

**EXPLANATORY MEMORANDUM TO
THE GENERAL OPTICAL COUNCIL (FITNESS TO PRACTISE)
RULES ORDER OF COUNCIL 2013**

2013 No. 2537

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Rules scheduled to this Order make provision for revised procedures to be followed in relation to fitness to practise proceedings brought under the Opticians Act 1989 (“the Act”) against a registered optometrist, a registered dispensing optician or a business registrant of the General Optical Council (“the GOC”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

This Order approves the General Optical Council (Fitness to Practise) Rules 2013 which were made by the General Optical Council at its meeting on 8th August 2013.

4.1 These Rules replace the General Optical Council (Fitness to Practise) Rules 2005 (“the 2005 Rules”) as scheduled to S.I. 2005/1475. The rules reflect procedural and policy changes to the GOC’s fitness to practise processes. They include provisions relating to the transitional arrangements to be applied to allegations of impairment of fitness to practise which are in progress before the GOC under the 2005 Rules as at the commencement date of this Instrument.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The General Optical Council is the independent regulator for optometrists and dispensing opticians in the United Kingdom. Its statutory purpose is to promote high standards of professional education, conduct and performance among registrants and its main objective in exercising those of its functions as affect the health and safety of members of the public is to protect, promote and maintain their health and safety. This Order relates to its procedures for regulating the fitness to practise of registrants.

7.2 These Rules build upon the provision of the 2005 rules to reflect current good practice and recent developments in professional regulation. By their introduction, the GOC seeks to clarify and improve upon the 2005 Rules and to promote public protection by improving the efficiency and efficacy of the fitness to practise process. The main changes introduced by these Rules are as follows.

The definition of “allegation” - Rule 2(1)

7.3 The definition clarifies that an allegation of impairment of fitness to practise is a single allegation which may be based on any one or more of the grounds set out in section 13D(2) (relating to individual registrants) or section 13D(3) (business registrants) of the Opticians Act 1989. This clarifies that the Fitness to Practise Committee can consider more than one possible ground of alleged impairment within the same hearing and therefore have a full picture of the registrant’s fitness to practise.

Introduction of the case examiners process: Rule 2(1) and Rule 12

7.4 The case examiner mechanism is created by a delegation of the functions of the Investigation Committee under section 13E(1) of the Opticians Act 1989. The case examiners will be appointed as “officers of the Council” and as such, may exercise the functions of the Investigation Committee under section 13D of the Act. The term “case examiner” is defined in Rule 2(1).

7.5 Two case examiners (one professional and one lay) will be able to take most of the decisions taken under the 2005 Rules by the Investigation Committee, including whether an allegation should be referred to the Fitness to Practise Committee. If one or both of the case examiners is of the opinion that the Fitness to Practise Committee should consider making an interim suspension order or an order for interim conditional registration, the case examiner(s) shall direct the Registrar to that effect and the Registrar shall refer the matter the Fitness to Practise Committee for consideration.

7.6 Cases will only be referred to the full Investigation Committee where the case examiners do not agree on whether or not the allegation should be considered by the Fitness to Practise Committee, or where they decide an assessment of the registrant’s health or performance is required. The powers in the Opticians Act 1989 do not permit the case examiners to direct an assessment of the registrant’s health or performance and they must therefore refer the matter to the Investigation Committee for it to direct the assessment.

7.7 The GOC considers that the introduction of the case examiner scheme will reduce the workload of the Investigation Committee and improve the pace and efficiency of the throughput of fitness to practise cases, to the benefit of the public and the registrant.

Initial consideration of allegations by the registrar and referral for consideration of an interim order: Rule 4

7.8 Section 13D(9) of the Opticians Act 1989 provides that the Investigation Committee can refer a matter to the Fitness to Practise Committee for its consideration of whether to make an interim suspension order or an order for interim conditional registration. Using the power in section 13E(1) to delegate the functions of the Investigation Committee to the Registrar, the new Rules provide that the Registrar must initially consider an allegation and must also consider, at this stage, whether or not to refer the matter to the Fitness to Practise Committee for consideration as to whether an interim order should be made. The GOC considers that this change promotes public protection by allowing interim orders to be considered as promptly as possible after receipt of an allegation by the Council, without the need first to refer to the Investigation Committee.

