law suggests that, if, on the balance of probabilities, the Committee considers that the registrant is unwell and their absence is involuntary, it will usually be appropriate for the Committee to adjourn the hearing, unless the registrant is represented and asks that the hearing should go ahead. It is good practice for the Committee to make clear whether medical evidence will be required to support future applications.

13. Evidence and the standard of proof

The standard of proof

13.1 Rule 38 establishes the standard of proof to be applied by the FtPC when making findings of fact:

"The standard of proof applicable to proof of any facts alleged by the Council at substantive hearings before the FtPC is the standard applicable in civil proceedings."

13.2 The standard of proof in civil proceedings is the balance of probabilities. A fact will be established if it is more likely than not to have happened.

13.3 The standard of proof is only relevant in relation to finding of fact. Following a finding of fact, determining whether the registrant has acted in a way which amounts to misconduct, deficient professional performance, or adverse physical or mental health is a matter of judgement for the Committee, to which the standard of proof is not relevant. The same is true regarding the decision as to whether the registrant's fitness to practise is impaired and what sanction is to apply (*CHRP v GMC and Biswas [2006] EWHC 464*).

13.4 The standard of proof is not relevant for interim orders where no findings of fact are

made. Nor is it relevant where there is no dispute as to the facts. The standard of proof is only relevant where there are facts in dispute between the parties.

The application of the standard of proof

13.5 Case law has made clear that there is only one civil standard of proof (i.e.. proof that the fact in issue more probably occurred than not), and it is finite and unvarying. There is no "sliding scale", and the standard of proof does not vary depending on the seriousness of the allegations (*In re B (Children)*[2008] UKHL 35 and *In re Doherty* [2008] UKHL 33).

13.6 The application of the civil standard of proof was considered by the House of Lords in the case of *In re Doherty* [2008] UKHL 33. Lord Carswell stated:

"...in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite, and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place..., the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from the acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or an especially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

13.7 When considering whether something is more likely than not to have occurred, the Committee should bear in mind that there is no necessary connection between the seriousness of what is alleged and inherent probability. Lord Hoffman said in *Re B*, approved in *S-B Children*:

"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 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 probably that one rather than the other was the perpetrator".

13.8 A decision in relation to sanction can only be taken by the Committee at the final stage of the process, once both parties have had an opportunity to make further submissions on the appropriate outcome. Considering the potential consequences for the registrant during the fact-finding stage does not mean that the Committee decide on sanction at this stage. The potential consequences for the registrant are simply a result of the seriousness of the allegations presented to the Committee.

Commented [PSA18]: The meaning and relevance of this paragraph were unclear to us. If this is a point about burden of proof, this should be made clearer.

Admissibility of evidence

- 13.9 Rule 40 of the Fitness to Practise Rules sets out what evidence the Committee may hear. It may "*admit any evidence it considers fair and relevant to the case before it, whether or not such evidence would be admissible in a court of law*" (Rule 40(1)). However, if the evidence would not be admissible in a civil court, the Committee should not admit it unless, having considered the advice of the legal adviser, the Committee believes that its duty to make due inquiry makes it desirable to hear the evidence (Rule 40(2)).
- 13.10 Production of a certificate (e.g. memorandum of conviction/ certificate of conviction) to illustrate that the practitioner has been convicted of a criminal offence will stand as conclusive evidence of the offence committed (Rule 40(3)).
- 13.11 Production of a certificate signed by an officer of a regulatory body that has made a determination about the fitness to practise of a practitioner shall be conclusive evidence of the facts found proved in relation to that determination. (Rule 40(4)).
- 13.12 The Committee cannot, therefore, look behind a criminal finding and must accept it as evidence. However, civil findings will not be accepted as conclusive evidence and must be proved during the Fitness to Practise hearing.

Hearsay

- 13.13 On many occasions a witness will attend a hearing in person, so that both the registrant and the case presenter can examine and cross-examine them, and the Committee may ask questions. However, if a witness cannot attend the hearing, the Committee may decide to admit their written statement as hearsay evidence. Hearsay evidence can only be admitted when the Committee is satisfied that it is fair to do so. What is fair will depend on the circumstances of each case and, in particular, on the seriousness and gravity of the allegations and the importance of the hearsay evidence to any disputed facts or allegations. The court in *R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin)* stated that:

"...in the absence of a problem in the witness giving evidence in person or by video link, or some other exceptional circumstance, fairness requires that in disciplinary proceedings a person facing serious charges, especially if they amount to criminal offences which if proved are likely to have grave adverse effects on their reputation and career, should in principle be entitled by cross-examination to test the evidence of his accuser(s) where that evidence is the sole or decisive evidence relied on against him."

- 13.14 The Committee may decide to admit hearsay evidence but to give it less weight than evidence where both parties have been able to examine the witness. However, it may not always be a sufficient answer to the objection to admissibility (*Thorneycroft v NMC [2014] EWHC 1565*). The Committee will also need to consider why the witness is not attending the hearing, and whether the GOC has tried to secure their attendance (*Ogbonna v NMC [2010] EWCA Civ 1216*). A reminder of the established distinction between the admissibility of hearsay evidence and the weight to be attached to hearsay evidence was given in *El Karout v Nursing and Midwifery Council [2019]*.
- 13.15 While there are no set rules on when it would be unfair to admit hearsay evidence, and there is no absolute right to cross-examine a witness, the courts have been reluctant to allow hearsay evidence when its use has been challenged by the registrant and

where hearsay is the only evidence to support a disputed charge.

- 13.16 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 requirements of fairness*”. (*R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin)*, *Ogbonna v NMC [2010] EWCA Civ 1216*, *White v NMC [2014] EWHC 520*).

Vulnerable witnesses

- 13.17 Rule 41(1) sets out that any person falling into one or more of the following categories may be treated by the FtPC as a vulnerable witness:
- Any witness under the age of 17 at the time of the hearing;
 - Any witness with a mental disorder within the meaning of the Mental Health Act 1983;
 - Any witness who is significantly impaired in relation to intelligence and social functioning;
 - Any witness with physical disabilities who require assistance to give evidence;
 - Any witness where the allegation against the registrant is of a sexual nature and the witness was the alleged victim; and
 - Any witness who complains of intimidation.
- 13.18 In hearings involving a vulnerable witness, the Committee may take such measures as it considers desirable to enable evidence from a vulnerable witness, subject to the advice of the legal adviser, and upon hearing representations from the parties (Rule 41(2)).
- 13.19 Where the allegation being tried is of a sexual nature, a registrant who is acting in person may not directly cross-examine a witness who was the alleged victim of the allegation without written consent of that witness (Rule 41(4)).
- 13.20 When deciding what measures to put in place for a vulnerable witness, the Committee should consider what is fair for the parties involved. Cases involving vulnerable witnesses may be suitable for a procedural directions hearing.

Adverse inference – right to silence

- 13.21 In *R (on the application of Kuzmin) v General Medical Council [2019] EWHC 2129 (Admin)*, the Divisional Court confirmed that disciplinary tribunals can draw an adverse inference from the silence of an individual charged with breaches of a regulatory scheme, even if the tribunal has not historically drawn such inferences.
- 13.22 The decision to draw an adverse inference must be fair and will depend on the facts of the particular case. The court indicated that an adverse inference would, generally, not be appropriate unless:
- a prima facie case to answer has been established;*

- ii. *the individual has been given appropriate notice and an appropriate warning that, if he does not give evidence, then such an inference may be drawn; and an opportunity to explain why it would not be reasonable for him to give evidence and, if it is found that he has no reasonable explanation, an opportunity to give evidence;*
- iii. *there is no reasonable explanation for his not giving evidence; and*
- iv. *there are no other circumstances in the particular case which would make it unfair to draw such an inference.*

13.23 The GOC's Standards of Practice include the requirements for registrants to respond to complaints effectively and be candid when things go wrong. The decision in *Kuzmin* supported the decisions in *General Medical Council and Olufemi Adeogba* and *General Medical Council and Evangelos-Efstathios Visvardis Court of Appeal (Civil Division) [2016] EWCA Civ 162* which highlighted that it is in the public interest to ensure members of a profession engage with the regulator and, therefore, that a tribunal has the power to draw an adverse inference from silence if it is fair to do so in the circumstances of the case.

"...[T]here is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."³

14. Mitigation

Mitigating factors

14.1 The FtPC should consider and balance any mitigating factors against the central aim of the sanctions, namely, protection of the public. The Committee's ability to take a mitigating factor into account when deciding upon the appropriate sanction will, therefore, depend on the nature of the concern raised against a registrant.

14.2 The following are examples of mitigating factors:

- No impact on victim – to include both harm and potential harm;
- Evidence that the registrant has shown insight and remorse (taking into account, where relevant, their attitude and behaviour at the hearing). This may include the registrant accepting they should have behaved differently, taking timely steps to remediate and apologise at an early stage, making efforts to prevent recurrence and demonstrating the timely development of insight during the investigation and hearing. The Committee should be aware that cultural differences and the registrant's ill health could affect how they express insight.
- If the registrant is presenting evidence that they have attempted to address or remediate the problem, the Committee should be aware that the Standards of Practice states that the registrant should do the following:
 - a. Raise concerns if patients are at risk and put matters right where possible;
 - b. Ask for advice if they are concerned that a colleague may not be fit to

Commented [PSA19]: Perhaps the GOC would consider adding further context, or some examples here.

We often see panels identify matters of secondary importance / limited relevance when identifying mitigation. For example, 'no evidence of clinical concerns', in a conviction case. We also see examples of mitigation which is in fact, the absence of what would otherwise be aggravating (i.e. no repetition of the dishonesty).

³ *General Medical Council v Adeogba* [2016] EWCA Civ 162, para. 20

practise and may be putting patients at risk. If they remain concerned, they must report this in line with GOC guidance and any relevant workplace policy;

- c. Be open and honest with patients if things go wrong and respond promptly, fully, and honestly to complaints and apologise where appropriate.
- The Committee may consider the stage of a registrant's career, including that of students, when making decisions. Evidence that the registrant has gained insight and might have done things differently with the benefit of experience, may be a mitigating factor if:
 - a. The incident was spontaneous;
 - b. The conduct was a one-off event;
 - c. The conduct has been remediated - which can take several forms, including coaching, mentoring, or training.

Aggravating factors

14.3 The following are examples of aggravating factors:

- The registrant lacks insight:
 - a. By refusing to apologise or accept their mistakes.
 - b. By promising to remediate, but failing to take appropriate steps, or only doing so when prompted immediately before or during the hearing.
 - c. Not demonstrating the timely development of insight.
 - d. Not telling the truth during the hearing.
- Where the incident has occurred in the light of previous findings made by the GOC or another regulator.
- Where the actions involved an abuse of trust or position.
- Where the circumstances surrounding the event are likely to lead the Committee to consider taking more serious action, such as:
 - a. A failure to raise concerns.
 - b. A failure to work collaboratively with colleagues.
 - c. Attempting to conceal wrongdoing or mistakes.
 - d. Sexual misconduct.
 - e. Sexual offences and/or child pornography.
- Where the registrant has been dishonest.

