

Council, 10 February 2016

A report on the investigation into the GDC's handling of a whistleblower's disclosure about the Investigating Committee

Executive summary and recommendations

### **Introduction**

On 21 December 2015, the Professional Standards Authority (PSA) published its report into the General Dental Council's (GDC's) handling of a whistleblowing disclosure about the practices of its Investigating Committee.

The report concludes that: '...the other eight health and care professional regulators could learn from the outcomes of this investigation.' (Paragraph 6.29.) This paper applies the conclusions and recommendations of the investigation report.

Section three of the paper provides a commentary against each of the report's recommendations, identifying any actions for the Executive. These actions include reviewing the HCPC's whistleblowing policies for partners and employees.

### **Decision**

The Council is invited to discuss the attached paper and to agree the actions outlined in section three.

### **Background information**

The investigation follows a previous investigation by the PSA into allegations made by the GDC's former chair, the report of which was published in early 2013. See paper for more information.

### **Resource implications**

The delivery of actions identified is considered achievable within existing resources.

### **Financial implications**

No significant financial implications are anticipated at this stage. The review and revision of the whistleblowing policies will require appropriate legal input. This will be accounted for in budgets for 2015-16 / 2016-17.

### **Appendices**

PSA 2015 Investigation report

**Date of paper**

29 January 2016

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## **A report on the investigation into the GDC's handling of a whistleblower's disclosure about the Investigating Committee**

### **1. Introduction**

- 1.1 On 21 December 2015, the Professional Standards Authority (PSA) published its report into the General Dental Council's (GDC's) handling of a whistleblowing disclosure about the practices of its Investigating Committee ('the 2015 investigation').
- 1.2 The report concludes that: '...the other eight health and care professional regulators could learn from the outcomes of this investigation. We will ensure that we signpost the regulators to the learning arising from this investigation.' (Paragraph 6.29.) This paper follows the organisation's routine practice of considering such reports and applying the findings and recommendations to the HCPC and its work.
- 1.3 This paper is divided into three sections.
- Section two provides a summary of the relevant background as well as a summary of the report's conclusions and recommendations.
  - Section three is a table which takes each of the recommendations, summarises the issues involved and provides a commentary from the Executive, highlighting any actions for the HCPC.
- 1.4 A full copy of the PSA report is also appended.

### **2. Summary**

#### **Background information**

- 2.1 The following provides some background information which will assist the Council in understanding the GDC's processes and terminology compared to the HCPC's.
- The role of the GDC's Investigating Committee (IC) is to consider allegations made about its registrants and decide whether there is a 'case to answer'. That means deciding whether there is a 'prima facie' case for the matter to be referred for further consideration at a hearing.
  - This is similar to the HCPC's Investigating Committee. When the HCPC's Investigating Committee meets to consider 'case to answer' matters, it does so convened as 'Investigating Committee panels' or 'ICPs'.
  - The GDC refers to those who attend meetings of the Investigating Committee as 'statutory Committee members' or 'Investigating Committee members'.

- The HCPC refers collectively to partners who are involved in fitness to practise panels and hearings as ‘panel members’. Panel members are not tied to a single statutory Committee – they are able to sit on ICPs, as well as on panels of the Conduct and Competence and Health Committees (which meet to consider cases at final hearings).
- The GDC’s Appointments Committee consists of appointed members who are not members of the GDC’s Council. The Appointments Committee has responsibility for the recruitment, training and performance management of members who sit on its Investigating Committee and fitness to practise panel. The idea is to make this function as arm’s length as possible from the Council and Executive.
- The HCPC’s partners department sits within the Human Resources Directorate and administers the processes for recruiting, training and performance management of partners, in conjunction with the directorates that use their services. The Directorates are accountable to the Council and Audit Committee.
- The GDC recruited legally qualified IC Secretaries to provide the secretariat to meetings of the Investigating Committee. At the HCPC, ICP meetings are facilitated by ICP Coordinators (a role undertaken by Hearings Team Managers who are part of the Adjudication Management team). Case Managers also attend the meetings to present background and factual information about the cases being considered.

### **The 2013 investigation**

- 2.2 The GDC was the subject of a previous investigation by the PSA, the report of which was published in early 2013 (‘the 2013 investigation’).<sup>1</sup> This was triggered as a result of the resignation of the GDC’s then Chair, who raised a number of concerns about the governance and operation of the organisation.
- 2.3 A number of the concerns raised were not substantiated in the investigation. However, of relevance to the 2015 investigation were a number of concerns identified with the operation of the GDC’s investigating committee. Some of these concerns are also identified and examined in the 2015 investigation, including allegations of case work employees / IC secretaries attempting to exert undue influence on IC members’ decision making, changing decisions without proper authorisation and the provision of conflicting or inaccurate legal advice.

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<sup>1</sup> <http://www.professionalstandards.org.uk/docs/special-reviews-and-investigations/130204-gdc-investigation-report-final.pdf?sfvrsn=0>

- 2.4 The report describes the GDC's response to these concerns. Case work employees would be removed from IC meetings and legally qualified IC Secretaries recruited.

