

Introduction

This document provides guidance to support the rational and consistent adjudication of complaints under part 3 of the Fitness to Teach and Appeals Rules. It is also issued to help all parties understand how decisions will be made under these Rules as part of GTC Scotland's commitment to ensuring its fitness to teach functions are carried out openly and transparently.

The adjudication of complaints involves a 3 stage process. A Panel has to decide, in turn:

- 1 Whether it finds the facts alleged in the complaint proved;
- 2 Whether, on the basis on the facts found proved, the Respondent's fitness to teach is impaired or he/she is unfit to teach; and
- 3 If it finds that fitness to teach is impaired, what action should be taken or sanction imposed in view of that identified impairment.

This document sets out general and specific guidance for Panels covering the matters described below which relate to stage 2 and stage 3 of the process described above.

At **Part A**:

- How to approach making a decision about whether a Respondent's fitness to teach is impaired or whether he/she is unfit to teach.

At **Part B**:

- The range of outcomes available where a determination has been made that a Respondent's fitness to teach is impaired;
- general principles and factors to consider when determining the appropriate outcome in any given case; and
- how to approach the matter of deciding whether GTC Scotland should exercise its discretion and refer a case to Scottish Ministers in terms of Protection of Vulnerable Groups legislation.

At **Part C**:

- How to approach making a decision where an individual submits an application for registration *subsequent* to them having been removed from the Register (or refused registration) by order of a Fitness to Teach Panel (or its historic equivalent).

Panel members must always exercise their own judgement in making decisions and must consider the particular circumstances of each case. This guidance is not designed to constrain that process and does not provide exhaustive or prescriptive lists of the principles and factors that may require to be considered. However, to ensure a general consistency of approach by Panels in determining cases, decisions should be made with due regard to this guidance and where it is departed from, an explanation as to why should be included in the Panel's written decision.

General

In arriving at any decision, the Panel should bear in mind the following principles of good regulation:

- Legality;
- Natural Justice / Fairness;

- Transparency;
- Proportionality; and
- Rationale.

Reference is made to **the public interest** at a number of points in this guidance and it should also be borne in mind throughout the decision making process. Assessing the public interest will involve consideration of the following:

- The protection of members of the public (in particular, children and young people);
- The maintenance of the public's confidence in registrants and in the integrity of the teaching profession;
- The maintenance of the public's confidence in GTC Scotland as a professional regulator;
- The need to declare and uphold proper teaching standards; and
- The deterrent effect that the determination may have upon other GTC Scotland registrants.

In terms of procedure, it is important that a Panel keep the fitness to teach and disposal stages of a hearing quite separate. The range of sanctions available must not influence the decision regarding the Respondent's fitness to teach.

The Panel must give written reasons for decisions that it makes covering each stage of the decision making process. These should make appropriate reference to this guidance, explaining:

- The interests and factors that the Panel took into consideration in reaching its decision;
- The weight that the Panel attached to the interests and factors considered; and
- How the balancing of those interests and factors led the Panel to its decision.

Part A – Determining Fitness to Teach

Once a Panel has determined that the facts set out in a complaint are proved (stage 1 of the process), it will need to make a determination on the Respondent's fitness to teach (stage 2 of the process). This is a matter of judgement for the Panel and is not something that is proved in the same way as findings of fact are.

The Public Services Reform (General Teaching Council for Scotland) Order 2011 (the "Order") states that an individual is unfit to teach if GTC Scotland considers that his/her conduct or professional competence falls *significantly* short of the standards expected of a registered teacher. An individual's fitness to teach should be considered impaired where GTC Scotland considers that the individual's conduct or professional competence falls short of the standards expected of a registered teacher.

It is important that the Panel bears in mind that it should apply the fitness to teach tests described above to the Respondent *currently* (i.e. at the time of the hearing and for the foreseeable future rather than, for example, at the time that the facts found proved took place). This is consistent with the principle that professional regulation is about looking forward in order to protect rather than about looking back in order to punish and also aligns with relevant case law (a summary of which is provided in Appendix 2). Assessing fitness to teach should be approached holistically, taking account of: (i) the way in which the Respondent has acted or failed to act; (ii) any information available as to where the Respondent is now with regards to his/her fitness to teach and how he/she is likely to behave or perform in future; and (iii) wider public interest considerations.

In putting the above into practice, the Panel should consider:

- 1 Whether the facts found proved mean that the Respondent's conduct or competence at that time fell short of the expected professional standards. Another way of putting this is: has the Respondent been guilty of misconduct or a lack of competence?