Commented [PSA20]: We suggest some cross-referencing with section 22 might be helpful here for clarity and consistency.

Commented [PSA21]: We suggest the GOC consider adding the following to the list of aggravating factors:

- Misconduct motivated by hostility towards someone's race, sexual orientation (or perceived sexual orientation), disability, sex, gender (or presumed gender identity), religion or age [wording taken from GMC guidance on low-level dishonesty and violence]
- Misconduct directed towards a vulnerable person

Commented [PSA22]: We recommend the GOC use the term 'duty of candour' or 'failure to be candid' for consistency, and to cross-reference with other relevant documents such as the joint statement on the Duty of Candour to which the GOC is a signatory.

Personal mitigation and testimonials

- 14.4 The FtPC should consider testimonials in the light of the factual findings that have been made. Testimonials prepared in advance of a hearing need to be evaluated in the light of the factual findings made at the hearing. The Committee should consider whether the authors of the testimonials were aware of the events leading to the hearing and what weight, if any, to give to them. The Committee should also consider how long the author has known the registrant, how recently the author has had experience of the registrant's behaviour at work and whether there is any evidence that the author has a conflict of interest in providing the testimonial.
- 14.5 The FtPC should consider the relevance of testimonials, mitigating circumstances, remorse, insight, and apologies in relation to the primary issue of fitness to practise. If a registrant's conduct shows they are fundamentally unsuited for registration as a healthcare professional, no amount of remorse or apology, or indeed positive personal qualities in other respects, can mitigate the seriousness of that conclusion and its impact on registration.
- 14.6 Persuasive evidence of rehabilitation and a credible commitment to high standards in the future will be directly relevant to the question of fitness to practise. Such evidence may be considered as mitigation, subject to the circumstances of the case, notwithstanding that there may have been a concern about the registrant's conduct in the past.

Absence of evidence in mitigation

- 14.7 The FtPC should only take account of evidence (for example, testimonials) that is put before it and should not draw inferences from an absence of such evidence, because:
- a. There may be cultural or other reasons why a registrant would not or could not solicit testimonials from colleagues or patients, and
 - b. In any event, such inferences would be likely to be influenced by the Committee's assumptions about the sort of references that might have been produced, assumptions which are untested.

When should the Committee consider personal mitigation and testimonials?

- 14.8 The FtPC will need to consider the appropriate stage to take account of personal mitigation and testimonials subject to the circumstances of the case.
- 14.9 Where there is an allegation of dishonesty, it may be appropriate for the Committee to take into account testimonials about a registrant's good character at the fact finding stage, when deciding the issue of dishonesty. This is because such evidence, while not a defence in itself, may be relevant to the registrant's credibility and propensity to do what is alleged, see *Donkin v The Law Society* [2007] EWHC 414 (Admin) and *Wisson v Health Professions Council* [2013] EWHC 1036 (Admin).
- 14.10 Letters of testimonial or other evidence which attests to the steps taken by the registrant to remedy the conduct which led to the hearing (for example, from professional colleagues) and evidence of the registrant's current fitness to practise, will be relevant at the point when the Committee is considering the issue of impairment. Such evidence should not be left to the sanction stage. Mr Justice McCombe said in *Azzam v General Medical Council* [2008] EWHC 2711:

“It must behave a FTP Panel to consider facts material to the practitioner’s fitness to practise 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 ... that some elements of reputation and character may well be matters of pure mitigation, not to be taken into account at the “impairment” stage. However, the line is a fine one and it is clear to me that evidence of a [practitioner’s] overall ability is relevant to the question of fitness to practise.”

- 14.11 Mitigation that is purely personal in nature, (i.e.. does not relate to workplace competence) including testimonials and references, will usually only be relevant at the point of considering sanction.

15. Impaired fitness to practise - s13D(2-3) of the Opticians Act 1989

Registered individuals (including students)

- 15.1 A finding of impaired fitness to practise (fitness to undertake training in the case of students) against a registrant can be based on any of the following:
- a. Misconduct;
 - b. Deficient professional performance (not in the case of a student registrant);
 - c. A conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
 - d. The registrant having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal) or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992 (penalty as alternative to prosecution);
 - e. The registrant, in proceedings in Scotland for an offence, having been the subject or an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging him absolutely;
 - f. Adverse physical or mental health; or
 - g. A determination by any other UK health regulatory body that fitness to practise is impaired (or a determination by a regulatory body elsewhere to the same effect).

Business registrants

- 15.2 A finding of impaired fitness to practise against a business registrant can be based on any of the following:
- a. Misconduct (by the business registrant or a director);
 - b. Practices or patterns of behaviour occurring within the business which:
 - (i) The registrant knew or ought reasonably to have known of; and

(ii) Amount to misconduct or deficient professional performance.

- c. The instigation by the business registrant of practices or patterns of behaviour within the business where that practice or behaviour amounts, or would if implemented amount, to misconduct or deficient professional performance;
- d. A conviction or caution in the British Islands of the business registrant or one of its directors for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;
- e. The registrant or one of its directors having accepted a conditional offer under section 302 of the Criminal Procedure (Scotland) Act 1995 or agreed to pay a penalty under section 115A of the Social Security Administration Act 1992;
- f. The registrant or one of its directors, in proceedings in Scotland for an offence, having been the subject of an order under section 246(2) or (3) of the Criminal Procedure (Scotland) Act 1995 discharging it or him absolutely;
- g. A determination by any other UK health regulatory body that:
 - (i) The business registrant's fitness to carry on business as a member of that profession is impaired; or
 - (ii) The fitness of a director of the business registrant to practise that profession is impaired (or a determination by a regulatory body elsewhere to the same effect).

15.3 While there is no statutory definition of impairment of fitness to practise, it is clear from case law that the decision on impairment should be a separate decision to the decision whether the facts found proved amount to a ground of impaired fitness under s.13D.

15.4 The Committee must first decide whether a ground of impairment under section 13D has been proved. Having made that decision, the Committee must go on to determine whether, as a result, fitness to practise is impaired. For example, despite misconduct having been proved against a registrant, the Committee may decide that the registrant's fitness to practise is not impaired.

Misconduct

15.5 There is also no statutory definition of misconduct. The FtPC must exercise its judgment to determine whether an act or omission amounts to misconduct.

15.6 In *Roylance v GMC [1999] Lloyd's Rep Med 139* misconduct was described as:

"A falling short by omission or commission of the standards to be expected among [medical practitioners] and such falling short must be serious... It is of course possible for negligent conduct to amount to serious professional conduct, but the negligence must be to a high degree".

15.7 Although the terminology has changed since the *Roylance* case, the Courts have been clear that it was "*inconceivable*" that the change in language should signify a lower threshold for disciplinary intervention.

15.8 Misconduct can be found in relation to a single act where the conduct has been

particularly serious.

- 15.9 Where a registrant may have been negligent, misconduct may be constituted by a series of acts, unless the one act in question was particularly serious; see R (on the application of Vali) v General Optical Council [2011] EWHC 310 (Admin):

"Mere negligence does not of itself show that the act was misconduct. A higher degree of gravity than mere carelessness is required. I also note and agree that a single act is less likely to cross the threshold of misconduct but that depends of course on the gravity of the act."

Deficient professional performance

- 15.10 There is no statutory definition of deficient professional performance. Caselaw has confirmed that it is a separate concept to misconduct (or negligence). *Calhaem v GMC [2007] EWHC 2606 (Admin)* explained the concept of deficient professional performance:

"(3)... It connotes a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work.

(4) A single instance of negligent treatment, unless very serious indeed, would be unlikely to constitute "deficient professional performance".

(5) It is neither necessary nor appropriate to extend the interpretation of "deficient professional performance" in order to encompass matters which constitute "misconduct"."

- 15.11 The case of *Vali* emphasised that, because the definitions of misconduct and deficient professional performance are distinct, a particular set of facts can only be decided as one or other category.

Health

- 15.12 Under section 13D(2)(f), a registrant's fitness to practise may be impaired by reason of adverse physical or mental health.

- 15.13 To find an allegation of adverse physical or mental health proved, the FtPC must be satisfied that the registrant's health may put patient safety at risk. Expert evidence in the form of a medical report will normally be required.

- 15.14 Under Rule 46(22) when determining whether a registrant's fitness to practise is impaired by reason of adverse physical or mental health, the FtPC may consider:

- a. The registrant's current physical or mental condition;
- b. Any continuing or episodic condition suffered by the registrant; and
- c. A condition suffered by the registrant which, although currently in remission, may reasonably be expected to cause a recurrence of impairment of the registrant's fitness to practise.

16. Determining impairment

- 16.1 Relevant factors for the committee to consider when determining impairment include: whether the conduct which led to the allegation is remediable; whether it has been remedied; and whether it is likely to be repeated. Certain types of misconduct (for example, cases involving clinical issues) may be more capable of being remedied than others.
- 16.2 The Committee must look forward, not back when determining impairment. For example, the severity of a proven allegation may be such that, looking forward, the Committee is persuaded that the registrant is simply not fit to practise without restrictions, or at all. Conversely, a proven allegation that is less serious and considered in the context of an otherwise unblemished career and remedial steps taken by the registrant, may lead the Committee to conclude that, looking forward, fitness to practise is not impaired despite the misconduct (or deficient professional performance or adverse health).
- 16.3 Following a decision that fitness to practise is not impaired, the Committee must make clear in its determination what remedial steps have been taken into account and why these mitigate against recurrence of the concerns raised in the case.
- 16.4 When considering impairment of fitness to practise, the Committee must have regard to public interest considerations. In *PSA v Nursing and Midwifery Council (Grant) [2011] EWHC 927*, the High Court said that, in deciding whether fitness to practise is impaired, the Committee should ask themselves,

"Not only whether the registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case."

- 16.5 The Committee must also have regard to whether a practitioner is fit to practise unrestricted in their current state. In *GOC v Clarke [2018] EWCA Civ 1463*, the High Court said that, in the consideration of current impairment, the concept of fitness to practise is whether a practitioner is fit to practise currently, rather than a deliberation of whether there is any likelihood of a return to practice, and thereby any risk in the future.
- 16.6 In cases involving the denial of allegations, which are subsequently found proved at facts stage, it is important to reconcile the need to ensure the registrant has acquired the requisite insight with the fact that they could not be required to accept the allegations.⁴
- 16.7 The above guidance on impairment is taken from *Cohen v General Medical Council [2008] EWHC 581*; *Zygmunt v General Medical Council [2008] EWHC 2643*; *Azzam v General Medical Council [2008] EWHC 2711*; *Cheatle v General Medical Council [2009] EWHC 645*; *Yeong v General Medical Council [2009] EWHC 1923*; and *PSA v Nursing and Midwifery Council (Grant) [2011] EWHC 927*.