### **The 2015 investigation**

- 2.5 The 2015 investigation relates to concerns raised by a whistleblower to both the PSA and to the Chair of the UK Parliament Health Committee. The whistleblower had first raised their concerns with the GDC under its whistleblowing policy.
- 2.6 The PSA's investigation looked into three areas which are briefly summarised below. The PSA says that it decided to investigate, not because it disagreed with the findings of an external investigation the GDC had commissioned, but because it was concerned about the adequacy of the response from the GDC to the external investigation report and its ability or willingness to address the findings (paragraph 3.6 of the report).
- 2.7 The summary that follows attempts to provide a short description of the key events so that the Council can easily understand the PSA's conclusions and recommendations, which are also summarised.
- **Concerns about the management and support of the Investigation Committee**
- 2.8 The whistleblower (an IC member) raised concerns about the management of the support processes of the IC, alleging the continuation in 2013 of a number of what the report collectively refers to as 'objectionable practices', some of which were identified in the 2013 investigation. These were alleged to have comprised or risked comprising the IC's independence (see section three).
- 2.9 They also raised concerns about the accuracy of the information provided to the 2013 investigation and about the behaviour of a senior employee involved in overseeing the secretariat providing support to the IC.
- 2.10 The GDC commissioned a law firm, Penningtons Manches LLP (Penningtons) to look into the concerns raised. The Penningtons report, received in late 2013, validated the whistleblower's concerns about the practices of the IC Secretariat in 2013, concluding overall that these practices risked compromising the propriety and independence of the IC as the statutory decision maker. An action plan was implemented in early 2014. Penningtons also produced a post-implementation review report.
- 2.11 In summary the investigation made the following conclusions.
- The recruitment, induction, training and oversight of the IC Secretaries led to the development and continuation of the practices considered to be objectionable.

- There was a lack of knowledge and/or understanding and agreement between the two senior employees responsible that these practices were happening and/or that they were objectionable.
  - There was a failure to review arrangements in place to gather feedback from IC members following the 2013 investigation and evidence that feedback that was received had not been reviewed or acted on.
  - There was a focus on speed of case throughput and consistency of decision making which was to the detriment of the propriety of decision making.
  - The GDC did take appropriate remedial action on receipt of the Penningtons report, but should have considered interim preventative steps earlier given the potential significance of the practices alleged by the whistleblower.
- **The adequacy of the information provided to the GDC's Council and Committees and its scrutiny**

2.12 The investigation examined the role of the GDC's Council and Committees as the PSA considered this was relevant to assessing the adequacy of the GDC's response to the 2013 investigation report; to the whistleblowing disclosure; and to the subsequent Penningtons reports (paragraph 4.3).

2.13 In summary the investigation made the following conclusions.

- The presentation of information by the Executive to the Council and Committees was inadequate. This risked hindering the Council and Committees oversight of the performance of the GDC and/or the risks involved.
- Concerns identified by the PSA included inaccurate or misleading information being provided by the Executive and poor quality analysis of the issues.
- The Council and its Committees did not always challenge sufficiently the information provided to them.

- **The GDC's whistleblowing policy and its operation**

2.14 The whistleblower alleged that they had been the victim of detriment as a direct result of their whistleblowing disclosure, raising a number of concerns about their treatment following their disclosure. A short summary of some relevant events is given below.

- Shortly after their disclosure, the whistleblower was the subject of a complaint. An IC Secretary alleged that they had made an inappropriate remark prior to a meeting, which concerned their race and gender.
- The Chief Executive referred the matter to the Appointments Committee, rather than dealing with it under the internal complaints procedure.
- The Chair of the Appointments Committee decided to exercise their discretion under the relevant policy, accepting the complaint made by the IC Secretary even though this was made outside of the normal one month period.
- The details of the whistleblowing disclosure and the name of the whistleblower were disclosed to the IC Secretariat, to IC Committee members and Chairs and to the Appointments Committee at various points in the handling / investigation.
- The IC Secretary's complaint was subsequently resolved by way of an apology by the whistleblower.
- The whistleblower alleged detriment as a result of their disclosure because they considered that the IC Secretary's complaint had been made as a result. They also alleged (amongst other concerns) that their confidentiality had been breached; that inappropriate decisions had been made to refer the complaint to the Appointments Committee and to accept it out of time; and that they had not been offered a fair number of IC sittings.
- Consideration of the complaint of detriment was delayed, pending receipt of the Penningtons report into the whistleblowing disclosure.
- Following its receipt, the former Director of Governance was appointed to carry out the investigation into the whistleblower's allegations of detriment. The report subsequently concluded that the whistleblower had not suffered any detriment, but made recommendations for improvements to policies and processes.

2.15 In summary the investigation made the following conclusions.

- Overall, the PSA does not criticise the motivation of the GDC employees involved in handling/investigating the whistleblowing disclosure and allegation of detriment, but is critical of some of the decisions that were made.
- The decisions considered inappropriate in the circumstances include: referring the IC Secretary's complaint to the Appointments Committee rather than using the informal complaints procedure; accepting the IC Secretary's complaint out of time without undertaking further inquiries to

establish whether there were exceptional circumstances; and breaching the confidentiality of the whistleblower unnecessarily.

- The appointment of the former Director of Governance to undertake the investigation was considered unwise because of questions of their perceived impartiality.
- The investigation carried out by the former Director of Governance was not thorough and did not properly apply the test of 'detriment'.
- There was a lack of adequate follow-up of the recommendations made in the former Director of Governance's report.
- The revised whistleblowing policy is unsatisfactory and requires further improvement.

### **3. Analysis of conclusions and recommendations**

3.1 The table below takes each recommendation made by the PSA in section two of its report and describes the background to each recommendation. A short commentary is then provided by the Executive applying the recommendation to the HCPC and identifying any necessary actions.

3.2 The table also includes areas where the PSA has identified issues and/or made conclusions but has not identified specific recommendations, where it is considered helpful to provide further assurance to the Council. For example, in light of the PSA investigation, it is relevant for the Council to know about how the Executive supports the work of ICPs. Where the PSA reached conclusions which are confined to the specific details of events or the individuals involved, they are not listed here. Section two provides an overview.

3.3 The following specific actions are identified in the table for summer 2016. Where required / appropriate, it is intended that the Council will be invited to discuss and agree the products of these actions at its meeting in July 2016.

