



**November 2015**

## **Dental Protection's response to the General Dental Council's consultation on: *Voluntary Removal from the Register***

### **Introduction**

Dental Protection has in recent years assisted thousands of members who have made requests for assistance with General Dental Council (GDC) investigations. A small but significant subset of that group has sought assistance with applications for Voluntary Removal (VR). We are therefore very well placed to make constructive comments on this important policy.

### **Background and General Comments**

Dental Protection welcomes the fact that this Consultation is taking place with a view to publishing a Guidance document on this important and sensitive subject. It is surprising and disappointing that such important guidance has not been published previously as its absence has left registrants and their advisers unclear about the process that the GDC has adopted up to this point regarding voluntary removal from the register. In the absence of such clarity, there has been a lack of transparency as to the decision making process and criteria adopted, and this in turn has fuelled a sense of there being a lack of fairness and consistency in earlier decisions concerning applications for Voluntary Removal (VR). There have also been concerns surrounding the GDC's rationale for decisions to refuse VR given that there is often no public interest rationale when dentists are no longer practising anyway.

Fitness to Practise investigations are highly stressful for the registrant and their families regardless of whether or not the ultimate outcome results in a finding of impairment. In April 2015 Dental Protection published the findings of a survey of members (all dentists) who had been investigated by the GDC<sup>1</sup>. 78% of respondent dentists reported a detrimental effect upon their mental or physical health. 94% reported an impact upon their stress and anxiety. 76% said it had an impact on their personal life and

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<sup>1</sup> Dental Protection conducted a survey of dental members to find out about the effect a GDC investigation had on them. The survey ran from 23 March 2015 to 6 April 2015 and received 140 responses.

67% reported an adverse effect on their confidence. A staggering 34% of dentists considered leaving the profession after having been investigated by the GDC.

The above statistics may not all be surprising but they are revealing in terms of the impact that a GDC investigation can have on even the most robust of registrants. The GDC needs to be mindful of the fact that this stress arising from any serious investigation (for example GDC or NHS Fraud) can become unbearable for a small number of affected registrants. Unfortunately in these situations suicide is a very real risk

Whilst we naturally welcome the recognition (in paragraph 25) that there will be “*exceptional circumstances*” when VR will be granted in situations where there is “*evidence that the process carries a risk of suicide*” we strongly urge the GDC to adopt a humane and proportionate view when considering applications for VR. The balance, in our experience, has swung too far towards justifying hearings on the supposed basis of “protecting the public interest” and “maintaining public confidence in the profession” at the expense of the health and wellbeing of registrants. In some instances, and especially where a retired and perhaps unwell former dentist chooses not to attend a hearing, we believe that insisting on a hearing in these circumstances can have quite the opposite effect. For example, in such circumstances the only possible public interest is to maintain public confidence in the profession and yet, in all but the most serious cases, the absence of the dentist from the hearing hardly achieves this. It is also a significant waste of the Annual Retention Fee paid by registrants, at a time when this has become a highly sensitive issue.

This consultation represents a welcome opportunity for this imbalance to be addressed. The Council is well aware that the purpose of an FTP investigation is to determine whether or not a registrant’s fitness to practise is currently impaired. A hearing must not proceed on the basis that the registrant is to be punished for previous misconduct, and we submit that any consideration of an application for VR must be considered against this background.

When a registrant decides that he/she will never practise dentistry again and applies to the Registrar for VR, we believe that there would need to be “exceptional circumstances” to justify refusal of that request rather than the reverse as the GDC seems to propose.

Dental Protection recognises and understands that the GDC has a statutory duty to protect the public, including through the FTP process, however we question whether the costs to the other registrants and the stress to the registrant concerned can be justified when a registrant has retired and no longer practises.

## Proportionality and balancing the interests of all parties

This consultation fails to recognise that in any consideration of the interests of the public, the reputation of the profession and the interests of the individual registrant, “proportionality” must be a key factor. Sadly this crucially important word is absent from the guidance. Compare this to the information on the GDC’s website concerning its plans to improve on its performance, which includes the following passage:

*‘The following are the key values that the GDC recognises good case handling should incorporate:*

- *Proportionality: Intervening when necessary and remedy should be appropriate to the risk posed...’*

The public interest includes the need for proportionate decision making with reference to the risks posed by the particular case. A reasonable member of the public would not expect the GDC to hold a fitness to practise hearing (at considerable expense and inconvenience to those involved, including any witnesses who may be required to attend) in every case where a registrant’s fitness to practise might be found to be impaired, if that registrant will not return to practise in the future. The views of the individual complainant should be a factor that is taken into account, but is simply one of a range of factors for consideration. Those views should not be misinterpreted as being representative of the wider public view or public interest.

An increasing number of registrants, having been refused VR, have taken the decision not to attend any hearing, and instead submit a letter explaining their absence and the fact that they have retired or by simply not co-operating. That represents a huge cost to the GDC (and therefore the remaining registrants where the ARF is a significant cost to each one) and it is incumbent on the Council to reflect whether this is a justifiable, prudent and responsible use of that money.

No-one would argue against a hearing proceeding in the absence of the registrant when erasure or suspension is a likely outcome, and no registrant should be allowed to “escape” the severest sanction by VR. Fortunately,, erasures are rare , as are substantive suspensions. There is absolutely no benefit to the reputation of the profession by imposing conditions of practice upon a retired registrant. Indeed we would suggest that there is a real risk that it undermines the reputation of the Council and its process when that happens.

