EXPLANATORY MEMORANDUM TO

THE GENERAL DENTAL COUNCIL (FITNESS TO PRACTISE) (AMENDMENT) RULES ORDER OF COUNCIL 2016

2016 No. 902

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This Order approves the General Dental Council (Fitness to Practise)(Amendment) Rules 2016 ("the 2016 Rules"), which amend the General Dental Council (Fitness to Practise) Rules 2006, which are set out in the Schedule to S.I. 2006/1663 ("the Fitness to Practise Rules").

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Some of the powers for these proposed changes to the Fitness to Practise Rules were inserted to the Dentists Act 1984 ("the Act") by the General Dental Council (Fitness to Practise etc.) Order 2016 (S.I. 2016/496) ("the 2016 Order"), which came into force on 13th April 2016.

Other matters of interest to the House of Commons

3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

4.1 The Act empowers the GDC to make Rules in relation to fitness to practise, education, registration and registration appeals. The Act provides that the GDC should consult representatives of any groups of persons it considers appropriate, and any groups of persons who appear likely to be affected by any proposed changes to those Rules. Under section 50C(2) and (3) of the Act, these rules cannot come into force until approved by an order of the Privy Council.

4.2 The Rules scheduled to this Order make amendments to the Fitness to Practise Rules.

5. Extent and Territorial Application

5.1 This instrument extends to all of the United Kingdom (UK).

5.2 This instrument applies to all of the UK.

6. European Convention on Human Rights

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

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 were required to the Act in order to improve the GDC's fitness to practise procedures. In addition the GDC has seen a 110% increase in its fitness to practise complaints over three years, putting a significant strain on its 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 Therefore Parliament amended the Act by means of the 2016 Order, to provide the GDC with new powers in respect of its fitness to practise functions; some of the proposed amendments to the Fitness to Practise Rules by the 2016 Rules rely on these new powers. The 2016 Rules amend the Fitness to Practise Rules as follows.

Delegation of Investigating Committee powers to Case Examiners

7.3 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 the Investigating Committee, meaning a panel must be convened for every case that reaches this stage, and sufficient time allocated to allow consideration of the papers. This can take some time given the Committee members are independent contractors who have other commitments. The 2016 Order amended the Act 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.

7.4 The 2016 rules amend the Fitness to Practise rules to provide for Case Examiners (one lay and one registered dentist or dental care professional) to consider allegations of impairment of fitness to practise and decide how a case should proceed at the end of the investigation stage of fitness to practise process. The Case Examiners will exercise all the powers of the Investigating Committee in this regard. It is anticipated this will lead to the swifter resolution of fitness to practise cases, as a panel of the Investigating Committee will not need to be convened to consider every allegation, 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.

7.5 The General Medical Council and the General Optical Council already use Case Examiners; both of which 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. The Nursing and Midwifery Council have recently introduced Case Examiners and expect to see a positive impact.

Power for the Case Examiners to agree undertakings with registrants

7.6 The 2016 Order introduced a power to the Act enabling the Investigating Committee to agree undertakings with a registrant. The power to agree undertakings means that in appropriate cases, instead of referring a person to a full fitness to practise hearing, the Investigating Committee can instead agree with the registrant, certain conditions of practise. 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. 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. However, where undertakings cannot be agreed or are not complied with the allegation will be referred to a Practice Committee.

7.7 The 2016 Rules amend the Fitness to Practise Rules to provide that the Case Examiners can exercise this function of the Investigating Committee.

7.8 The 2016 Order also amended the Act to provide a rule making provision in connection with undertakings. This power is being used to amend the Fitness to Practise Rules to provide that undertakings cannot be agreed by the Case Examiners or the Investigating Committee where there is a realistic prospect that, if the allegation were referred to a Practice Committee, the respondent's name would be erased from the register.

7.9 The 2016 Rules also insert provisions to the Fitness to Practise Rules for monitoring compliance with undertakings and the consequences of a breach of undertakings.

To provide for i) the review of cases closed at the end of the investigation stage and ii) the review of a determination that an allegation does not amount to an allegation of impairment of fitness to practise

7.10 At present if a case is closed at the investigation stage, the case cannot be re-opened even if the decision was later thought to be materially flawed or if new information comes to light which suggests that consideration by a Practice Committee might be necessary. Following the amendment of the Act by the 2016 Order, rules can provide that the registrar can review a determination by the Case Examiners or the Investigating Committee that an allegation ought not to be considered by a Practice Committee. The 2016 Rules will amend the Fitness to Practise Rules to specify the circumstances in which a review can take place: 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, prevention of injustice to the respondent or is otherwise necessary in the public interest. The Fitness to Practise Rules are also amended to 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. The Fitness to Practise Rules are amended to specify the procedure to be followed by the registrar when exercising this power

7.11 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.

