

## **GUIDANCE FOR THE INVESTIGATION COMMITTEE**

### **The purpose of the guidance**

1. The General Optical Council (GOC) recognises that it is important that patients, registrants, professional and representative organisations and other stakeholders, including the general public, are aware of the basis upon which the GOC's Investigation Committee (IC) operates and makes decisions about fitness to practise complaints.
2. This document contains guidance to be used by the GOC's IC when considering complaints about a registrant's fitness to practise/train/carry on an optical business. The guidance is intended to encourage consistent decision-making by the IC. However, every decision that the IC makes will be based upon the facts of the case being considered.
3. The Fitness to Practise Rules (2013) define a case examiner as an officer of the Council appointed by the Registrar on the Council's behalf for the purposes of exercising the functions of the IC, in accordance with these rules, being a registered optometrist or dispensing optician, or a lay person.
4. This guidance is a public document and is available from the GOC's website at:  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)
5. A report about the fitness to practise of a GOC registrant may also, at different stages of the GOC's process, be considered by the case examiners or a Fitness to Practise panel. This guidance contains some references to their roles. The GOC has also published guidance for the case examiners and for Fitness to Practise panels. These guidance documents are public documents and are available from the GOC's website at:  
[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)
6. The GOC currently registers around 29,000 optometrists, dispensing opticians, student optometrists/dispensing opticians and optical businesses. Individual optometrists or dispensing opticians must be registered with the GOC before beginning to practise. In addition, the GOC regulates student optometrists and student dispensing opticians who must be registered with the GOC in order to undertake training.

## Definitions

7. Throughout this document:

**“Allegation”** refers to a complaint about:

- a business registrant’s fitness to conduct business;
- an individual registrant’s fitness to practise; or
- a student registrant’s fitness to undertake training.

**“Business registrant”** refers to a body corporate that is registered with the GOC.

**“Factual particular”** refers to the alleged facts that amount to an allegation.

**“Fitness to practise”** refers to the fitness to:

- practise of registered optometrists or dispensing opticians;
- undertake training as a student optometrist or dispensing optician; or
- undertake business as a business registrant (optical businesses that are registered with the GOC).

**“Individual registrant”** refers to an individual who is registered with the GOC.

## Revision of the guidance

8. This guidance is intended to be a ‘living document’. It will be amended as and when appropriate, taking into account the growing experience of the IC in dealing with fitness to practise allegations, as well as legal developments, including the amendment/introduction of legislation and new case law. The GOC will review this guidance annually or as the need arises.

9. The GOC will highlight any significant amendments to this guidance by publishing the amended version on the GOC's website, [www.optical.org](http://www.optical.org).

## The General Optical Council

10. The GOC is one of 12 organisations in the UK known as health and social care regulators. These organisations oversee the health and social care professions by regulating individual professionals (and in some instances, registered businesses). The GOC is the regulator for the optical professions in the UK.

11. The constitution, purposes and functions of the GOC are set out in the Opticians Act 1989<sup>1</sup>. The GOC is responsible for promoting high standards of professional education, conduct and performance among optical professionals in order to protect the public. The main statutory functions of the GOC are to:

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<sup>1</sup> [http://www.opsi.gov.uk/acts1989/pdf/ukpga\\_19890044\\_en.pdf](http://www.opsi.gov.uk/acts1989/pdf/ukpga_19890044_en.pdf)

- set standards for optical education and training, performance and conduct;
  - approve qualifications leading to registration;
  - maintain registers of individuals who are qualified and fit to practise or train as optometrists or dispensing opticians;
  - maintain lists of bodies corporate who carry on business as ophthalmic or dispensing opticians; and
  - investigate and act where a business registrant's or an individual registrant's fitness to practise, train or carry on business is impaired.
12. The GOC can also take action if the laws in relation to the sale of optical appliances, or the testing of sight, are being broken and where there is a risk to the public. The GOC's protocol on the Investigation and Prosecution of Criminal Offences sets out the Council's role in this process and is available from:
- [https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)
13. Information about the GOC's complaints process is set out in the leaflet entitled "How to complain about an optician" which is available from:
- [https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)
14. Every year the GOC publishes both a general report across all its activities, which includes a report dedicated to fitness to practise matters, with statistical information about the number and types of complaints that have been considered by the organisation. The GOC's annual reports are available from:
- [https://www.optical.org/en/news\\_publications/Publications/annual\\_reports\\_archive.cfm](https://www.optical.org/en/news_publications/Publications/annual_reports_archive.cfm)
15. Only a minority of complaints that are made to the GOC result in a referral to the Fitness to Practise Committee (FTPC)<sup>2</sup>. In the majority of cases, case examiners decide that there is no need for any further action to be taken, or that the matter can be appropriately dealt with by issuing a registrant with a warning or advice.

