

# **Section 60 and amendment to the Fitness to Practise Rules: Case Examiners**

**A consultation on guidance on  
agreeing Undertakings and issuing  
Warnings**

**General  
Dental  
Council**

protecting patients,  
regulating the dental team

## About this consultation

We have made a commitment to consult on guidance that will set out measures for ensuring that the process for agreeing undertakings and issuing warnings is transparent and open. There will be a series of technical guidance documents to support the new role which we will published in April 2016.

The aim of this consultation is to seek your views on the draft guidance on undertakings and warnings which we have developed for Case Examiners (see Appendix 1) which sets out how we intend to operate the power to agree undertakings with registrants and manage the new requirement to notify a registrant if we are minded to issue a warning.

## About the GDC

The General Dental Council (GDC) is the organisation that regulates dental professionals in the United Kingdom. We set the standards of conduct, performance and behaviour that all dental professionals working in the UK are required to adhere to. We investigate complaints or concerns that suggest that a dental professional may have failed to meet those standards, and ensure that we take the appropriate action to protect patients.

## Why are we consulting?

We are asking members of the dental team, patients and anyone interested in our work whether we have got the draft guidance right, whether it is clear and whether it covers what it should.

## How can I respond?

The consultation is open until **Monday 14 March 2016**

You can respond online at [www.gdc-uk.org](http://www.gdc-uk.org) or by email at [S60@gdc-uk.org](mailto:S60@gdc-uk.org)

If you have printed this document please post it to:

Consultation on Case Examiner draft guidance  
Corporate Policy Team  
General Dental Council  
37 Wimpole Street  
London  
W1U 8DQ

## The changes to our fitness to practise processes

The GDC is responsible for ensuring that every dental professional registered to work in the UK is suitable to be registered and meets our professional standards. One of the ways in which we do this is by investigating complaints or concerns about the fitness to practise of GDC registrants. To be able to do this effectively, our fitness to practise process must be fit for purpose and enable us to manage cases efficiently and effectively, so that we can take fast and appropriate action.

Last year the Department of Health consulted on proposals to make changes to the Dentists Act 1984 that would in turn allow us to make changes to our Fitness to Practise Rules “the rules”. The changes are designed to improve the efficiency of our fitness to practise processes, enabling swifter resolution of complaints, which will improve the system for both patients and dental professionals as well as reduce costs by an estimated £1.8m per year.

We consulted on these changes from 17th November 2014 to 12th January 2015<sup>1</sup>. We also made a commitment to develop clear guidance to support the role of Case Examiners and to consult on the approach that we will take to the use of our powers in relation to warnings and undertakings. The draft guidance on warnings and undertakings (Appendix 1) will form part of a suite of published guidance that will support the new role.

The new arrangements introduce changes to fitness to practise processes in the following areas:

### **Case Examiners**

The GDC is in the process of appointing Case Examiners. These individuals will be officers of the Council and will be able to carry out all the decision-making functions that are currently performed by the Investigating Committee. The Investigating Committee is a panel of at least three people who meet in private and consider a set of cases, prepared and referred to them by the GDC’s casework department. The introduction of Case Examiners is expected to lead to the swifter resolution of some fitness to practise cases and will lead to greater consistency in decision-making.

Under the new scheme, there will still be a role for the Investigating Committee. If the Case Examiners cannot reach a unanimous decision in respect of the case, it will be referred to the Investigating Committee for consideration. We anticipate that in the future the Investigating Committee will only be convened a small number of times each year. Throughout this consultation document, when we refer to the new and existing powers available to Case Examiners these will also apply to the Investigating Committee if a case has been referred to them.

### **Agree undertakings with registrants**

This will enable us to address concerns about a dental professional’s fitness to practise by inviting a practitioner to agree to comply with undertakings – for example to carry out certain activities (such as training), or to refrain from particular aspects of practice until re-training has been completed. This new power will provide for better streamlining of the fitness to practise process and ensure that, while the most serious cases are progressed to a full hearing (maintaining public protection), less serious

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<sup>1</sup> Consultation on changes to the GDC’s Fitness to Practise Rules 2006 <http://www.gdc-uk.org/GDCcalendar/Consultations/Pages/Consultation-on-changes-to-the-GDCs-Fitness-to-Practise-Rules-2006.aspx>

cases can be dealt with at an earlier stage in the process than is currently possible under our existing legislation.

### **The requirement to seek representations from a dental professional when issuing a warning**

If the GDC is minded to issue a dental professional with a warning, we will be required to notify the dental professional of that intention and that they are entitled to make written representations. Any representations made by the dental professional must be considered before a decision is taken as to whether to issue a warning. Currently, dental professionals can comment on the allegations in general terms, but are not given the opportunity to comment specifically on the prospect of receiving a warning. Enabling dental professionals to submit representations before a warning is issued will improve the fairness of the fitness to practise process for registrants.

### **The ability to refer to the Interim Orders Committee at different points in the process.**

This will enable us to close the gaps that currently exist in our ability to refer appropriate cases to the Interim Orders Committee before and after they have been considered by the Investigating Committee. The Interim Orders Committee has the power to suspend or impose conditions on a GDC registrant on an interim basis if there are immediate concerns about their fitness to practise which may have implications for patient safety, the wider public interest, or the dental professional's own interest. This will provide the GDC with greater flexibility and will enable swifter action if concerns arise 'mid investigation'.

### **The power to review fitness to practise decisions**

This will enable us to review certain fitness to practise decisions in specified circumstances, for example where new information comes to light or where there is evidence to suggest the original decision was materially flawed. Introducing reviews of this nature will enhance the fairness of our processes for patients as well as registrants.

