

GOC ILLEGAL PRACTICE CONSULTATION – DRAFT ABDO RESPONSE

1. To what extent do you agree that the updated protocol links more closely with our overarching public protection function?

a) Strongly agree b) Agree c) Neither agree nor disagree d) **DISAGREE** e) Strongly disagree

If you answered 'disagree' or 'strongly disagree', please explain your reasons.

ABDO supports the new aspects of the protocol, namely the emphasis on collaboration with online platforms to prevent illegal sales. This will be particularly beneficial in relation to the supply of products that can be sold only under supervision and, therefore, cannot be sold online, such as children's spectacles and cosmetic contact lenses.

We also support test purchases to obtain evidence of an illegal sale in cases where the GOC suspects that illegal sales are continuing after a cease-and-desist letter has been sent.

However, the overall impression created by the protocol is that tackling illegal practice is not a priority area for the GOC and that a key concern is being able to show that a clear process has been followed in dealing with reports of illegal practice and that decisions to not take action can be justified.

We agree with the GOC's aspiration, as set out in paragraph 1.5 of the consultation document, to develop a strategy that links more closely with its overarching public protection function. Unfortunately, the updated prosecution protocol does not in itself constitute such a strategy.

In addition, paragraph 1.6 states that the GOC has carried out a review of its illegal practice strategy and protocol in line with its desire, "to be more proactive in [its] approach to illegal practice and also provide clarity on when [it] will take action and what action will be taken."

However, the consultation document contains no information about the outcome of the GOC's review of its existing strategy. This strategy has five elements of which handling complaints is only one.

What the GOC has published for consultation is a revised prosecution protocol rather than a strategy to address illegal practice in the optical sector. While handling reports of illegal practice in line with the protocol should form part of an illegal practice strategy, relying solely on this activity would be of limited effectiveness.

The GOC concedes this point in, for example, acknowledging that concerns raised about non-UK businesses or individuals would simply be closed. This will not help members of the UK public who buy products from such businesses and risk harm as a result. For this reason, action to promote patient awareness of the risks involved in buying products and services online is also required.

We would like to understand what outcomes the GOC is seeking to achieve in line with its duty to protect the public and what activities it will be undertaking to achieve those outcomes.

We recognise that addressing illegal practice effectively will require concerted effort across the optical sector and would be happy to work with you and other sector bodies to support the development and implementation of a revised illegal practice strategy.

2. To what extent do you agree that the updated protocol will improve sector awareness of our remit regarding illegal optical practice?

a) Strongly agree b) Agree c) Neither agree nor disagree d) **DISAGREE** e) Strongly disagree

If you answered 'disagree' or 'strongly disagree', please explain your reasons.

The protocol does not clearly explain the GOC's remit in relation to illegal optical practice. In particular, it does not explain the extent to which the GOC will be able to address future challenges, such as sight-tests offered online from outside the UK.

Also, the protocol does not explore the challenges involved in pursuing non-UK businesses or individuals, suggesting simply that it would not be able to prosecute such companies. We would like the GOC to consider a more creative approach, including examining whether action against non-UK businesses with UK distribution centres would be feasible and whether a code of practice for online supply would be helpful in enabling patients to gain assurance that they are buying from a reputable supplier.

In any case, updating the protocol will not in itself improve awareness of the GOC's remit. More proactive steps would be required to achieve this, including communication with registrants and professional bodies and the publication of data on performance against objective criteria. In particular, a six-monthly report to the GOC Council would improve transparency and awareness of an area of activity that traditionally has had much less visibility than other areas, such as the handling of fitness to practise complaints. Such a report could include the number and manner in which illegal cases were addressed and the outcomes achieved.

We recognise and very much welcome the progress that the GOC has made in its approach to handling fitness to practise cases and the scrutiny applied to this area at Council level has certainly contributed to the improvement in this area.

We also wish to make the point that raising awareness of the GOC's remit should not be an end in itself. It would be of more value to raise awareness of how to

report illegal practice to the GOC and make it easier to do so via the GOC's website.

3. To what extent do you agree that the updated protocol will provide clarity on when we will act and what action will be taken?

a) Strongly agree b) Agree c) Neither agree nor disagree d) **DISAGREE** e) Strongly disagree

If you answered 'disagree' or 'strongly disagree', please explain your reasons.

The updated protocol will provide some clarity about when the GOC will act and what action will be taken. However, several questions remain.