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<sup>2</sup> 27% of complaints considered by case examiners in 2016-17 were referred to the FTP Committee

## **The Investigation Committee's (IC) membership**

16. The legislation specifies the membership of the IC and its decision-making procedures<sup>3</sup>.
17. The IC has a mixture of lay and professional members. It has nine members in total, of which three must be registered optometrists, two must be registered dispensing opticians, three must be lay persons, and one must be a medical practitioner<sup>4</sup>.
18. Details of the current membership of the IC are available from:  
[http://www.optical.org/en/about\\_us/how\\_we\\_work/Investigation\\_Committee.cfm](http://www.optical.org/en/about_us/how_we_work/Investigation_Committee.cfm)
19. There must be a minimum of five<sup>5</sup> IC members present in order for the Committee to make decisions about an allegation (the Committee's "quorum"). This must include at least one optometrist, one dispensing optician and one lay member.
20. The IC meets in private. It is able to obtain independent legal advice. The complainant, registrant and their representatives are not allowed to attend IC meetings. The IC takes its decisions by a simple majority vote (the Chair does not have a casting vote). No Committee member may abstain from voting and where the votes are equal, the legislation states that the Committee must decide in favour of the registrant<sup>6</sup>.

## **Referral of cases to the Investigation Committee (IC)**

21. All reports of fitness to practise which are received by the GOC are initially considered by the Registrar. Where the Registrar considers that the allegation falls within one of the grounds described at section 13D of the Opticians Act, the matter shall be referred to the case examiners for consideration (save for those resulting from a criminal conviction which has resulted in the imposition of a custodial sentence (immediate or suspended); which will be referred straight to the FTP Committee (FTPC))<sup>7</sup>. Alternatively, if the Registrar does not consider that the allegations falls within any of the relevant grounds, (s)he shall notify the complainant and the case will be closed.

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<sup>3</sup> The GOC(committee Constitution Rules) Order of Council 2005 and The GOC (Committee Constitution) Amended Rules Order of Council 2008 – <http://www.opsi.gov.uk/si/si2005/20051474.htm> and [http://www.opsi.gov.uk/si/si2008/uksi\\_20083113\\_en\\_1](http://www.opsi.gov.uk/si/si2008/uksi_20083113_en_1)

<sup>4</sup> Rule 9 of the GOC (Committee Constitution Rules) Order of Council 2005 as amended by the GOC (Committee Constitution) Amended Rules Order of Council 2008 (see note 3 above)

<sup>5</sup> Rule 10 of the GOC(committee Constitution Rules) Order of Council 2005 as amended by the GOC (Committee Constitution) Amended Rules Order of Council 2008 (see note 3 above)

<sup>6</sup> Rule 59(4) of the GOC (Fitness to Practise) Rules 2013.

<sup>7</sup> Rule 4(5) of the GOC (Fitness to Practise) Rules 2013.

22. The case examiners will consider the allegation and decide whether or not it should be referred to the FTPC for hearing. The case examiners will be able to deal with the majority of cases, however, there are limited circumstances in which cases must be referred to the IC for further action. Cases will be referred to the IC by the case examiners in two situations; (1) where the case examiners decide to refer an individual registrant for a health and/or performance assessment, which can only be directed by the IC or (2) where the case examiners are not unanimous in their decision about the appropriate disposal of the matter<sup>8</sup>.

### **Assessment (health and/or performance)**

23. Where the case examiners decide that they require further information about a registrant's health and/or the standard and quality of their work before they can reach a decision on the case, they must refer the matter to the IC requesting that an assessor (or assessors) be appointed and an assessment (or assessments) be directed. Also, if the IC is, itself, considering a case where the case examiners have been unable to reach a unanimous decision about disposal of the allegation and the case has been referred to the IC, it may decide that an assessment (or assessments) are required.
24. In such circumstances, the IC may direct that any one or more of the following investigative actions should be carried out (including, if required, more than one assessment):
25. A health assessment of an individual practitioner<sup>9</sup>.
- this may be appropriate if the complaint (or an individual registrant's representations) raises questions as to whether their health (including any health condition relating to substance abuse) is having any impact on their work.
26. A performance assessment of an individual practitioner<sup>10</sup>.
- this may be appropriate if it is considered that the complaint raises broad questions about the adequacy of the individual's standard of work in certain areas of practice, and that the decision-making would be assisted by a formal

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<sup>8</sup> Rules 12 and 13 of the GOC (Fitness to Practise) Rules 2013.

<sup>9</sup> Rule 7 of the GOC (FTP) Rules 2013.