Direct referral of serious criminal convictions to the Fitness to Practise Committee: Rule 4(5)

7.9 Rule 4(5) provides that the registrar must refer an allegation relating to a criminal conviction which has resulted in the registrant receiving a custodial sentence directly to the Fitness to Practise Committee for a hearing, without the need for it to be considered by the case examiners or the Investigation Committee. This allows a serious criminal conviction to be 'fast-tracked' through the process, in order that action in relation to the registrant's registration can be taken swiftly to protect the public and/or the reputation of the profession.

Disclosure and exchange of written observations upon the complaint during the investigation process: Rule 5

7.10 Rule 5 deals with the investigation of an allegation before it is considered by the case examiners or the Investigation Committee, the process for informing the registrant of the allegation and for seeking his or her written representations upon it. The procedure for the exchange and disclosure of comments upon the complaint between the registrant and the maker of the allegation is made clearer in the new rules. While the provision of the 2005 Rules is clear that the registrant must be sent a copy of any written comments from the maker of the allegation on the registrant's response to the allegation, the 2005 Rules make no provision as to whether any further comments submitted by the registrant would be placed before the Investigation Committee when it considered the allegation. The new rules clarify an end point to the comments process, in that rule 5(4) provides that any further comments sent by the registrant will not usually be placed before the case examiners or the Investigation Committee when they consider the allegation, but allows the registrar a discretion to do so in the particular circumstances of any individual case. This provides some clarity for the registrant. The GOC also considered it was in the public interest for the maker of the allegation

usually to have the last word in the comments process. It mitigates against the risk of the registrant providing inappropriate or irrelevant information in the early stages of the investigation and helps with the efficiency of the process.

Assessment of individual registrants: Rules 10 and 11

7.11 Rules 6 and 7 deal with the appointment of assessors by the Investigation Committee and the Fitness to Practice Committee respectively to report to the Committee on the registrant's health or the standard of quality of the registrant's work. Rules 8 and 9 make provision for the notification arrangements and assessment meeting dates.

7.12 Rule 10(2) provides that, where more than one assessor is appointed to report on the standard or quality of a registrant's work, a joint report from the assessors must be prepared. Under Rule 10(3), where more than one assessor is appointed to conduct an assessment of the registrant's health, each assessor must prepare a report.

7.13 Rule 11 deals with failure by a registrant to submit to, or co-operate with, an assessment. Section 23C(3) of the Opticians Act 1989 provides for the committee which directs an assessment to draw such inference in relation to the registrant as seems appropriate to it. Rule 11 now expressly refers to both the Investigation Committee and the Fitness to Practise Committee, rather than only the latter.

The case examiners' powers: Rule 12

7.14 Rule 12 sets out the decisions which the case examiners may make when an allegation is referred to them by the Registrar. Since the case examiners act under the powers delegated to them from the Investigation Committee, they may make decisions under Section 13D of the Opticians Act 1989.

7.15 Rule 12(1) provides that the case examiners may decide either that an allegation ought to be referred to the Fitness to Practise Committee, or that no further action will be taken. If they decide not to refer to the Fitness to Practise Committee, they may also decide that a warning should be given to the Registrant regarding his or her future conduct or performance.

7.16 The case examiners may decide that further investigations should be conducted. If they do so, they must inform and direct the Registrar as to what further investigations are to be undertaken. Further evidence obtained from those investigations must be provided to the Registrant and may be provided to the maker of the allegation. There is a process for the submission of comments upon any further evidence, and for the further evidence and the comments to be provided to the case examiners when they resume their consideration of the allegation.