- Written information for partners will be produced setting out the options available to make complaints not covered by the Partner Complaints Procedure.
- A review of the Partner Complaints Procedure will be carried out to include more explicit information on confidentiality and disclosure of information.
- The whistleblowing policy (for employees) will be reviewed.
- A partner whistleblowing policy will be developed.



Issue and background	PSA conclusion / recommendation (if applicable)	Executive commentary and actions
<p><b>1. Recruitment, induction, supervision and monitoring of the work of the IC Secretaries</b> (pages 29-40)</p> <p>The report highlights a number of problems.</p> <ul style="list-style-type: none"> <li>• Recruitment of IC Secretaries with lack of experience of IC work or UK legal experience.</li> <li>• An apprentice model of induction, which led to the perpetuation of the ‘objectionable’ practices.</li> <li>• Some evidence of lack of effective supervision or monitoring.</li> <li>• Lack of understanding or agreement between the two senior employees involved that the practices identified were objectionable.</li> <li>• Lack of proper scrutiny of the work of the IC secretariat.</li> </ul>	<p>‘The approach taken by the GDC to recruiting, training and supervising the IC Secretaries is likely to have contributed to the development / continuation of objectionable practices...we were not convinced that the approach being taken to training and supervision...at the time provided sufficient support or guidance to employees...We recommend that if the GDC has not since changed its approach, it should keep this area under review.</p> <p>We recommend that regular training is provided to the IC Secretaries on their core role and that this training covers the rationale as to why their role is an adviser and facilitator to the IC. We also recommend that the GDC puts in place a comprehensive induction programme for new IC Secretaries as well as robust monitoring and supervision of their work.’</p>	<p>The role of ICP Coordinator is undertaken by our Hearings Team Managers who are part of the Adjudication Management team. We currently have two Hearings Team Managers, who were both formerly Hearings Officers. As part of their induction as Hearings Officers they would have received training on the importance of Panel independence and transparency in Panel decision making. As Hearings Officers they had several years’ experience of providing support to Panels.</p> <p>If we recruit new Hearings Team Managers in the future, the Adjudications Manager and Fitness to Practise Training Advisor will review our existing induction training programme on the role of ICP Coordinator.</p> <p>ICP Coordinators receive bespoke refresher training on their role on an annual basis. Feedback received from Panel members, or from other avenues, is fed into this training where appropriate.</p>

		<p>ICP Coordinators have one to one meetings with the Adjudication Manager on a monthly basis. As part of these meetings, the ICPs conducted that month are reviewed and any specific issues discussed.</p> <p>Case Managers also attend ICPs to present background and factual information about the cases to be considered. As part of their induction, Case Managers have a training session with an experienced Case Manager about attending ICPs. They also have a training session with the ICP Coordinator and will observe an ICP meeting. When a Case Manager begins to attend ICP meetings to present their own cases they will be supported at the meeting by an experienced Case Manager until such a time it is decided by their Case Team Manager that they can attend on their own.</p> <p>The presence of two HCPC members of staff at ICP meetings allows for peer to peer monitoring.</p>
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<p><b>2. Mechanisms for seeking and acting on feedback from IC members and employees</b> (pages 72-101)</p> <p>The report highlights the following concerns.</p> <ul style="list-style-type: none"> <li>• No formal review of mechanisms for IC members to provide feedback (i.e. on the operation of the process) took place, although this was a recommendation of the PSA's 2013 report. (The GDC says that it had already modernised its approach in this area.)</li> <li>• Lack of response to IC Chairs who did provide feedback about practices they were concerned with.</li> <li>• Disengagement of IC members with the feedback process as a result of the above.</li> <li>• Feedback forms received which highlighted that the objectionable practices were continuing to take place. This feedback was either not reviewed or if reviewed its significance was not recognised.</li> </ul>	<p>'The GDC did not carry out a formal review of the processes in place to gather feedback from IC members after publication of the 2013 Investigation Report, despite our recommendation that it should do so.</p> <p>We also expect the GDC to institute a system of sharing feedback received from the IC members with the executive management team and the Audit and Risk Committee, and, so far as is relates to members' training and development, the Appointments Committee.'</p>	<p>At their induction Panel members are informed that they can provide the HCPC with feedback at any time. They are reminded of this at refresher training events and in the quarterly Panel newsletter.</p> <p>In relation to ICPs, Panel members are encouraged to provide feedback to the ICP Coordinator on the day of the meeting. In addition, at the end of each meeting the ICP Coordinator conducts a review of the day with the Panel Chair. Any feedback received in this way is recorded in a log.</p> <p>Any feedback received ad hoc, for example, in a letter or email from a Panel member, is also recorded in a log.</p> <p>We are currently in the process of developing a feedback form for Panel members to complete on the day of ICP meetings. This will be similar to the feedback form used for final and review hearings and will increase the formality of the process.</p> <p>Any feedback received is shared between the Adjudications Managers and the Investigations Managers at monthly operational meetings. The feedback is</p>
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		<p>reviewed to consider whether the issues identified are individual performance issues or whether there are wider concerns, which need to be addressed through training or a review of policies, procedures or guidance documents.</p> <p>We do not have a formal process for reporting feedback received from Panel members. However, individual feedback or trends in feedback are escalated as appropriate. In future, following the completion of the independence in adjudication project, Panels will operate as the 'Tribunal Service' with separate governance arrangements to ensure a higher degree of transparency and separation. Feedback mechanisms will be built into these governance arrangements.</p> <p>In terms of responding to Panel members who provide feedback, we will do so if a Panel member requests a response.</p>
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<p><b>3. Objectionable practices</b> (pages 40-71)</p> <p>(i) Pre-meeting discussions between IC Chairs and IC Secretaries.</p> <p>Pre meeting discussions took place between IC Secretaries and IC Chairs and it was reported that some Secretaries strayed into giving their views about case outcomes. The Penningtons report did not find any evidence of inappropriate influence, but concluded that this practice risked compromising the independence of the IC.</p>	<p>There were no specific recommendations made in this area. The report records that the GDC has taken remedial action.</p>	<p>Pre-meeting discussions between Panel Chairs and ICP Coordinators is not usual practice. Occasionally telephone contact may be made pre-meeting however this will only be to discuss logistical issues such as the running order of the meeting. Similarly any discussions before the start of the meeting on the day, will have the same focus.</p> <p>At the start of the meeting, the ICP Coordinator will brief the Panel on its task and the test to apply. This briefing is intended as a refresher and based on the Case to Answer Practice Note.</p> <p>ICP Coordinators do not have any specific knowledge of the cases to be considered at meetings, therefore whilst it would not be our practice to provide advice or instruction to Panel members during any pre-meeting discussions or the briefing, there is no opportunity for this to happen in our process.</p>
<p>(ii) Advance drafting of IC decision documents /reasons by IC Secretaries.</p> <p>IC Secretaries would prepare draft or skeleton IC decision documents.</p>	<p>There were no specific recommendations made in this area. The report records that the GDC has taken remedial action.</p>	<p>The Case Manager assists the ICP in the process of drafting its decision by typing the decision in the room where the ICP takes place whilst the Panel members are present. The decision, whilst being typed, is projected on a screen so the Panel</p>