## **The Current Situation**

Currently, if the Investigating Committee decides there is a real prospect of a Practice Committee finding that a dental professional's fitness to practise is currently impaired, it refers the case to a Practice Committee. If the Practice Committee decides that a dental professional is unfit to practise, it can impose a range of sanctions including making the dental professional's registration subject to particular conditions, by issuing a conditions order. A conditions order is designed to address identified deficiencies in a dental professional's practice. At present, the only way that restrictions can be placed on a dental professional's registration is if a Practice Committee decides to impose restrictions following consideration of the case at a hearing.

The new power to agree undertakings will enable the GDC, in appropriate cases, to agree remedial measures with a registrant without the delay and expense of a full hearing. This new power would provide for better streamlining of the fitness to practise process and ensure that the most serious cases are progressed to a full hearing and less serious cases are dealt with at an earlier stage in the process than is currently possible under our existing legislation. This will enhance the effectiveness of our processes for patients, dental professionals and the public.

## Guidance on agreeing undertakings

We consider that in certain cases, it will be possible to protect the public by inviting the dental professional to abide by particular undertakings to address the alleged concerns about his or her fitness to practise without the need for a Practice Committee hearing.

### What are ‘undertakings’?

Undertakings are an agreement between the GDC and a dental professional (registrant) about the person’s future conduct or practice. Undertakings will allow the GDC to deal effectively with certain types of cases without having to refer the matter to a Practice Committee hearing.

Undertakings might include:

- restrictions to the registrant’s practice
- commitments to undergo training in a particular area
- commitments to practise under supervision

### When will undertakings be applied?

Criteria for determining whether undertakings are appropriate (1- 17 of the proposed guidance document at Appendix 1)

The proposed guidance sets out the criteria we intend to apply when determining whether undertakings are appropriate and the circumstances where undertakings will never be appropriate. In considering whether undertakings are appropriate, the Case Examiners (or the Investigating Committee) will have regard to the GDC’s duty to act in the public interest, which includes protection of the public and patients and maintaining public confidence in the dental and dental care professions and their regulation. The guidance specifically highlights that when agreeing undertakings, insight on the part of the registrant is an important factor. When assessing whether the registrant has demonstrated insight, the Case Examiners may consider whether there is evidence that the registrant:

- has reflected on their performance or conduct;
- recognises that they should have behaved differently in the circumstances; and
- has identified and put in place measures that will prevent a recurrence of the issues

The guidance sets out that undertakings must be workable and when they are likely to be appropriate:

- For example, if it is alleged that a dental professional is deficient in a particular clinical skill, the dental professional could undertake to complete a specific form of training. The dental professional could also agree not to carry out a particular type of treatment during this period. In certain situations, this is likely to be more effective in protecting the public than referring the case to a full hearing as it enables the GDC to intervene to address issues more quickly and in an appropriate manner.
- Similarly, if a case involved an allegation that a dental professional’s health was affecting their fitness to practise, it may be possible to agree undertakings that would address any risks posed by the physical or mental health condition, such as undertaking to attend regular appointments or submit to regular testing. Agreeing undertakings would permit the GDC to intervene positively to protect the public, as well as avoiding the time and cost incurred by referring the case for a full hearing.

- The proposed guidance sets out a number of situations where undertakings will never be appropriate. They will not be available to Case Examiners in cases where there is a realistic prospect that, if the allegations were referred for consideration by a Practice Committee, the registrant could be removed from the register. This means that undertakings will not be considered appropriate where there are very serious concerns about a dental professional's fitness to practise.

## Process (18 – 27)

The guidance highlights that undertakings must be workable and the registrant's input into the process is likely to be useful in assessing whether this is the case. Ultimately it is for the Case Examiners to consider whether the undertakings offered are appropriate - if the registrant is not willing to accept the invitation offered, or does not respond within the specified timeframe, then the case must be referred to a Practice Committee. This is set out in brief below and in full at 13 – 20 in the attached guidance.

- If the Case Examiners are of the view that a case may be appropriate for undertakings, they will formulate a set of undertakings to address the deficiencies or concerns alleged in that particular case.
- The undertakings will specify the length of time for which they apply, and the evidence that the dental professional will have to submit to the GDC to demonstrate compliance. The rules state that the proposed set of undertakings will be sent to the dental professional.
- The dental professional will be given 28 days (or longer if the Case Examiners allow this) to agree or refuse to accept the undertakings as proposed. It will not be possible for the dental professional to 'negotiate' or to suggest an alternative set of undertakings, though the Case Examiners may consider representations that a particular undertaking is unworkable.
- If the dental professional decides not to agree to comply with the proposed undertakings, the case must be referred to a Practice Committee for a hearing.
- If the dental professional agrees to comply with the proposed undertakings, the Case Examiners will cease consideration of the case and the dental professional's continuing compliance with the undertakings will be monitored by the GDC's Case Review Team.

1. We would welcome your comments on the criteria and process as set out at 1- 28 in the proposed guidance document:

We support the criteria and processes proposed as they should lead to a more efficient procedure which will benefit all parties (the patient, the dentist, their families, the whole dental team and the GDC). They would also bring the dental regulation more closely aligned to the GMC.

However, we would suggest that the Case Examiners should be dentally qualified.

2. The guidance specifically highlights that when agreeing undertakings, insight on the part of the registrant is an important factor. Do you agree with this approach?

**Yes**

We believe that insight is essential in achieving a successful outcome as if lacking, there is unlikely to be any change in practice and behaviours. A lack of insight is often

associated with a lack of appreciation of the gravity of the situation and may indicate that a registrant needs greater guidance, counselling and greater remedial corrective methods.

## Publication

We are committed to being transparent about our processes and decisions and to publishing information on our publicly available registers which enables patients to make informed choices about their care. The proposed guidance requires Case Examiners and the Investigating Committee to specify the length of time during which undertakings will apply in each case. The GDC considers that undertakings should ordinarily be published for the duration of the period for which there are in force against the registrant's entry on the online register.