⁴ *Yussuff v GMC [2018] EWHC 13(Admin)*, *Blakely v GMC [2019] EWHC 906 (Admin)*

Commented [PSA23]: We thought this could be more clearly explained.

There is some recent case law on this point that expresses the point well, in our view, that the GOC could refer to, namely *GMC v Awan [2020] EWHC 15553 (Admin)*

At [37] ‘..it is too much to expect of an accused member of a profession who has doughtily defended an allegation on that ground that he did not do it to suddenly undergo a Damascene conversion in the impairment phase following a factual finding that he did do it.’

And more recently *Towuaghantse v GMC [2021] EWHC 681 (Admin)*

17. Dishonesty

- 17.1 The GOC's Code of Conduct for individual registrants and Standards document both state that the registrant must "*be honest and trustworthy*". Dishonesty is particularly serious as it may undermine trust in the profession. Examples of dishonesty may include:
- Defrauding an employer, a colleague, or an insurance company;
 - Defrauding the NHS (see 17.3 below);
 - Improperly amending or changing the detail on patient records;
 - Submitting or providing false references and information on a CV;
 - Research misconduct; or
 - Failure to disclose to the Council or employer or PCT criminal convictions and cautions.
- 17.2 Misconduct can range from presenting misleading information in publications to dishonesty in clinical trials. This type of behaviour undermines the trust that the public and the profession have in optometry as a science, regardless of whether this leads to direct harm of the patient. Because it has the potential to have far reaching consequences, this type of dishonesty is particularly serious.
- 17.3 The Privy Council in *Dr Shiv Prasad Dey-v-GMC (Privy Council Appeal No. 19 of 2001)* has emphasised that:
- "...Health Authorities must be able to place complete reliance on the integrity of practitioners; and the Committee is entitled to regard conduct which undermines that confidence as calculated to reflect on the standards and reputation of the profession as a whole."*
- 17.4 The question of whether or not a registrant's conduct is dishonest will be decided by the Committee at the fact-finding stage. In cases where the Committee must determine whether a registrant was dishonest, it should seek advice from the Legal Adviser to ensure decisions are based on the most recent case law.
- 17.5 The test for dishonesty is set out in the case of *Ivey (Appellant) v Genting Casinos (UK) Ltd t/a Crockfords (Respondent) [2017] UKSC 67*, which brought the test for dishonesty in criminal and regulatory proceedings in line with civil proceedings. When dishonesty is in question the Committee must:
- First ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts.
 - When his state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.
- 17.6 There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest. *Ivey* has more recently been affirmed in *R v Barton and Booth [2020] EWCA Crim 575*. The defendant's own view of the matter is not

Commented [PSA24]: As previously mentioned, it is helpful to stick to the established terminology of 'confidence'.

determinative. All matters that lead an accused to act in the manner alleged will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard.

- 17.7 *Uwen v GMC [2019] EWHC 3483 (Admin)*, applied the test in *Ivey* as the correct approach in a regulatory case. The reasonableness or otherwise of the belief held by the Registrant is a matter of evidence. The question of dishonesty is an objective one.
- 17.8 The Committee should be mindful of the guidance given in *Lusinga v NMC [2017] EWHC 1458 (Admin)* about the scale of dishonesty: "...dishonest conduct can take various forms; some criminal, some not; some destroying trust instantly, others merely undermining it to a lesser or greater extent."

18. Interim orders

Interim orders – s.13L Opticians Act 1989

- 18.1 Section 13L(1) sets out the grounds on which an interim order may be made. The FitPC must be satisfied that an order is necessary for the protection of the public or otherwise in the public interest, or the interests of the registrant for the registrant's registration to be suspended or made subject to conditions, or an entry relating to a specialty or proficiency to be removed temporarily or made subject to conditions.
- 18.2 If the Committee is satisfied that an interim order is necessary, it may make the following orders:
- a. An interim suspension order: suspension of registration for a period not exceeding 18 months; or temporary removal of an entry to a specialty or proficiency for a specified period not exceeding 18 months.
 - b. An order for interim conditional registration: the registrant's registration or the entry relating to a specialty or proficiency is conditional on the registrant's compliance for a specified period not exceeding 18 months with such requirements as the Committee think fit to impose.
- 18.3 The primary purpose of an interim order is to protect members of the public. The Committee must take a proportionate approach and start with the least interventionist approach (no order). Even in the most serious cases, if the making of an order is necessary, the Committee must consider whether the public can be protected by conditions, such as restricting patient contact, instead of a suspension order (see *Bawa-Garba v General Medical Council [2015] EWHC 1277 (QB)*). It will be relatively rare for an interim order to be made only on the ground that it is in the public interest (for example, to maintain public confidence in the profession) (see *R (Shiekh) v General Dental Council [2007] EWHC 2972*).
- 18.4 The High Court has considered the three limbs (public protection, public interest, and the interests of the registrant) of the grounds on which an interim order may be made and has considered whether a registrant can only be suspended on public interest grounds if this was "necessary". The High Court indicated that while the legislation allows an interim order on public protection grounds only if this is "necessary", there is no such qualification to the public interest limb (see *Sandler v General Medical Council [2010] EWHC 1029*).
- 18.5 If an interim order is made to safeguard public confidence, care must be taken to explain why it is proportionate bearing in mind the interim nature of the relief, and that

public interest considerations could be fairly reflected by an appropriate decision at the final hearing. (See *Sosanya v General Medical Council* [2009] EWHC 2814 (Admin) *Patel v General Medical Council* EWHC 3688 and *Houshian v General Medical Council* [2012] EWHC 3458).

Factors the Committee must take into account

- 18.6 The Committee must take account of the following factors when deciding whether an interim order is necessary:
- a. The effect which any order might have on the registrant. Interim orders are a draconian measure, and the Committee must balance the need for an order against the effect an order would have on the registrant. The Committee must balance the risk to the public of making no order against the consequences an order would have on the registrant and ensure that the making of an order is proportionate. (*Madan v General Medical Council* [2001] EWHC Admin 57 and *Scholten v General Medical Council* [2013] EWHC 173 (Admin))
 - b. The Committee is not making any findings of fact as to whether the allegations are established. A decision about the veracity of a disputed allegation is a matter for the substantive hearing. The Committee may act if they take the view that there is a *prima facie* case and that the *prima facie* case, having regard to such material as is put before them by the registrant, requires that the public be protected by an interim order (*R (George) v General Medical Council* [2003] EWHC 1124 paragraph 42; *Perry v Nursing and Midwifery Council* [2013] EWCA Civ 145).
 - c. The source of the allegation and its potential seriousness. The allegation should have been made or confirmed in writing, although it may not yet have been reduced to a formal witness statement. An allegation that is trivial or clearly misconceived should not be given weight (*General Medical Council v Sheill* [2006] EWHC 3025).
 - d. In cases where a registrant has been charged with a criminal offence, the Committee can proceed on the basis that the Crown Prosecution Service has concluded there was sufficient substance in the matter to justify charges being brought (*Fallon v Horse Racing Regulatory Authority* [2006] EWHC 2030). The Committee will not always be obliged to hear evidence or submissions as to any alleged weaknesses in the criminal case.

Interim order determinations

- 18.7 An interim order determination does not need to be lengthy, but it should identify any relevant factors as listed above and apply them to the details of the allegations against the registrant and give reasons for the decision reached by the Committee. The determination should clearly explain the proportionality of any or no interim action in respect of the identified risks (and the degree of potential harm) posed by the registrant in the specific circumstances of the case.
- 18.8 When setting the length of an interim suspension or conditional registration order, the Committee should bear in mind the length of time the Council requires to bring the matter to a final substantive hearing which can, in some cases, be over 12 months. If a substantive hearing in the matter cannot be held before 18 months expires from the setting of the interim order (or before the expiry of an order that is imposed for less

than 18 months), the Council will be required to apply to the High Court for an extension. The maximum period should not be specified as a default, and the period must be justified on the individual facts of the case (*Harry v General Medical Council* [2012] EWHC 2762).

Review of interim orders

- 18.9 Section 13L(3) and (9) set out when the Committee must review interim orders.
- 18.10 The Committee must review the order within a period of six months from the making of the order. And, while the order remains in force, the Committee must further review the order within 6 months of the date of the immediately preceding decision (s.13L(3)(a)(i)).
- 18.11 A registrant may request an earlier review after a period of three months from the most recent decision. The Committee must review the order as soon as practicable after the request has been received (s.13L(3)(a)(i)).
- 18.12 A Committee may review and order if new evidence, relevant to the order, becomes available after the order has been made (s.13L(3)(b)).
- 18.13 An Interim Order that has been reviewed by the FtPC and replaced with a different order under section 13L(4)(c) must be reviewed within three months (s.13L(9)(a)).
- 18.14 If an order has been extended following an application to the High Court, the Committee must review the order within three months of the High Court extension (s.13L(9)(b)).
- 18.15 There also needs to be a review if a case has an interim order but it is no longer proceeding to a FtPC (see paragraph 18.21 below).
- 18.16 Following a review of the order, the Committee may:
- a. Continue the order
 - b. Revoke the order
 - c. Vary conditions
 - d. Replace an interim conditional order with an interim suspension order (and vice versa)
- 18.17 An interim order review determination should include:
- a. Details of the initial allegations against the registrant;
 - b. A brief summary of the initial findings;
 - c. Any actions taken by the registrant since the last hearing; and
 - d. Any decisions reached by the Committee and its reasons for them.
- 18.18 The Committee's determination should contain as much detail as is necessary to enable understanding of the details of the review hearing, and the committee's

decision and reasons for its decision, in isolation of previous determinations.

Revocation of interim orders

- 18.19 Any existing interim order will not automatically lapse on the making of a subsequent substantive order. The Committee at a substantive hearing must, therefore, revoke any interim order immediately after it has determined the allegation (Section 13L (11) of the Opticians Act 1989).
- 18.20 Interim orders when a referral to the Committee has been terminated under Rule 16, Fitness to Practise Rules 2013
- 18.21 Where an allegation has been referred to the FtPC, under Rule 16, the case examiners may review the allegation and direct the registrar that the allegation should not be considered. This may happen after the Committee has already made an interim order against the registrant under Rule 17.
- 18.22 If a referral to the Committee is cancelled when it has already made an interim order against the registrant, the Committee is required to hold a review hearing and should revoke the interim order using its powers in Section 13L.
- 18.23 If multiple allegations against the registrant have been referred to the Committee but the case examiners have directed that only one or some of the allegations should no longer be considered by the Committee, the Committee must use the interim order review hearing to determine whether the remaining allegations meet the requirements for an interim order. The Committee may decide to continue the interim order or to vary or revoke the interim order.