The Panel should have regard to the GTC Scotland Code of Professionalism and Conduct (“CoPAC”) together with the GTC Scotland Standard for Full Registration (the “SFR”) in determining this. It may also make use of the professional judgement, expertise and experience of its members.

If the Panel finds that the Respondent is guilty of misconduct or a lack of competence, it should then consider:

- 2 Whether the shortfalls identified are remediable; whether they have been remedied; and whether there is a likelihood of reoccurrence; and
- 3 If the conclusion at bullet point 2 above is that the shortfalls are remediable, have been remedied and that reoccurrence is not likely: whether there is nevertheless an overriding public interest in making a finding that fitness to teach is impaired or that the Respondent is unfit to teach in the circumstances. Guidance on what consideration of the public interest involves is set out at the “General points” section above.

In deciding whether the shortfalls identified are remediable; whether they have been remedied; and whether there is a likelihood of reoccurrence in terms of bullet point 2 above, the Panel may be asked to consider character evidence. Whilst it is appropriate to do so, a Panel should do so with caution. Panels must draw a distinction between evidence which has a direct bearing on the fitness to teach findings it must make and evidence which is simply about the Respondent’s general character. General character evidence will only be relevant as mitigation at the outcome determination stage (stage 3). Character evidence that is relevant to the determination of fitness to teach stage would be expected to relate to what the Respondent has done to remedy the misconduct or incompetence matter(s) identified and the insight he/she has demonstrated as a result; how he/she is currently performing or behaving; and/or the absence or presence of similar events in the Respondent’s history.

If the Panel decides that the Respondent’s fitness to teach is impaired, it will then need to make a judgement as to the extent to which the person has fallen short of the standards expected. The critical question for the Panel in this respect will be: has the Respondent fallen *significantly* short of the standards expected meaning that he/she is unfit to teach? If the Panel is of the view that the Respondent’s conduct or professional competence is fundamentally incompatible with being a registered teacher, this indicates that he/she is unfit to teach. It may also be the case that the public interest requires a finding to be made that the Respondent is unfit to teach as noted above.

Where a determination is made by a Panel that an individual is unfit to teach, the Order dictates that he/she must be refused registration or removed from the Register. As a result, in any case where a Panel determines that an individual is unfit to teach, it need not deliberate on which sanction to impose as is envisaged below. This will only be necessary where the Panel makes a determination that fitness to teach is *impaired*. The Panel will, however, need to decide how long the Respondent should be prohibited from applying to be restored to the Register, or from making a further application for registration. This period may not be set at more than 2 years. The Panel should hear submissions from the parties on the matter before making its decision on the appropriate period with reference to the guidance set out at the section of Part B entitled “Removal of Registration and Refusal of Application for Registration”.

Part B – Determining outcomes

General principles

Once a Panel has decided that a Respondent’s fitness to teach is impaired, it needs to decide what action it is appropriate for GTCS to take in light of this impairment (stage 3 of the process). The Panel will hear submissions from the parties on this issue.

In making a decision, a Panel should consider and have proportionate regard to:

- The public interest;

- The interests of the Respondent, including any mitigating factor that he or she may have submitted; and
- The particular circumstances of the case, including any aggravating factors.

Considering the interests of the Respondent, the circumstances of the case and any mitigating or aggravating factors present will include consideration of some or all of the following:

- The seriousness of the matters at issue with reference to CoPAC and the SFR as well as public interest considerations;
- Whether there has been an abuse of a position of trust and/or harm caused to a child/pupil;
- Whether there is an indication of a pattern of behaviour as opposed to an isolated event;
- Whether the matters at issue are remediable;
- The extent to which the behaviour or act was deliberate and intended;
- The character and previous history of the Respondent (including references/testimonials and the absence or presence of previous convictions/adverse fitness to teach or similar findings);
- Whether any disability, illness, particular inexperience, vulnerability, duress, or other similar mitigating factor has been made evident in the explanation of the facts/circumstances surrounding the matters at issue;
- Whether the Respondent has admitted the matters at issue; and
- Whether the Respondent has reflected, shows genuine remorse and has taken steps to properly address the conduct or competence matters at issue.

In considering written references and testimonials submitted in mitigation by the Respondent, the Panel should consider how recent they are, the nature of the providers, whether the providers were aware of the allegation(s) against the Respondent and provided the reference or testimonial knowing that it would be used within the context of fitness to teach proceedings.