The [online register](#) entry will also include, alongside the undertakings, a summary of the issues, prepared by the Case Examiners, which explains the background to the agreement of the undertakings, and how undertakings will protect the public in the future. Including such a summary in the register will maintain public confidence in the process of agreeing undertakings, and will ensure that members of the public are able to make an informed choice before commencing treatment with a particular registrant.

The GDC will not publish any information or undertaking which relates to the health or private and family life of the registrant concerned, or which relates to any named third party.

3. Do you agree the proposed guidance on our publication policy will support transparency and patient choice?

### Yes

We would agree that providing the evidence has been carefully and objectively reviewed, transparency will increase both the public and profession's understanding and appreciation of the GDC and its new processes. We also agree that information relating to health or private/family matters should not be published.

However, transparency is equally important regarding when a dentist has satisfactorily completed any required actions and restriction in an area of work lifted.

It is not clear from the information given how long information will remain in the public domain. We would not support any suggestion that it would remain as a permanent record.

## Monitoring and non – Compliance (34 – 47)

The proposed guidance sets out that the process for monitoring that the registrant is complying with undertakings and the action that will be taken in the event of non – compliance. Failure to comply with undertakings may occur for a number of reasons, including if the undertaking proves unworkable for the registrant or as a result of the registrant's own choices or actions. In the former, Case Examiners may determine to vary the type of undertaking as appropriate. However, if following investigation it appears that a dental professional has not complied with undertakings as a result of their own actions, or that the agreed undertakings did not prove workable and a suitable alternative could not be found,

the Case Examiners may refer the matter to a Practice Committee. The Case Examiners may also consider whether to vary the time in which the undertakings should be complied with.

### **Variation**

There may be circumstances where failure to comply with undertakings may be the result of the undertakings proving unworkable, in those circumstances Case Examiners may agree to varying the undertakings if appropriate.

### **Breach of Undertaking (40 – 45)**

Failure to comply with undertakings may also be the result of the registrants own choice or actions as opposed to the undertakings being unworkable. The proposed guidance sets out what will occur in these circumstances for example, a breach could result in Case Examiners referring the matter to a Practice Committee.

### **Termination (48 – 50)**

The proposed guidance sets out that in the event that, following receipt of information, the Case Examiners consider that undertakings should no longer apply they can direct the Registrar that the undertakings should no longer apply and that the allegations should not be considered further.

4. Is the proposed guidance clear on what will happen in the event of non – compliance?

**No** - please comment on why you agree or disagree.

We recommend that greater detail is required as to who is responsible for compliance and how it will be monitored. For example, for dentists in the GDS, will this be the area team or postgraduate dean? For Trusts or corporate bodies employing dentists, will it be the employing authority?

### **Changes to our powers to give warnings (42 - 66 of the guidance at Appendix 1)**

The guidance sets out how the GDC will apply the changes to our powers to issue warnings.

### **What is a warning?**

A warning tells the registrant and the wider profession that standards must be maintained and that particular conduct or behaviour is unacceptable.

### **The Current situation**

Currently, if the Investigating Committee decides that a case ought not to be referred to a Practice Committee, they will close the case. In closing the case, they are able to issue a written warning to the dental professional, and can direct whether or not that warning should be published against the dental professional's name on the register. Additionally, the fact that a warning was issued remains part of a dental professional's registration history and can be disclosed to future employers. Currently, the dental professional is given the opportunity to submit their representations on the case generally, but they are not given the opportunity to comment specifically on the prospect of receiving a warning.

### **The new powers**

Under the new powers, the Case Examiners will also be able to issue and publish a warning. There will be a new obligation on the GDC's Case Examiners and Investigating Committee to notify a dental professional that they are minded to issue a warning, and seek the dental professional's representations prior to deciding whether the warning will be issued. Enabling dental professionals to submit representation before a warning is issued will improve the fairness of the fitness to practise process for registrants. From April 2016 there will further be a power for the Case Examiners and Investigating Committee to review their decision to issue a warning to a dental professional.

### **Publication**

In the interests of patient protection and transparency a warning will only be unpublished in exceptional circumstances and will be issued for a period of up to 24 months. The guidance sets out factors which may lead the Case Examiners to consider that a warning should be issued for a shorter period. The registrant will be notified of the duration of the warning that will be issued to them, however, ultimately, the decision to publish a warning and the duration of a warning will be for the Case Examiners or Investigating Committee to consider and decide on a case by case basis, balancing the public interest against the interests of the registrant.

Do you agree that the proposed guidance will support Case Examiners in their decision making on issuing warnings and reviewing their decisions to issue a warning?

#### **5. Yes**

We agree that the proposed guidance will support Case Examiners, and feel the process balances both the public and registrant's interests.

However, we do not consider it appropriate that a review of a case should be undertaken by the same personnel who undertook the previous review.

If, following a review, the decision is made to withdraw the warning against the registrant this should be published on the website with a summary of why the withdrawal was made, prior to the warning being erased.

