



Modernisation of the General Dental Council's Fitness to Practise Procedures

April 2012

Dental Protection

Dental Protection Limited (DPL) is a wholly-owned subsidiary company of the Medical Protection Society (MPS) which is the world's largest professional indemnity organisation for doctors, dentists and other healthcare workers, having over 260,000 members internationally. The two companies operate on a mutual, not for profit, discretionary basis as they have done successfully since 1892.

DPL serves almost 59,000 dental members in 70 countries worldwide. This total includes approximately 70% of UK dentists and a higher proportion of UK dental therapists and hygienists. DPL provides indemnity to its members for claims in negligence, and also legal advice and assistance with GDC Fitness to Practise (FTP) enquiries for our UK members. This means that DPL advisers and our panel of experienced regulatory lawyers have enormous experience in assessing FTP cases and advising our members on how to respond to FTP cases at all stages of the process, up to and including Judicial Review, High Court Appeals and CHRE appeals to the High Court.

In addition to this, DPL offers members advice and assistance in dealing with complaints arising from the member's practice. Typically this means offering firstly telephone advice to a member who is subject to a complaint and subsequently assisting with drafting responses to complaints and providing advice on complaints management. We also liaise with the Dental Complaints Service, on behalf of our members. We have experience of managing claims in negligence worldwide, and we assist dentists with inquiries by Dental Councils and other Regulators in all of the jurisdictions where we operate.

Bearing in mind the above and the fact that DPL indemnifies the majority of dentists in the UK, we believe that we are well placed to comment on the current consultation.

Introductory Remarks

DPL has been publicly very critical of the Assessment and Investigating Committee stages of FTP cases since the current rules were introduced in 2006. In our experience both the Assessment stage and IC have been inconsistent in both quality and operation and therefore unfair to both the registrants and the informants. The decision to dispense with a dentally qualified screener has handicapped the early stages of the process and we welcome the introduction of a clinical review before assessment.

We note the decision in *Lutton*¹ and look forward to seeing the benefits for registrants and informants in the following months. DPL welcomes the IC Guidance document and the decision to reduce the number of cases considered by IC at each meeting though we remain concerned that even twenty cases in one day taxes the concentration and consistency of the Panellists.

¹ *Lutton v GDC* [2011] CSIH 62 P1227/10

Therefore, bearing in mind the Law Commission's timely review of Professional Regulation, we are pleased to be able to respond to this consultation. In general terms DPL is supportive of the measures proposed as they should introduce consistency for those amongst our members who find themselves subject to an FTP investigation. We agree with the GDC that these proposals ought to speed up the time each case takes to progress through to a decision on disposal – which is a desirable aim – but these decisions also need to be good decisions. We do have concerns to ensure that whole process is transparent to all parties, asking the GDC to ensure that all guidance documents used by GDC are freely available to all parties.

We wholly endorse the observation that a 'one size fits all' model is irrational, administratively burdensome and unnecessary, and also makes inefficient use of resources not only for the GDC itself but for all stakeholders in the FTP process. It has to date had the perverse effect of deflecting time, energy and resources away from other activities that had the potential to have a far greater impact on public protection and safety.

But we would also sound a note of caution. While a more flexible, tailored approach allows for cases of varying seriousness to be dealt with in ways that are more appropriate to what is actually necessary for the protection of the public, in each case, this does presuppose that a transparent mechanism will exist for deciding which 'track' each case requires. Some of the proposals in this consultation paper provide glimpses of such a mechanism, but in the light of the unfortunate recent history of FTP it will be necessary to win the confidence of all parties that the new direction of travel really is towards 'right touch' regulation and not replacing one unnecessarily complex and unsound set of processes with another. It is in the interests of no party – least of all, the patient – if these revised procedures simply generate the need for more challenges and do not resolve existing concerns over procedural robustness, fairness and transparency.

Consultation Questions

Question One

Do you agree or disagree with our proposal to introduce case examiners into our fitness to practise processes? (Where possible, please provide us with reasons for your answer.)

At the core of the GDC proposal lies the replacement of the Investigating Committee with Case Examiners. This follows the GMC model, which has operated since 2005. This proposal has no doubt been influenced by the recent influx of former GMC personnel into the General Dental Council's administration.