19. Decision making

Giving reasons in determinations

- 19.1 The judgment in the case of *Threlfall*, following a registrant's appeal against the GOC's decision, held that there are obligations at common law, and pursuant to Article 6 of the European Convention on Human Rights, for a Disciplinary Committee to give adequate reasons in good time in any case in which a decision is made to impose a disciplinary order. The judgement stated, "*There is a further practical reason why disciplinary Committees should give adequate reasons for their decisions, and that is to enable the Council for the Regulation of Health Care Professionals to consider whether to exercise its powers under section 29 of the 2002 Act*".
- 19.2 Generally, failings in this regard tend to fall into four main areas:
 - a. Failure to explain what the allegations are in sufficient detail to enable the reader to understand the seriousness of the allegation;
 - b. Failure to explain why allegations have or have not been found proved;
 - c. Failure to explain why, in light of any mitigation, the registrant is or is not found to be impaired;
 - d. Failure to explain why the committee feel that a particular sanction is the most appropriate sanction for them to apply.
- 19.3 The amount of detail will depend on the complexity of the case. The determination should clearly set out what the facts of the case are with sufficient detail to enable the

Commented [PSA25]: We welcome the reference to s.29 in this paragraph.

Commented [PSA26]: Perhaps this could make clear that personal mitigation should generally not be considered at impairment.

Commented [PSA27]: We suggesting making clear that panels should also explain why the 'next most serious sanction' is not needed.

We often see cases where this is not properly explained, such as where the panel make a 'generalised assertion' (Stone) that erasure is not appropriate.

Commented [PSA28]: Consideration could also be given to including failure to explain any departure from the Indicative Sanctions Guidance (Doree).

reader to understand what has been decided and why.

Findings of fact

- 19.4 If a decision turns on the credibility of one witness as opposed to another, then the reasons for the decision might be brief depending on the circumstances of a case. In cases where a finding may appear to be inexplicable in relation to the evidence received by the FtPC, then there would be a compelling need for detailed reasons. The courts have clarified that in exceptional cases, for example, where the factual background is complex or the evidence is finely balanced, more is required by way of explanation.
- 19.5 In particular, the reasons why a witness is or is not found to be credible must be given where the witness evidence has been inconsistent. If the Committee considers that a witness has been dishonest in the evidence they have given, this must be stated clearly and reasons given. (*Southall v General Medical Council [2010] EWCA Civ 407* and *Casey v General Medical Council [2011] NIQB 95* and *Yaacoub v General Medical Council [2012] EWHC 2779 (Admin)*).

What makes a good determination?

- 19.6 The FtPC should explain fully why they have come to the decision that has been reached and why that outcome is more appropriate than any other possible outcomes. The Committee should use clear language and vocabulary so that the registrant, the other parties to the hearing and members of the public will understand the decision and the reasons for it.
- 19.7 The Committee's determination should always cover:
- a. A description of the allegations (a reference to the Code of Conduct may be made);
 - b. An explanation of why each factual allegation was or was not found proved;
 - c. An explanation of any important background facts which led the Committee to reach its conclusion;
 - d. Confirmation or otherwise that the Committee has accepted any legal advice given by the legal adviser (it is particularly important to give a full explanation of the Committee's position in relation to any advice it has not accepted);
 - e. Confirmation as to whether the Committee has taken into account any guidance, and if so, the extent to which that guidance has been taken into account;
 - f. The Committee's conclusions on the main submissions made to it by the parties or their representatives;
 - g. A clear explanation of the reason why the Committee has preferred some evidence over other evidence where an issue is in dispute;
 - h. Whether, on the basis of the facts found proved, the registrant's actions amount to misconduct, deficient professional performance or that they have adverse physical or mental health, and why;

Commented [PSA29]: Or departed from and why.

- i. Whether the fitness to practise of a registrant is currently impaired, and if so, why and, if not, why not;
- j. What sanctions are being imposed and why, and how the sanction imposed protects the public;
- k. Why the Committee rejected the other sanctions available;
- l. Show consideration of any details of good character that have been submitted;
- m. In a case where the registrant is suspended or has conditions placed on registration, whether or not a review hearing should be held with reasons. If there will be a review, an explanation of the sort of evidence the registrant would be expected to provide at the review hearing and the issues the review panel may wish to consider;
- n. Where conditions or a suspension has been imposed and the Committee has not directed a review hearing, explain what factors led the Committee to decide that the registrant will be fit to return to unrestricted practice when the conditions or suspension lapse and the reasons why;
- o. Consideration of whether or not to make an order for immediate conditions or suspension, with reasons, and, if making an interim order, which of the grounds in s.13L(1) or (2) the Committee is relying on.
- p. A review hearing determination should include details of the initial allegations against the registrant, a brief summary of the initial findings and the actions taken by the registrant since the last hearing. It should also include any decisions made by the Committee as to any directions or orders made and its reasons for them, and where the registrant is considered fit to return to unrestricted practice, the reasons why;
- q. Where a matter has been adjourned and an interim order imposed, quote the powers under which the order has been made.

Commented [PSA30]: 'upholds standards, and maintains public confidence.'

19.8 Whatever the FtPC decides at a hearing, it needs to explain its reasons. It is in the Committee's interest to produce a well-reasoned decision as it is far less likely to result in the Professional Standards Authority (PSA) asking for additional information, unless the decision appears to be clearly inappropriate. Giving clear reasons will also avoid adverse inferences being drawn, for example by the PSA or the courts, that matters were not considered or that there was no reasonable basis for the decision.

19.9 A well-reasoned decision will enable the public, witnesses, and the parties to see why a particular course has been taken, even if they disagree with the outcome. The registrant and, as mentioned previously, the PSA may have the right to appeal against the Committee's decision. A complainant might also wish to apply for leave for judicial review of the decision. A full explanation of the reasons for the Committee's decision will help them decide whether to exercise that right and will help the court which has to consider any appeal.

Part B: Indicative Sanctions Guidance

20. Available sanctions following a finding of no impairment

Warning (s.13F(5))

- 20.1 A warning may be given in a case where the fitness to practise of a registrant is found not to be currently impaired, but the circumstances of the case deem it necessary to issue the registrant with a warning as to their future conduct or performance, with reference to the facts found proved.
- 20.2 Warnings allow the FtPC to indicate to a registrant that certain behaviour, conduct or practice represents a departure from the standards expected of its registrants and should not be repeated. Further, they highlight to the wider profession that certain behaviour or conduct is unacceptable.
- 20.3 When issuing a warning, the FtPC should consider setting a date of expiry of the warning. A warning does not directly affect a registrant's ability to practise or undertake training but is published on the Council's website and disclosed if anyone enquires about the registrant's fitness to practise history.
- 20.4 A warning may be appropriate where concerns raised by the case are sufficiently serious to require a formal response, but do not reach the threshold for impairment. Care should be taken to explain why a formal response is required in the light of the finding of 'no current impairment' and the mitigating factors that may, therefore, be present. The Committee will, need to record its reasons for issuing or not issuing a warning.
- 20.5 Factors when a finding of no impairment has been made and a warning may be appropriate:
- A clear and specific breach of the Standards of Practice;
 - The particular conduct, behaviour, or performance approaches, but falls short of the threshold for current impairment;
 - Where the concerns are sufficiently serious that, if there were a repetition, they would likely result in a finding of impaired fitness to practise;
 - There is a need to record formally the particular concern(s).
- 20.6 If the Committee are satisfied that the registrant's fitness to practise is not impaired, they can take account of a range of aggravating or mitigating factors to determine whether a warning is appropriate. These might include:
- Genuine expression of regret/apology;
 - Acting under duress;
 - Previous good history;
 - No repetition of behaviour since incident;
 - Appropriate rehabilitative/corrective steps have been taken; and
 - Relevant and appropriate references and testimonials.

Commented [PSA31]: The GOC may wish to consider adding more here to convey that warnings play an important role in upholding the public interest and declaring standards. The public interest ought to be a key consideration.

Commented [PSA32]: Express mention of the public interest should be made here – i.e. the panel should have regard to the public interest when considering whether a warning is required.

Commented [PSA33]: Again, the panel should be encouraged to consider the public interest as part of their considerations – warnings serve to uphold standards and maintain public confidence in the profession (*Uppal and Hilton*)

No further action

- 20.7 If, following a finding of no impairment, the Committee does not require any restriction on the registrant's registration, a determination of no further action may be made. The Committee must still give reasons for its decision and determination of no further action.

21. Available sanctions following a finding of impairment

- 21.1 Where fitness to practise is found to be currently impaired, the Fitness to Practise Committee may impose a sanction. The purpose of any sanction is not to punish the registrant but to protect patients and the wider public interest (see 10 above).
- 21.2 Where a committee finds that a registrant's fitness to practise is currently impaired, it can direct:
- a. That no further action be taken;
 - b. A financial penalty (except in a health case) (which may be imposed in conjunction with another sanction);
 - c. Conditions (ordinarily to be followed by a review) for up to three years;
 - d. A period of suspension (ordinarily to be followed by a review) for up to 12 months; or
 - e. Erasure (except in a health case); and
 - f. Entries relating to specialty or proficiency may be subject to conditions or removal. Where impairment is found on the ground of deficient professional performance, and the deficiency relates to the performance of a specialty or proficiency, particulars of which are entered in the register, the Committee may direct that the entry relating to that specialty or proficiency be subject to conditions (for up to three years), removed temporarily (for up to 12 months) or removed (s13F(4)).

No further action

- 21.3 Where a registrant's fitness to practise is impaired, the FtPC would usually take action to protect the public interest to ensure protection of patients, maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour.
- 21.4 There may, however, be exceptional circumstances in which a committee might be justified in taking no action. Such cases are likely to be very rare. In order to be 'exceptional', circumstances must not be routinely or normally encountered (*R-v-Kelly (Edward) [2000] QB 198*) and reasons must be given as to what the relevant circumstances are, why they are considered exceptional and why they mitigate against action being taken.
- 21.5 No action might be appropriate in cases where the registrant has demonstrated considerable insight into their behaviour and has already embarked on, and completed, any remedial action the Committee would otherwise require them to

Commented [PSA34]: This section could benefit from some acknowledgement that in the absence of non-restrictive such as a caution (and noting that financial penalties will have specific applications), an impairment finding with no further action is a way to mark the seriousness of the misconduct in the public interest, where a restrictive sanction cannot be justified.

undertake. The Committee may wish to see evidence to show that the registrant has taken steps to mitigate their actions.

- 21.6 In such cases it is particularly important that the Committee's determination sets out very clearly the reasons why it considered it appropriate to take no action, notwithstanding the fact that the registrant's fitness to practise was found to be impaired.