It is not clear what is the significance of the GOC adjudging that a case carries a higher risk in line with the factors set out in paragraph 3.10 – intent to misuse a protected title, offences involving vulnerable patients and actual – and how this informs the GOC's assessment decision.

Presumably in cases that are adjudged to be lower risk, there is more likely to be a recommendation that no further action should be taken by the GOC. This would be problematic in that the public interest test criteria include potential harm, meaning that it could be in the public interest to prosecute a case where there is potential but not actual harm. However, this will not be possible if the case has been closed or referred elsewhere at an earlier stage.

It is also not clear which cases may be judged as suitable for referral to trading standards and what the GOC will do in such cases if trading standards do not report a positive outcome. The protocol should be amended to make provision for the GOC to reopen the case if trading standards are not able to act or not able to act successfully. Given that the priorities of trading standards departments are decided on a local level and that their funding has been very constrained in recent years, the GOC should not assume that referral to trading standards will guarantee a successful outcome.

As mentioned above, the GOC should also clarify its position in relation to non-UK businesses and individuals as the protocol suggests that in no circumstances will it be possible to take any formal action against such entities.

4. Is there anything unclear or missing in the updated protocol?

a) **YES** b) No c) Not sure

If you answered 'yes', please give details.

We note that the protocol specifies the need for a risk assessment to be carried out on receipt of a complaint and says that this will be carried out by the case

assessor with legal input. There should also be a requirement to seek clinical input in appropriate cases.

We also note the protocol refers to Annex A, which was not included with the published version.

We would also like the GOC to seek statutory powers of investigation and enforcement as part of the Government's regulatory reform programme.

Paragraph 3.5 of the protocol states that, "A complaint may be closed if we are unable to obtain information to substantiate an investigation." To avoid this outcome, the GOC should seek powers to require information to be provided.

It is also incongruous for the GOC, as the statutory regulator for the optical professions, to be in a position where in relation to illegal optical practice it is limited to pursuing a private prosecution in the Magistrates court. This should be rectified, with the prospect of legislative reform providing an opportunity to do so.

5. Are there any aspects of the updated protocol that could discriminate against stakeholders with specific characteristics? (Please consider age, sex, race, religion or belief, disability, sexual orientation, gender reassignment, pregnancy or maternity, caring responsibilities or any other characteristics.)

a) Yes b) No c) Not sure

If you answered 'yes', please give details.

There should be greater focus on ensuring that the process for reporting possible instances of illegal practice is as accessible and inclusive as possible, including for members of the public with any of the relevant characteristics.

It should not be necessary to download and complete a long word form that assumes considerable knowledge of illegal practice.

The GOC should also make clear that it welcomes input from the public, whereas the form does not even appear to consider that a member of the public might want to raise an issue – as shown in the following extract seeking information from the complainant:

"Which of these best describes you?

Please select one option by putting a cross in the relevant box.

a. ☐ Trading Standards Officer

b. ☐ Employee or officer of a public body (other than Trading Standards), the GOC or another regulator

c. ☐ GOC or GMC registrant

d. ☐ Journalist or other press/media freelance/employee

e. ☐ None of the above"

The fact that a member of the public falls into the category of 'none of the above' does not suggest that the GOC welcomes or is keen to encourage the public to raise issues with them.

6. Are there any aspects of the updated protocol that could have a positive impact on stakeholders with specific characteristics? (Please consider age, sex, race, religion or belief, disability, sexual orientation, gender reassignment, pregnancy or maternity, caring responsibilities or any other characteristics.)

a) Yes b) No c) Not sure

If you answered 'yes', please give details.

7. Are there any other impacts of the updated protocol that you would like to tell us about?

a) YES b) No c) Not sure

If you answered 'yes', please give details.

As stated above in answer to question four, the impact of updated protocol will be the lessened by the fact that it does not form part of a wider illegal practice strategy.

Also, we disagree with the statement in the impact assessment that, "There are no plans for legislation to be changed." The Government has consulted on legislative changes relating to how healthcare regulators carry out their functions and we understand that the GOC will be carrying out a review of the Opticians Act.

This creates an opportunity to consider whether there are changes to legislation that would enable the GOC to tackle illegal practice more effectively.

We also question whether considering the level of media interest in the last 12 months is appropriate and suggest that a longer view is required. There have, in the past, been front page stories in the national press about loss of sight caused by wearing contact lenses without receiving appropriate aftercare advice. When considering risk in this area, it is important to consider the level of harm that might occur in the event of an adverse incident as well as the likelihood of such an adverse incident occurring.