If you have any further comments on the proposed guidance, please comment here:

## About you

We would be grateful if you would provide some information to help us analyse the consultation responses

If you are responding to this consultation as an **individual** please tell us whether you are a:

Dentist	Dental nurse	Dental Hygienist
Dental Technician	CDT	Dental Therapist
Orthodontic Therapist	Dental Student	Dental educator/trainer
Other healthcare professional	Member of the public	Other

If you are responding to this consultation on behalf of an **organisation** please tell us which best describes your organisation:

<b>Body representing Dentists</b>	Body representing DCPs
Body representing the patients or public	NHS/Health service organisation
Dental school (undergraduate)	DCP training provider
Postgraduate dental deanery	Independent healthcare provider
Other	

Name of organisation: **Faculty of Dental Surgery, Royal College of Surgeons of England.**

**Guidance on agreeing Undertakings  
and issuing Warnings  
(draft: 29 January 2016)**

## UNDERTAKINGS

### Introduction

1. Undertakings are an agreement between the GDC and a registered dental professional (“registrant”) about that person’s future conduct or practice.
2. The Dentists Act 1984<sup>2</sup> (“the Act”) and the General Dental Council (Fitness to Practise) Rules 2006<sup>3</sup> (“the Rules”) provide the GDC’s Case Examiners and Investigating Committee with the power to agree undertakings with a registrant, with effect from 1 August 2016<sup>4</sup>.
3. The Act and Rules provide that, where the Case Examiners have determined that an allegation ought to be referred to a Practice Committee they may, as an alternative to making an immediate referral, agree with the registrant concerned that they will comply with such undertakings as the Case Examiners consider appropriate<sup>5</sup>.
4. Undertakings may be agreed to restrict a registrant’s practice, for example by preventing them from practising in certain circumstances, from carrying out certain treatments, or from treating particular categories of patient. Undertakings may also make positive requirements of a registrant, such as a requirement to undergo training in a particular area of practice.
5. By inviting a registrant to agree undertakings, the GDC is able to address concerns about that registrant’s fitness to practise and still deal effectively with particular types of case in a proportionate way.
6. This guidance sets out the factors to be considered by the Case Examiners when considering whether undertakings may be appropriate, and the process to be followed should any issues arise once those undertakings are in place.

### Criteria

7. In considering whether undertakings are appropriate, the Case Examiners will have regard to the GDC’s duty to act in the public interest, which includes protection of the public (and, in particular, patients requiring dental services), the maintenance of public confidence in the dental and dental care professions and their regulation, and the declaration of proper standards for the dental and dental care professions.
8. In particular, the Case Examiners should consider whether undertakings are a proportionate response but will be sufficient to protect patients and maintain public confidence in the professions.
9. Undertakings must also be workable, and are likely to be appropriate where:
  - (i) it is possible to fully address the issues of impairment of fitness to practise by agreeing actions which are specific, unambiguous, and can be objectively measured (for example, by completing a course and providing evidence and reflection on what was learned); and

<sup>2</sup> as amended by the *General Dental Council (Fitness to Practise etc.) Order 2015*

<sup>3</sup> as amended by the *General Dental Council (Fitness to Practise) (Amendment) Rules Order of Council 2015*

<sup>4</sup> whilst the Investigating Committee and Case Examiners both have power to agree undertakings, in practice it is likely that the power will be exercised most frequently by the Case Examiners, as the Rules make it clear that the Investigating Committee will only consider an allegation where the Case Examiners do not agree. As such, the body of this Guidance refers to the Case Examiners only – it is, however, equally applicable to the Investigating Committee.

<sup>5</sup> see section 27A(4)(za) and section 27A(6)(za) of the Act (for dentists) and section 36O(4)(za) and section 36O(6)(za) (for DCPs)

- (ii) a registrant is likely to accept and agree to comply with them.
10. In that context, insight on the part of the registrant is likely to be an important factor. A registrant who demonstrates insight into their shortcomings, recognises that steps need to be taken to limit their practice, and/or that they need to undertake remediation may be more likely to accept and comply with undertakings.
11. When assessing whether the registrant has demonstrated insight, the Case Examiners may consider whether there is evidence that the registrant:
- has reflected upon their performance or conduct;
  - recognises that they should have behaved differently in the circumstances; and
  - has identified and put in place measures that will prevent a recurrence of the issues.
12. The GDC's *Standards for the Dental Team* requires registrants to give patients who complain a prompt and constructive response. This includes offering an apology and a practical solution where appropriate<sup>6</sup>. If a complaint has been made locally prior to being raised with the GDC, the Case Examiners may wish to take into account any attempts which the registrant has made at resolving the complaint, including any expression of apology made at that stage, as evidence of insight.
13. As a general principle, the fact that a registrant has recognised that corrective action needs to be undertaken is more important than the manner in which any apology is expressed, which may depend on many factors including the registrant's circumstances as well as questions of culture and language.
14. Undertakings are not, however, available to the Case Examiners where there is a realistic prospect that, if the allegations were referred for consideration by a Practice Committee, the registrant's name would be erased from the register<sup>7</sup>. This may include where concerns arise about behaviour which is fundamentally incompatible with being a registered dental professional.
15. Further guidance as to where erasure may be appropriate can be found in paragraph 7.34 of the GDC's *Guidance for the Practice Committees including Indicative Sanctions Guidance*, available [here](#).
16. Undertakings may also be inappropriate where:
- (i) it is not possible to formulate workable undertakings to address the potential issues;
  - (ii) there remains a substantial dispute over the facts alleged;
  - (iii) any deficiencies identified are such that patients may be put at risk directly or indirectly, even with undertakings in place;
  - (iv) they would fail to declare and uphold proper professional standards (this may occur where the case raises concerns about dishonesty, abuse of trust, serious violence, or sexual or financial motivation, although there may be circumstances however where undertakings would still be appropriate if they fully addressed the risk of any harm to the public and/or to the public interest); and/or

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<sup>6</sup> see Standards 5.3 and 5.3.8

<sup>7</sup> see Rule 6(4) of the Rules (Rule 8(4) for the Investigating Committee)

- (v) there is reason to believe that the registrant will not comply with them (for example, if the respondent has limited or no insight into their shortcomings, or has in the past failed to comply with undertakings or conditions of practice, imposed by the GDC or otherwise). Undertakings can only be considered to provide adequate public protection if the Case Examiners can reasonably be confident in the registrant's capacity and intent to comply with them.