<sup>10</sup> Rule 7 of the GOC (FtP) Rules 2013.

assessment of the registrant's work in those areas. The GOC has published separate guidance relating to performance assessments, available from:

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

- The IC shall specify the matters on which a registrant is to be assessed. If more than one assessor is appointed to conduct a performance assessment, the assessors must together prepare a joint report for the IC. In respect of health assessments, each assessor will prepare a report. The registrant will be sent a copy of all report(s) prepared and may submit comments on the report(s) to the Registrar within 28 days of receipt.
27. If the IC directs, on its own behalf or on referral from the case examiners, that an assessment (or assessments) should be carried out, consideration of the case will be adjourned until the relevant further investigations are completed. Any additional evidence that is obtained as a result of further investigation will be provided to the registrant who will be given an opportunity to make additional written representations, which will be provided to the IC or case examiners, (and, if relevant, to the person making the complaint).
  28. Where a registrant co-operates with an assessment (or assessments) requested by the case examiners, the IC must refer the allegation back to the case examiners, with the assessment report (or reports), together with any information provided by the registrant. The case examiners will resume their consideration of the matter under the provisions of rule 12.
  29. If an individual registrant fails to co-operate with, or submit to, an assessment (or assessments) where the IC has directed an assessment (or assessments) following a referral from the case examiners, the IC shall not refer the allegation back to the case examiners for determination and shall, instead, proceed to consideration of the allegation itself. The IC shall draw such inferences as seems fit, following an individual registrant's failure to co-operate with an assessment.
  30. Further details in relation to the IC's decision making process are set out below.

#### **Case examiners are unable to reach a unanimous decision**

31. Cases will be considered by a lay case examiner and a registrant case examiner. The case examiners must be unanimous in their decision about the disposal of an allegation. In the event that they are unable to reach a unanimous decision in a particular case, they must inform the Registrar and the Registrar will refer the matter to the IC. The IC will then determine how to dispose of the case following the decision making process which is set out in this guidance.

#### **Further investigation**

32. At any stage, prior to making their final decision, the IC may adjourn their consideration of a case pending further investigation and inform the Registrar who will undertake that investigation. The Registrar will provide any additional evidence obtained to the registrant and, where appropriate, to the maker of the

allegation, giving them a reasonable opportunity to respond. The Registrar will then provide the IC with all additional evidence, together with any further comments. The IC will resume its consideration of the matter.

33. If, during the course of considering the allegations, the IC considers that there may be evidence (either from the complaint made to the GOC or from any further investigation) of allegations not included by the Registrar, or that the allegations should be amended, the IC should adjourn its consideration of the case and inform the Registrar. The Registrar may then consider the matters raised and whether additional or alternative allegations should be drafted for consideration by the IC. The IC may then, after the registrant has had an opportunity to respond to any new or amended allegations/evidence (Rule 12), resume its consideration of the matter.

### **Decision-making process**

34. When making any decision about a particular allegation, the IC will consider not only the original allegation and any evidence that has been gathered by the GOC, but also any written representations that have been received from the registrant concerned. The rules state that a registrant must be given copies of any information or documents received in support of the allegation, and allowed 28 days in which to make any written representations before the IC considers the allegation(s).
35. The IC will also consider any comments received from the complainant, made once the complainant has seen any written representations made by the registrant. Any comments from the complainant are also copied to the registrant.
36. The IC must not be influenced by the type, or volume, of evidence that has been gathered by the GOC, except where that evidence is relevant to their consideration of a particular allegation. In wider terms, the overall volume of evidence gathered is only relevant to the decision-making process if the IC agree that it is insufficient for them to reach a decision and that they need to adjourn their consideration. The volume/type of evidence, in isolation, is not relevant to whether or not an allegation is likely to pass the realistic prospect test.
37. There may be cases that involve concerns about a number of aspects of a registrant's fitness to practise. In making a decision, it is the cumulative effect of all impairing factors that must be taken into account. Health and performance assessments are part of the process of collecting evidence (for individual registrants), but there may also be other evidence that the IC will need to consider when reaching a decision. Where the factual particulars relate to a number of aspects of a registrant's fitness to practise, the IC should include in its decision references to any specific representations or evidence it has considered that relates to its decision.
38. Where the IC's decision discounts, either fully or partially, an undisputed expert opinion, it must provide very clear reasons for this. The IC must also remember that its role is not to make decisions on the facts, but only to determine whether

the realistic prospect test has been met.

### **Potential outcomes of the IC's consideration of an allegation**

39. There are a number of different potential final outcomes arising from the IC's consideration of an allegation:

- referral of the case to the FTPC;
- the issue of a warning to the registrant<sup>11</sup>;
- a decision to take no further action, including issuing the registrant with advice about their future conduct; or
- a decision to take no further action.

Further information about each of these potential outcomes is set out below.

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<sup>11</sup> In accordance with sections 13D(7) of the Opticians Act 1989 (see note 1 above)



## **The public interest**

40. The IC should always take into account the public interest. The wider public interest includes not just the protection of members of the public, but the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct and behaviour.

## **Equality and diversity**

41. The IC must be aware of and apply the GOC's Equality and Diversity Scheme. The GOC is committed to promoting equality and valuing diversity and to operating procedures and processes which are fair, objective, transparent and free from discrimination. Promoting equality is also a requirement under the Equality Act 2010 – everyone who is acting on behalf of the Council is expected to adhere to the spirit and letter of this legislation.