In taking account of any insight, explanation, apology or remorse offered by a Respondent, note that there may be cultural differences in the way that these may be expressed. The Panel's primary focus should be on whether the Respondent has genuinely recognised his/her failings, has taken or is taking remedial action to address those failings and whether there is a risk of repetition. Those issues should be considered with reference to the evidence provided on them rather than focusing on the exact manner or form in which they may be explained or addressed.

The decision on which sanction to impose (or indeed whether to impose a sanction at all) should be approached by a Panel with holistic and proportionate regard to the principles set out above, the indicating factors identified for the sanctions available below and any specific factors that a particular case may present. The principle of proportionality should be applied throughout this decision making process with the Panel asking itself:

- Does the proposed sanction address appropriately and sufficiently any public protection concern identified?
- Does the proposed sanction take account of the public interest?
- Is the proposed sanction the least restrictive means of achieving the level of public protection required?
- Does the proposed sanction address *all* of the facts found proved that have led to the fitness to teach impairment finding?
- Is the proposed sanction proportionate to the facts found proved that have led to the fitness to teach impairment finding, striking an appropriate balance between the public interest and the rights of the Respondent?

The balancing of all of the factors involved is entirely a matter for the Panel to consider on a case-by-case basis, at its discretion, in order to reach what it considers to be an appropriate outcome in the circumstances.

The Panel should bear in mind throughout that, whilst it is acknowledged that a sanction may have a punitive effect, the primary purpose of a sanction is to be protective and not punitive.

In terms of procedure, the Panel must consider sanctions in ascending order. This means that the Panel should work its way up from least to most severity, starting with No Order. This should also be mirrored in the way that the Panel writes up its decision, describing the Panel's consideration of each sanction in turn with an explanation as why it was or was not considered appropriate.

1 No Order

A Panel need only impose a sanction if it thinks fit. This means that it is open to a Panel to make no order.

Making no order means that there will be no impact upon the Respondent's registration status or his/her application for registration. However, the finding made that the individual's fitness to teach is impaired will be published on GTC Scotland's website as part of the hearing outcome and could be noted (at the appropriate part of proceedings) in the event that the Respondent is referred to a Panel again in future.

Making no order is likely to be an exceptional outcome but may be appropriate where the following indicating factors are present:-

- The matter does not constitute an abuse of a position of trust;
- Harm has not been caused to a child/pupil;
- The matter has been admitted;
- The Respondent has reflected on the matter, shows genuine remorse and has taken steps to properly address the issue(s);
- The matter represents an isolated incident;
- There is no risk of repetition of the matter at issue;
- There is evidence attesting to the good character and history of the Respondent; and
- There is no public interest in imposing a sanction.

2 Reprimand

A reprimand is recorded in the Register against a Respondent's name for such period of time as a Panel specifies. Other than the mark on the Register, registration status remains unaffected so it does not restrict or control the Respondent in any way with a view to ensuring ongoing fitness to teach.

A reprimand may be the appropriate sanction to impose where most or all of the following indicating factors are present:-

- The matter does not constitute an abuse of a position of trust;
- Harm has not been caused to a child/pupil;
- The matter has been admitted;
- The Respondent has reflected on the matter, shows genuine remorse and has taken steps to properly address the issue(s);
- The matter represents an isolated incident;
- There has been no repetition of the matter at issue since the incident concerned;
- There is evidence attesting to the good character and history of the Respondent; and
- A reprimand appropriately indicates to the profession and the public the seriousness of the matter at issue, therefore maintaining public confidence in teachers and the teaching profession.

A reprimand may be imposed for such period as the Panel sees fit. In order to ensure that a generally consistent approach is adopted in this respect, Panels may regard:

- 6 months as an appropriate starting point;
- 1 year as the period that is applied in the majority of cases where a reprimand is determined to be the appropriate outcome; and
- 2 years as the maximum that it is generally envisaged would be appropriate.

It must be emphasised that the above is general guidance only. A Panel should always impose a reprimand for the period of time that it considers appropriate based on the circumstances of the case and this may mean departing from the general parameters indicated above.

3 Conditional Registration Order

A conditional registration order imposes specified conditions that the teacher must comply with in order to maintain registration. In the case of applicants for registration, the offer of registration itself may also be made subject to conditions set by the Panel. It is for the Panel to decide in each case what conditions should be imposed and for what period of time. A conditional registration order is therefore a means of controlling and/or restricting the Respondent with a view to ensuring that any corrective action appropriate in the circumstances is taken and that the Respondent then maintains his/her fitness to teach.

