EXPLANATORY MEMORANDUM TO

THE GENERAL DENTAL COUNCIL (FITNESS TO PRACTISE ETC.) ORDER

2015 No. [XXXX]

1. Introduction

1.1 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 This Order amends the Dentists Act 1984 to make changes to the General Dental Council's (GDC) investigation stage fitness to practise processes. The fitness to practise processes are the procedures through which the regulator deals with allegations that a registrant's continuing practice presents an unacceptable risk to the public or otherwise renders them unfit to be a registered member of the dental profession. The proposed amendments are designed to remove the inflexibility of the legislation in this area, leading to the swifter resolution of fitness to practise complaints, by improving the efficiency of the GDC's processes, whilst enhancing patient protection and public confidence in dental regulation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments / the Select Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 The GDC, established through the Dentists Act 1984, regulates dentists and dental care professionals (clinical dental technicians, dental hygienists, dental nurses, dental technicians, dental therapists and orthodontic therapists) working in the United Kingdom. The General Dental Council (Fitness to Practise etc.) Order 2015 amends this Act to make changes to the way in which the GDC operates its fitness to practise procedures.

4.2 Once in force the GDC will be provided with the powers to make rules, approved through the Privy Council in respect of certain of these proposed changes. The GDC will amend the GDC (Fitness to Practise) Rules 2006 (set out as a Schedule to S.I. 2006/1663) ("the Fitness to Practise Rules") using these powers. The Fitness to Practise Amendment Rules, on which the GDC have consulted, will be laid in Parliament and be accompanied by a separate explanatory memorandum.

5. Extent and Territorial Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Care Quality has made the following statement regarding Human Rights:

In my view the provisions of the General Dental Council (Fitness to Practise etc.) Order 2015 are compatible with the Convention rights.

7. Policy background

What is being done and why

7.1 The UK Law Commissions undertook a review of professional regulation legislation and found it to be inconsistent, fragmented and inflexible. Arising from the review it was identified that there are a small number of areas where priority changes are required. In addition the GDC has also seen a 110% increase in its fitness to practise complaints case load within the last 3 years, putting a significant strain on the GDC's resources. To address this, and to ensure a satisfactory level of public protection, the GDC need to be able to expedite complaints received to prevent an unmanageable backlog of cases and ensure that public protection is maintained.

7.2 The existing legislation also sometimes makes it difficult for the GDC to act promptly where a complaint has been raised about a registrant's practice which presents a risk to patient safety. In order to maintain the correct levels of patient safety, ensure continuing confidence in dental regulation and to generate necessary efficiency savings, changes are required to the GDC's early investigatory stage fitness to practise processes.

7.3 Whilst it has already made a number of changes to its procedures, the GDC needs legislative change to further improve the efficiency and effectiveness of its early investigation processes.

7.4 Therefore the Department of Health intends to amend the Dentists Act 1984 in the following ways:

Introduce a power to delegate Investigating Committee powers to case examiners

7.5 The GDC's current legislative framework requires that, following the initial consideration of a complaint, if that complaint falls within the GDC's remit it must be considered by an Investigating Committee, meaning a panel must be convened for every case that reaches this stage. This can take some time given the Committee members are independent contractors who have other commitments. At present there are no powers within the legislation allowing the GDC to delegate the functions of the Investigating Committee. The Department therefore proposes to make an amendment to allow the GDC to make rules to delegate the decision-making functions of the Investigating Committee to officers of the GDC, known as case examiners.

7.6 Case examiners (one lay and one registered dentist or dental care professional) will consider allegations of impairment of fitness to practise that are referred to them by the registrar and will make the decision about how a case should proceed at the end of the investigation stage of fitness to practise procedures. It is anticipated this will lead to the swifter resolution of fitness to practise cases, as a full Investigating Committee will not need to be convened to consider the allegations, as well as achieve a greater degree of consistency in decision-making as the case examiners will deal with a greater number of cases on a regular basis than individual members of the

Investigating Committee do. The Investigating Committee will continue to have a role in the investigation stage of the process in that, if the case examiners fail to agree on a determination in respect of an allegation, they must refer the allegation for consideration by the Investigating Committee.

