

Response to the General Optical Council consultation – Fitness to practise complaints strategy: policy for consensual disposal of cases

September 2017

1. Introduction

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

2. General comments

- 2.1 We welcome the opportunity to respond to this consultation from the General Optical Council (GOC) on its proposals for consensual disposal. We are pleased to see that the GOC is exploring ways to improve its processes without the need for changes in its legislation, as the timing of legislative reform is uncertain.
- 2.2 We support the GOC's proposals, with some comments and reservations. The aim of encouraging participation by registrants in the fitness to practise (FtP) process, the focus on the demonstration of insight, the concern for the wellbeing of witnesses, and the emphasis on public protection and the wider public interest are all welcome. The GOC's direction of travel is broadly in line with our own thinking as set out in *Regulation rethought*, where we argued that the current approach was unnecessarily onerous, expensive and adversarial, and took too great a toll on those involved.
- 2.3 In addition, we consider the GOC's proposals relatively low-risk, as they are not proposing to change who will be making decisions about cases either at the end of the investigation or at the hearing, and the final decisions will continue to be made in a public hearing, albeit in a different hearing format. When we look to the caselaw and broader legal framework for guidance on

this matter, we find that the emphasis tends to be on the need for a fair and public hearing, rather than dwelling unduly on the un-contestability of it. The right to a fair hearing, enshrined in Article 6 of the European Convention on Human Rights, includes a right to “adversarial proceedings”.¹ However, the right is not absolute and can be waived in certain circumstances.

- 2.4 On the face of it, it seems the GOC’s proposals might avoid some of the pitfalls we have seen with consensual panel disposals. In particular, we were reassured to note that:
- consensual disposal cases would still be fully investigated – there is a risk with consensual outcomes of investigations being less thorough, if cases are identified early as being suitable for this disposal route
 - the final fitness to practise decisions would be made in a public hearing with the registrant present – this will ensure a level of transparency, and help to maintain public confidence
 - panels would be presented with the full evidence bundle – this would enable panellists to scrutinise the evidence themselves, and reach their own conclusions concerning the facts, grounds for impairment and current impairment².
- 2.5 The Professional Standards Authority supports regulators innovating in fitness to practise and other areas of regulation, and thinking creatively about how to fulfil their statutory duties. There are reasons why we might sometimes express reservations about innovations, even if we agree with them in principle:
- we may have concerns about how they are put into practice (for example when we have supported proposals at the consultation stage but subsequently identify issues with implementation)
 - the proposals or practice may not be in line with the current legislation or established case law (even if we believe the current legislative framework is not fit for purpose)
 - we may not be confident that they will protect the public, or enable transparent and accountable regulation (this is as important for individual changes as it is for comprehensive reforms).
- 2.6 We set out our response to the consultation questions below.

3. Questions

Question 1. What are your views on our proposals about when consensual disposal should be considered?

- 3.1 We support the approach set out in the document, and in particular the requirement for the registrant to accept the facts, misconduct (or other ground for impairment) and impairment. This is a position we have set out on

¹ See page 41 of the European Court of Human Rights guidance on Article 6:
http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

² We reference our case law that has enshrined the principle of these panels being panels of enquiry:

numerous previous occasions, including in our responses to consultations on the NMC³ and GDC⁴ proposals for undertakings.

- 3.2 It might have been helpful if this section had provided more detail on the types of case that would be likely to be dealt with through the new process, as this was not clear to us.
- 3.3 We would also be interested to know under what circumstances a contested public hearing would need to be held in the public interest, even when the registrant was prepared to accept the case put to it by the regulator. We do not disagree with the inclusion of this criterion. However, the proposed method of disposal nevertheless involves a public hearing with examination of the evidence by a decision-making FtP panel, and all sanctions are available through this route – this means there would be only limited circumstances in which a hearing might be needed in the public interest. It might therefore have been helpful if the consultation document had outlined the types of circumstances in which this might be the case – for example, in our view, it could be relevant where a registrant agreed to the misconduct, impairment, and sanction, but not to all the facts.

Question 2. What factors should be taken into account when deciding whether a case is suitable for consensual disposal?

- 3.4 It would have been helpful to have some explanation of why these specific factors in the list under 4.1 were included.
- 3.5 We view this question as follows. Because all sanctions would be available through the consensual route, and because the case would still be heard at a public hearing, the factors that should be taken into account here relate to just two particular aspects of the case:
- factors relating to the registrant’s attitude towards the alleged wrongdoing and level of engagement with the fitness to practise process; this would include some of the factors listed in 4.1, such as admissions and intentions regarding their practice, but also insight⁵;
 - factors that would guide a decision as to whether there was a public interest in holding a contested hearing (see above).
- 3.6 We therefore suggest that the factors for determining the suitability of a case for consensual disposal be framed along these two lines.