7.12 The 2016 Order also introduced a power to the Act enabling the GDC to make rules providing that the registrar can 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 Case Examiners). The 2016 Rules amend the Fitness to Practise Rules enabling the registrar to carry out such a review. The Fitness to Practise Rules are also amended to specify the circumstances in which the registrar may exercise this power (which are the same as those in respect of the review of a case closed at the investigation stage as set out in paragraph 7.10). The Fitness to Practise Rules will provide that such a review cannot (except in exceptional circumstances) be commenced more than two years after the initial determination.

7.13 The 2016 Rules also amend the Fitness to Practise Rules to provide for the procedures to be followed by the registrar when exercising these powers.

Review of a decision to issue a warning to a registrant

7.14 The 2016 Order amended the Dentists Act 1984 to give the Investigating Committee the power to review its decision to issue a warning at the conclusion of the investigation stage of a fitness to practise investigation if the registrant or registrar requests such a review within two years of the decision to issue the warning. This new provision will help to ensure the overall fairness of the process. The 2016 Rules amend the Fitness to Practise Rules to provide that the Case Examiners can exercise this function of the Investigating Committee. The Fitness to Practise Rules are also amended to provide for the procedure to be followed by the Case Examiners and the Investigating Committee when exercising this power.

Consolidation

7.15 The GDC will produce a consolidated version of its rules for publication on its website at: http://www.gdc-uk.org/Aboutus/Thecouncil/Pages/governancemanual.aspx

8. Consultation outcome

8.1 Between 17th November 2014 and 12th January 2015, the GDC consulted on its proposals to amend the Fitness to Practise Rules. During the early stages of the work, preliminary discussions were held with representatives of the relevant professional bodies and trades unions. The outcome of these discussions informed the development of the detailed proposals. The proposals were also informed by feedback collected from the fitness to practise panel members.

8.2 An online consultation survey was published on the GDC's website at http://gdc-uk.org/GDCcalendar/Consultations/Pages/Consultation-on-changes-to-the-GDCs-Fitness-to-Practise-Rules-2006.aspx and a number of interested parties were informed, including patient groups, professional bodies and trades unions, and employers, on 17th November 2014.

8.3 The GDC received 11 responses from organisations and 30 from individuals. The proposals were generally well supported and there were no major areas of disagreement. More detail can be found in the consultation response, which will be available at http://www.gdcuk.org/Newsandpublications/consultations/Pages/default.aspx

8.4 The majority of the 41 respondents to the consultation were supportive of the proposals and considered that the changes would produce significant improvements to the way GDC manages cases. The key points are highlighted below:

Introduction of Case Examiners

8.5 The Professional Standards Authority (PSA) expressed concerns about how the GDC would ensure the separation of function between the investigation of a case and the adjudication of it given that Case Examiners will be GDC employees. However, Case Examiners will not be involved in evidence gathering nor will they determine whether a registrant's fitness to practise is impaired. Case Examiners will decide whether a matter ought to be referred to a Practice Committee and it is the Practice Committee that will decide whether a dental professional's fitness to practise is impaired.

The power to agree undertakings with registrants

8.6 Most respondents supported the proposal to introduce the power to agree undertakings. The PSA, whilst not objecting to the introduction of undertakings in principle, was concerned to ensure that undertakings were deployed in a way that did not diminish transparency, considering it to be essential for public protection. The PSA also proposed that registrants should be required to agree the facts of the case and admit impairment before undertakings can be agreed in principle. In response the GDC are putting in place an appropriate framework to ensure transparency of decision making in this area, including published guidance and a thorough system of training, performance management, audit and review.

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

8.7 The majority of respondents supported this proposal. Concerns were expressed about the fairness of the process to registrants as the review power could result in additional stress for registrants and could amount to 'double jeopardy' as dental professionals could be 'judged' on the same issue on more than one occasion.

8.8 It is considered that these measures are required for public safety. However, the Fitness to Practise Rules are amended to ensure safeguards are in place around the use of the power, in that; a review may only be carried out due to a material flaw in the original decision, or new information has come to light which would have led to a different decision and a review is necessary for the protection of the public, or necessary for the prevention of injustice to the respondent, or is otherwise necessary in the public interest. Also, a review must not be undertaken after more than two years, save for exception circumstances., The new fitness to practise process which is intended to improve decision making and the robust initial and ongoing training programme for Case Examiners, clear guidance and regular audits of decisions made should mean that very few cases should require review.

Review of a decision to issue a warning to a registrant

8.9 The GDC received near unanimous support for the proposal from respondents to the consultation.

9. Guidance

9.1 The GDC will publish guidance on its website in relation to the measures introduced by the 2016 Rules 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 also 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 was carried out and submitted in respect of the 2016 Order (S.I.20016/496). This indicated a net benefit to business over 10 years of approximately £21 million, approximately 2m per annum.

10.2 There is no impact on the public sector, charities or voluntary bodies.

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. These measures amend the GDC's fitness to practise procedures. 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 S.I. which is an order of the Privy Council approving rules made by the General Dental Council.

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 to the fitness to practise procedures introduced by the 2016 Rules and provide insight into the effect 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.