## **Allegation of fitness to practise**

42. An allegation that an individual registrant's fitness to practise is, or may be, impaired may relate to acts or omissions which occurred outside the United Kingdom or at a time when that registrant was not registered<sup>12</sup>.
43. A registrant's fitness to practise may be impaired only on certain grounds which are set out at Section 13D (2) and (3) of the Opticians Act 1989. Those grounds vary, depending on whether it is a business registrant, a student registrant or an individual practitioner. Case law has established the following principles regarding the concepts of "misconduct" and "deficient professional performance"<sup>13</sup>:
- "misconduct" does not mean any breach of the duty owed by a business registrant or an individual registrant to their patient; it connotes a serious breach which indicates that the business registrant's or an individual registrant's fitness to practise is impaired;
  - mere negligence does not constitute "misconduct" but negligent acts or omissions which are particularly serious may amount to "misconduct";
  - a single negligent act or omission is less likely to cross the threshold of "misconduct" than multiple acts or omission. However, there may be some circumstances in which a single negligent act or omission, if particularly grave, could be characterised as "misconduct"; and

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<sup>12</sup> Section 13D(4) of the Opticians Act 1989.

<sup>13</sup> Calhaem v General Medical Council [2007] EWHC 2606 (Admin)

- “deficient professional performance” connotes a standard of professional performance which is unacceptably low. A single instance of negligent treatment would be unlikely to constitute “deficient professional performance” unless it was very serious indeed. Except in exceptional circumstances, “deficient professional performance” should be based on consideration of a fair sample of work.

### Referral of an allegation to the FTPC

44. When considering whether an allegation ought to be referred to the FTPC, the IC should keep in mind the GOC’s over-arching objective as set out in the legislation<sup>14</sup>:

“The over-arching objective of the Council in exercising their function is the protection of the public.”

The over-arching objective encompasses the following aims:-

- To protect, promote and maintain the health, safety and well-being of the public;
  - To promote and maintain public confidence in the professions regulated under the Act;
  - To promote and maintain proper professional standards and conduct for members of those professions; and
  - To promote and maintain proper standards and conduct for business registrants.
45. When considering whether a case ought to be referred to the FTPC, the IC should ask itself the following question: is there a realistic prospect of establishing that the registrant’s fitness to practise is impaired to a degree that justifies action being taken against their registration (this is known as “**the realistic prospect test**”).
46. This involves consideration of two issues:
- Is there a realistic prospect of being able to prove the facts alleged against the registrant, if the allegation is referred to the FTPC?
  - If the alleged facts were proved, are they so significant as to indicate that the registrant’s fitness to practise is or may be impaired to a degree that justifies action being taken against their registration?
47. It is **not** the role of the IC to decide whether or not a registrant’s fitness to practise **is** impaired – that is a decision for the FTPC to make (if the matter is referred onto that stage).

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<sup>14</sup> Section 1(2A) of the Opticians Act 1989 (see note 1 above)

48. When considering the realistic prospect test, the IC should have regard to the following:
- it should proceed with caution (given that, among other considerations, the IC is working from documents alone and the evidence before them may be untested);
  - it is not the IC's role to make any findings of fact. It is for the FTPC to make factual findings;
  - the FTPC will only find facts disputed by the registrant proved if, having heard the evidence, the Committee considers it more likely than not to have happened (the "civil standard of proof")<sup>15</sup>;
  - the IC is entitled to assess the weight of the evidence. However, the Committee must not (normally) resolve substantial conflicts of evidence;
  - where there is a plain conflict between two accounts, either one of which may realistically be correct, and on one account the matter would call into question a registrant's fitness to practise, the conflict should be resolved by the FTPC not the IC;
  - if the IC is in doubt about whether to refer the matter to the FTPC, they should consider the complainant's version of events at their highest then apply the realistic prospect test;
  - it is not the IC's role to refer to the FTPC an allegation that is not supported by any evidence. There must be a genuine (not remote or fanciful) possibility both that the facts alleged could be found proved and that if they are, the registrant's fitness to practise could be found impaired by the FTPC;
  - when determining whether the realistic prospect test is met in relation an allegation of culpable omission (i.e. that the registrant failed to do something that they should have done), the IC must consider whether i) there is a realistic prospect of proving that the registrant had a duty to do the specified thing AND ii) that there is a realistic prospect of proving that the registrant failed to do the specified thing. If the realistic prospect test is not met for both i) and ii), it will not be met for the allegation overall;
  - there is a public interest in both business registrants and/or individual registrant's not being harassed by unfounded allegations;
  - where the realistic prospect test is met, there is a public interest in there being a public hearing before the FTPC;

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<sup>15</sup> Rule 38 of the GOC FTP Rules 2013.