<p>Sometimes these would include text based on the anticipated outcome or range of outcomes. On occasion, these drafts were directly shared with the IC, contrary to the guidance in place. The PSA concludes that whilst template decision documents which include standard wording is acceptable, the practice that developed at the GDC risked comprising the independence of the statutory decision maker.</p>		<p>members can read what is being drafted as it is drafted. This allows the Panel to have full control as they can view and amend the decision as it is being drafted.</p> <p>The decision is drafted using a template to ensure that key background information is included, in addition to the Panel's finding in relation to the elements of test.</p> <p>To assist with efficiency, Case Managers may pre-populate the template with key background information in draft form, which usually comprises of a summary of the fitness to practise concerns and the context within which they arose. However, as Case Managers are not involved in the decision making process they do not pre-populate the template with the Panel's decision.</p> <p>Once the Panel is satisfied with the drafting of the decision, a copy is printed and at the end of the meeting, the Panel Chair will proof read, date and sign all of the decisions on behalf of the Panel. Occasionally the Panel Chair may make amendments at this stage however these will only be minor in nature, for example, the correction of typographical errors.</p>
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		<p>The process for the drafting of ICP decisions is set out in our operational guidance 'Attending ICPs'. This guidance is currently being reviewed and will incorporate learning from the PSA's report. The revised operational guidance will be rolled out to the Fitness to Practise Department via team meetings.</p> <p>Our Case to Answer Determinations Practice Note provides guidance to ICPs on drafting decisions and giving reasons. The Practice Note is currently being reviewed and will incorporate learning from the PSA's report. Panel members will be made aware of any amendments to the Practice Note through the quarterly Panel newsletter and refresher training events.</p> <p>All ICP decisions are reviewed by the Quality Compliance team on a monthly basis and a report providing an analysis of these reviews is considered by the Council on an annual basis.</p>
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<p>(iii) Provision of legal advice by IC Secretaries during meetings.</p> <p>There was a lack of clarity about the advice that IC Secretaries could properly give to IC meetings. There was a lack of clarity about the process of obtaining formal legal advice when this was necessary.</p>	<p>There were no specific recommendations made in this area. The report records that the GDC has taken remedial action.</p>	<p>ICP Coordinators and Case Managers do not provide legal advice during meetings.</p> <p>ICPs are able to request further information before making a decision. Therefore, if an ICP requires legal advice, it can defer its decision so that legal advice can be obtained. The case would then be considered at another meeting when the legal advice is available, having been disclosed to the registrant in advance and providing them with the opportunity to comment on the additional information.</p>
<p>(iv) Inappropriate interventions/undue influence by IC Secretaries during meetings.</p> <p>IC Secretaries were reported to have inappropriately intervened in meetings, for example, by interrupting committee members and becoming involved in case discussions, overstepping their role as a facilitator/adviser.</p>	<p>There were no specific recommendations made in this area. The report records that the GDC has taken remedial action.</p>	<p>ICP Coordinators facilitate ICP meetings and provide generic advice on the test to be applied and the HCPC's policies and procedures as set out in the relevant Practice Notes and Policy documents. Case Managers attend ICP meetings to present background and factual information about the cases being considered. Neither the ICP Coordinator nor the Case Manager become involved in case discussion (apart from giving background or factual information) and do not give any advice or opinion on the decision.</p>