DPL accepts that the proposal to replace the Investigating Committee with Case Examiners is in principle a sensible one, and is arguably necessary if the GDC is to manage its increased caseload. The GDC will then have an effective means of filtering cases and arriving at appropriate and proportionate disposals. The current system in which, effectively, all cases capable of generating fitness to practise concerns are referred to the Investigating Committee, is already unworkable and this has proved to be an inherent and serious flaw in the present arrangements.

Having said that, DPL's agreement with this alternative proposal is contingent upon the GDC providing clarification in three areas:-

- (a) In relation to paragraph 6 of the consultation document, reference is made to an appeal procedure, which is developed in paragraphs 18 – 28. DPL has considerable misgivings about the viability of this appeal procedure as proposed, and we develop our views on this in more detail below.

- (b) In relation to paragraph 7 of the consultation document, reference is made to “*clear guidance and decision making criteria*” which will be issued to the newly appointed Case Examiners. All such guidance and criteria must be published and available to registrants and their defence organisations, not only in order to ensure that they are being properly applied, but also to enable registrants and their professional/legal representatives to target their submissions effectively. This in turn will streamline the process and make challenges less likely/unnecessary.
- (c) The consultation document needs to be expanded so as to make clear the extent to which the Registrant and/or their defence organisation and/or legal representatives will be involved in the investigation process. It should be clarified whether the system of notification of allegations and the right to respond in writing will apply to the Case Examiner decision making process in the same way as it currently applies to the Investigating Committee.
- (d) The success of this proposal will be heavily dependent upon the calibre and approach of the people appointed as case examiners. The confidence of all parties in these appointments will be an absolute pre-requisite.

Question Two

Do you agree or disagree that case examiners should have the same powers as those currently reserved to the Investigating Committee? (Where possible, please provide us with reasons for your answer.)

This proposal relies on the CE following the guidance issued by the GDC. Registrants will accept this change if decisions are properly given, transparent, fair and consistent especially in “disputed facts” cases. This is particularly important if cases are to be re-opened later (Question 5). Having said that, DPL agrees with this proposition subject to clarification of the following issues:

- (a) In relation to paragraph 8(vii) and (viii), the circumstances in which these powers can be exercised need to be expanded, and clearly identified criteria need to be agreed.
- (b) In relation to paragraph 10, there is a power to refer cases to the Investigating Committee where the lay and dentally qualified Case Examiners are unable to agree upon disposal. This follows a parallel procedure in the General Medical Council, which to the best of our knowledge has never been used in its seven years of operation. It may therefore be assumed that properly trained investigators are in fact capable of reaching a consensus view and that this mechanism may therefore be superfluous in practical terms even if not in terms of perception. The danger for the IC Panellists is that if they do not convene regularly, they will very quickly de-skill, introducing inconsistency and errors into its decision making. This runs contrary to the purpose of introducing Case Examiners. Furthermore, if the power to refer in the event of disagreement is retained, it has ramifications for the clarity and operation of the appeals process, as discussed below.
- (c) It would seem sensible in the early stages following such a fundamental change to retain the controls and safeguards that regular IC oversight/scrutiny could provide. However, this could conflict with the option of a formal mechanism of appeal to the IC of a CE decision that is felt to be unsatisfactory/unreasonable.

Question Three

Do you agree or disagree that case examiners should have the power to make decisions on voluntary removals where the registrant is under investigation? (Where possible, please provide us with reasons for your answer.)

In principle it would appear to be sensible to transfer this power from the Registrar to the Case Examiners. However, there is a wider and unresolved debate as to whether there can in fact ever be grounds for refusing an application for voluntary erasure. DPL understands that the GDC is receptive to this concept. It ought to be possible to formulate a declaration for the Registrant to sign, which precludes any possibility of a subsequent application for restoration, which would, for example, include an undertaking not to apply for future restoration, and/or an acceptance that the Council would be excused any need to adduce oral evidence in support of previous allegations prior to voluntary erasure being granted, in the event that the former Registrant did indeed subsequently seek restoration.

As matters stand, the GDC frequently encounters cases where the Registrant seeks voluntary erasure and plainly has no intention of practising again. In spite of that, spurious arguments concerning the public interest in holding a public hearing, the importance of doing so in the maintenance of public trust and confidence, and the risk that evidence of misconduct or poor performance would be unavailable for the purposes of resisting a subsequent application for restoration, collectively result in voluntary erasure being refused. A full Fitness to Practise Committee hearing then follows, with all the waste of time and expense that entails, not to mention the unnecessary public humiliation of a Registrant, who has already decided that his career is at an end.