7.7 The General Medical Council and General Optical Council already use case examiners and these have recently been introduced for the Nursing and Midwifery Council. All of whom have seen a positive impact from the introduction of this measure on the speed of completion of fitness to practise cases and thereby also improving public protection.

Introduce the power for the Investigating Committee (and case examiners) to agree undertakings with registrants

7.8 Within the current system the Investigating Committee can determine that an allegation ought not to be considered by a Practice Committee and, if it so determines, it may also decide to issue a warning or advice to the registrant, or it can determine that an allegation ought to be considered by a Practice Committee.

7.9 The power introduced by this Order will mean that where the Investigating Committee and (using the new power to make rules delegating Investigating Committee functions) case examiners determine that an allegation ought to be considered by a Practice Committee, in appropriate cases, it may agree undertakings with the registrant instead of referring the allegation to a Practice Committee. For example, if it is alleged that a registrant is deficient in a particular clinical skill, an undertaking to complete specific retraining could be agreed. The new power will mean that the Investigating Committee and case examiners will be able to invite a registrant to comply with undertakings in cases where it considers that, if certain conditions were agreed with the registrant, it would be unnecessary for an allegation to proceed to a full fitness to practise hearing before a Practice Committee.

7.10 Therefore, some types of cases which are currently referred to a Practice Committee may not need to be, if it is determined that the agreement of undertakings would lead to the resolution of a case in a way which is sufficient to protect patients, the public or the registrant and maintain public confidence in the profession.

7.11 Undertakings will only be used where they are considered to satisfactorily protect the public and address the concern about the professional. The Fitness to Practise Amendment Rules will provide that the Investigating Committee cannot invite the registrant to comply with undertakings where there is a realistic prospect that, if the allegation were referred to a Practice Committee, the registrant's name would be erased from the register. The Fitness to Practise Amendment rules will provide for monitoring compliance with undertakings and the consequences of a breach of undertakings. These rules will be accompanied by a separate explanatory memorandum.

The introduction of a rule making power to enable i) the review of cases closed at the end of the investigation stage and ii) to review a determination that an allegation does not amount to an allegation of impairment of fitness to practise

7.12 At present if a case is closed at the investigatory stage, the case cannot be re-opened even if the decision was thought to be materially flawed or if new information comes to light which suggests that consideration by a Practice Committee might be necessary. This Order introduces a rule-making power to enable the registrar to

review a determination by the Investigating Committee, or case examiners, that an allegation ought not to be considered by a Practice Committee. Rules will specify the circumstances in which a review can take place: these will be on the grounds of material error, or new information coming to light which could have made a difference to the outcome of the case and if the review is necessary for the protection of the public or is otherwise necessary in the public interest. The rules will also provide that, except in exceptional circumstances, such a review must take place within 2 years from the date of the determination that an allegation ought not to be considered by a Practice Committee.

7.13 This measure will improve patient safety and will allow the GDC to ensure all allegations are addressed in the most appropriate way. If a case was closed and upon review it was determined that it possibly should be referred to a Practice Committee the allegation can be referred back to the Investigating Committee or case examiners for further consideration and further action, which could mean preventing someone from practising, if necessary.

7.14 The Order also introduces a power enabling the registrar to review a decision that an allegation received by the GDC does not amount to an allegation of impairment of fitness to practise (and therefore need not be referred to the Investigating Committee). The Fitness to Practise Amendment Rules will provide the circumstances in which this power can be exercised (which will be the same as those in respect of the review of a case closed at the investigation stage) and will also be subject to the 2 year time limit.

Introduction of the ability to review a decision to issue a warning to a registrant following a fitness to practise investigation

7.15 The Order amends the Dentists Act 1984 to allow a registrant who has been issued with a warning following a fitness to practise investigation, to request a review of the warning within 2 years of the decision to issue that warning. There are no such powers currently and if a registrant wishes to challenge the decision to issue a warning, they must do so by means of judicial review proceedings. This is onerous and this new provision will help to ensure the overall fairness of the process. The Fitness to Practise Amendment Rules will also provide that, where the Investigating Committee (or case examiners) is minded to give a warning, the registrant should be notified of such and be invited to make representations in that regard.