		<p>The roles of the ICP Coordinator and Case Manager at ICP's is set out in our operational guidance 'Attending ICPs'. This guidance is currently being reviewed and will incorporate learning from the PSA's report. The revised operational guidance will be rolled out to the Fitness to Practise Department via team meetings.</p>
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<p>(v) Amendment of decision documents by IC Secretaries after meetings without appropriate authorisation.</p> <p>IC Secretaries were asked to scrutinise decisions to correct any spelling errors. More substantive corrections such as errors of fact or expression had to be agreed with IC Chairs. It was found, however, that sometimes decisions were redrafted to amend the reasons significantly, sometimes without properly highlighting the changes to the Chair or to the Committee as a whole. These practices were motivated by a desire to ensure consistent, well-reasoned decisions which were less likely to be challenged.</p> <p>The PSA reports that the amendments to operating guidance initially put in place as remedial action, which limited the types of amendments that could be made, had the unintended consequence of leading to identified errors not being corrected in decisions prior to publication.</p>	<p>There were no specific recommendations made in this area. The report records that the GDC has taken remedial action.</p>	<p>All ICP decisions are finalised, signed and dated by the Panel Chair on the day of the meeting. A copy of the signed and dated decision must be sent to the parties involved. Therefore, whilst it would not be our practice to redraft or amend ICP decisions, there is no opportunity for this to happen in our process.</p>
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<p><b>4. Inadequate information provided to Council / Committees and lack of appropriate scrutiny</b> (pages 102-144)</p> <p>The report is critical of the following in relation to Council/Committee consideration of the findings, outcomes and actions of the 2013 investigation report and the subsequent whistleblowing disclosure and Penningtons reports.</p> <ul style="list-style-type: none"> <li>• The accuracy of the information provided by the Executive including instances of factually incorrect information being given.</li> <li>• On occasions it is unclear how some actions identified in response relate to the concerns raised / recommendations made.</li> <li>• The quality of the analysis provided by the Executive including downplaying the significance of some of the findings of reports.</li> <li>• A failure of the Council / Committees to scrutinise the accuracy of the information</li> </ul>	<p>The report makes no specific recommendation in this area. However, the role of Councils in providing appropriate oversight and scrutiny of the role of Executives is a theme in the papers and investigation reports produced by the PSA.</p>	<p>The Council has established mechanisms to ensure that this area is kept under regular review.</p> <p>They include the Council members' and Chairs' performance reviews, which include an anonymised report being considered by the Council in open session.</p> <p>The Council regularly reviews its own performance at its annual offsite away day. This has included discussion and self-evaluation of the Council's effectiveness in balancing support, oversight and scrutiny.</p> <p>However, this is an area in which it is important to guard against complacency. Whilst there are no specific recommendations to make here, this is an area which should be kept under regular review, including through the mechanisms described above.</p>
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<p>provided by the Executive when they were in a position to do so and a failure to follow up on progress against agreed actions.</p>		
<p><b>5. Internal complaints procedure</b> (pages 188-195)</p> <p>The GDC’s disciplinary procedure says that an employee who wishes to make a complaint about a member must first use the internal complaints procedure. It also says that a complaint under the disciplinary procedure from an employee can only be taken forward in the name of the Chief Executive. The Chief Executive referred the complaint made about the IC member direct to the Appointments Committee.</p> <p>The PSA is critical of a lack of clarity about what those internal complaints procedures were.</p> <p>The PSA is also critical of a failure to consider those procedures first, as required under the policy. It is also critical of the reasons given for referral direct to the Appointments Committee – and says that if it is never appropriate for the internal complaints procedures to be</p>	<p>‘The disciplinary procedure for statutory committee members should be amended to set out clearly: what the internal complaints procedures are and how they apply; and the factors that should be considered when deciding whether a complaint should be referred to the Appointments Committee. The views of those who use the disciplinary procedure should be sought when making amendments.’</p>	<p>The Council has a written Partner Complaints Procedure which can be used by any HCPC employee or partner to make a complaint about a partner. The procedure emphasises informality with the aim of resolving problems quickly, simply and fairly. Matters are determined by the relevant Head of Department or Director. If a complaint is of a particularly serious nature or may constitute a breach of the Partner Code of Conduct, then it is dealt with under the terms of the partner’s Service Agreement.</p> <p>The Partner Complaints Procedure does not cover situations where a partner wishes to complain about matters such as an HCPC policy, process or an HCPC employee. In these situations the partner can raise the matter informally with the relevant department, or follow the HCPC complaints process available on the website.</p> <p><b>Action:</b> Written information for partners will be produced setting out the options available to make complaints not covered</p>

<p>used in respect of IC members, then this should be stated clearly in the policy.</p>		<p>by the Partner Complaints Procedure – by summer 2016.</p>
<p><b>6. Time limit for consideration of complaints</b> (pages 195-203)</p> <p>The GDC policy provides a time limit of one month for a complaint to be made but provides the Chair of the Appointments Committee with the discretion to accept complaints out of time if there are ‘exceptional circumstances’ to do so. The Chair accepted the complaint made by an employee out of time (10 weeks since the event complained about) for a number of reasons, including the nature of the complaint and because they concluded that a reasonable reason for the delay had been given by the complainant.</p> <p>The PSA is critical of this decision, in part because they considered the nature of the complaint to be at lower end of seriousness and because further inquiries to establish the reasons for the late complaint were not made.</p>	<p>‘The disciplinary procedure for statutory committee members should be amended to set out the types of factors that should be considered when deciding if a complaint should be accepted out of time because of ‘exceptional circumstances’.</p> <p>The views of those who use this procedure should be sought when making amendments.’</p>	<p>The Partner Complaints Procedure does not specify time limits and, in line with its emphasis on informality, a complaint about a partner can be made at any time.</p>