Far from maintaining public trust and confidence in the profession and the GDC, the net effect is very often precisely the reverse.

Question Four

Do you agree or disagree that case examiners should be given the powers to agree and monitor undertakings? (Where possible, please provide us with reasons for your answer.)

DPL agrees with this proposal, subject to some caveats. We would make the following comments:

- (a) Just as there is a “Bank” of substantive and interim conditions currently in operation for the purposes of Interim Orders Committees and Fitness to Practise Committees, so a “Bank” of undertakings should be published and available to all registrants and their advisers. These published undertakings should be advisory and non-exhaustive, with the possibility of creating and agreeing bespoke undertakings, where appropriate, in the particular circumstances of any given case.
- (b) In relation to paragraph 13 of the consultation paper, it is worth noting that if the potential for undertakings is to be introduced, the GDC will need, in practice, to establish a system of medical supervision for all health-based cases. This would follow the model currently applied by the GMC, and would entail the creation of a panel of GDC-appointed medical supervisors, who would be engaged (and funded) by the GDC in order to review the Registrant and provide periodic reports at intervals agreed in the undertakings. Without this, a system of undertakings will be unworkable in health cases, because it will become contingent upon the Registrant being able to secure the co-operation of, for example, his treating physician or psychiatrist. This is a frequently encountered problem within the context of interim orders in health cases. Difficulties arise when:

- (i) the Registrant's treating psychiatrist sees any supervisory duty to the GDC as incompatible with his therapeutic responsibilities to his patient; and or
- (ii) the treating physician/psychiatrist comes to the conclusion that there is no clinical need for continued contact with the Registrant, thereby forcing the Registrant to fund continued supervision on a private basis in order to comply with the undertakings he has agreed.

The transfer of medical supervision to a GDC-appointed doctor removes these fundamental obstacles, and at the same time renders undertakings a more attractive and feasible disposal.

- (c) We can foresee situations where CEs may not have sufficient knowledge and awareness of a particular area of dental practice, to be in a position to agree and monitor undertakings. Indeed, in other jurisdictions we have encountered well-intentioned undertakings being shown to be completely unworkable. Someone with a closer and better practical knowledge of the specific work setting would have anticipated this.

Question Five

Do you agree or disagree that we should add the power to re-open closed cases to our legislation? (Where possible, please provide us with reasons for your answer.)

Please see the answer to Q6 below.

Question Six

Do you agree or disagree that three years is a reasonable time limit to impose for the re-opening of cases? (Where possible, please provide us with reasons for your answer.)

DPL welcomes the recent IC Guidance which sets out the "Realistic Prospect" test for decision making within FTP. However when considering the threshold for re-opening cases, we are concerned that many cases which pre-date the "Realistic Prospect" test may be dragged back into the spotlight. In many of these cases the factual matrix was disputed, and with the passage of time the prospect of the chances of a fair investigation and analysis of the case, in the face of dimming memory, reduces. When the initial soundings for this consultation were taken the "Realistic Prospect" test had only just been introduced and the GDC was proposing a five year window for re-opening cases. We proposed reducing that to 36 months. For the reasons set out below, having reflected on the more detailed proposals, we think even 36 months may be too long.

If the "realistic prospect" test has been properly applied, then any case that has been closed with a letter of advice or a warning (published or unpublished), has been found to be not capable of amounting to an impairment of the Registrant's fitness to practise. Consequently, it is very difficult to justify re-opening that case simply because a further complaint has been received within a stipulated period of time, particularly if the maximum period within which it can be re-opened is going to be as long as three years. At the moment – and we see no reason to change the current position – closed FTP cases are considered at the disposal stage of a substantive hearing by a Practice Committee. Provided that the decision letter has been properly written, there should be no need to formally reopen a case. Leaving open such a possibility simply as a device for remedying previous failures and omissions is inappropriate.

In summary then, we do not think this proposal should be agreed to, without substantial qualification, based upon the following:

- (a) The period of three years that is proposed is too long in any event, and should be much shorter, for example, 12 months, or in the case of published warnings, the duration of the publication period itself.
- (b) There should be a requirement for a demonstrable factual nexus between the new case and the case that it is proposed should be re-opened.
- (c) A single further complaint would not generally be sufficient to suggest performance based impairment, and there should instead be evidence of a continuing and persistent performance failure, before re-opening is permitted.
- (d) The ability to generate the re-opening of a previously closed case would be open to abuse by vexatious informants – whether members of the public or other registrants.