Amendments to close potential gaps in the legislation and thereby ensure registrants can be referred to an Interim Orders Committee at any time during the fitness to practise process

7.16 An Interim Orders Committee determines whether interim restrictions need to be placed on a registrant's practice while allegations are being investigated. This Interim Orders Committee may impose conditions on or suspend the registrant while the matter is investigated. It does not make findings of fact on an allegation but by making an interim suspension order or an order for interim conditional registration during the fitness to practise process it ensures those who are potentially unsafe are limited in their practice while enquiries and investigations are made.

7.17 It is arguable that under current provisions relating to interim orders, after the registrar has referred an allegation to the Investigating Committee, the registrar can no longer refer the allegation to the Interim Orders Committee to consider whether an interim order is necessary. So, if the allegation has been referred to the Investigating

Committee but that Committee has yet to convene to consider the allegation, and new information is received which suggests that an interim order may be necessary, it is arguable that the registrar cannot act on this and refer to the Interim Orders Committee. A similar situation arises in respect of the Investigating Committee and its powers to refer to the Interim Orders Committee after it has referred an allegation to a Practice Committee. The amendments to the Dentists Act 1984 introduced by this Order will close a potential gap in the legislation and maintain public protection and confidence throughout the entire fitness to practise process by guaranteeing appropriate measures can be taken where necessary to safeguard patients and the public and ensure they are not exposed to inappropriate practice.

7.18 These proposed amendments are designed to remove the inflexibility of the legislation surrounding the early investigation stages within the fitness to practise process, allowing the GDC to improve the efficiency of its processes. These measures should also lead to the swifter resolution of fitness to practise complaints, as they will improve the efficiency of the GDC's processes, whilst also enhancing patient protection and public confidence in dental regulation.

Consolidation

7.19 The Law Commissions of England and Wales, Scotland and Northern Ireland made 125 recommendations to reform the regulation of health and (in England) social care professionals in April 2014. One of the recommendations made by the Law Commissions' was to consolidate all of the legislation governing the health and (in England) social care professional regulators including the General Dental Council. Department of Health Ministers are currently considering how best to take forward these recommendations.

7.20 In the interim the GDC has seen a 110% increase in its fitness to practise complaints case load over 3 years, putting a significant strain on the GDC's resources. To counterbalance this, and to ensure a satisfactory level of public protection, the GDC need to be able to deal with complaints more efficiently to prevent an unmanageable backlog of cases and ensure that public protection is maintained.

7.21 It has, therefore, been identified that in order to maintain the correct levels of patient safety, confidence in dental regulation and to generate necessary efficiency savings, changes need to be made to the GDC's early investigation stage fitness to practise processes.

8. Consultation outcome

8.1 The Government undertook a public consultation on the measures contained within this Order for a period of 8 weeks, from 26 September – 21 November 2014. Respondents were given the opportunity to comment via the Department's gov.uk website, through Citizen Space (a web-based consultation and public engagement device) and in writing.

8.2 An 8 week consultation was considered proportionate given the scale and relatively uncontroversial nature of the proposals. It took into account the specialised subject area discussed and the low response rate of previous consultations of a similar nature operated by the Department. The proposals also have the full support of the GDC, who will be responsible for operating the revised system. In addition, the Department alerted interested parties to the consultation's launch i.e. relevant Royal Colleges,

patient representative groups, the professional regulatory bodies, trades unions and defence organisations and the devolved administrations.

8.3 The consultation document provided an overview of the current system, a rationale about why the changes are deemed necessary, a description of the changes and their intended effects. The questions went on to focus on whether the respondents agreed with the proposed measures, whether there are likely to be any costs or impacts on the protected groups and whether there were any general comments on the draft Order.