17. In the circumstances outlined in paragraph 16 above, referral to a Practice Committee may be appropriate.

## Process

- 18. An assessment of whether undertakings are appropriate will be made by the Case Examiners, when considering an allegation of impairment referred to them by the Registrar.
- 19. The Rules provide<sup>8</sup> that the Case Examiners must not make their determination unless they are satisfied that the registrant and the maker of the allegation (if any) have been provided with a reasonable opportunity to submit written representations commenting on the allegation and the evidence relating to the allegation<sup>9</sup>.
- 20. As such, when the Case Examiners consider the matter, the information available to them will include any representations which the registrant has chosen to make, via which the registrant may confirm whether they admit the facts as alleged, and whether they admit that their fitness to practise is impaired as a result of those allegations. A registrant who expressly denies impairment or refutes the facts alleged may be unlikely to agree to comply with undertakings and therefore they may not be appropriate.
- 21. As set out above, undertakings are an alternative to referral of an allegation to a Practice Committee. They are therefore available where the Case Examiners consider that the allegation ought to be referred to a Practice Committee. This will arise either where the registrant admits the facts as alleged and that their fitness to practise is impaired as a result of those allegations, and/or where the Case Examiners consider that there is a real prospect of the facts, statutory ground and current impairment being established.
- 22. In those circumstances, the Case Examiners will consider whether undertakings are appropriate. If so, the Case Examiners will invite the registrant to comply with such undertakings as the Case Examiners consider appropriate<sup>10</sup>.
- 23. The Case Examiners will draw the proposed undertakings from the GDC's bank of undertakings, or will draft them on a bespoke basis if standard undertakings are not suitable in the circumstances of the case. In preparing undertakings, the Case Examiners will ensure that they are clear, relevant to the identified shortcomings, proportionate, workable, capable of being monitored by the GDC, and addressed only to the registrant and not to a third party.
- 24. The Case Examiners will then write to the registrant, specifying the proposed undertakings and inviting the registrant to respond within 28 days of the date of the letter (or such further period as the Case Examiners may allow) to confirm whether they are prepared to comply with the specified undertakings<sup>11</sup>.

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<sup>8</sup> see Rule 6(5) of the Rules (Rule 8(5) for the Investigating Committee)

<sup>9</sup> Subject to Rule 6(6) (Rule 8(6) for the Investigating Committee) which provides that any evidence which the registrant or a third party has provided relating to that person's health or private and family life must not be disclosed by the registrar to the maker of the allegation

<sup>10</sup> see Rule 6(3)(b) of the Rules (Rule 8(3)(b) for the Investigating Committee)

<sup>11</sup> in accordance with Rule 6A(1) of the Rules (Rule 8A(1) for the Investigating Committee)

25. In terms of duration, the GDC's Rules do not provide for any specific limit on the time period for which undertakings may be agreed. However, undertakings would not ordinarily be agreed for a period exceeding three years.
26. As set out above, undertakings must be workable and the registrant's input into the process is likely to be useful in assessing whether this is the case. However, ultimately the Rules provide that the undertakings offered are such undertakings as the Case Examiners consider appropriate; if the registrant is not willing to accept the invitation offered, or does not respond within the specified timeframe, then the Case Examiners must refer the allegation to a Practice Committee<sup>12</sup>.
27. In the event that undertakings are agreed, the Case Examiners must cease consideration of the allegation<sup>13</sup>.

## Publication

28. Where undertakings have been agreed with a registrant as an alternative to referral to a Practice Committee, the Act and Rules provide the Case Examiners and Investigating Committee with discretion to decide whether those undertakings should be published on the GDC's online register<sup>14</sup>. However, as a matter of policy, and save as set out below, the GDC considers that undertakings should ordinarily be published for the duration of the period for which they are in force against the individual registrant's entry on the online register. In the event that an undertaking is varied (see below), the online register will be updated accordingly.
29. The online register entry will also include, alongside the undertakings, a public-facing summary of the issues, prepared by the Case Examiners, which explains the background to the agreement of the undertakings, and how undertakings will protect the public in the future. The summary should include details of the grounds of allegation which have been admitted or stand a real prospect of being established, brief reference to the evidence supporting those grounds, as well as a short explanation as to why the Case Examiners have determined that it would be appropriate to offer undertakings in the circumstances of the particular case.
30. Including such a summary in the register will maintain public confidence in the process of agreeing undertakings, and will ensure that members of the public are able to make an informed choice before commencing treatment with a particular registrant.
31. The GDC will not publish any information or undertaking which directly relates to the health or private and family life of the registrant concerned, or which relates to any identifiable third party. This is because that information is considered to be confidential and publishing it may breach the individual's right to private and family life. The Case Examiners should, however, consider whether it is possible in such cases to publish a version of the undertakings with any confidential elements redacted, to preserve the confidentiality of the individuals concerned whilst providing information about any conduct or performance aspects of the case.
32. In other circumstances, it will be for the Case Examiners or Investigating Committee to consider, on a case by case basis and balancing the public interest against the interests of the registrant, any reason(s) why undertakings should not be published.
33. Undertakings form part of a registrant's fitness to practise history with the GDC. As such, they may be considered by GDC decision makers in the event that a further complaint or information is received in the future, and, even after the period of publication has expired, details will be made available on request to relevant enquirers,

<sup>12</sup> in accordance with Rule 6A(2) of the Rules (Rule 8A(2) for the Investigating Committee)

<sup>13</sup> as per Rule 6A(3) of the Rules (Rule 8A(3) for the Investigating Committee)

<sup>14</sup> see Rule 6C(3) of the Rules for the Case Examiners, and section 27A(6C) for the Investigating Committee

34. including prospective employers, overseas authorities, and otherwise where it is in the public interest for such information to be disclosed<sup>15</sup>.