A conditional registration order may be the appropriate sanction to impose where the following indicating factors are present:-

- It is possible to identify specific areas of the Respondent's conduct or competence that is at issue that are remediable and that could be effectively, appropriately and practically controlled or restricted by imposing a conditional registration order;
- Conditional registration will adequately protect the public (including children and young people, as well as colleagues) from risk of harm or there is no risk of harm present;
- The Respondent shows the potential and willingness to respond positively to the imposition of conditions on his/her registration;
- The Respondent shows sufficient insight to suggest that he/she will be able to comply with conditions; and
- A conditional registration order appropriately indicates to the profession and the public the seriousness of the matter at issue, therefore maintaining public confidence in teachers and the teaching profession.

If a conditional registration order is decided upon, in determining what conditions to impose, the Panel should consider:

- Will the Respondent realistically be able to comply with the conditions proposed and can he/she be trusted to do so?
- Are the conditions proportionate and appropriate in the context of the case?
- Do the conditions provide the level of public protection required?
- Will the conditions still be effective even if the Respondent's employment situation changes or has any such change been appropriately accommodated within them?
- Are the conditions measurable so that they may be monitored effectively?
- Are the proposed conditions framed so that it is clear what the Respondent needs to do in order to comply with those conditions?
- Are the conditions all directed at the Respondent and not elsewhere, for example at an employer or doctor?
- Has an appropriate time period been provided for the conditions proposed?

The Panel must also generally be mindful that conditions must be compatible with Article 8 of the European Convention on Human Rights, the right to have respect for privacy and family life.

Example style conditions are provided in the "Conditions Bank" set out in Appendix 1. Please note that these conditions are intended to be neither prescriptive nor definitive; they are intended to assist in the drafting and formulating process only and should always be considered with careful reference to the guidance set out above.

4 Conditional Registration Order and Reprimand

Having considered the indicating factors for a conditional registration order and a reprimand above, a Panel may decide that it is appropriate to impose both of these sanctions where the Panel considers:-

- That it would more appropriately indicate to the profession and the public the gravity of the charges, therefore maintaining public confidence in teachers and the teaching profession, if a reprimand was recorded against the Respondent's entry in the Register as well as a conditional registration order; or
- That although a conditional registration order is appropriate with reference to some of the matters at issue, there is one (or more than one) area that is not remediable and/or that it is not considered possible to effectively, appropriately and practically control or restrict by imposing a conditional registration order and, with reference to the guidance above, the Panel considers a reprimand to be an appropriate sanction in this respect.

The terms of the reprimand and conditional registration order should be framed with reference to the guidance set out at the relevant sections (2 and 3) above.

5 Removal of Registration and Refusal of Application for Registration

It may be appropriate to remove a Respondent from the Register or refuse his/her application for registration where most or all of the following indicating factors are present:-

- The Respondent's conduct, conviction or incompetence is/are incompatible with being a registered teacher (with reference to CoPAC and the SFR as appropriate);
- The public interest requires removal or refusal of registration; and
- A conditional registration order and/or reprimand is inappropriate or impractical in the circumstances of the case and with reference to the guidance set out above.

Once the Respondent has been removed from the Register or refused registration, the Respondent remains removed or refused unless and until a (further) registration application is made by him/her and a Fitness to Teach Panel is satisfied at a hearing that the application should be granted in line with Part C of this guidance on Subsequent Registration Applications. Registration following removal or refusal by a Fitness to Teach Panel is not automatic and is not at all guaranteed. A person will only ever be granted registration where he/she demonstrates to a Panel's satisfaction that he/she is now fit to teach.

Where a removal or refusal decision is reached, a Panel has to decide how long the Respondent should be prohibited from making a registration application subsequent to this. The period of prohibition can be set at up to 2 years. . In order to ensure that a generally consistent approach is adopted in this respect, Panels may regard:

- 6 months as an appropriate starting point; and
- 2 years as the period that is applied in the majority of cases where registration removal or refusal is determined to be the appropriate outcome.

It must be emphasised that the above is general guidance only. A Panel should always set the period of time according to what it considers appropriate based on the circumstances of the case.

6 Protection of Vulnerable Groups Referrals

Once a Panel has decided on an appropriate sanction in any case, it should also consider whether or not it is appropriate to make a referral in terms of the Protection of Vulnerable Groups (Scotland) Act 2007 (the "PVG Act") in order that Scottish Ministers may consider whether or not the Respondent should be barred from working with children or protected adults.