Patients have a right to make claims against a registrant. The GDC is ensuring that indemnity is compulsory for all registrants, giving confidence that where there has been genuine harm through

clinical negligence, damages can be claimed and paid. The GDC has made clear its intention that such indemnity should include past periods of practice.

Dental Protection accepts the three key factors that the Registrar must consider and balance when considering a request for VR. As we have explained above, we recognise that in some very serious cases there may be a necessity for the GDC to investigate a case with a public hearing even though the registrant has decided not to attend, in order to be seen to uphold standards. In our submission these very serious cases will be very rare.

Once a practitioner who is subject to FTP proceedings has retired, the public is safe and no longer needs protection by the GDC. Moreover if VR is granted, any current proceedings will lie on their file and in the unlikely event that an application for restoration to the register is ever made in the future, the case can be re-opened, and reviewed as part of the re-application process. It also follows that a registrant will be unable to obtain a certificate of good standing should they seek to work elsewhere in the world.

## **Specific Comments**

Having made the above remarks we would like to make some specific comments on the guidance, paragraph by paragraph. The numbers in bold correspond with the numbering of the paragraphs in the consultation document.

**2:** 'person with delegated authority'. It would be helpful if there were some criteria in place to ensure that this person(s) was of an appropriate level of experience and seniority at the GDC and not connected/involved with the FTP investigation of the registrant. We assume that Case Examiners (CE) are intended to fulfill this function when they are introduced, and we would urge the Council to ensure that CE are firstly competent at their main role before they are asked to carry out this task.

**4:** Although an application for VR is processed administratively by the Registrations Department when a registrant is not subject to active proceedings, the GDC should ensure that anyone who is in proceedings should be made aware of that fact. On many occasions administrative removal is declined although the registrant is at the time unaware that an FTP case has commenced, typically at the renewal of registration.

**6:** Dental Protection would expect that the registrant is entitled to see the memo that is prepared for the Registrar, particularly if an application is rejected. Given that this memo may contain highly sensitive personal data we would be anxious to receive an assurance that this memo would never be shared with any complainant/informant.

**7:** It would be helpful to specify that the Registrar's decision should include the matters which she has taken into account in reaching a decision, and the reasons for her decision with reference to those matters.

**10:** Given that the Registrar herself has not (in practice) made the decision and Judicial Review (JR) is an expensive exercise, the GDC should consider introducing an appeal mechanism, which if exhausted would leave JR an option. This process would be much easier to facilitate if the first decision on VR is given by the Case Examiners, as both the Director of Fitness to Practise and the Registrar could act as the internal reviewer. Although more appeals might take place overall, the cost implication of this compared to JR would represent a considerable saving and it would satisfy the test of proportionality.

**18:** Why should the mere fact that a registrant does not admit the factual allegations and that his/her fitness to practise is impaired '*normally militate against granting voluntary removal*'? Dental Protection suggests that the words 'will normally' are replaced with 'which might be a factor that would'.

**22:** References to the case law should be provided if reliance is being placed on what the 'Courts have held'. We are very disappointed by this significant omission, as it requires consultees to guess what evidence the GDC has relied upon thereby denying them the opportunity to make a properly informed response.

**25:** Does the requirement for 'independent' medical evidence preclude evidence from the registrant's treating doctors? If so, then essentially the GDC would require a potentially unwell registrant to arrange and pay for a consultation with an independent medical expert for the sole purpose of persuading the GDC that he/she should be granted VR on the grounds of health. Not only would this be disproportionate in the majority of cases but could also have a negative impact on the mental, if not, physical health of the registrant. If this is not the GDC's intention, this fact should be made clear.

**27:** Dental Protection is concerned about the use of the words 'special and sufficient reason' in this context, as this could in practice amount to a two stage test, which is probably not the intention. We would suggest that the inclusion of these words is superfluous given the context provided by the rest of the document. If the GDC insists on their inclusion, then these words should at least be defined for the avoidance of doubt or misunderstanding. Dental Protection also disagrees with the proposition that the public interest 'ordinarily' requires allegations of fitness to practise being ventilated before a Practice Committee, for the reasons set out above under the heading: 'The Public Interest'. However, we do agree that **serious** allegations where

there is likely to be a presumption of impairment if the facts were proved, such as sexual misconduct or fraud, should ordinarily be ventilated before a Practice Committee to maintain the public's confidence in the profession.

**28/29:** We do not agree with the proposition that the need for a public ventilation of an individual complaint will be 'particularly likely' where there has not been any 'public investigation', for the reasons set out above under the heading: 'The Public Interest'. In many cases some public ventilation of the issues will be possible through the civil courts (for example, in claims for compensation based on alleged negligence) or via the Ombudsman's Office and Dental Complaints Service.

**33:** For the avoidance of doubt, the words 'based on their health,' should be inserted before 'than a registrant who has a chronic...' Also, in this paragraph the phrase 'voluntary removal' should be used, not 'voluntary erasure'.

### **Concluding comments**

We hope these comments are helpful and constructive. Naturally, if we can be of any further assistance in reviewing documents or information leaflets prepared to go alongside this guidance, we will be pleased to assist the Council.

## **About Dental Protection**

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