7.17 Because the powers in the Opticians Act 1989 do not permit the case examiners to order an assessment of a registrant's health or performance, the Rules provide that if the case examiners consider that such an assessment is necessary, they must adjourn their consideration of the allegation and refer it

to the Investigation Committee for it to appoint an assessor and direct an assessment.

7.18 If the registrant co-operates with the assessment, the assessment report will be referred to the case examiners, who will then continue with their consideration of the allegation under Rule 12. Where the registrant does not co-operate with the assessment process, the further consideration of the allegation will continue to be dealt with by the Investigation Committee and the case examiners will take no further part in the consideration of the allegation.

7.19 Rule 12(7) provides that at any stage during their consideration of an allegation, either one of the case examiners may direct the registrar to refer the matter to the Fitness to Practise Committee for consideration of an interim order.

7.20 The GOC considers that this provision, together with the similar power given to the registrar by the new rule 4(2) and to the Investigation Committee by section 13D(9) of the 1989 Act, promotes public protection, since at any stage of the fitness to practise process where it becomes necessary, a registrant may now be referred to the Fitness to Practise Committee for consideration of whether an interim order should be made.

Consideration by the Investigation Committee: Rule 13

7.21 Cases will now only be referred to the Investigation Committee where the case examiners cannot agree as to whether an allegation should be referred to the Fitness to Practise Committee or where the case examiners decide to refer a registrant for an assessment of the registrant's health or quality or standard of the registrant's work (as an assessment must be directed by the Investigation Committee).

7.22 Rule 13(2) provides that, where the registrant co-operates and the assessment takes place, the Investigation Committee will refer the allegation back to the case examiners with the assessment report and the registrant's comments on the report. The case examiners will then resume their consideration under rule 12.

Warnings: Rule 14

7.23 Rule 14 sets out the process for the giving of a warning to the registrant where it is decided that the allegation ought not to be referred to the Fitness to Practise Committee. The case examiners may issue a warning in the same circumstances as the Investigation Committee.

Review of decision not to refer: Rule 15

7.24 The 2005 Rules enable the Investigation Committee to review an earlier decision not to refer an allegation to the Fitness to Practise Committee, but only where it considers that there is new evidence or information which makes such a review necessary for the protection of the public, for the prevention of injustice to the registrant, otherwise in the public interest, or where it receives information indicating that the Council has erred in its

administrative handling of the case and a review is necessary in the public interest.

7.25 The new Rules make two changes: first, the decision to review is now delegated to the case examiners, which will improve the efficiency of the process and reduce the workload of the full Investigation Committee.

7.26 Second, the new Rules introduce a limit of five years, beginning with the date of the letter informing the registrant of the decision, within which a review may take place. There remains a discretion to review a decision after a longer period where the registrar considers the circumstances are exceptional.

7.27 The GOC considers it is appropriate for there to be a restriction on the time period in which a decision not to refer may be reviewed. Five years is considered to be an adequate period of time for any issues likely to justify a review to emerge. As a result of the responses to the GOC's consultation relating to Rule 15, rule 15(6) provides that a decision by the case examiners to review must be unanimous as must a decision on a review of a decision not to refer, failing which the original decision not to refer will stand.

7.28 Rule 15(4) allows the case examiners when reviewing a decision to decide that, where no warning was given to the registrant at the time of the original decision, a warning should now be given, or that a warning given at the time of the original decision should not have been given, and that any record the GOC has of it should be removed. The 2005 Rules did not deal with warnings in this respect.

Termination of referral: Rule 16

7.29 In the new Rules, the case examiners, rather than the Investigation Committee, may terminate a referral of a matter to the Fitness to Practise Committee.

7.30 Where case examiners will review a referral to the Fitness to Practise Committee, it is now expressly provided that the maker of the allegation shall be given an opportunity to submit comments which will be considered by the case examiners. This will ensure that the views of the maker of the allegation will be taken into account before a decision is taken to terminate a referral.