- the IC should proceed with caution in reaching a decision not to refer a case where the decision may be perceived as inconsistent with a decision made by another public body (for example, a decision where there has been input from optical professionals, or a decision of an NHS body) in relation to the same or substantially the same facts. If the Committee does reach such a decision, it should give detailed reasons in writing for any apparent inconsistency;
- the presence of an interim order or previous interim orders is not relevant to considering whether the realistic prospect test has been met. The test for imposing an interim order is different in many regards. The presence of an interim order should not be a factor in considering whether to refer an allegation to the FTPC, as the presence of an interim order does not constitute a factual finding.
- the IC should note the statement within the GOC's Protocol on the handling of criminal convictions disclosed by a registrant and, in particular, that the Registrar will generally presume against registration, restoration or retention on the GOC Register where an applicant discloses a conviction for an offence included in Schedule 4 of the Criminal Justice and Court Services Act 2000. A copy of the GOC's protocol on the handling of criminal convictions disclosed by business registrants and/or individual registrants is available from:

[https://www.optical.org/en/Investigating\\_complaints/How\\_to\\_make\\_a\\_complaint/index.cfm](https://www.optical.org/en/Investigating_complaints/How_to_make_a_complaint/index.cfm)

- the IC should further note the factors identified within the FTPC's guidance as indicating that (if the case is considered by the FTPC) erasure is likely to be the appropriate sanction, see attached for relevant guidance which is also available from:

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

The IC should keep in mind the presence of mitigating factors which can result in a decision by the IC not to refer an allegation to the FTPC but only where the mitigating factors:

- (a) are well supported by credible evidence;
  - (b) relate to the circumstances of the allegation rather than to matters that are personal to a business registrant or an individual registrant; and
  - (c) are so significant that there is no realistic prospect of the FTPC finding that a registrant's fitness to practise is impaired.
- the likely impact on the FTPC's consideration of any evidence showing that:
    - (a) a registrant's admitted failings are capable of being remedied; and/or

(b) have already been remedied;

(c) the level of any risk of repetition;

as well as the weight that can reasonably be given to that evidence.

- certain types of misconduct may be more capable of being remedied than others (for example, allegations concerning deficient professional performance). Such evidence may not always be available and, where it is available, it may not be clear or persuasive. Examples of types of misconduct which by their nature may be less capable of remediation include sexual misconduct or dishonesty.
- Even if the IC is satisfied that there is evidence that a registrant has remedied their failing, the IC may still decide that it is in the public interest for the case to be referred to the FTPC. In *CHRE 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.*" The existence of an interim order must not influence the decision as to whether to refer the allegation to the FTPC as an interim order does not involve making any factual findings.

### **Recording decisions**

49. All decisions made by the IC shall be recorded (in writing) setting out full and detailed reasoning for the decision made. The IC must always ensure that their reasoning is clear, and must take particular care, for example:

- where the IC is referring some but not all of the factual particulars to the FTPC, or where more than one ground of impairment has been alleged, in order to be clear which factual particulars and allegations are being referred and on which ground of impairment;
- where numerous documents have been submitted to support the allegation, the decision should be clear that these have been read. The decision should refer to the specific document(s)/section(s) and set out how these relate to that part of the decision;
- where the IC considers that there is a realistic prospect of finding the factual particulars proved but decide not to refer the allegations due to evidence of insight and remediation. The IC should set out why the evidence is so compelling as to decide not to refer the allegation of impairment;
- where the decision of the IC, which will not have resolved disputes of fact,

appears to discount the findings of an expert opinion (see paragraph 38).

50. The IC should also remember that their decision may be read by third parties who may be unfamiliar with the GOC's role or procedures. As such its reasons need to be clearly written in plain English to explain what decisions are being taken and why.

### **Guidance regarding warnings issued by the IC**

51. Before considering giving a warning, the IC will ensure that it has correctly identified the grounds for the allegation that a registrant's fitness to practise is impaired under section 13D(2) or (3) of the Optician's Act 1989 (OA). The ground of impairment will usually arise as a result of a breach of the standards of behavior and performance expected of optical professionals, students and businesses. Until 31 March 2016 these standards were contained in the "Code of Conduct of optometrists, dispensing opticians and optical students" and the "Code of Conduct for business registrants". Although there may be occasions where it is necessary to make reference to externally produced guidance (for example, College of Optometrist guidance), the IC will, wherever possible, apply GOC produced guidance, standards and competencies to their decision-making process.

From 1 April 2016 the existing Code of Conduct relating to fully qualified individuals and students has been replaced by new Standards of Practice for Optometrists and Dispensing Opticians and Standards of Practice for Students. This means that where the IC are considering a matter where the conduct complained of occurred after 1 April 2016, the Standards will apply. For matters prior to that date, the Code will be applicable but the IC should make reference to the new Standards where they consider that this will help to inform the registrant's future practice. The Code of Conduct for business registrants remains in force.