## **Monitoring**

35. Once in place, undertakings are monitored by the GDC's Case Review Team. Each case will be allocated to a Case Review Officer, who will monitor the registrant's compliance with undertakings by conducting regular reviews.
36. Where undertakings are in place, the GDC may carry out any investigations that are appropriate to the consideration of whether the registrant has complied with all their undertakings, or the registrant's fitness to practise<sup>16</sup>.
37. Where it appears that the registrant has failed to comply with any undertaking or varied undertaking, the matter should be dealt with as an issue of non-compliance in accordance with the guidance below.

## **Non-compliance**

### Undertakings unworkable

38. Failure to comply with undertakings may be the result of the undertakings proving unworkable. In those circumstances, the matter should be referred by the Case Review Team to the Case Examiners who must, if they consider that any undertaking should be varied, direct the Registrar to write to the registrant inviting them to agree in writing, within 28 days, to comply with such varied undertakings as the Case Examiners consider appropriate.
39. Agreement of varied undertakings may be appropriate where suitable alternative undertakings are available. However, where there are no suitable alternative undertakings (or where the registrant has not accepted the invitation to agree to all of the varied undertakings<sup>17</sup>) then referral of the original allegation to a Practice Committee may be appropriate<sup>18</sup>.
40. Referral of the original allegation to a Practice Committee may also be appropriate where the undertakings concerned have already been varied on one occasion, but there remains an issue of non-compliance, suggesting that undertakings are not workable in the circumstances of the particular case.

### Breach of undertaking

41. Failure to comply with undertakings (or varied undertakings) may, also or alternatively, be the result of the registrant's own choices or actions, rather than the undertakings (or varied undertakings) themselves being or becoming unworkable.
42. The Rules provide<sup>19</sup> that where it appears to the Case Examiners that a registrant has failed to comply with undertakings (or varied undertakings) the Case Examiners may either refer the original allegation to a Practice

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<sup>15</sup> sections 33C(3)/36Z(3) of the Dentists Act 1984 states that the Council or the Registrar may disclose to any person any information relating to a person's fitness to practise as a dentist, including information relating to an allegation of impairment, where they consider it to be in the public interest for the information to be disclosed

<sup>16</sup> in accordance with Rule 6B(1)(a) of the Rules (Rule 8B(1)(a) for the Investigating Committee)

<sup>17</sup> see Rule 6B(3)(c) of the Rules (Rule 8B(3)(c) for the Investigating Committee)

<sup>18</sup> in accordance with Rule 6B(4)(a) of the Rules (Rule 8B(4)(a) for the Investigating Committee)

<sup>19</sup> see Rule 6B(4) of the Rules (Rule 8B(4) for the Investigating Committee)

43. Committee, or may direct the Registrar to write to the registrant inviting them to confirm in writing, within 28 days, that they will comply with the undertaking.
44. In the latter case, if, within 28 days, the Registrar has not received written agreement from the registrant to comply with all of the Case Examiner undertakings or varied undertakings, the Case Examiners must refer the allegation to a Practice Committee.
45. The Rules also provide that, where the Registrar considers that failure to comply with undertakings (or varied undertakings) amounts to an allegation in its own right, the Registrar must refer that allegation to the Case Examiners.
46. Whether a breach of undertakings (or varied undertakings) amounts to an allegation in its own right will be a question of fact and degree in each case. The Registrar will make an assessment of the seriousness of the breach, with factors pointing towards referral of a new allegation of non-compliance including where:
- (i) there has been an intentional or reckless (as opposed to inadvertent) breach of undertaking (or varied undertaking);
  - (ii) there are probity concerns surrounding the breach of undertaking (or varied undertaking) (for example, denial or other failure to declare that undertakings are in place or about their extent);
  - (iii) breach of the undertaking (or varied undertaking) has put patients or the wider public at risk; and/or
  - (iv) the breach of undertaking (or varied undertaking) has undermined, or has the potential to undermine, public confidence in the professions or their regulation.
47. In the event that the Registrar refers a new allegation to the Case Examiners, that allegation should be considered by the Case Examiners who should then determine, in accordance with the Act and Rules, how to dispose of the new allegation.

### **Variation**

48. There may be circumstances where a registrant has not breached their undertakings, but where it may be appropriate for the content or duration of the undertakings to be varied. This may include whether the registrant's health or performance has deteriorated to the extent that varied undertakings are necessary in order to protect patients or the wider public, or, conversely, that the registrant's health or performance has improved such that the previous undertakings can safely be relaxed.
49. In those circumstances, the matter (including any new information available) will be considered by the Case Examiners with a view to the previously agreed undertakings being varied.

### **Termination**

50. If, on the other hand, the Case Examiners receive information such that they consider that the undertakings should cease to apply, they must direct the Registrar that the undertakings should no longer apply and that the allegation should not be considered further<sup>20</sup>. This may arise in circumstances where the Case Examiners are satisfied that the registrant has remedied the concerns such that there is no longer a real prospect of their fitness to practise being found to be impaired by a Practice Committee.

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<sup>20</sup> see Rule 6B(2)(b) of the Rules (Rule 8B(2)(b) for the Investigating Committee)

51. Otherwise, prior to the end of the period for which the undertakings (or varied undertakings) are in force, a registrant's case will be reviewed by the Case Examiners. Where the Case Examiners are satisfied that there is no longer a real prospect of the registrant's fitness to practise being found to be impaired by a Practice Committee, the Case Examiners may direct that the undertakings should no longer apply and that the allegation should not be considered further.
52. Where, however, the Case Examiners consider that there remains a real prospect of a Practice Committee finding that the registrant's fitness to practise is impaired, the Case Examiners may either agree further undertakings, or may determine that the original allegation should be considered by a Practice Committee.