In short therefore, the GDC should be asked to augment the consultation so as to stipulate precise criteria that must be satisfied before a closed case can be re-opened.

Question Seven

Do you agree or disagree that case examiners should be able to refer cases to the Investigating Committee? (Where possible, please provide us with reasons for your answer.)

As indicated earlier, if the GMC model is followed, this requirement may ultimately prove to be superfluous although retaining this option may be helpful for a limited initial period while the new system is bedding itself down – especially if the only available appeals mechanism is by way of Judicial Review (see response to Q8-11). Taking the long view and bearing in mind the approach the Law Commissioners are discussing, (a single Act and each Council adopting a similar procedure for FTP), it makes sense for the GDC to reconsider this proposal completely in the context of what it is trying to achieve.

As the consultation paper is presently framed, paragraph 16 refers to this option being available in complex or novel cases. If the Case Examiners are properly and appropriately trained, this scenario should easily be overcome, and there is no obvious reason why a Committee comprising several dentally-qualified and lay members should be any better placed to reach an informed decision than properly trained dental and lay Case Examiners. It may be an unnecessary complication to the proposal notwithstanding the limited support DPL has given the proposal for a specific, initial purpose. It also has ramifications for questions 8 - 11 below.

Question Eight

Do you agree or disagree that Option A is an appropriate mechanism for challenging decisions by the case examiners and the Investigating Committee? (Where possible, please provide us with reasons for your answer.)

Please see the answer to Q11.

Question Nine

Do you agree or disagree that Option B is an appropriate mechanism for challenging decisions by the case examiners and the Investigating Committee? (Where possible, please provide us with reasons for your answer.)

Please see the answer to Q11.

Question Ten

Do you agree or disagree that Option C is an appropriate mechanism for challenging decisions by the case examiners and the Investigating Committee? (Where possible, please provide us with reasons for your answer.)

Please see the answer to Q11.

Question Eleven

Do you agree or disagree that the Registrar should be able to make decisions on appeals made at this stage in our processes? (Where possible, please provide us with reasons for your answer.)

DPL has taken Q8-11 together.

This section of the consultation puts forward three options for an appeals process in respect of decisions taken by the newly created Case Examiners. This particular section of the consultation paper is confusing and DPL does not believe that in its present format it would operate effectively. It needs to be read against the backdrop of Section 27A(8) of the Dentists Act 1984, which sets up a limited review procedure for decisions of the Investigating Committee.

As matters stand, there is no appeal mechanism in relation to case closure or the issue of a letter of advice, or a published/unpublished warning, save for judicial review. Judicial review is available as a remedy to the complainant, to the Registrant and, theoretically at least, to the GDC itself. Section 27A(8) creates a review power solely in relation to cases referred to a Fitness to Practise Panel. Typically, it is used when the GDC has decided that the inquiry should be cancelled, although more recently, registrants have been encouraged to use this facility, where substantial evidence of remediation becomes available between the Investigating Committee referral and the Fitness to Practise Committee hearing.

Paragraph 17 refers to the power to refer to the Investigating Committee in complex or novel cases. It does not mention referral in the event of disagreement between the Case Examiners. However, for the reasons set out above, both mechanisms may be superfluous.

Paragraph 22 – It is agreed that Judicial Review should (and indeed must) be retained as a challenge of last resort, but DPL feels strongly that it is in the interests of the GDC, complainants and registrants alike to have a cheaper, faster, and more effective system of challenging decisions. Judicial Review is expensive, and the Administrative Court has repeatedly stated its reluctance to interfere with the decisions of regulatory bodies. Option A is therefore unattractive.

Option B

This is presumed to be the option that the GDC is seeking to promote in the consultation paper, given the attention it receives.

DPL believes that the GDC should be encouraged to differentiate between the need for an appeal mechanism for registrants (who have received an advisory letter, or a warning) on the one hand, and on the other hand a complainant who is dissatisfied with the disposal and closure of the case, or who feels that the issue of an advisory letter/warning represents an unduly lenient disposal.