In accordance with the terms of the PVG Act, a Panel may consider it appropriate to make a referral to the Scottish Ministers for consideration in terms of the above where the Respondent has:

- Harmed a child or protected adult;
- Placed a child or protected adult at risk of harm;
- Engaged in inappropriate conduct involving pornography;
- Engaged in inappropriate conduct of a sexual nature involving a child or protected adult; or
- Given inappropriate medical treatment to a child or protected adult.

In interpreting the above, the PVG Act sets out the following -

- A “child” means an individual under the age of 18.
- A “protected adult” means an individual aged 16 or over who is provided with –
 - (a) A service by a person carrying on –
 - (i) A support service,
 - (ii) An adult placement service,
 - (iii) A care home service, or
 - (iv) A housing support service,which is registered under Part 1 of the Regulation of Care (Scotland) Act 2001,
 - (b) A prescribed service –
 - (i) By a health body acting in exercise of functions conferred by the National Health Service (Scotland) Act 1978,
 - (ii) Which is secured by a health body acting in exercise of such functions,
 - (iii) By an independent hospital,
 - (iv) By a private psychiatric hospital,
 - (v) By an independent clinic, or
 - (vi) By an independent medical agency,
 - (c) A community care service –
 - (i) Provided or secured by a Council under the Social Work (Scotland) Act 1968 or the Mental Health (Care and Treatment) (Scotland) Act 2003, or
 - (ii) In respect of which a Council has made a direct payment, or
 - (d) A prescribed welfare service (which includes any service which provides support, assistance, advice or counselling to individuals with particular needs).
- An individual (“A”) **harms** another (“B”) if:
 - A's conduct causes B physical harm,
 - A's conduct causes B psychological harm (for example: by putting B in a state of fear, alarm or distress), or
 - A engages in unlawful conduct which appropriates or adversely affects B's property, rights or interests (for example: theft, fraud, embezzlement or extortion).
- An individual (“C”) places another (“D”) at **risk of harm** if:
 - C attempts to harm D,
 - C incites another to harm D,
 - C encourages D to self-harm, or
 - C's conduct otherwise causes, or is likely to cause, D to be harmed.

Part C – Subsequent Registration Applications

Where an individual submits an application for registration subsequent to them having been removed from the Register (or refused registration) by order of a Fitness to Teach Panel (or its historic equivalent), the application must be considered by a Panel. The Panel's role in considering any such application is to determine whether or not the individual is now fit to teach meaning that his/her registration may be restored, or that he/she may now be admitted to the Register. The Panel will hear submissions from parties on this issue.

The reasons why the applicant was originally removed from the Register will be relevant to the Panel in making its decision but it must be emphasised that a subsequent registration application is not an appeal from, or review of, the original findings and determination. Panels should therefore try to avoid being drawn into "going behind" the original finding and determination and, in making its decision, instead focus on:

- The conduct or competence matters that led to the individual being removed from (or refused entry to) the Register and the reasons given by the original Panel for the decision;
- Whether the individual accepts and shows insight into those matters;
- Whether the matters are capable of being resolved and, if so, whether the individual has done so or shown the willingness and ability to do so;
- What other remedial or rehabilitative steps the individual has taken; and
- What steps the individual has taken to keep his/her professional knowledge and skills up to date.

The Panel should have appropriate confirmatory evidence with regards to the last three bullet points listed above.

If a Panel determines that (subject to the individual meeting the general registration requirements) the registration application should be accepted, it may do so unconditionally or may direct that registration should be subject to specified conditions (i.e. impose a conditional registration order). In setting any conditions, the guidance on conditional registration orders set out at Part B above applies equally within the context of subsequent registration applications and should be considered by the Panel.