<p><b>7. Disclosure of information to the Appointments Committee</b> (pages 203-208)</p> <p>The Chair of the Appointments Committee sought the views of the Committee on whether the IC member should be suspended. In doing so, they sent the entirety of the complaint to the Committee and disclosed the whistleblower's name.</p> <p>The PSA considered that more information than necessary was disclosed and that this had the potential to prejudice the consideration of the complaint, had it progressed further in the process.</p>	<p>'The disciplinary procedure for statutory committee members should be amended to set out the circumstances in which it is acceptable for information about a complaint to be disclosed to members of the Appointments Committee, whether in order to allow a decision to be made about the suspension or removal of the member or otherwise.'</p>	<p>Under the HCPC Partner Complaints Procedure, decisions about partner suspensions and terminations are made by the relevant Head of Department, advised by the Partner and HR Manager or the HR Director. Information is only disclosed more widely than these individuals where absolutely necessary to gather facts to determine the matter. Personally identifiable information is redacted as necessary.</p> <p><b>Action:</b> A review of the Partner Complaints Procedure will be carried out to include more explicit information on confidentiality and disclosure of information – by summer 2016.</p>
<p><b>8. Record keeping</b></p> <p>The PSA reports that its investigation was hampered by a lack of good record keeping.</p>	<p>'Any complaints about statutory committee members should be appropriately documented and records stored in one central and secure location in order to enable an audit trail of events and decisions to be kept.'</p>	<p>Records of all complaints made about partners are stored electronically by the Partners Team.</p>

<p><b>9. Operation of the whistleblowing policy</b> (pages 209-266)</p> <p>The PSA is critical of the following.</p> <ul style="list-style-type: none"> <li>• The disclosure of the whistleblower’s name to IC employees and to all IC members and Chairs without need or good reason.</li> <li>• Failure to keep the whistleblower up to date with the progress of the investigation.</li> <li>• A delay in offering support to the whistleblower and a lack of consideration whether additional support was required once their identity was disclosed.</li> <li>• The decision to appoint the former Director of Governance (rather than an independent investigator) to investigate the whistleblowing disclosure (when it concerned a peer, a subordinate, their line manager and they had previously offered a view on part of it).</li> </ul>	<p>The GDC should develop guidance for employees on how the whistleblowing policy should be operationalised. To include:</p> <ul style="list-style-type: none"> <li>• updates on progress of investigations;</li> <li>• maintenance of confidentiality; and</li> <li>• how complaints of detriment should be managed and investigated.</li> </ul> <p>‘The GDC should develop similar guidance for whistleblowers.</p> <p>The views of those who have used or may use this procedure should be sought when developing this guidance.</p> <p>We also recommend that the GDC should seek external advice from experts in whistleblowing management. Employees should be trained on how to use the guidance and the policy.’</p>	<p>The HCPC’s current whistleblowing policy provides a range of assurances for employees raising a concern around maintaining confidentiality; protection against disadvantage and reprisal; access to impartial advice and support; and information about the outcome of any investigation. Operational guidance and clarification is provided for some but not all of the areas identified in the PSA’s report about the GDC.</p> <p><b>Action:</b> The whistleblowing policy will be reviewed to ensure that it includes an appropriate and reasonable amount of operational guidance – by summer 2016.</p> <p>The review will include consideration of the NAO Assessment Criteria for Whistleblowing Policies, the Department for Business Innovation and Skills Whistleblowing Guidance for Employers and Code of Practice and comments from the HCPC’s legal advisors.</p> <p>Employees and managers will be consulted on suggested amendments and informed and trained in its use.</p>
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<ul style="list-style-type: none"> <li>• The thoroughness of the former Director of Governance’s report including the conclusions reached. In particular, the PSA concluded that the test of ‘detriment’ had not been properly applied.</li> <li>• A lack of effective oversight of the implementation of the recommendations made in the former Director of Governance’s report.</li> </ul>		
<p><b>10. The whistleblowing policy</b> (pages 266-271)</p> <p>The PSA says that the GDC’s whistleblowing policy (revised since the events giving rise to the investigation) requires further improvement, including in the following areas.</p> <ul style="list-style-type: none"> <li>• There is a lack of clarity in some terminology.</li> <li>• The policy requires amendment to ensure that it is clearer on reporting up the management line.</li> <li>• There needs to be improved clarity on applicability to associates (partners).</li> </ul>	<p>‘The GDC’s Council and Audit and Risk Committee should review the current whistleblowing policy in light of the concerns that we have raised about its clarity and factual accuracy and consider adopting a revised policy as necessary.’</p> <p>The PSA also suggests that the whistleblowing policy should be reviewed by a third party, such as the National Audit Office (NAO) (paragraph 5.439).</p>	<p>The current whistleblowing policy applies to employees and workers only. Partners and Council members are not workers or employees and would therefore not be covered by the regime of legal protections applying to whistleblowers. However, the HCPC takes whistleblowing very seriously and will provide access to and information about internal whistleblowing processes and assurances.</p> <p><b>Action:</b> A partner whistleblowing procedure (also to cover Council members) will be developed with reference to the considerations in (9) above – by summer 2016.</p>



<ul style="list-style-type: none"><li>• There are parts of the policy that might inadvertently be discouraging of whistleblowers.</li><li>• There is lack of clarity about to whom an IC member should whistleblow.</li></ul>		
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*A report on the investigation into the  
General Dental Council's handling of  
a whistleblower's disclosure about  
the Investigating Committee*

21 December 2015

## About the Professional Standards Authority

The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.

We oversee the work of nine statutory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise.

We also set standards for organisations holding registers for people in unregulated health and care occupations and accredit those organisations that meet our standards.

To encourage improvement we share good practice and knowledge, conduct research and introduce new ideas including our concept of right-touch regulation<sup>1</sup>. We monitor policy developments in the UK and internationally and provide advice to governments and others on matters relating to people working in health and care.

We also undertake some international commissions, which are paid for by the commissioners, to extend our understanding of regulation and to promote safety in the mobility of the health and care workforce.