Financial penalty orders (s13H)

- 21.7 The FtPC has the power to impose a financial penalty order of any sum not exceeding £50,000.
- 21.8 A financial penalty order may be made in addition to, or instead of, an erasure order, suspension, or conditional registration order.
- 21.9 When making a financial penalty order, the Committee must specify the period within or date on which the sum is to be paid.
- 21.10 If the Committee is considering making a financial penalty order against an individual registrant, the registrant's ability to pay should be taken into account.
- 21.11 If the Committee is considering making a financial penalty order against a business registrant, the size and financial resources of the business should be taken into account.
- 21.12 There may be some types of allegations where a financial penalty order is more appropriate, for example, where the misconduct was financially motivated and/or resulted in financial gain.

Conditional registration (maximum 3 years) (s13F(3)(c) and 4(c))

Consider: Will imposing conditions be sufficient to protect patients and the public interest?

- 21.13 The primary purpose of conditions should be to protect the public. Conditions on the registrant's registration may be imposed up to a maximum of three years. Conditional registration allows a registrant to return to practise under certain conditions, for example, no longer being able to carry out certain procedures or working under supervision. Conditions may also make positive requirements of a registrant, such as a requirement to undergo training in a particular area of their practise.
- 21.14 When deciding upon an appropriate condition, the Committee should consider the possibility that the registrant may change their field of practise; the conditions imposed should not, therefore, be restricted to the registrant's current field of practise, or rely on him being currently employed (*Perry v Nursing and Midwifery Council* [2012] EWHC 2275).
- 21.15 Conditions might be most appropriate in cases involving a registrant's health, performance, or where there is evidence of shortcomings in a specific area or areas of the registrant's practise.
- 21.16 Where the FtPC has identified that there are significant shortcomings in the registrant's practise or evidence of incompetence exists, the Committee should satisfy itself that the registrant would respond positively to retraining and remedy any deficiencies in practice whilst protecting patients. When assessing the potential of using conditions, the Committee would need to consider objective evidence submitted

Commented [PSA35]: In addition to these examples, this section could benefit from some basic principles to guide decisions about when a financial penalty would be appropriate.

on behalf of the registrant, or such evidence that is available to them, about the registrant's practise.

- 21.17 The objectives of any conditions placed on the registrant must be relevant to the conduct in question and any risk it presents. The conditions and their objectives should be made clear to the registrant so that they understand what is expected of them and will help the Committee at future review hearings to evaluate whether the aims of the conditions have been achieved.
- 21.18 Conditions should be appropriate, proportionate, workable, and measurable, and should be discussed fully by the Committee before imposing them.
- 21.19 In drafting conditions, the Committee should place the onus on the registrant to comply. The Committee should avoid conditions that require a third party (including the Council) to undertake specific tasks, because the Committee has no jurisdiction over third parties.
- 21.20 If public protection demands that the Committee consider conditions that require the involvement of a third party (such as a supervisor or medical professional), the Committee should consider the willingness or potential willingness and capacity of this third party to co-operate. The Committee should not impose conditions which are tantamount to a suspension.
- 21.21 Many conditions will require the registrant to have some form of supervisor. A learning supervisor might be appropriate for a student, a workplace supervisor for an employed registrant and a professional colleague for a sole practitioner or a locum practising at different locations.
- 21.22 A bank of conditions which can be considered by a committee is shown at the end of this document.
- 21.23 Conditional registration may be appropriate when most, or all, of the following factors are apparent (this list is not **exhaustive**):
- a. No evidence of harmful deep-seated personality or attitudinal problems.
 - b. Identifiable areas of registrant's practise in need of assessment or retraining.
 - c. Evidence that registrant has insight into any health problems and is prepared to agree to abide by conditions regarding medical condition, treatment, and supervision.
 - d. Potential and willingness to respond positively to retraining.
 - e. Patients will not be put in danger either directly or indirectly as a result of conditional registration itself.
 - f. The conditions will protect patients during the period they are in force.
 - g. It is possible to formulate appropriate and practical conditions to impose on registration and make provision as to how conditions will be monitored.

Commented [PSA36]: It might be helpful also to include a list of factors that might indicate that conditions would be less suitable, such as dishonesty, sexual misconduct.

Educational Conditions

- 21.24 Before imposing educational conditions, the panel should satisfy itself that:

- a. The problem is amenable to improvement through education;
- b. The objectives of the conditions are clear; and
- c. A future committee will be readily able to determine whether the educational objective has been achieved and whether patients will or will not be avoidably at risk.

21.25 When imposing conditional registration, it is also normally appropriate to direct a review hearing (see below (from paragraph 21.30) on directing a review hearing).

21.26 If the Committee directs conditional registration, or in cases based on deficient professional performance, a direction that an entry relating to a specialty or proficiency be made conditional, it should also consider whether the conditions should take effect immediately and give reasons for its decision (see section below on immediate orders for conditions or suspension where direction made for conditional registration, suspension, or erasure) (s13I)).

Suspension (maximum 12 months) (s13F(3)(b) or (4)(b))

Consider: Does the seriousness of the case require temporary removal from the register? Will a period of suspension be sufficient to protect patients and the public interest?

21.27 This sanction may be appropriate when some, or all, of the following factors are apparent (this list is not exhaustive):

- a. A serious instance of misconduct where a lesser sanction is not sufficient.
- b. No evidence of harmful deep-seated personality or attitudinal problems.
- c. No evidence of repetition of behaviour since incident.
- d. The Committee is satisfied the registrant has insight and does not pose a significant risk of repeating behaviour.
- e. In cases where the only issue relates to the registrant's health, there is a risk to patient safety if the registrant continued to practise, even under conditions.

21.28 If the Committee directs a period of suspension, or in cases based on deficient professional performance, temporary removal of an entry relating to a specialty or proficiency, it should also consider whether the suspension should take effect immediately and give reasons for its decision (see section above on immediate orders for conditions or suspension (where direction made for conditional registration, suspension, or erasure) (s13I)).

21.29 While the Committee is only able to suspend a registrant for up to 12 months, it should also be aware that any future review hearing may extend the suspension for up to another 12 months (s13F(7) and *HK v General Pharmaceutical Council [2014] CSIH 61*). However, any extension of suspension must be based on the registrant's fitness to practise at the time of the review, rather than at the time of the initial finding of impairment.

Directing a review hearing

21.30 The Committee should normally direct that there be a review of a conditional order or a suspension order before they expire. This is because before a suspension or

conditions are lifted, the FtPC will need to be reassured that the registrant is fit to resume practice either unrestricted or with conditions, or further conditions. Where conditions have been imposed, the registrant must demonstrate to the Committee that they have satisfied the conditions imposed at the previous hearing (*Bangbelu v General Dental Council [2013] EWHC 1169*).

- 21.31 Where the Committee decides not to direct a review hearing, it should explain why and detail the factors which led it to conclude that the registrant would be fit to resume unrestricted practice when the suspension or conditions expire.
- 21.32 If the Committee directs a review hearing, it may wish to give guidance, or clarify its expectations regarding the evidence or matters the review panel may find useful to take into account in reconsidering the case. This is non-binding and cannot form the basis of an appeal against the decision, but may assist the registrant and the future committee. (*Ferguson v NMC [2011] EWHC 1456 and Levy v GMC [2011] EWHC 2351 (Admin)*).

Erasure (s13F(3)(a))

Consider: Is erasure the only sanction which will be sufficient to protect patients and the public interest? Is the seriousness of the case compatible with ongoing registration? Can public confidence in the profession be sustained if this registrant is not removed from the register?

- 21.33 Erasure is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered professional and involves any of the following (this list is not exhaustive):
- a. Serious departure from the relevant professional standards as set out in the Standards of Practice for registrants and the Code of Conduct for business registrants;
 - b. Doing serious harm to individuals (patients or otherwise), either deliberately or through incompetence, and particularly where there is a continuing risk to patients;
 - c. Abuse of position/trust (particularly involving vulnerable patients) or violation of the rights of patients;
 - d. Offences of a sexual nature, including involvement in child pornography;
 - e. Offences involving violence;
 - f. Dishonesty (especially where persistent and covered up); or
 - g. Persistent lack of insight into seriousness of actions or consequences.
- 21.34 Erasure cannot be imposed in cases where impairment is only by reason of adverse physical or mental health.
- 21.35 Erasure from the register is appropriate if it is the only means of protecting patients and/or maintaining public confidence in the optical profession. The Privy Council in *Bijl v GMC (Privy Council Appeal No. 78 of 2000)* emphasised that a committee should not feel it necessary to remove:

Commented [PSA37]: As above, the GOC might consider making explicit reference to the duty of candour (noting that these would be the most egregious lapses, including preventing others from being candid).

“...an otherwise competent and useful [registrant] who presents no danger to the public in order to satisfy [public] demand for blame and punishment.”

- 21.36 It is the Committee’s role to maintain confidence in the profession, in some cases, this may mean considering whether erasure is appropriate despite a practitioner presenting no risk. In *Bolton v Law Society*, adopted by the Privy Council in the case of *Dr Gupta [2001]*, Lord Bingham said:

“The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price.”

- 21.37 If the Committee directs erasure (or in cases based on deficient professional performance, removal of an entry relating to a specialty or proficiency), it should also consider whether erasure or removal should take effect immediately, and give reasons for its decision (see section above on Immediate orders for conditions or suspension (where direction made for conditional registration, suspension, or erasure) (s13l)).

22. Type of case and indicative sanction

Sexual misconduct

- 22.1 A wide range of conduct is encompassed in this category, from criminal convictions for sexual assault, sexual abuse of children (including child pornography), to sexual misconduct with patients, patients’ relatives, or colleagues. The risk to patients is vitally important and the misconduct is particularly serious where there is an abuse of the registrant’s special position of trust, or where a registrant has been registered as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases.

Indecent images of children

- 22.2 Taking, making, distributing, or showing with a view to being distributed to publish, or possession of an indecent photograph or pseudo-photograph of a child is illegal and regarded as morally reprehensible. Where a registrant has any involvement in these offences, the Committee should consider whether the public interest demands that their registration be affected.
- 22.3 A conviction for these offences is a matter of grave concern and it is, therefore, highly likely that the only proportionate sanction will be erasure. The Committee, however, must bear in mind this guidance and the issue proportionality. If it decides to impose a sanction other than erasure, it is important that it fully explains the reasons for doing so.

Dishonesty

- 22.4 There is no blanket rule or presumption that erasure is the appropriate sanction in all cases of dishonesty. The Committee must balance the particular circumstances of the case against the effect a finding of dishonesty has on public confidence in the profession (*R (on the application of Hassan) v General Optical Council [2013] EWHC 1887 (Admin and Siddiqui v General Medical Council [2013] EWHC 1883)*).
- 22.5 When deciding on the appropriate sanction on dishonesty, it is important to consider the context in which the dishonest act took place, and the nature of the dishonesty.