Ruscillo v CHRP and GMC [2004] EWCA Civ 1356; Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Jozi [2015] EWHC 764 (Admin)

³ Available at: <http://www.professionalstandards.org.uk/publications/detail/repsonse-to-nmc-legislation-amendments-to-modernise-midwifery-regulation-and-improve-the-effectiveness-and-efficiency-of-ftp-processes>

⁴ Available at: [http://www.professionalstandards.org.uk/publications/detail/response-to-general-dental-council-consultation-on-guidance-on-agreeing-undertakings-and-issuing-warnings-for-case-examiners-\(amendments-to-the-fitness-to-practise-rules\)](http://www.professionalstandards.org.uk/publications/detail/response-to-general-dental-council-consultation-on-guidance-on-agreeing-undertakings-and-issuing-warnings-for-case-examiners-(amendments-to-the-fitness-to-practise-rules))

⁵ It is important to note that where impairment is admitted, a panel is not required to assess insight which is then relevant at the sanction stage. Therefore, in serious cases where genuineness of insight and remorse are key factors in determining the appropriate sanction, a consensual process may be inappropriate

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

- 3.7 In principle, we are in favour of encouraging free and frank discussion between the registrant and the regulator in line with the duty of candour. However, we find the proposal to specify this as a “without prejudice” discussion problematic. This is because it appears to be incompatible with the statutory duty of a regulator to act on any information it receives that calls into question a registrant’s fitness to practise. Our concern is that discussions with the registrant “without prejudice” could give rise to new concerns about their fitness to practise that the GOC cannot then act upon. The GOC would therefore need to introduce an exception to the “without prejudice” principle to enable the fulfilment of its statutory functions.
- 3.8 Furthermore, in 5.7, the document states that consensual disposal is not a ‘plea bargaining’ process. We would be interested to know how this would be demonstrated to the public, if the GOC were to proceed with the proposal to hold “without prejudice” meetings behind closed doors with registrants.

Question 4: To what extent does consensual disposal represent a fair and proportionate way of protecting the public?

- 3.9 The process described in this document appears fair. As we mentioned in our general comments, human rights legislation entitles registrants to a fair and public hearing, but they can waive this right. We would also urge the GOC to ensure that its decisions reflect its statutory objectives.
- 3.10 We are wary of using the concept of proportionality on its own when talking about fitness to practise processes, because in our experience it can be used to justify alternative approaches that are less effective at protecting the public. A more complete test would be whether such an approach would be more proportionate while continuing to meet the threefold purpose of fitness to practise:
- to protect, promote and maintain the health, safety and well-being of the public
 - to promote and maintain public confidence in the professions, and
 - to promote and maintain proper professional standards and conduct for members of the professions.

Question 5: What would be the likely impacts of consensual disposal for a) registrants; b) the public; c) the GOC

- 3.11 We cannot provide a definitive view on the impact on registrants and the public, at this early stage, but it seems on the face of it that the proposed process would make the fitness to practise process less adversarial. This could therefore reduce the negative impacts on the parties involved, that we documented in *Rethinking regulation* and *Regulation rethought*.
- 3.12 We would anticipate a number of improvements to follow from this approach, including in terms of how quickly the process can be completed, cost-

effectiveness and encouraging registrants to have insight. The process needs, of course, to be fully transparent in order to maintain public confidence.

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

- 3.13 We have a few remaining comments and queries.
- 3.14 We welcome the involvement of the referrer described in 5.8 – it would be helpful to know what weight their response would be given and how it would be taken into account in the decision about whether consensual disposal was appropriate. Since the response of the referrer is going to be sought then it has to be given proper weight and we would suggest that this be emphasised in guidance documents.
- 3.15 Paragraph 6.2 sets out the documents that would be presented to the panel – this list should include any comments from the referrer.
- 3.16 We note from paragraph 6.2 that the registrant may attend the hearing and be represented. It would be helpful to know whether it would be open to the panel to cross-examine the registrant, or for the registrant to make representations.
- 3.17 In paragraph 6.6, it is stated that where the panel's views diverge from those in the consensual disposal report, a full contested hearing would be held on *the remaining stages* of the proceedings. This would be problematic, as a new panel would need to conduct their own examination of the evidence in order to make a determination about facts, misconduct, impairment and/or sanction. We strongly recommend that this is amended to ensure that a full hearing would be convened on all the stages of the decision-making.

Further information

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

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