52. For example, the IC may consider that the facts of the complaint amount to an allegation of "*misconduct*" under section 13D(2)(a) of the OA, by failing to respect a patient's dignity and privacy in breach of Standard 1 of the Standards of Practice.
53. Alternatively, the IC may consider that the facts of the complaint amount to an allegation of "*misconduct by the business registrant or by one of its directors*" under section 13D(3)(a) of the OA, by failing to take reasonable and proportionate steps to ensure that advertising or publicity complies with appropriate advertising codes of practice, in breach of paragraph 7 of the GOC Code of Conduct for Business Registrants.
54. When considering alleged breaches of the GOC's Code of Conduct for Business Registrants, the IC will bear in mind that the obligations imposed on business registrants are not absolute. The obligations are to take "*reasonable and proportionate steps*" to comply with its provisions.

### **The issue of a warning to a business registrant or an individual registrant**

55. The IC will only consider issuing a warning once it has decided that the matter should not be referred to the FTPC.
56. When considering an allegation, the IC must ensure that the potential ground for the allegation against a registrant under section 13D has been identified, so that it can assess the prospects of being able to prove the necessary facts against the registrant in order to sustain the allegation.
57. In giving reasons for issuing a warning, the IC must avoid giving the impression that it has made a finding or determination of matters of fact on substantive issues arising from the complaint.
58. The terms of any warning must be in clear terms, and must not seek to impose on a registrant a more onerous obligation than that required under the terms of the current GOC Code or Standards. For example, if a warning is given for a breach of the GOC Code for Business Registrants, it must qualify an instruction as to future conduct to the effect that the registrant must take "reasonable and proportionate steps to comply with the relevant provisions of the Code, rather than seek to impose an absolute obligation to do so.

A warning issued by the IC is a record of a concern on the part of the IC which, while not requiring referral to the FTPC, is potentially significant. A warning is not shown on the publicly available GOC Register, but it is recorded by the GOC for a period of four years from the date of the warning letter. Independent legal advice is available to the IC.

59. Warnings are only issued by the IC once a registrant has been given an opportunity to make further written representations to the IC, having been advised of the nature of the warning being considered. The IC shall consider any representations made by the registrant and decide whether or not to give a warning in the particular circumstances.
60. The GOC has published separate guidance on warnings issued by the IC, available from:

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

### **Taking no further action**

61. If the IC decides that an allegation does not need to be referred to the FTPC, or result in the issue of a warning, it may decide to close a case without taking any further action.
62. The IC may decide to close a case and take no further action if:
  - the allegation demonstrates no issue that could call into question a registrant's fitness to practise; or

- the alleged facts, even if proved, are not serious enough to result in that registrant's fitness to practise being impaired to the extent that would justify action being taken against their registration, and a warning is deemed unnecessary; or
- the alleged facts, if proved, may demonstrate that a registrant's fitness to practise is impaired, but there is no realistic prospect of being able to prove the alleged facts for evidential reasons and a warning is deemed unnecessary.

### **Notification**

63. Following the IC meeting, the complainant(s) and the registrant(s) concerned receive a letter from the GOC setting out the IC's decision and the reasons for that decision. In the case of individual registrants, their employer will be informed of the committee's decision but they will not be provided with the full decision.

### **Other parties**

64. The IC may instruct the GOC to refer an allegation to the police if it appears to relate to the commission of a criminal offence (or to refer the allegation to another enforcement agency, as appropriate) if it appears to relate to a non-GOC optical professional, for example, to the General Medical Council if the allegation concerns laser eye surgery carried out by a doctor.

### **Interim orders**

65. The Registrar and the IC are also required to consider whether the FTPC should consider making an interim order suspending or placing conditions on the registration of a registrant who is the subject of an allegation<sup>16</sup>. An interim order can:
- suspend a registrant from practice completely;
  - temporarily remove an entry relating to a specialty or proficiency; or
  - make their registration conditional on compliance with requirements imposed by the FTPC.

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<sup>16</sup> Section 13D(9) of the Opticians Act 1989 – see note 1 above.



An interim order can last for a maximum of 18 months, unless extended by the relevant court, and will be subject to regular reviews during that period.

66. If the IC is of the opinion that the FTPC should consider making an interim order, it will have regard to the legislation. In particular, section 13L of the Opticians Act 1989, which states that the FTPC may only make an interim order where it is satisfied that it is:

- necessary for the protection of members of the public; or
- otherwise in the public interest; or
- in the interests of a business registrant or an individual registrant.