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## **WARNINGS**

### **Introduction**

- 53. The Act and Rules provide that, if the Case Examiners or Investigating Committee determine that an allegation ought not to be considered by a Practice Committee, they may issue a warning to the person who is the subject of the allegation regarding their future conduct, performance and practice.
- 54. The issuing of a warning allows the Investigating Committee and Case Examiners to indicate to a registrant that, whilst not requiring referral to a Practice Committee, their conduct, practice or behaviour represents a departure from the standards expected of the profession and should not be repeated.
- 55. Warnings, where published, also have the effect of highlighting to the wider profession that particular conduct or behaviour is unacceptable.

### **Criteria**

- 56. The issue of what is serious enough to require a warning is a matter for the Case Examiners or Investigating Committee. A warning may be appropriate where the Case Examiners or Investigating Committee consider:
  - (i) there is a real prospect of the facts alleged being found proved;
  - (ii) there a real prospect of the statutory ground (misconduct, deficient professional performance, etc.) being established;
  - (iii) there is no real prospect of a Practice Committee finding the registrant's fitness to practise is currently impaired; but
  - (iv) there is evidence to suggest that the registrant's conduct, practice or behaviour has fallen below the standard expected to a degree warranting a formal response by the GDC.
- 57. The GDC publishes Indicative Outcomes Guidance which provides decision makers with specific scenarios where a warning may be the most appropriate disposal for a case. These include (but are not limited to) where there has been a clear breach of, or departure from, the GDC's Standards, but not a breach which is so significant that the case ought to be referred to a Practice Committee; or where there is a serious failing which has been remedied, and where there is a low risk of reoccurrence.
- 58. The fact that the allegations are disputed does not preclude the Case Examiners or Investigating Committee from issuing a warning. However, where issuing a warning involves resolving a factual dispute between the registrant and the patient, the decision must explain, in broad terms, why that dispute has been resolved against the registrant.

### **Process**

- 59. The GDC's Investigating Committee has had a longstanding power to issue a warning, without prior consultation, where they determined that an allegation ought not to be considered by a Practice Committee.

60. However, with effect from 1 August 2016, where one or both of the Case Examiners or the Investigating Committee are minded to give a warning, the registrant must be notified in writing that they are so minded. The

61. registrant must also be informed that he or she is entitled to make written representations about the issuing of the warning, which must be received by the Case Examiners within the period of 28 days beginning with the date of the notice<sup>21</sup>.
62. The notification to be sent to the registrant will also include details of the warning which the Case Examiners or Investigating Committee are minded to issue. In drafting a warning the Case Examiners or Investigating Committee must ensure that they clearly state why the registrant's conduct or practice has, on balance, been identified to be deficient, and that they clearly set out any remedial action which is required to be taken<sup>22</sup>.
63. The notification sent to the registrant will also indicate:
- whether the Case Examiners or Investigating Committee are minded that the warning, if issued, should be published (if so, the notification will include details of the proposed public-facing summary of the issues to be published alongside the warning which the Case Examiners or Investigating Committee are minded to issue); and
  - the duration of the warning that they are minded to issue.
64. In respect of the latter, a warning will be ordinarily be issued for a period of up to 24 months; however, ultimately, the duration of a warning will be for the Case Examiners or Investigating Committee to consider and decide, on a case by case basis, balancing the public interest against the interests of the registrant.
65. Factors which may lead the Case Examiners to consider that a warning should be issued for a shorter period (of up to 12 months) include where:
- the registrant has no previous fitness to practise history with the GDC i.e. is of previous good character;
  - the incident was isolated and has not been repeated;
  - a significant period of time has elapsed since the issues arose;
  - the registrant has demonstrated appropriate insight into the shortcomings identified;
  - the registrant has taken appropriate steps to remediate any issues raised, to avoid risk of repetition; and/or
  - the conduct is not such that it has brought the reputation of the profession into disrepute.
66. Aggravating factors which may lead the Case Examiners to consider that a warning should be issued for a longer period (of between 12 and 24 months) include where:
- the registrant has previous fitness to practise history with the GDC;
  - the incident cannot be described as isolated, or there is evidence of subsequent repetition;

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<sup>21</sup> see Rule 6C(1) of the Rules (Rule 8C(1) for the Investigating Committee)

<sup>22</sup> Further guidance on warnings in the Investigating Committee context can be found in the case of *Lutton v General Dental Council* [2011] CSIH 62

- there is limited insight on the registrant's part;
  - there has been disregard of the role of the GDC or other regulators with a public protection function;
  - the issues involve misleading behaviour, breach of trust, or involvement of a vulnerable individual; and/or
  - harm has been caused to a member of the public, or to the reputation of the profession (although in all circumstances, prior to issuing a warning the Case Examiners must be satisfied that there is no realistic prospect that a Practice Committee will find current impairment).
67. The Case Examiners or Investigating Committee must then consider any representations made by the registrant before deciding whether or not to issue a warning<sup>23</sup>. Ultimately, however, a decision as to whether to issue a warning is at the discretion of the Case Examiners or Investigating Committee, and, under the GDC's Rules, a warning may be issued even if the registrant objects.