We are committed to being independent, impartial, fair, accessible and consistent. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

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<sup>1</sup> Professional Standards Authority. 2015. *Right-touch regulation revised*. Available at <http://www.professionalstandards.org.uk/policy-and-research/right-touch-regulation>

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# 1. Introduction

- 1.1 On 11 April 2014 we wrote to the General Dental Council's (GDC) Chief Executive to inform the GDC that we had decided that it was both necessary and proportionate for us to conduct a special investigation into the concerns that had been raised with us by a whistleblower on 26 September 2013 about the management of and support for the GDC's Investigating Committee, and about the GDC's operation of its whistleblowing policy.
- 1.2 The decision in April 2014 to initiate a special investigation took into account additional information we had received in the period since our original risk assessment (to determine what action we should take) was conducted in March 2014 following receipt of the whistleblower's concerns. In particular, the decision in April 2014 (which followed a further risk assessment) took account of our assessment of the GDC's performance against the Standards of Good Regulation in 2013/14 for the purposes of our 2013/14 performance review report<sup>2</sup>, new information we had received from the whistleblower, as well as information that the GDC had allowed us access to during April 2014. It also took account of the letter we had received from the then Chair of the Health Select Committee who asked: 'Whether the Authority proposes to monitor the implementation of the [Penningtons] recommendations<sup>3</sup>, either as part of the annual performance review of the GDC or otherwise?' and 'What is the Authority's assessment of the adequacy of the GDC's policies governing the handling of concerns raised by members of the GDC and its Committees?' Once we had informed the GDC about the initiation of our special investigation we also published information about it on our website.
- 1.3 Our Board agreed at its meeting on 21 May 2014 the terms of reference for the special investigation, as set out below. The investigation would examine:
- The GDC's:
    - a) Management of the processes and support for its investigating committees which post-dates the publication of our Investigation report 'An investigation into concerns raised by the former Chair of the General Dental Council (February 2013)'.
    - b) Response to the recommendation contained within our report, which was to review the processes and support that it has in place for its investigating committees, including the arrangements for gathering and monitoring feedback received.
  - The adequacy of the GDC's whistleblowing policy and the operation of this policy as evidenced by:
    - a) Its response to a disclosure by a whistleblower about the GDC's management of the processes and support of the Investigating Committee.

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<sup>2</sup> <http://www.professionalstandards.org.uk/library/document-detail?id=d716599e-2ce2-6f4b-9ceb-ff0000b2236b>

<sup>3</sup> This is a reference to recommendations made in the report which the GDC commissioned an external solicitors firm (Penningtons Manches LLP) to conduct. Those recommendations were provided to the GDC in Penningtons report in December 2014.

b) Its management of a complaint by the whistleblower of detrimental treatment because of their disclosure.

- 1.4 This report details the matters that we investigated in our special investigation, the means we used to investigate, the evidence we considered and the conclusions we reached. It is divided into three main sections.
- 1.5 The first section of the report addresses the GDC's management of the processes and support for the Investigating Committee in the period following the publication of our previous Investigation report, 'An investigation into concerns raised by the former Chair of the General Dental Council (February 2013)'.
- 1.6 The second section of the report considers the adequacy of the information provided to the Audit and Risk Committee ( prior to October 2013, the Audit Committee), its Appointments Committee and its Council (both the previous Council, which left office in October 2013, and the current Council) about:
- Our previous investigation report.
  - The whistleblower's disclosure.
  - The outcome of the actions that the GDC took in response to the whistleblower's disclosure.
- 1.7 The third section of the report addresses the adequacy of the GDC's whistleblowing policy and the operation of this policy as evidenced by:
- Its response to a disclosure from the whistleblower.
  - The operation of the policy as evidenced by its management of a complaint by the whistleblower of detrimental treatment because of their disclosure.
- 1.8 We also look at the adequacy of the GDC's revised whistleblowing policy which was introduced in July 2014.
- 1.9 At the beginning of each of those three sections of the report, we explain the relevant terms of reference, why we decided to investigate those matters and the steps we took in our investigation to gather relevant evidence. We also set out a brief chronology of the relevant events and summarise our findings, before setting out in detail our findings about each aspect of the concerns we investigated. The final part of each section of the report sets out our conclusions and recommendations (where appropriate).The final section of the report sets out our overall conclusions.
- 1.10 We have no legal powers to compel individuals or organisations to provide us with information or evidence, or to do so within particular timescales. We are grateful to all those who have assisted with this investigation. We acknowledge and appreciate the time those individuals have taken to provide documentation and to answer our questions (and in relation to some key individuals, to comment on earlier drafts of this report). We have decided not to refer by name to any individual GDC staff (or former staff) members. Similarly, the report does not include the names of any GDC Associates (including Investigating Committee members) who provided evidence to us. We recognise that it may be possible to identify some individuals simply by reference to their posts and we gave that possibility careful consideration before finalisation of our report. We refer to 'former' post-holders where the individual concerned has, since the events referred to in this report, left their role at the GDC. The former Director of Regulation and the former Head of the Investigating Committee left the

employment of the GDC in late 2014 and the former Director of Governance left the GDC's employment at the end of July 2015 for reasons unconnected with the subject-matter of our investigation.

- 1.11 This report has been approved by our Board and provided to the GDC, to the whistleblower, and to Departments of Health officials prior to its publication.