8.4 The Department of Health received 43 responses in total. There were 23 from individuals (mainly identifying themselves as healthcare professionals) and 20 from organisations including: the Professional Standards Authority for Health and Social Care; the GDC; the British Association of Dental Nurses; Dental Faculty - the Royal College of Surgeons Edinburgh; and the Medical Protection Society – Dental Protection.

8.5 The vast majority of responses were supportive of the proposals and agreed that the measures would improve the efficiency and proportionality of the GDC's fitness to practise processes and would also improve patient safety. Where concerns have been raised these have been addressed within the consultation response report, or through separate correspondence.

8.6 Following analysis of the consultation responses received and views raised, we are of the opinion that subject to minor and technical changes to the draft Order (none of which alter the original policy intentions) the proposed amendments should be proceeded with. In summary the changes made following consultation were:

i. The Investigating Committee / case examiners will now need to determine that a case ought to be considered by a Practice Committee but that undertakings can be agreed instead. The wording of the draft Order that was consulted on would mean that for undertakings to be agreed a determination would need to be made that the case did not need to be considered by the Practice Committee (the rationale being that the Investigating Committee/case examiners could instead deal with the issue by means of undertakings. The GDC agree with this change.

ii. During the consultation exercise concerns were raised about the provision enabling the registrar to review a decision not to refer an allegation to the Investigating Committee/case examiners. This was because the drafting (in which reference was made to another provision of the Act) would have allowed the Registrar to review a decision that an allegation amounted to an allegation of impairment of fitness to practise (and therefore should be considered by the Investigating Committee/case examiners). This was not the policy intention and so the drafting has been amended to allow the Registrar to review decisions not to refer to the Investigating Committee/case examiners only.

8.7 A full Government consultation response report has been published at: https://www.gov.uk/government/consultations/measures-to-improve-the-gdcs-processes-on-fitness-to-practice.

9. Guidance

9.1 The Department does not intend to publish any guidance in respect of this SI. However, the GDC will publish guidance on its website including an explanation

of undertakings and when they might be agreed and of the role the case examiners will have within the GDC's regulatory regime. Guidance will be drafted specifically for the case examiners explaining their functions and role in greater detail (these guidance documents will also be published). Information will be provided to those registrants who are given a warning following an investigation on the procedure for seeking a review. Information about the review process as it applies at other decision points will be provided to both complainants and registrants.

10. Impact

10.1 The impact on business is expected to be beneficial. An impact assessment has been carried out and we anticipate an equivalent annual net cost to business of approximately -£2m per annum (i.e. a benefit) to be generated by the introduction of this Order. This will result from the improvements to the efficiency of the GDC's fitness to practise proceedings, and thereby reduce operating costs, resulting from this SI.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the legislation.gov.uk website.

11. Regulating small business

11.1 The legislation applies to activities that are undertaken by small businesses.

11.2 The impacts to business relate to the impacts on individual dental practitioners who practise mainly in the private sector. The measure will enable the GDC to amend the administrative procedures of their fitness to practise activities. If the GDC choose to exercise these powers, there may be second order impacts passed through to registrants (as the GDC is primarily funded by registrants). This would either be in the form of the fees charged or swifter resolution of fitness to practise proceedings. In both cases, the impact would be on the individual rather than the business they work for. Exempting small and micro businesses would therefore, in this context, entirely negate the intention of the measure to improve the GDC's fitness to practise proceedings.

12. Monitoring & review

12.1 The duty under section 28 of the Small Business, Enterprise and Employment Act 2015, for a Minister of the Crown to make provision for review in secondary legislation, does not apply in respect of this Order which is an Order made by Her Majesty in Council under the powers conferred by section 60 Health Act 1999.

12.2 The Professional Standards Authority for Health and Social Care (PSA) conducts annual performance reviews of each of the health and care professional regulatory bodies. It is anticipated the PSA, when performing such reviews, will take into account the changes and provide insight into the establishment of these measures. The Department will also keep these measures in view as part of its role in developing and maintaining the professional regulatory landscape.

13. Contact

13.1 Kelly Craig at the Department of Health, Tel: 0113 254 5249 or email: kelly.craig@dh.gsi.gov.uk, can answer any queries regarding the instrument.