67. In order to reach a decision about whether the FTPC should consider making an interim order the Committee will:

- take into account the circumstances, specified in the FTPC's guidance, as being likely to mean that an interim order is necessary. A copy of the FTPC's Guidance is attached and is also available at:

[https://www.optical.org/en/Investigating\\_complaints/fitness-to-practise-guidance/index.cfm](https://www.optical.org/en/Investigating_complaints/fitness-to-practise-guidance/index.cfm)

- have regard to all the factors that will be taken into account by the FTPC when considering such a referral, including:
  - (a) the effect which any order might have on a registrant;
  - (b) the requirement on the FTPC to balance the need for an order against the consequences which an order would have for that registrant, in order to satisfy it that the consequences are not disproportionate to the risk to the public.
  - (c) the primary purpose of an interim order is to protect the public from a real present or likely future risk. 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).
  - (d) that an interim order might be made at an early stage of the investigation and, therefore, although the allegation ought to have been made in writing, it may not yet be supported by formal witness statements.

## Guidance for IC on findings by other regulators

68. By section 13D(5) of the Opticians Act 1989 (“the Act”), the IC is required to investigate an allegation (often referred to as a complaint) made to the GOC that the fitness to practise of an individual registrant, the fitness to carry on business of a business registrant, or the fitness to undertake training of student registrant is or may be impaired (section 13D(1) of the Act).
69. By section 13D(2) of the Act, the only grounds on which the fitness to practise of an individual registrant, or the fitness to undertake training of a student registrant, can be “impaired” for the purposes of the Act are as set out in section 13(2)(a)-

(g). These grounds include “*misconduct*” (section 13(2)(a)), and

*“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect”* (section 13D(2)(g)).

70. By section 13D(3) of the Act, the only grounds on which the fitness to carry on business of a business registrant can be “impaired” for the purposes of the Act are as set out in section 13D(3)(a)-(g). These grounds include “*misconduct by the business registrant or by one of its directors*” (section 13D(3)(a)), and

*“a determination by a body in the United Kingdom responsible under any enactment for the regulation of a health or social care profession to the effect 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”*

(section 13D(3)(g)).

### **This guidance will assist in deciding upon the evidential status of a determination of impairment of fitness to practise or carry on business by another UK health or social care regulator for the purpose of section 13D(2)(g) or (3)(g)**

71. When the IC is considering an allegation of impairment by reason of a finding of impairment of fitness to practise by another UK health or social care regulator, it must examine the evidential status of the determination of the other regulator on which the GOC allegation is based. Such a determination does not have the same status as a conviction for a criminal offence, which is normally proved by a certificate of conviction from the court concerned, and cannot normally be challenged in professional disciplinary proceedings. A criminal conviction may be a ground for impairment under section 13D(2)(c) or 13D(3)(d) of the Act.

72. A determination by another UK health or social care regulator will, save in exceptional circumstances, be strong prima facie evidence of the facts found proved in relation to that determination, but is not conclusive. The registrant must be given a fair chance to explain himself, but a fitness to practise panel is not required to conduct itself as a court of law rehearing all the evidence underlying the original determination.<sup>17</sup>
73. The main test to be applied when examining the status of such a determination is whether the process whereby the determination was reached was fair. In the case of other UK health or social care regulators, the decision will have been reached by the disciplinary panel after a hearing conducted in accordance with due legal process. The regulator will have had the burden of proving the allegations to the required standard of proof. Legal representation of the parties will have been permitted. The panel may have considered and assessed oral evidence tested under cross-examination, and any documentary evidence submitted by the parties. The panel will have received legal advice, from an independent legal advisor or from a member of the panel, before reaching its decision. The determination of the panel will have contained the reasons for its findings.
74. Therefore, in the case of a determination by another UK health or social care regulator, that determination can usually be relied upon by the IC to provide a reliable basis for referring the allegation to the FTPC. This is on the basis that there is a realistic prospect of being able to prove the facts as found by the other regulator, and that they are so significant as to indicate that the registrant's fitness to practise is or may be impaired to such a degree that justifies action being taken against their registration.
75. It will be for the FTPC to determine whether there are exceptional circumstances in any particular case to question the determination of the other regulator, or to find that the findings of the other regulator are not sufficient to find impairment of fitness to practise of a GOC registrant.
76. It is possible that a determination by another UK health or social care regulator may be sufficient to justify an allegation of misconduct under section 13D(2)(a) or 13D(3)(a), in addition to an allegation under section 13D(2)(g) or 13D(3)(g). In that case, the principles as to the status of the determination of the other regulator set out above are equally applicable.