Appendix 1 - Conditions Bank

Condition	Particular considerations
<p>You must inform the following parties that your GTC Scotland registration is subject to these conditions and provide them with a copy of the Decision Notice that resulted in this Order being imposed upon you:</p> <ul style="list-style-type: none"> (a) Any organisation or person employing you as a teacher or in a post for which GTC Scotland registration is required (whether on a permanent, temporary or supply basis); and (b) Any prospective employer covered by (a) above at the time of making your application for employment. 	<p>Consideration should be given to including this condition in any Order in order to support the monitoring, enforcement and general effectiveness of the other condition(s) imposed.</p>
<p>You must promptly inform GTC Scotland's Fitness to Teach Department if you cease to be employed by your current employer or take up any other or further employment as a teacher or for which GTC Scotland registration is required. You must also provide GTC Scotland's Fitness to Teach Department with contact details for any new employer.</p> <p>You must promptly inform GTC Scotland's Fitness to Teach Department of any disciplinary proceedings taken against you by your employer or any other professional regulatory body.</p> <p>In the event that you are the subject of enquiry or investigation in relation to alleged criminal conduct, you must inform GTC Scotland's Fitness to Teach Department of such enquiry or investigation within [TIME PERIOD] of the date upon which the relevant authorities first contacted you.</p> <p>Each [STATE FREQUENCY], you must provide GTC Scotland's Fitness to Teach Department with written reports from your [Head Teacher/line manager] confirming that no issues have arisen related to your conduct or behaviour in that period.</p>	
<p>In order to improve your xxxx skills/knowledge, you are required to complete satisfactorily a training course in relation to xxxx [that is approved by GTC Scotland's Fitness to Teach Department], and complete it by xxxx.</p> <p>It will be your responsibility to identify the training course and seek approval of it from GTC Scotland's Fitness to Teach Department in advance of undertaking it.</p> <p>On completion of the training course, you must provide to GTC Scotland's Fitness to Teach Department written evidence of your successful completion of it.</p> <p>Each [STATE FREQUENCY], you must provide GTC Scotland's Fitness to Teach Department with written reports from your [Head Teacher/line manager] confirming that you have kept your knowledge and skills up to date in [INSERT AREA] and have successfully completed any appropriate courses accordingly.</p>	<ul style="list-style-type: none"> ▪ The Panel must be confident that a course exists at the time the Order is imposed that will meet the condition set. ▪ The Panel may be in a position to identify a specific training course/training provider. If this is the case and the condition will still be realistic with this level of specificity, the specific training course/training provider may be specified in the condition. ▪ The Panel should consider the overall cost of the training required and the Respondent's ability to meet those costs in the context of considering whether the condition is realistic.

You must attend regularly [alcohol/drug counselling sessions] [meetings of Alcoholics Anonymous/Narcotics Anonymous/ any other appropriate support group] and must provide GTC Scotland's Fitness to Teach Department with evidence of such attendance [on a monthly basis].

You must provide GTC Scotland's Fitness to Teach Department with, at xxxx monthly/xxx yearly intervals, written reports from xxxx which show you are [participating in, and responding positively to, alcohol or drugs rehabilitation treatment].

You must submit on a [INSERT FREQUENCY] basis [blood] [urine] samples to an accredited laboratory for testing for the presence of:[INSERT SUBSTANCES]. You must submit the reports of the results of such tests to GTC Scotland's Fitness to Teach department within [TIME PERIOD] of receipt by you.

You must work with [XXX] to formulate a Professional Development Plan designed to address the deficiencies identified in the following areas of your teaching practice: [INSERT AREAS]

You must meet with [XXX] [Head Teacher] on a [monthly basis] to consider your progress towards achieving the objectives set out in your Professional Development Plan.

Each [STATE FREQUENCY], you must provide GTC Scotland's Fitness to Teach Department with written reports from XXX] confirming that you have met the requirements specified above.

You must provide a copy of the Professional Development Plan formulated to GTC Scotland's Fitness to Teach Department within [three months] of the effective date of this Order.

You must maintain a [reflective practice] [continuing professional development] portfolio detailing every occasion when you [XXX] and must provide a copy of that portfolio on a monthly basis to GTC Scotland's Fitness to Teach Department. The first profile must be received by XXX.

Appendix 2 – Summary of Relevant Case Law

Azzam v General Medical Council [2008] EWHC 2711

Dr Azzam appealed against the panel's decision to impose a one month suspension. At the conclusion of the fact-finding stage (stage 1) Dr Azzam's representative applied to the panel to admit evidence on Dr Azzam's behalf in three broad categories: (1) testimonial evidence; (2) evidence as to Dr Azzam's training following the incident in the case; and (3) evidence from a Dr Pitman as to Dr Azzam's current performance. The application was opposed by the General Medical Council. The panel decided to admit the evidence but said that it gave it "little weight".

The Court held that the panel's decision to give little weight to the above evidence was wrong because this evidence was relevant to the issue of whether Dr Azzam's fitness to practise was impaired at the date of the hearing. The Court said that a fitness to practise panel must consider facts material to the practitioner's fitness to practise looking forward and for that purpose, to take into account evidence presented as to his/her present skills or lack of them and any steps taken, since the conduct/competence criticised, to remedy any defects in skill. The Court said that some elements of reputation and character may well be matters of pure mitigation to be taken into account at the disposal stage (stage 3) and not at stage 2. The line, however, is a fine one.