Commented [PSA38]: The GOC could consider including a section on conduct motivated by hostility towards someone’s race, sexual orientation (or perceived sexual orientation), disability, sex, gender (or presumed gender identity), religion or age.

- 22.6 The evaluation of 'exceptional circumstances' at sanction stage in cases of dishonesty involves a balancing exercise between the nature and extent of the dishonesty and degree of culpability on the one hand, and matters such as personal mitigation, health issues and working conditions on the other.
- 22.7 Where the fact finding Committee has concluded that an individual was dishonest, notwithstanding mental health issues or workplace related pressure, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused, all of which must be of more significance (*Solicitors Regulation Authority v James*; *Solicitors Regulation Authority v MacGregor*; *Solicitors Regulation Authority v Naylor* [2-18] EWHC 3058 (Admin)).

Commented [PSA39]: We do not consider that this is an accurate statement insofar as the statement relates to 'exceptional circumstances'.

In *Hassan v GOC* [2013] EWHC 1887 at [39] the court held that it would be wrong to approach the question of sanction in dishonesty cases on the basis that there is only a small residual category of exceptional cases where erasure would be disproportionate and then to ask whether there are any exceptional factors which take the instant case into that residual territory.

More recently it has been emphasised by the courts that dishonesty is not a monolithic concept and questions of degree arise (*Chaudhury*). The GOC may therefore wish to re-draft this paragraph.

Commented [PSA40]: We welcome the inclusion of this section, and suggest as per previous comments that the guidance could benefit from additional explicit references.

Candour

- 22.8 All healthcare professionals have a professional duty of candour – this is a professional responsibility to be open, honest, and transparent with patients when things go wrong. This professional duty of candour is now expressed in the Council's Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students, which require that registrants must "*be candid when things have gone wrong*." This includes telling the patient that something has gone wrong, offering an apology or support, explaining the effects of what has been done and outlining the actions that will be taken to prevent reoccurrence.
- 22.9 Similarly, registrants are expected to raise any concerns they may have about the actions of conduct of their colleagues, including their fitness to practise, as part of a broader culture of candour, and in accordance with the Standards.
- 22.10 Failure to comply with this standard should be treated seriously. Being open and honest with patients is a patient right and is central to professionalism. A breach of this standard will normally be charged as a specific factual allegation. In these situations, the Committee should consider whether the registrant complied with the standard on candour as part of determining the facts, and any breach of the standards that might amount to misconduct.

Commented [PSA41]: We suggest also making reference to misconduct involving preventing others from being candid.

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

- 22.11 In cases where a registrant has not acted in the patient's best interests and has failed to provide an adequate level of care - the care given falling well below the professional standards expected of a registered optometrist or dispensing optician - and where a persistent failure to provide clinical care is apparent, the FtPC must consider whether a registrant has, or has the potential to develop, insight into these failings.
- 22.12 There are many ways in which a registrant can demonstrate insight, or the potential to develop insight, including coaching, mentoring, training, and rehabilitation and, where fully successful, will make impairment unlikely. Where a registrant is unable to demonstrate insight, or the potential to develop insight, into the established failings, it is likely that conditions on registration or suspension may not be appropriate or sufficient to protect the public.
- 22.13 However, there are some cases where a registrant's failings are irremediable. This is because they are so serious or persistent that, despite steps subsequently taken, action is needed to maintain public confidence. This might include where a registrant knew, or ought to have known, they were causing harm to patients and should have

taken steps earlier to prevent the harm.

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

- 22.14 Impairment of fitness to practise may be found by reason of a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence. This can include a conviction by a Court Martial. The registrant must have admitted guilt and consented to a caution for a caution to have been given.
- 22.15 Impairment may also be based on a determination by a body in the UK responsible under legislation for the regulation of a health or social care profession, to the effect that the registrant's fitness to practise is impaired, and includes a determination by a regulatory body elsewhere to the same effect.
- 22.16 In cases involving convictions, cautions or determinations by another regulatory body, the purpose of the hearing is not to punish the registrant a second time for the offences committed. The purpose is to consider whether the registrant's fitness to practise is impaired and, if so, whether there is a need to impose a sanction to protect the public, or in the wider public interest, for example, to maintain public confidence in the profession.
- 22.17 The Committee should bear in mind that the sentence imposed by a criminal court, or sanction imposed by another regulatory body, is not always an accurate guide to the seriousness of the offence. There may have been particular circumstances which led that court or regulatory body to be lenient or too harsh in sentencing. For example, because it was anticipated that the registrant would be dealt with firmly by their regulatory body.
- 22.18 Similarly, in the case of determinations by other regulatory bodies, the range of sanctions and how they are applied may vary significantly. While the Committee cannot question the conviction itself or the sentence given, according to *RCVS v Samuel [2014] UKPC 13*, a committee "is entitled to form its own view of the gravity of the case" and may consider the circumstances of the offence.
- 22.19 A caution is as much a possible ground for impairment as a criminal conviction, notwithstanding that, when accepting it, the registrant may not have realised how seriously it might affect their professional career. The Committee must judge each case on the evidence.
- 22.20 In *O v Nursing and Midwifery Council [2015] EWHC 2949*, it was confirmed that a guilty plea in relation to a criminal conviction can be considered as a mitigating factor when considering a regulatory sanction. A not guilty plea should not be considered as an aggravating factor automatically, as a defendant has a fundamental right to contest a criminal charge.

Commented [PSA42]: The GOC may also wish to make the point that criminal and regulatory hearings serve different functions and different considerations will apply. E.g., something that is relatively trivial in the criminal world may be considered very serious in the regulatory world. This point is well established, is made in the 5th Shipman report, and was apparent more recently in the case of Bawa-Garba.

Obtaining consent

- 22.21 It is a central principle of healthcare that patients must give informed consent to any actions or treatment performed. The concept of informed consent was developed in *Montgomery v Lanarkshire Health Board (Scotland) [2015] UKSC 11* as that:

"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment

interfering with her bodily integrity is undertaken. The doctor is, therefore, under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

- 22.22 Failure to obtain consent should, therefore, be treated seriously. However, the Committee may wish to consider the scale of the treatment for which consent has not been obtained, and the likelihood that the patient would have consented had they been aware of the treatment and its material risks.

Raising concerns

- 22.23 Failing to raise concerns internally (or to the GOC) can lead to failures in healthcare and cause significant risk to patients. Therefore, registrants must act to prevent problems arising. It is important that there is an environment and culture where individuals are supported in raising concerns about standards of care and risks to patient safety, and this is reflected in the Standards of Practice for Optometrists and Dispensing Opticians and the Standards for Optical Students.

- 22.24 A committee should take very seriously a finding that a registrant did not raise concerns to the appropriate person or body where patient safety is at risk. More serious outcomes are likely to be appropriate, as set out at paragraph 14.3 with reference to aggravating factors, if a registrant has failed to raise concerns, where:

- a. There is reason to believe a colleague's fitness to practise is impaired and may present a risk of harm to patients.
- b. Patients are at risk because of inadequate premises, equipment or other resources, policies, or systems.

23. Other types of hearing

Review hearing by FtPC

- 23.1 A review hearing will always be treated as a substantive hearing and will commence at the impairment stage. Impairment needs to be considered afresh (*Clarke v General Optical Council [2017] EWHC 521 (Admin)*).
- 23.2 The Committee should bear in mind that, as at the original hearing, orders for conditional registration (or orders varying conditions), suspension and erasure (including orders regarding entries relating to a specialty or proficiency) will not take effect until the end of the appeal period or, if an appeal has been made, before the appeal has been concluded (Section 23H).
- 23.3 The Committee will need to satisfy itself that the registrant has fully appreciated the gravity of the offence, has not re-offended and has maintained their skills and knowledge, and that the registrant's patients will not be placed at risk by resumption of practice or by the imposition of conditional registration (following a period of suspension or more stringent conditions).
- 23.4 The Committee should consider whether the registrant has produced any information

Commented [PSA43]: We suggest this section also make reference to attempts to cover up issues, along with preventing others from raising concerns.

or objective ns.

- 23.5 All sanctions are available to a committee at a substantive review (see s13F(7) and (13)), but the reasons for sanction must reflect the current situation and can only follow a finding that the registrant's fitness to practise remains impaired.
- 23.6 Under s13F(8) and (9) in a case which involves impairment by reason of adverse physical or mental health only and the review hearing is within two months of the period when the current suspension order would expire, and a registrant's name will have been suspended from the appropriate register for at least two years, the Committee may direct that a registrant's period of suspension be extended indefinitely. Any period of interim suspension prior to a substantive sanction of suspension cannot count towards the two-year period (*Okeke v Nursing and Midwifery Council [2013] EWHC 714*).
- 23.7 evidence. At a review hearing, where a registrant has shown reluctance to attend recommended courses in connection with conditional registration, and where the training institutions have offered to provide further training to the registrant, the Committee should always consider elevating recommendations into conditions.
- 23.8 At a review hearing, if the Committee considers that the registrant will not improve their performance through existing conditions without further supervision, the Committee should always consider imposing further educational or training conditions.

Restoration by Registration Appeals Committee

- 23.9 Restoration cases are governed by the General Optical Council (Registration Appeals Rules) Order of Council 2005 which sets out the procedure for considering applications for restoration to the Register following erasure or removal by the FtPC, or where an entry relating to a speciality or proficiency has been removed. The person/body concerned is defined as the Applicant.
- 23.10 The same Order sets out the separate procedure which governs appeals against decisions to refuse entry to the Register. Applications are made under s13K Opticians Act 1989.
- 23.11 The applicant cannot make an application until 22 months have passed since the order for erasure took effect and the restoration hearing cannot take place until 24 months have passed. The applicant must have acquired the required number of Continuing Education and Training (CET) points before making an application.
- 23.12 The Registration Appeals Committee can order health or performance assessments of individual applicants (but not bodies corporate). Failure to submit to or co-operate with any examination will result in the Committee "*drawing such inferences as seem appropriate to them in respect of the appeal/application*" (Rule 13, Fitness to Practise Rules 2013). The burden is on the applicant/appellant to satisfy the Committee that they are "*fit*" and that their name or entry should be restored.
- 23.13 The rules governing proceedings of the Registration Appeals Committee are essentially the same as those for a FtPC under the Fitness to Practise Rules. The order of proceedings in Registration Appeals is different; the appellant/applicant (registrant) goes first. In practice, however, Committees have found it useful for the respondent (the Council) to address the Committee first by setting out the framework of the decision-making power and the evidence on which the Council relies. If the

Committee proposes to follow this route, the appellant's/applicant's agreement should be sought.