Interim Orders: Part 5, Rules 17-20

7.31 Rules 17 to 19 set out a detailed process for the notification of an interim order hearing and for the procedure for the conduct of Interim Order hearings in Rule 20.

7.32 Rule 20(2) provides that Interim Order hearings shall be held in private, rather than in public. This is more appropriate because at this stage, the Fitness to Practise Committee is not testing the evidence or reaching a final decision on the allegation, but is considering whether an interim restriction of the registrant's right to practise is necessary.

7.33 The GOC considers that public interest in such hearings is satisfied by the publication of information about the interim order, where one is made. Where no interim order is made, it is not appropriate that the matter should be in the public domain.

7.34 Rules 20(3) to (6) set out a similar process to that of other regulators, so that oral evidence is not usually heard at Interim Order hearings. This reflects the different purpose of Interim Order hearings from substantive hearings. However, the new Rules retain a discretion, in rule 20(4), for the Committee to receive oral evidence at an Interim Order hearing if it considers such evidence is desirable to enable it to discharge its functions.

7.35 Rules 20(7) and (8) set out the hearing process in more detail than is provided in the 2005 rules. The GOC believes this will assist all parties and allow the Committee to follow a clear and consistent procedure.

Standard directions for case management and procedural hearings: Part 7

7.36 Part 7 of the Rules deals with the procedures to be followed once an allegation has been referred for consideration by the Fitness to Practise Committee.

7.37 Rule 29 sets out a table of standard procedural directions which will take effect in all cases referred to the Fitness to Practise Committee. The new Rules therefore remove the requirement in the 2005 Rules for a separate procedural hearing to be held in every case. However, rule 30 provides that either the registrant or the GOC's presenting officer may require a procedural hearing to be held.

7.38 The standard directions set out a timetable for the various steps to be taken by both parties in the period leading up to the fitness to practise hearing, including service of each side's evidence, provision of time estimates for the hearing, provision of witness lists, agreement and preparation of document bundles to be used at hearing and identification of agreed witness evidence.

7.39 In addition to removing the automatic requirement for a procedural hearing in every case, the standard directions will also assist in ensuring that the preparations of both parties are thorough and timely. They therefore promote the efficient and effective throughput of cases, whilst retaining flexibility to vary the directions according to the needs of the particular case.

The standard and burden of proof: Rules 38 and 39

7.40 Rule 38 provides that the standard applicable to the proof of any facts alleged by the GOC at substantive hearings is the civil standard. This reflects the change from the criminal standard of proof implemented in 2008 by the General Optical Council (Fitness to Practise) (Amendment in relation to the Standard of Proof) Rules Order of Council 2008, (S.I. 2008/2690) which amended the 2005 Rules.

7.41 Rule 39 expressly provides that the burden of proof of the facts alleged is on the GOC.

Admissibility of evidence: Rule 40

7.42 Rule 40(1) retains the provision in the 2005 Rules that the Fitness to Practise Committee may admit any evidence which it considers fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.

7.43 Rule 40(2) now provides that where the evidence would not be admissible in civil proceedings in England and Wales, the Committee will not admit such evidence unless, on the advice of the legal adviser, they are satisfied that their duty of making due enquiry into the case makes its admission desirable.

7.44 The reference to admissibility on the *civil* rather than the *criminal* basis represents a change from the position in the 2005 Rules, but one which in the GOC's view is appropriate and consistent with the move in healthcare regulatory hearings to the application of the civil standard of proof. Since disciplinary proceedings are by their nature civil in character, it is more appropriate to apply the civil rules of evidence in rule 40(2).

Evidence to prove a criminal conviction: Rule 40(3) and (5)

7.45 The new rule 40(3) provides for a criminal conviction to be proved at a hearing by means of a certificate of conviction signed by an officer of the relevant court. The 2005 Rules did not provide for how a conviction was to be proved.