## **Publication**

68. The Rules provide the Case Examiners and Investigating Committee with discretion to decide whether a warning should be published on the GDC's online register<sup>24</sup>. However, as a matter of policy, the GDC considers that a warning should be published save as set out in paragraph 67 below.
69. This is because publishing a warning will ordinarily be necessary in order to:
- (i) declare and uphold proper professional standards (i.e. in order to highlight to the wider professions that particular conduct is not acceptable);
  - (ii) protect the public (for example, where a registrant has practised whilst unregistered, without appropriate indemnity insurance, or beyond scope of practice); and/or
  - (iii) otherwise uphold the public interest (including in order to maintain public confidence in the professions and their regulation).
70. The GDC will not publish, as part of a warning, any information which directly relates to the health or private and family life of the registrant concerned, or which directly relates to any identifiable third party. Otherwise, however, it will be for the Case Examiners or Investigating Committee to consider, on a case by case basis and balancing the public interest against the interests of the registrant, any exceptional circumstances giving rise to reason(s) why a warning which they are minded to issue should not be published.
71. A warning forms part of a registrant's fitness to practise history with the GDC. As such, it may be considered by GDC decision makers in the event that a further complaint or information is received in the future, and, even after the period of publication has expired, details will be made available on request to relevant enquirers,

<sup>23</sup> see Rule 6C(2) of the Rules (Rule 8C(2) for the Investigating Committee)

<sup>24</sup> see Rule 6C(3) of the Rules for the Case Examiners, and section 27A(6C) for the Investigating Committee

72. including prospective employers, overseas authorities, and otherwise where it is in the public interest for such information to be disclosed<sup>25</sup>.
73. Where, however, a warning has been revoked in accordance with the review provisions below, it will be removed from the register. The GDC's records will indicate that the warning was issued but was revoked, including the reasons for revocation.

## Review

74. The amendments to the Dentists Act provide a power for the Investigating Committee (and later the Case Examiners) to review their decision to issue a warning, within two years of that decision being made. The power will only apply to warnings issued by the Investigating Committee after 13 April 2016, and by the Case Examiners after 1 August 2016.
75. An application for a review can be made by the registrant to whom the warning was issued, or the Registrar<sup>26</sup>. The review will be conducted by whichever decision-maker issued the warning concerned; therefore the Investigating Committee will review warnings issued by them, and the Case Examiners those warnings which they issued. The GDC will, depending on the particular circumstances of the case, endeavour to ensure the review is conducted by different personnel to those who made the original decision; however this may not always be necessary depending on the particular circumstances of the case, or possible for operational reasons.
76. Where the Case Examiners or Investigating Committee decide to review their decision to issue a warning they must inform the Registrar, who must:
- (i) notify the registrant, the maker of the allegation (if any) and any other person who has an interest in the decision to issue a warning, of the decision to review, giving reasons for that decision;
  - (ii) notify the registrant, the maker of the allegation (if any) and any other person who has an interest in the decision to issue a warning, of any new information, and where appropriate, provide that information; and
  - (iii) seek representations from the registrant, the maker of the allegation (if any) and any other person who has an interest in the decision to issue a warning, regarding the review of that decision<sup>27</sup>.
77. The Registrar may also carry out any investigations which are appropriate to facilitate the making of a review decision<sup>28</sup>.
78. Upon review, the Case Examiners or Investigating Committee will take into account all the relevant material and will consider whether the original decision to issue a warning was materially flawed for any reason, or whether there is new information that would probably have led to a different decision. In either circumstance, they may

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<sup>25</sup> sections 33C(3)/36Z(3) of the Dentists Act 1984 states that the Council or the Registrar may disclose to any person any information relating to a person's fitness to practise as a dentist, including information relating to an allegation of impairment, where they consider it to be in the public interest for the information to be disclosed

<sup>26</sup> see section 27A(11) for the Investigating Committee – the corresponding power will be given to the Case Examiners by section 27AA of the Act

<sup>27</sup> see Rule 6D(2) for the Case Examiners; Rule 8D(2) for the Investigating Committee

<sup>28</sup> see Rule 6D(3) for the Case Examiners; Rule 8D(3) for the Investigating Committee

79. decide to revoke the decision to issue a warning<sup>29</sup>, and, if the warning has been published, direct the registrar to remove details of the warning from the entry in the register relating to the registrant<sup>30</sup>.
80. If, on the other hand, the Case Examiners or Investigating Committee, conclude that the decision was not materially flawed and there is no new information which would probably have led to a different decision, they must decide that the original decision to issue a warning should stand<sup>31</sup>.
81. In either case, the Case Examiners or Investigating Committee should give reasons for their decision. The registrant, the maker of the allegation (if any), and any other person the Case Examiners or Investigating Committee consider has an interest in receiving the notification, will be notified of the outcome of the review, and the reasons for it, as soon as is reasonably practicable<sup>32</sup>.

### Further review

82. The decision to initiate a review is at the discretion of the Case Examiners or Investigating Committee. However, where one review has already been conducted and the Case Examiners or Investigating Committee have determined that the decision to issue a warning should stand, a further application for review of a warning will only be considered by the Case Examiners or Investigating Committee where the registrant is able to supply new information which was not previously available to the decision-maker, or where there has otherwise been a material change in circumstance.
83. The Rules also make separate provision for the review of a determination by the Case Examiners or the Investigating Committee that an allegation referred to them ought not to be considered by a Practice Committee<sup>33</sup>. The use of that review power is beyond the scope of this Guidance, but will include cases where the Case Examiners or Investigating Committee have decided to issue the registrant with a warning, and cases closed with the issuing of advice to the registrant, or closed with no further action.

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<sup>29</sup> see Rule 6D(4)(a) for the Case Examiners; Rule 8D(4)(a) for the Investigating Committee

<sup>30</sup> see Rule 6D(4)(b) for the Case Examiners; Rule 8D(4)(b) for the Investigating Committee

<sup>31</sup> see Rule 6D(5) for the Case Examiners; Rule 8D(5) for the Investigating Committee. NB: There is no discretion in these sections of the Rules for a warning to be revised – it must either be revoked or must stand

<sup>32</sup> see Rule 6D(6) for the Case Examiners; Rule 8D(6) for the Investigating Committee

<sup>33</sup> see Rule 9 of the Rules