Cheatle v General Medical Council [2009] EWHC 645 (Admin)

In this case the Court considered that the 4 examples given by Dame Janet Smith in her Fifth Shipman Report helpfully set out the reasons why a decision-maker might conclude that a registrant was unfit to practise or that his/her fitness to practise was impaired. These were:

- (a) The practitioner presents a risk to patients;
- (b) The practitioner has brought the profession into disrepute;
- (c) The practitioner has breached one of the fundamental tenets of the professions;
- (d) The practitioner's integrity cannot be relied upon.

The Court further said that considering fitness to practise required the context of the practitioner's behaviour to be examined. The Court stated:

"In circumstances where there is misconduct at a particular time, the issue becomes whether that misconduct, in the context of the doctor's behaviour both before the misconduct and to the present time, is such as to mean that his or her fitness to practise is impaired. The doctor's misconduct may be so egregious that, looking forward, a panel is persuaded that the doctor is simply not fit to practise medicine without restrictions, or maybe at all. On the other hand, the doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a fitness to practise panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct."

Cohen v General Medical Council [2008] EWHC 581 (Admin)

Dr Cohen, a consultant anaesthetist, appealed against the decision of the GMC fitness to practise panel that his fitness to practise was impaired and to impose conditions on his registration. This decision was based on a complaint made by a patient. Apart from this complaint, Dr Cohen was of good character and had been a consultant anaesthetist since 1980, with no previous adverse findings against him, and with many references to support his skills and expertise. Significantly, the GMC called an expert consultant anaesthetist who, whilst critical of some of Dr Cohen's practise, did not consider that these matters were so serious as to amount to misconduct. The expert said that the core anaesthetic treatment of the patient who had complained was carried out to a standard entirely in keeping with what might be expected of a consultant anaesthetist. The Court, in allowing the appeal, held that whether fitness to practise was impaired was a relevant factor at stage 2 of the process, rather than at stage 3 (the sanctions stage). On the facts, the errors of the practitioner were easily remediable and the panel should have concluded that his fitness to practise was not impaired.

Council for Healthcare and Regulatory Excellence v Nursing and Midwifery Council (Paula Grant) [2011] EWHC 927 (Admin)

The Council for Healthcare and Regulatory Excellence (CHRE) appealed against a decision of the NMC's Conduct and Competence Committee that Ms Grant, a registered nurse and midwife, was guilty of misconduct but that her fitness to practise was not impaired.

Ms Grant worked as a midwifery sister in a hospital. The charges against her included that she had, over some 20 months, failed to provide assistance to a junior colleague, and subjected that colleague to bullying and harassment for reporting her, had failed to provide appropriate care to a patient admitted for delivery of her baby who had died in utero and had failed to properly record that a baby born at 20 weeks' gestation had been born alive. The Committee found that Ms G had committed misconduct but also found that her attitude had improved and that she had addressed her poor performance so that her fitness to practise was not currently impaired.

In allowing the appeal, the Court said that it was essential, when deciding whether fitness to practise was currently impaired, not to lose sight of the need to protect the public, and the need to declare and uphold proper standards of conduct and behaviour so as to maintain public confidence in the profession. A panel should consider not only whether the practitioner continued to present a risk to members of the public in his or her current role but also whether the need to uphold professional standards and public confidence in the profession would be undermined if a finding of impairment were not made. The Committee in this case had not referred in its reasons to this important public interest aspect and there was nothing in its reasons to suggest that it had had regard to them.

Meadow v General Medical Council [2007] QB 462, 481H

This case concerned the provision of expert evidence by a paediatrician as part of a criminal trial. It was subsequently alleged (and found by a panel) that the evidence provided at the trial by Professor Sir Meadow was, in effect, negligent, that he was guilty of misconduct and that his fitness to practise was impaired as a result. In considering Prof Sir Meadow's appeal, the Court said as part of its judgement:

"In short, the purpose of fitness to practise proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past."

Nicholas-Pillai v General Medical Council [2009] EWHC 1048 (Admin)

The panel found that the practitioner was guilty of dishonesty in relation to his note-taking. In considering the appeal, the Court said:

"The Panel are [sic] clearly entitled to take into account, at the stage at which they determine whether fitness to practise is impaired, material other than the allegations which they have considered which suggest that it either is not impaired or is impaired."

"In the view of the panel, which is not disputed, he contested the critical allegations of dishonesty and intention to mislead. That was a fact which the panel were entitled to take into account in determining whether or not his fitness to practise was impaired, even though it did not form a separate allegation against him. Indeed, it is hard to see how it could not have done."