In order to reduce the need for and incidence of Judicial Review, and in order to provide registrants with a means of challenging disputed warnings or advisory letters, a statutory appeal mechanism is highly desirable and should be implemented. However, we suggest that this should more closely follow the GMC model, and that the appeal should lie from the Case Examiners to the Investigating Committee. If this is implemented, the power to refer to the Investigating Committee in complex cases, or when the Case Examiners are unable to agree between themselves as to disposal, would be rendered superfluous. There are some merits in the GDC considering the introduction of a disincentive in order to discourage registrants from appealing on slender grounds to the Investigating Committee – otherwise all registrants who receive a warning will feel they have nothing to lose by exercising their right of appeal. There are two ways of accomplishing this (one subtle, and one less so):

- (i) The full texts of decisions of the Investigating Committee could be published on the GDC's website, irrespective of whether the outcome was favourable or unfavourable to the Registrant who has exercised his right of appeal;
- (ii) The appeal could carry the risk of a referral to a Fitness to Practise Committee, if the Investigating Committee, on appeal, consider that the Case Examiners were wrong in their original view that the allegation was incapable of amounting to an impairment of the Registrant's fitness to practise. The Registrant would therefore be forced to evaluate the risks of appealing a warning or advisory letter, and would have an active interest in such a decision.

As the consultation paper stands at present, the GDC is suggesting that all appeals should lie to the Registrar. It correctly identifies that this would produce certain difficulties (particularly for appeals initiated by the Registrar!), and it is for that reason we would suggest that the Registrant's right of appeal should lie not to the Registrar, but to the Investigating Committee, following the GMC's model, and with the checks and balances set out above.

A different approach should be taken for challenges brought by the complainant/informant. As an alternative to the only available current remedy of judicial review, it would be appropriate to introduce an appeal procedure based upon the GMC model. The dissatisfied complainant in these circumstances would not have received an adverse determination in the form of a warning or advisory letter, and consequently their position is very different. We would suggest a two-stage process:

- (i) The complainant would need to satisfy the Registrar of the criteria currently set out in paragraph 26 of the consultation paper, that is to say:
 - (a) there had been a material error by the Case Examiners; or
 - (b) new information had come to light which had it been considered at the time, could (not would) have resulted in a different decision being made; and
 - (c) reviewing the decision would be in the public interest.

Note: (a) and (b) are alternatives, whereas (c) must be present in all cases.

- (ii) If the Registrar agrees that the dissatisfied complainant has fulfilled the criteria above, then he/she can refer the matter to the Investigating Committee for re-determination. The Registrar would have the power to direct further investigation prior to the Investigating Committee hearing, and the Registrant and informant would have the right to make further written representations.

Unlike the GMC model, we would suggest that the Investigating Committee in these circumstances should determine the case on the papers, and that there should be no facility for an oral hearing, as experience has shown this adds nothing to the process.

It would be wrong in our view to allow complainants/informants an automatic appeal simply on the basis that the closure of the case, or its disposal with an advisory letter or warning, was felt by him to be insufficient. If that was the case, most if not all, complainants would exercise this right and the process would become extremely protracted. Many informants commence a complaint to the GDC as a precursor to, or in parallel with, civil litigation against the Registrant, and would therefore inevitably appeal any decision by the Case Examiners that was favourable to the Registrant. Consequently, whilst it might appear superficially favourable to the Registrant to provide a greater scope of appeal than that conferred upon the complainant/informant, in real terms it makes sense to do so.

Question Twelve

Do you agree or disagree that we have identified the key concerns relating to our proposals for change? (Where possible, please provide us with reasons for your answer.)

DPL has no additional comments.

Question Thirteen

Do you have any other comments about the proposals outlined in our consultation document?

Any change in procedures of this nature will invite comparisons with the existing (and previous) systems. We would emphasise the need – especially for, but not limited to, the transitional period – for absolute transparency and openness regarding how and why decisions have been reached. Paragraph 7 of the GDC's consultation paper suggests that this would be the case for the CEs, and if implemented across the whole of the FTP this would be an important step forward. The greatest risk of the move to the case examiner model is that of increasingly subjective decisions taken from a narrower base of experience and knowledge.

Further Information

DPL would welcome an opportunity to discuss our comments in more detail and would be happy to make ourselves available for as much time as necessary to make any changes a success. If I can be of any further assistance, please would you contact Dental Protection's Operations Manager Fenella Barnes via email. Her email address is fenella.barnes@mps.org.uk

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