- 23.14 The Committee may direct the Registrar to restore the person's name or entry relating to a speciality or proficiency to the register (s13K(6) of the Act). Factors the Committee may wish to consider for restoration cases are:
- a. The original allegations.
 - b. The Committee's reasons for the original sanction imposed.
 - c. Has the applicant demonstrated insight?
 - d. What steps has the applicant undertaken towards rehabilitation?
 - e. How has the applicant kept up to date with professional knowledge and skills?
- 23.15 Decisions must be in writing with reasons.
- 23.16 Under Rule 41 the Committee may assess costs and order them to be paid by any party.
- 23.17 If during the same period of erasure, a second or subsequent application for restoration is unsuccessful, the Committee may direct that the individual's or corporate body's right to make any further such applications be suspended indefinitely. However, the Applicant can appeal against the suspension direction and after two years of the suspension of the right to apply the applicant can apply to the Registrar for that suspension direction to be reviewed by the Registration Appeals Committee.

Registration Appeals by the Registrations Appeals Committee

- 23.18 These cases are also governed by the General Optical Council (Registration Appeals Rules) Order of Council 2005 which sets out the procedure for considering appeals against decisions to refuse entry to the Register where the person/body concerned is referred to as the appellant.
- 23.19 Appealable decisions are listed in paragraph 2 of Schedule 1A of the Act.
- 23.20 The most common decision appealed against is the refusal to register an individual or student (e.g., a decision on an application made under s8 or s8A of the Act).
- 23.21 An appellant's notice of appeal must be made before the end of 28 days (starting with the date of the notice of the Registrar's decision), but an extension can be granted. The Committee has the power to receive oral and documentary evidence that was not before the Registrar meaning the nature of the appeal is a fresh consideration of the issues.
- 23.22 The Committee may:
- a. Dismiss the appeal;
 - b. Allow the appeal and quash the decision appealed against;
 - c. Substitute for the decision appealed against any other decision which could have been made; or

- d. Remit the case back to the Registrar/Council to dispose of the case in accordance with the Committee's directions.

23.23 The Committee considering the appeal may make such enquiries as they consider appropriate (paragraph 4(6) of schedule 1A of the Act).

24. Considerations after sanction

Immediate orders (where direction made for conditional registration, suspension, or erasure) – s.13I Opticians Act 1989

- 24.1 Financial penalties, conditional registration, suspension, and erasure orders cannot take effect until the end of the appeal period or, if an appeal has been made, before the appeal has been concluded. In practice, therefore, if a registrant appeals, the sanction imposed may not come into force for some months. However, the FtPC has the power to impose immediate suspension or conditional registration to cover the appeal period.
- 24.2 If the FtPC has made a conditional registration order, it should consider whether there are reasons for imposing immediate conditions. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant.
- 24.3 If the Committee has made a direction for suspension or erasure (or removal of an entry relating to a speciality or proficiency), it should consider whether there are reasons for ordering immediate suspension. Before doing so the Committee must be satisfied that to do so is necessary for the protection of members of the public, otherwise in the public interest or in the best interests of the registrant.
- 24.4 If the Committee thinks there may be grounds for immediate conditions or suspension, it must inform the registrant of these concerns and invite representations on this issue from both the Presenting Officer and the registrant/registrant's representative (where present). The FtPC must then decide whether to impose an Immediate Order and give reasons.
- 24.5 The Committee must always make clear in its determination that it has considered whether to make an Immediate Order and explain the factors considered, even if it decides that an Immediate Order is not necessary.

Costs and expenses – Part 7, Fitness to Practise Rules 2013

- 24.6 At any substantive hearing or review hearing (other than a hearing to review an interim order), the FtPC has the power to summarily assess the costs of any party to the proceedings and order any party (the GOC or the registrant) to pay all or part of the costs or expenses of any other party.
- 24.7 Where the Committee is considering making such an award against an individual registrant, the registrant's ability to pay should be taken into account. It is incumbent on the registrant to adduce all relevant evidence and to make appropriate submissions in respect of their ability to pay any such order (*Solicitors Regulation Authority v Davis and McGlinchey* [2011] EWHC 232 (Admin) and *Sharma v Solicitors Regulation Authority* [2012] EWHC 3176).
- 24.8 When considering the amount of an award against an individual registrant, the

Committee may consider a statement from the registrant as to their means, and/or any publicly available information such as Companies House or Land Registry filings.

24.9 Before making an order for costs against the Council, the FtPC should take account of the following principles set out in *Baxendale – Walker v The Law Society [2007] EWCA Civ 233*:

- a. A professional regulatory body such as the Council is in a wholly different position from an ordinary litigant and the general rule in litigation that costs follow the event has no direct application.
- b. Unless the complaint is improperly brought or, for example, proceeds, as a “*shambles from start to finish*”, an order for costs should not ordinarily be made against the Regulator on the basis that costs follow the event.
- c. The “*event*” is a factor to consider but is not the starting point.

24.10 The GOC brings proceedings in the public interest and to maintain proper professional standards. “*For [a Regulator] to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage*”.

Part C: Bank of conditions

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| A1 | <p>Standard conditions</p> <p>This section lists conditions that will commonly be relevant to all cases before the Fitness to Practise Committee.</p> <p>Its purpose is to assist Committees and encourage consistency. It does not bind Committees, who must always ensure that the conditions are relevant.</p> |
| A1.1 Informing others | <p>You must inform the following parties that your registration is subject to conditions. You should do this within two weeks of the date this order takes effect.</p> <ul style="list-style-type: none"> a. Any organisation or person employing or contracting with you to provide paid or unpaid optical services, whether or not in the UK (to include any locum agency). b. Any prospective employer or contractor where you have applied to provide optical services, whether or not in the UK. c. The Chair of the Local Optometric Committee for the area where you provide optometric services. d. The NHS body in whose ophthalmic performer or contractor list you are included or are seeking inclusion. |
| A1.2 Employment and work | <p>You must inform the GOC within two weeks if:</p> <ul style="list-style-type: none"> a. You accept any paid or unpaid employment or contract, whether or not in the UK, to provide optical services. b. You apply for any paid or unpaid employment or contract to provide optical services outside the UK. c. You cease working. <p>This information must include the contact details of your prospective employer/ contractor and (if the role includes providing NHS ophthalmic services) the relevant NHS body.</p> |

Commented [PSA44]: And protect the public.

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| <p>A1.3 Supervision of Conditions</p> | <p>You must:</p> <ul style="list-style-type: none"> a. Identify a [workplace supervisor/learning supervisor] who would be prepared to monitor your compliance with numbers [specify the conditions to be monitored by the supervisor] of these conditions. b. Ask the GOC to approve your workplace supervisor/learning supervisor within [number of weeks] of the date this order takes effect. If you are not employed, you must ask us to approve your workplace supervisor before you start work. c. Identify another supervisor if the GOC does not agree to your being monitored by the proposed supervisor. d. Place yourself under the supervision of the supervisor and remain under their supervision for the duration of these conditions. e. At least once a [week/month] meet your supervisor to review compliance with your conditions and your progress with any personal development plan. f. At least every [three/six] months or upon request of the GOC, submit a written report from your supervisor to the Registrar, detailing how you have complied with the conditions they are monitoring. g. Inform the GOC of any proposed change to your supervisor and again place yourself under the supervision of someone who has been agreed by the GOC. |
| <p>A1.4 Other proceedings</p> | <p>You must inform the GOC within two weeks if you become aware of any criminal investigation or disciplinary investigation against you.</p> |
| <p>A1.5 Registration requirements</p> | <p>You must continue to comply with all legal and professional requirements of registration with the GOC.</p> <p>A review hearing will be arranged at the earliest opportunity if you fail to:</p> <ul style="list-style-type: none"> a. Fulfil all CET requirements; or b. Renew your registration annually. |
| <p>A2</p> | <p>Health conditions (impairment by reason of ill-health)</p> <p>This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health.</p> <p>Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about their health.</p> |

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| A2.1 | <p>You must:</p> <ul style="list-style-type: none"> a. Put yourself, and stay, under the medical supervision of a [specify type of practitioner, e.g. general practitioner (GP)/consultant psychiatrist/occupational health practitioner] within two weeks of these conditions taking effect. b. Attend medical supervision appointments as arranged. c. Follow the medical supervisor's advice. d. Follow the medical supervisor's recommended treatment. e. Inform your GP and any medical supervisor that your GOC registration is subject to conditions, and provide them with a copy of these conditions. f. Inform the GOC of the contact details of your GP and any specialist within [number of days] of these conditions taking effect. g. Arrange for the GOC to receive reports from your GP or medical supervisor every [number of months] or when we ask for them. h. Keep your professional commitments under review and limit your practice in accordance with your GP or medical supervisor's advice, including ceasing all practice if so advised. <p>[NOT TO BE PUBLISHED]</p> |
| A3 | <p>Conditions for inclusion in all determinations of substance misuse</p> <p>This section lists conditions that will commonly be relevant to cases concerning a registrant's mental or physical health.</p> <p>Unlike other conditions, the GOC will not enter conditions against a registrant's name if they disclose information about their health.</p> |
| A3.1 | <p>You must:</p> <ul style="list-style-type: none"> a. limit your alcohol consumption in line with the directions given by your medical supervisor/GP, abstaining completely if they tell you to do so. <p>[NOT TO BE PUBLISHED]</p> |
| A3.1 | <p>You must abstain completely from the consumption of:</p> <ul style="list-style-type: none"> a. Any alcohol, unless agreed in advance by your GP or medical supervisor. b. Any drugs other than those prescribed for you, unless agreed in advance by your GP or medical supervisor. <p>[NOT TO BE PUBLISHED]</p> |

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| A3.2 | <p>You must:</p> <ul style="list-style-type: none"> a. Attend meetings of any support or counselling service [including Alcoholics Anonymous/Narcotics Anonymous], as advised by your GP or medical supervisor. b. At least [number of weeks] before the next review hearing, provide the Registrar with a copy register evidencing your attendance, signed by an officer or organiser of the support or counselling service. c. Obtain treatment from any other agency, including local substance misuse teams, as advised by your GP or medical supervisor. d. At least every [number of months], obtain a report from any treatment agency detailing the treatment provided. e. Submit a copy of the treatment report to the Registrar within [seven days] of receiving it [or at least two weeks before the next review hearing]. <p>[NOT TO BE PUBLISHED]</p> |
| A3.3 | <p>You must:</p> <ul style="list-style-type: none"> a. Arrange and undergo [type of test] for [both the recent and long-term consumption of alcohol and/or [drug]] every [number of months] until this order ends. The results of these tests should be sent promptly to the GOC. b. Comply with the programme of random testing. f. Submit a copy of the test report to the Registrar within [seven days] of receiving it [or at least two weeks before the next review hearing]. |
| A3.4 | <p>You must:</p> <ul style="list-style-type: none"> a. not possess any drugs listed in Schedules 1-5 of the Misuse of Drugs Regulations 2001 (as amended from time to time) unless your GP or medical supervisor has prescribed these or agreed to your taking these. <p>[NOT TO BE PUBLISHED]</p> |
| A4 | <p>Deficient Performance</p> <p>This section lists conditions that will commonly be relevant to cases concerning deficient professional performance.</p> |