Evidence to prove a determination of another UK regulatory body: Rule 40(4)

7.46 Rule 40(4) relates to the ground of impairment set out at section 13D(2)(g) of the Opticians Act 1989, a determination of impairment of fitness to practise by another UK regulatory body of a health or social care profession, or by a regulatory body elsewhere to the same effect. The new rule 40(4) provides that production of a certificate signed by an officer of the relevant regulatory body shall be conclusive evidence of the facts found proved in relation to that determination.

7.47 The new rule 40(5) provides that the only means by which a criminal conviction or the determination of another regulatory body may be challenged is by bringing evidence to prove that the person is not the person referred to in the certificate or determination.

7.48 Rules 40(6), (7) and (8) introduce provisions dealing with admissions of facts, the use of copy documents and notices to produce documents, all of which will facilitate the resolution of evidential issues at hearings.

Hearings of the Fitness to Practise Committee: Rule 46

7.49 The Rules introduce a clearer procedure for hearings before the Fitness to Practise Committee than in the 2005 Rules.

7.50 The new Rules set out a detailed procedure for the different stages of the hearing in Rule 46 (2) to (23). Rule 46(1) allows the Fitness to Practise Committee discretion to vary the procedure where appropriate in a particular case. The new Rules provide expressly for submissions of ‘no case to answer’ to be made by the registrant at the close of the GOC’s case (Rule 46(8)), on whether sufficient evidence has been led upon which disputed facts could be found proved and on whether the facts could support a finding of impairment).

7.51 In particular, Rules 46(11)-(17) set out clearly the four stages of the Fitness to Practise Committee’s decision making process in relation to proof of the facts alleged, whether the alleged ground of impairment has been established, whether fitness to practise is found to be impaired and the appropriate sanction. The Fitness to Practise Committee is expressly required to provide reasons for its decisions.

7.52 This process, with its clearly delineated stages, is consistent with current good practice in healthcare regulatory tribunals and brings the GOC’s process into line with that regarded as appropriate by the High Court in recent regulatory case law. It has the practical benefit of providing clarity, certainty and consistency of approach in all cases, for both the parties and the Fitness to Practise Committee.

Power to amend the allegation: Rule 46(20)

7.53 Rule 46(20) permits the Fitness to Practise Committee to amend an allegation where they consider it appropriate, rather than only upon the application of the GOC’s presenting officer. Such a provision is necessary, as it permits the Committee, in a case where it becomes apparent during the hearing that additional or different allegations should be addressed, to consider amending the allegation in the Notice of Inquiry.

Notification of outcomes to a registrant’s current employer: Rule 51

7.54 Rule 51 provides that the Council may disclose the outcomes of investigations and hearings to the registrant’s current employer, if known to the registrar.

7.55 Since Section 13C(1) of the Opticians Act 1989 requires the GOC to notify the registrant’s current employer when an allegation is received, the GOC considers it is appropriate for the current employer also to be informed of the outcome of the matter. To do so is also consistent with the public interest and with Section 13C(3) of the Act, which permits the GOC to disclose to any person any information relating to a registrant’s fitness to practise where it considers it in the public interest to do so.

7.56 For similar reasons, the notification of outcomes to the current employer is expressly provided for Rule 15(5)(c) (reviews of decisions not to refer to the Fitness to Practise Committee) and Rule 16(5)(c) (termination of referrals).

Costs and expenses: Rule 52

7.57 The 2005 Rules provide for the Fitness to Practise Committee to assess summarily the costs of any party to the proceedings and to order a party to pay all or part of the costs or expenses of another party.

7.58 The new Rules clarify that costs awards may be considered at substantive hearings and review hearings, but not at initial interim order hearings, or interim order review hearings. They also set out a procedure to be followed.

8. Consultation outcome

8.1 A public consultation took place in accordance with terms of the GOC's Consultation Framework for 12 weeks between 14 February and 29 April 2011. The consultation was issued to patients, carers, the public and their representative groups, voluntary organisations and charities, seldom-heard groups and their representative organisations, registrants (including students), potential registrants and their professional and representative organisations, optical bodies corporate and employers, healthcare organisations, education providers, other regulators, government and staff.