"In the ordinary case such as this, the attitude of the practitioner to the events which give rise to the specific allegations against him is, in principle, something which can be taken into account either in his favour or against him by the panel, both at the stage when it considers whether his fitness to practise is impaired, and at the stage of determining what sanction should be imposed upon him."

Saha v General Medical Council [2009] EWHC 1907

Dr Saha appealed against the panel's decision to remove his registration following its finding that his fitness to practise was impaired by reason of misconduct. The relevant misconduct found was a failure to co-operate fully and to provide relevant information to the GMC in connection with an investigation into his conduct.

One of the issues that the Court considered was the question of separate consideration of "misconduct" and "impairment" at stage 2 of hearing proceedings.

The Court held that there no requirement for there to be a formal "two stage process" in considering the issues of misconduct and impairment. There was also no requirement for the reasons for a finding of misconduct to be distinct from the finding of impairment. The panel was required to consider whether there had been misconduct and, further, whether that misconduct was such as to impair fitness to practise. Often, a finding of impairment would follow from a finding of misconduct. In this case, the panel had found that one and the same facts gave rise to the misconduct and the impairment. The Court held that such an approach was not erroneous as a matter of law. It did, however, add:

"Often a finding of impairment will follow from past misconduct but that is not necessarily the case. As Mitting J put it in Zygmunt "even though the panel... finds... misconduct, it may conclude that fitness to practise is not impaired". After saying that in perhaps the majority of cases, the issue will not be live (i.e. in such cases a finding of impairment will following from the finding of misconduct), Mitting J continued, in contrast, by stating that in cases in which the issue is live, then impairment "must be separately and appropriately" addressed. It is thus necessary to distinguish between cases where misconduct is, of itself, likely to lead to a finding of impairment and cases where misconduct does not necessarily lead to a finding of impairment, because of other factors to be taken into account. Such factors usually comprise events between the date of misconduct and the date of the panel hearing, such as a one-off event of misconduct followed by the passage of substantial time, an (sic) otherwise unblemished record, or subsequent retraining. In each of Zygmunt, Cohen and Cheatle, the panel had failed to take into account what had happened in the period between a one-off incident of past clinical misconduct and the date of the assessment of fitness to practise at the panel hearing."

Yeong v General Medical Council [2009] EWHC 1923 (Admin)

Dr Yeong's GMC registration was suspended for 12 months following a sexual relationship with a former patient. Dr Yeong obtained an expert report from an experienced psychiatrist who assessed that he did not have a psychological disposition to engage in sexual relationships with patients, the likelihood of recurrence was extremely low, and that Dr Yeong did not pose a risk to patients in his professional capacity. On appeal Dr Yeong contended (amongst other things) that the panel applied an incorrect impairment test.

In dismissing the appeal, the Court said:

"The question of the possibility of a recurrence of such misconduct by Dr Yeong was a matter of the ordinary assessment of likely human behaviour, in relation to which a psychiatrist's expertise confers no special privileged insight. The assessment of risk of any particular form of future behaviour is the sort of task which courts and tribunals regularly perform without needing to refer to expert psychiatric evidence."

"Importantly, the panel's view was that the general public interest in clearly marking proper standards of behaviour for doctors in respect of relationships with their patients so as to uphold public confidence in the medical profession was by far the weightiest factor pointing in favour of the finding of impairment of fitness to practise and the sanction which was imposed."

“Where a panel considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession. In such a case, the efforts made by the practitioner in question to address his behaviour for the future may carry very much less weight than in a case where the misconduct consists of clinical errors or incompetence.”

Zygmunt v General Medical Council [2008] EWHC 2643 (Admin)

Professor Zygmunt appealed the panel’s decision that his fitness to practise was impaired and to impose a 2 month suspension. The allegation against Prof Zygmunt arose out of a wrong diagnosis that the patient suffered from a tumour and not an infected abscess.

The Court noted that even if a Panel properly finds that a practitioner has been guilty of misconduct, it may nevertheless conclude that his/her fitness to practise is not impaired. In many, perhaps the great majority of cases, the issue will not be live, but in cases in which it is, it must be separately and appropriately addressed by the panel.

The Court went on to say that it agreed with the decision reached in the *Cohen* case that when fitness to practise was being considered, the task of the panel is to take account of the misconduct of the practitioner and then to consider in the light of all the other relevant factors known to them whether his or her fitness to practise is (rather than has been) impaired.