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| <p>A4.1 Restriction on practice</p> | <p>You must:</p> <ol style="list-style-type: none"> a. Not undertake any locum work unless agreed in advance by your workplace supervisor / professional colleague and the Registrar. b. Not carry out [name of procedure]. c. Not carry out [name(s) of procedure(s)] unless directly supervised by a [registered dispensing optician, optometrist, or medical practitioner]. d. Maintain a log detailing every case where you have undertaken the above procedure, which must be signed by the person who supervised that procedure. e. Submit a report from your [workplace supervisor/professional colleague] to the Registrar at least two weeks before the next review hearing, together with a copy of the signed log or other confirmation that you have not undertaken the above procedure(s). |
| <p>A4.2 Observation of procedure</p> | <p>You must:</p> <ol style="list-style-type: none"> a. Observe a [dispensing optician/ optometrist/ medical practitioner] carrying out [name(s) of procedure(s)] for [number] sessions. b. Where possible, discuss the procedure with the clinician whom you observed. c. Maintain a log detailing every attendance, which must be signed by the clinician whom you observed. d. Submit a copy of the signed log to the GOC within [number of days] of observing the required number of procedures [or at least two weeks before the next review hearing]. |
| <p>A4.3 Tuition</p> | <p>You must:</p> <ol style="list-style-type: none"> a. Attend a university department or other formal learning environment for [number] hours of one-to-one tuition in [name of procedure(s)] within [number] months of these conditions taking effect. b. Maintain a log detailing every attendance, which must be signed by the person providing the tuition. c. Submit a copy of the signed log to the GOC within [number of days] or upon request by the GOC, of receiving the required hours of tuition. |

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| <p>A4.4</p> <p>Assessment of records</p> | <p>You must:</p> <ol style="list-style-type: none"> a. In consultation with the Chair of your Local Optometric Committee [or your workplace supervisor/ professional colleague], identify an independent assessor willing to review a random selection of your patient records. b. Arrange for the assessor to review [number] randomly selected patient records within [number] [weeks/ months] of these conditions taking effect. c. At least [number of weeks] before the next review hearing, provide the GOC with a written report from the independent assessor, setting out their views on the quality of the records he reviewed. |
| <p>A4.5</p> <p>Personal Development Plan</p> | <p>You must:</p> <ol style="list-style-type: none"> a. work with your workplace supervisor / workplace colleague to formulate a personal development plan, which should be specifically designed to address deficiencies in the following area(s) of your practice: [specify area(s) of concern]. b. Submit a copy of your personal development plan to the GOC for approval within [number] [weeks/months] of these conditions taking effect |

NOTICE TO REGISTRANT:

- 21.1.1.1 The GOC will enter these conditions against your name in the register save for any conditions that disclose information about your health.
- 21.1.1.2 In accordance with Section 13C(3) of the Opticians Act 1989, the GOC may disclose to any person any information relating to your fitness to practise in the public interest.
- 21.1.1.3 In accordance with Section 13B(1) of the Opticians Act 1989, the GOC may require any person, including your learning/workplace supervisor or professional colleague, to supply any information or document relevant to its statutory functions.

Guidance on Remote Hearings

1. On 19 March 2020, the Lord Chief Justice advised the Civil and Family courts on the obligation to continue their work as a vital public service. He stated:

“The default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely.”⁵

2. In each case, the GOC will consider whether a case is suitable to be heard physically, remotely or as a hybrid hearing.

What is a remote hearing?

3. A remote hearing (sometimes referred to as a virtual hearing) is a hearing held by telephone or video link. A remote hearing can be heard wholly or partly by telephone or video link.
4. A remote hearing can have every participant attending remotely or it can have some participants attending by telephone or video link, and other participants attending in person at a physical venue.

Can hearings be conducted remotely?

5. The GOC FTP Rules 2013⁶ allow hearings to be conducted using audio or video conferencing facilities provided that:
 - a. any notice required to be sent under these Rules giving notice of venue must include details of the audio or video conferencing arrangements required to access the hearing [Rule 2B(2)]

Process for listing remote hearings

6. The GOC has previously arranged for participants to join a hearing remotely by telephone or video link and has recently introduced wholly remote hearings.
7. The Hearings team may list a matter for a remote hearing in appropriate cases, as set out in the GOC’s [remote hearings protocol](#) and emergency statement on the approach to service documents and hearings during the COVID-19 emergency at [GOC/COVID/05](#)
8. If one or both parties disagree with the holding of a remote hearing, they can apply for a Committee to consider the issues at a procedural hearing.
9. Rule 27(3) requires that a procedural hearing must be held in private so care should be taken to ensure there are no unauthorised persons present at a remote

⁵ www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/

⁶ GOC Fitness to Practise Rules 2013 at [GOC rules and regulations](#)

procedural hearing.

10. The Committee should consider whether the remote hearing should proceed as listed or the matter adjourned to a date when all or some parties can attend a physical hearing.

Deciding whether there should be a remote hearing

11. In all cases, the Committee must ensure that proceedings are fair and comply with legislation. This applies to all hearings, whether or not there is party agreement to a remote hearing.
12. During the coronavirus emergency, Courts have considered whether cases should be heard remotely. There are many factors to consider, with an overriding factor being access to justice and fairness.
13. In *Municipio de Mariana v BHP Group PLC*⁷, the Court gave guidance on how to consider applications to extend time for complying with directions, or adjourn hearings during the coronavirus emergency:
 - a. Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
 - b. There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
 - c. The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.
 - d. There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice, before the court should accept that a just determination cannot be achieved in such a hearing.
 - e. Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play, and the issue of whether, and if so to what extent, live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.
14. In the case of *Re P*⁸, the Court identified some factors to consider when deciding to proceed with a family case hearing remotely; these factors are also relevant to Fitness to Practise proceedings:
 - a. Available local facilities and technology.
 - b. Personalities and expectations of key participants.

⁷ *Municipio de Mariana & Ors v BHP Group PLC & Ors* [2020] EWHC 928 (TCC)

⁸ *Re P (A child: remote hearing)* [2020] EWFC 32

- c. Category of case or impact of its outcome.
15. This is a rapidly evolving area with new cases being considered daily and this should be taken into account when considering each case.
 16. There may be additional issues relevant to individual cases and the Committee should consider all relevant matters, such as participants' physical and emotional needs, and the impact of up to a further year's delay on the administration of justice.

Factors relevant to all remote hearings

17. The Committee should consider all relevant legal factors, in particular:
 - a. Rule 43 requires a legal adviser to be present at all hearings.

Care should be taken to ensure the legal adviser is present throughout a remote hearing.
 - b. Rule 44 requires a clinical adviser to be present at the hearing when the registrant's physical or mental health is to be considered.

Care should be taken to ensure the clinical adviser is present throughout a remote hearing.
 - c. Rule 45 requires a specialist adviser to be present at a hearing where they have been appointed in relation to a matter to be considered at a substantive hearing.

Care should be taken to ensure the specialist adviser is present throughout the remote hearing.
 - d. Rule 60 requires a verbatim record of each hearing to be taken.

Care should be taken to ensure speakers can be heard and recorded appropriately.
18. The Chair should remind all participants that the proceedings must not be recorded, and that confidential information must not be disclosed without the Committee's prior consent.
19. A Committee may decide to introduce different methods of working during a remote hearing, to ensure the hearing is conducted fairly and properly, including:
 - a. Ensuring that all participants can hear the proceedings, to enable appropriate participation by everyone
 - b. Checking who is present with a participant, to manage undue influence and preserving confidentiality
 - c. Observing appropriate and respectable behaviours
 - d. Ensuring the transcriber can make a complete and accurate record.

Proceeding in the absence of the registrant

20. Extra care may need to be taken when considering whether to proceed in the absence of a registrant, especially where the registrant is unrepresented and has indicated an intention to attend.
21. The Presenting Officer will provide proof of the efforts made to inform parties, particularly unrepresented registrants, about how they can participate remotely.

Factors relevant to Interim Order applications

22. The Committee should be mindful of the different challenges that arise when an Interim Order hearing is held remotely, and should consider:
 - a. Rule 17 requires the notice of the interim order hearing to include the venue. In wholly remote hearings, the venue will be listed as being via videoconference or teleconference facilities.
 - b. Rule 20(2) requires an interim order to be a private hearing. Care should be taken to ensure there are no unauthorised persons present during the remote hearing.
 - c. Rule 20(8)(c) requires the Committee to deliberate in private. The Chair must ensure that there are no unauthorised persons present during their deliberations.
 - d. If an unrepresented registrant addresses the panel during a hearing, the Committee should ascertain whether the registrant is giving evidence or making submissions (if a registrant is represented, submissions should be made only through the representative).
 - e. Rule 20(8)(d) requires the Committee to announce its decision, together with reasons for its decision, in public and so care should be taken to ensure all parties, and any observers, are offered the opportunity to be in attendance on the telephone / video link when the decision is being delivered.

Factors relevant to Review hearings

23. The Committee should be mindful of the different challenges that arise when a review hearing is held remotely, and should consider:
 - a. Rule 58(1) requires an interim order to be a private hearing.

Care should be taken to ensure there are no unauthorised persons present during the remote hearing.

Factors relevant to Substantive hearings

24. The Committee should be mindful of the different challenges that arise when a substantive hearing is held remotely.

Public and private hearings

25. Rule 25(1) requires that substantive hearings must be held in public.

The Committee should satisfy itself that observers are offered the opportunity to observe the hearing by telephone or video link.

26. The Committee may determine that the proceedings, or any part of the proceedings, are to be held in private, where it considers appropriate having regard to the matters set out in Rule 25(2).

Care should be taken to ensure there are no unauthorised persons present where a hearing starts in private or switches from public to private.

Witnesses

27. Witnesses are required to take an oath or affirm, before giving evidence (Rule 42).

If the relevant holy book is not available to remote witnesses, the hearing officer will take the witness through the required affirmation.

28. The Committee should be mindful of the risk of witness interference, as witnesses will not be observable during breaks, and should consider how to address such risks.
29. Witnesses should be invited to join and give evidence only at the appropriate time and warned not to discuss their evidence while they are under oath.
30. If an unrepresented registrant addresses the panel during a hearing, the Committee should ascertain whether the registrant is giving evidence or making submissions.

Vulnerable witnesses

31. The Committee may need to take extra care when considering what is fair for a vulnerable witness. Some vulnerable witnesses may, for example, have difficulty using the technology involved in remote hearings or may require special measures under Rule 41.

Order of proceedings

32. Under Rule 46, the Committee may hear submissions and announce findings on the facts, grounds of impairment, finding of impairment and sanction, in separate stages. The Committee should give particular attention to whether to consolidate two or more of these stages, to reduce the impact of interruptions on the participants.