8.2 The consultation was publicised on the GOC's website at <http://www.optical.org/en/get-involved/consultations/past-consultations.cfm#2011>.

8.3 The GOC received responses on behalf of FODO (Federation of Ophthalmic Dispensing Opticians), ABDO (Association of British Dispensing Opticians), AOP (Association of Optometrists), CHRE (Council for Healthcare Regulatory Excellence), OHPA (Office of the Health Professions Adjudicator), the GOC's Investigation Committee and 9 individuals.

8.4 The responses were mainly in favour of the proposed changes, other than in respect of four matters.

8.5 The first issue, raised by GOC's Investigation Committee and the AOP, raised objections to the case examiner proposal. The Investigation Committee was concerned about the potential quality of decision making by two case examiners, as opposed to the full Investigation Committee. The AOP objected to the two case examiners having the power to issue a warning.

8.6 The second issue concerned the proposed time limit (five years or longer in exceptional circumstances) within which a decision not to refer an allegation to the Fitness to Practise Committee could be reviewed. FODO argued that a one year period would be fairer to the registrant and would adequately protect the public.

8.7 The third issue related to the introduction of a provision that the Fitness to Practise Committee may order a party to a hearing to pay all or part of the other's costs. All the professional bodies were opposed to the imposition of

such an order against a registrant found unfit to practise. They were of the view that there would be no savings to registrants since insurance premiums may have to be increased.

8.8 The fourth issue related to the proposal for the GOC's registrar to be able to re-open cases where fresh evidence is received and to fast track the most serious cases (convictions) directly to the Fitness to Practise Committee. The professional bodies objected to these powers being exercised by one individual.

8.9 The GOC considered the objections and took account of the views of the Department of Health, which were supportive of the rules as drafted. It decided to accept the objections relating to rule 15 and proposed amending this rule so that two case examiners, rather than the registrar, should decide whether to re-open a decision not to refer under rule 15. Otherwise, the GOC decided to proceed with the rules as drafted.

8.10 The proposed further amendment to draft rule 15 was consulted upon between 31 January 2012 and 30 April 2012. This consultation was limited to those who had submitted a response to the first consultation. Two responses were received, one of which was in favour of the revision. The other, from the Optical Confederation, was supportive of the proposal that a body other than the registrar would conduct reviews of a decision not to refer, although it thought the power should lie with the Investigation Committee pointing out that the Rules did not require the Case Examiners to reach a unanimous decision in relation to the review under rule 15. A further amendment was made to the Rules to require the said unanimity.

9. Guidance

9.1 The Department of Health has not issued any guidance in relation to this Order. However, the GOC intends to provide guidance for registrants and other users of the Order.

10. Impact

10.1 The new measures are designed for greater regulatory efficiency and effectiveness with no adverse financial impact on registrants. In fact, in some cases where there has been an interim order and the case examiners have decided to close the case, practitioners will benefit from being able to work again sooner without restriction.

10.2. For the GOC, the cost of recruiting case examiners will be off-set by fewer meetings of the Investigation Committee. The greatest benefit will be delivering better regulation through better performance.

11. Regulating small business

11.1 The legislation applies to small businesses, however, the new measures are designed to make the fitness to practise process more efficient through faster decision making at the early screening stages. Registrants will therefore have a shorter wait for the outcomes of cases, which will have a positive effect on those running small businesses where a faster decision to take no action will enable them to return to practise sooner.

12. Monitoring & review

12.1 The intended outcome of the Order is to provide greater clarity, fairness and efficiency for the parties to the GOC's Fitness to Practise Procedures and to further promote the GOC's commitment to protect and maintain the health and wellbeing of persons using the services of GOC registrants. The impact of the Order will be subject to on-going audit through the GOC's Quality Assurance Process.

13. Contact

13.1 David M. Smith at the Department of Health (telephone: **01132546001** or email: dave.smith@dh.gsi.gov.uk) can answer any queries regarding the instrument.