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<sup>17</sup> See *General Medical Council v. Spackman* (1943) AC 627, *Neelu Chaudhari v. General Pharmaceutical Council* (2011) EWHC 3433 (Admin)

**This guidance will assist in deciding upon the evidential status of an adjudication made by the Advertising Standards Authority (ASA) that a GOC registrant has acted in breach of their codes**

77. The ASA is the independent body responsible for regulating advertisers in the United Kingdom. Upon receipt of a complaint it will consider and determine whether an advertiser has acted in breach of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Advertising (CAP Codes). Its decision is published as an adjudication. An ASA adjudication can be reviewed at the request of the advertiser by the Independent Reviewer of ASA Adjudications.
78. It is not unusual for an ASA adjudication against a registrant of the GOC, normally a business registrant, to be sent to the GOC for consideration as to whether any disciplinary action should be taken against the registrant. If an ASA adjudication is sent to the IC for investigation and consideration, the IC must examine the status of that adjudication in relation to any allegation against the registrant on one of the grounds under section 13D(2) or (3) of the Act.
79. In the following paragraphs, the guidance will deal with ASA adjudications against a GOC business registrant, but similar principles will apply to adjudications against individual registrants.
80. Unlike a determination by another UK health or social care regulator, an adjudication by the ASA against a GOC registrant does not, of itself, constitute a ground for impairment under section 13D(2) or (3) of the Act. Therefore, it is important for the IC, at the outset, to identify the potential ground under section 13D for an allegation against the registrant. In most cases, the only potential ground will be “misconduct by the business registrant or one of its directors” under section 13D(3)(a), by reason of a potential breach of the GOC Code of Conduct for Business Registrants (the GOC Code).
81. In the case of an ASA adjudication, the allegation of misconduct will normally have to be based on a potential breach of paragraphs 7 and/or 11 of the GOC Code, which provide as follows:

*“...a business registrant will take reasonable and proportionate steps to:*

7. *Ensure that advertising or publicity complies with the appropriate advertising codes of practice; .....*
11. *Ensure that financial and commercial practices do not compromise patient safety.”*

It is stressed that these obligations under the GOC Code are not absolute. The obligations under the GOC Code are to take “*reasonable and proportionate steps*” to comply with its provisions.

82. The IC must not assume that an ASA adjudication, without more evidence, will prove itself in the same way as a conviction, or that the mere fact of an ASA adjudication will prove an automatic breach of the GOC Code.
83. The evidential status of an ASA adjudication is that it is likely to be admissible at a

hearing of the FTPC as prima facie evidence that the registrant has acted in breach of the CAP Codes. However, that finding may be rebutted by the registrant, who may seek to adduce evidence to go behind the ASA adjudication. The reason for this is that the ASA adjudication process is very different from that adopted in disciplinary hearings before other UK health or social care regulators. The ASA has no power to consider impairment of fitness to practise. No hearings are held, and the whole process is conducted on paper with the advertiser submitting written representations. Thus, there is no oral evidence tested by cross-examination. The burden of proof rests with the advertiser to prove that it has not acted in breach of the CAP Codes (i.e. the ASA applies the reverse burden of proof to that applied by the GOC and other UK health or social care regulators). The adjudication body does not receive independent legal advice before making its adjudication. Thus, it may be possible for a registrant to argue that the ASA adjudication process should carry little weight.

84. Even if breaches of the CAP Codes are proved, or admitted, that is not enough to prove a breach of the GOC Code which requires registrants to take “reasonable and proportionate steps” to comply with the CAP Codes. The position will depend on the evidence of the steps taken by the registrant.
85. In deciding whether to refer an allegation based on an ASA adjudication to the FTPC, the IC must consider the representations made by the registrant in response to the allegation under rule 5 of the rules.
86. The IC may take the view that the material indicates that the registrant has taken sufficient steps to comply with the findings, in which case the IC may decide to take no action.
87. The IC may take the view that there is a dispute as to whether the findings of the ASA of breaches of the CAP Codes are justifiable, and/or whether the registrant has taken “reasonable and proportionate steps” to comply with the CAP Codes. In which case, the IC may decide to refer the allegation to the FTPC. The IC must not make any findings of fact (see the IC guidance).
88. If the IC decides not to refer the allegation to the FTPC, it has the power to issue a warning to the registrant under section 13D(7) of the Act, and rule 14 of the rules. In deciding to issue a warning, the IC must take care to ensure that it does not appear to be making findings of fact on material issues that are in dispute relating to the allegation. If a warning is given, it must not be given in absolute terms, but must reflect the “reasonable and proportionate steps” qualification in the GOC Code. If a warning is being considered, reference should be made to the separate guidance regarding warnings.

**This guidance will assist in deciding upon the evidential status of findings by other non-healthcare regulators or tribunals**

89. The IC may take the view that there is a dispute as to the evidential status of any findings against a GOC registrant by another non-healthcare regulator or tribunal. It is possible that this will have to be examined by the IC in accordance with the principles set out above in relation to ASA adjudications. In each case,
  
90. It will be necessary to examine the nature of the decision-making process of the relevant regulator or tribunal, and to decide whether it was fair. A finding by a civil court of law will be strong prima facie evidence of the facts found proved.<sup>18</sup> A finding by another regulator with no power to consider fitness to practise, and operating a reverse burden of proof, will be more susceptible to challenge and rebuttal.

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<sup>18</sup> See the *Neelu Chadhari* case.