## 2. Summary of findings and recommendations

**Section one: The GDC's management of the processes and support for the Investigating Committee in the period following the publication of our previous Investigation report, 'An investigation into concerns raised by the former Chair of the General Dental Council (February 2013)'.**

2.1 We have found that:

- The approach taken by the GDC to recruiting, training and supervising the Investigating Committee Secretaries is likely to have contributed to the development/continuance of objectionable practices.<sup>4</sup> When we interviewed various GDC staff in mid-2014 we were not convinced that the approach being taken to training and supervision of the Secretaries at that time provided sufficient support or guidance to staff who carry out a key role in the fitness to practise process. We recommend that if the GDC has not since changed its approach, it should keep this area under review.
- Penningtons<sup>5</sup> found that various objectionable practices were in operation during 2013 and in the months following the publication of the 2013 Investigation Report.<sup>6</sup> We consider that those practices were allowed to develop for two reasons:
  - 1) there was a lack of understanding or agreement by either or both of the former Head of the Investigating Committee<sup>7</sup> and the former Director of Regulation that each of the practices was objectionable; and
  - 2) there was a lack of proper scrutiny of the work of the Investigating Committee during 2013 including in the months following the publication of the 2013 Investigation Report. In our view, these practices made it possible for the Investigating Committee Secretaries to exert excessive control over individual case outcomes. We are pleased that Penningtons found that these practices had ceased by autumn 2014. However, we recommend that to ensure that proper practices are embedded, regular training is provided to the Investigating Committee Secretaries on their core role and that this training covers the rationale as to why their role is an adviser and facilitator to the Investigating Committee. We also recommend that the GDC puts in place (if it has not already done so) a comprehensive induction programme for new Investigating Committee Secretaries, as well as robust monitoring and supervision of their work.

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<sup>4</sup> We use the term objectionable practices as a general term for those practices identified by Penningtons as having the potential to compromise the independence of the Investigating Committee or to inappropriately influence the Investigating Committee's decision-making. Further details on the specific nature of these practices can be found in section one of the report at 3.105 – 3.221.

<sup>5</sup> Penningtons Manches LLP, who were commissioned by the GDC in August 2013 to investigate the concerns that had been raised by the whistleblower about the operation of the Investigating Committee's processes.

<sup>6</sup> Penningtons found that while there had been no actual compromise to the independence of the Investigating Committee as a result of the objectionable practices, there had been the potential for such compromise and/or for inappropriate influence on the Investigating Committee's decision-making as a result of some of those objectionable practices. Penningtons recommended that a number of the practices should cease/change.

<sup>7</sup> The former Head of the Investigating Committee's full title was Head of Fitness to Practise Committee Services but they were commonly known as the Head of the Investigating Committee and this is the title we have used in this report.



- The GDC did not carry out a formal review of the processes in place to gather feedback from Investigating Committee members after publication of the 2013 Investigation Report, despite our recommendation that it should do so. This failure appears to have resulted from a belief that the system that had been introduced in early – mid 2013 was working effectively. This was not the case. This is evidenced by the fact that throughout 2013 (including after the whistleblowing disclosure) the GDC received team review forms from Investigating Committee members which highlighted the objectionable practices which were in operation, but that feedback was either not reviewed or if it was reviewed, its significance was not understood. We comment below at paragraphs 3.256, 3.27-3.278, 4.18 and 4.35 on our understanding of the extent to which the Appointments Committee monitored the effectiveness of the feedback system (to the extent that it related to the training and development of Investigating Committee members) in 2013. We note that an almost entirely new Investigating Committee came into office in autumn 2014 following a scheduled appointments process conducted by the GDC. It is to be hoped that the new Investigating Committee members will be encouraged to engage actively in both the team review process and the additional individual feedback process that has been set up, and that the GDC will work to ensure that the responses to their feedback (and/or any outputs which result from the identification of themes within the feedback) are made visible to the Investigating Committee members in terms of training and development plans. We also expect the GDC to institute a system of sharing feedback received from the Investigating Committee members with the executive management team and the Audit and Risk Committee and, so far as it relates to members' training and development, the Appointments Committee.
- The former Head of the Investigating Committee was aware of the practices that were in operation (although they said they were unaware that some of the Investigating Committee Secretaries were acting outside of instructions in terms of amending decision documents) but did not recognise or agree that they were objectionable. The former Director of Regulation was aware of some of the objectionable practices but not of their full extent, and does not agree that all of them were objectionable. The focus was on the speed of case throughput and/or the consistency of decision-making.<sup>8</sup> We consider that this was to the detriment of consideration of the propriety of the processes being operated.
- The Chief Executive placed a degree of reliance that was subsequently established as being ill-founded on what they were told by the former Director of Regulation about the processes in operation and their propriety. However, we consider that the Chief Executive did take the Penningtons reports' findings seriously, and acted appropriately on receipt of those reports. The GDC has told us that consideration was given to the possibility of taking additional interim measures both at that time and previously when Penningtons were commissioned to investigate the matters referred to in the whistleblower's disclosure, and that the Chief Executive, the Chair of the Council, the former Director of Governance and the Head of Corporate Legal all agreed that no

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<sup>8</sup> In response to seeing a draft of this report both the former Director of Regulation and the former Head of the Investigating Committee have said that these were not their sole concerns, nor were they mutually incompatible.

interim action should be taken pending the receipt of the Penningtons reports. The GDC has told us that it acted in accordance with external legal advice it had received in deciding not to take additional interim action following receipt of the Penningtons reports, and that the basis for this decision was that Penningtons' investigation had not identified any cases where the amendments made to Investigating Committee decision documents after the meetings had resulted in changes to outcome (just to reasoning). We have not seen any evidence about that consideration so cannot comment on why it did not result in such measures being taken. In our view, given the potential risks to confidence in the Investigating Committee process of the practices that the whistleblower alleged were occurring should those allegations be well-founded, as well as the likely impact of the remedial measures that would then need to be taken on the efficiency/throughput of the Investigating Committee process, it would have been more prudent to initiate preventative and/or interim action at an earlier stage, rather than to await receipt of the Penningtons reports, which were only available almost five months after the whistleblowing disclosure was first made.

**Section two: The adequacy of the information provided to the GDC's Council and committees (specifically its Audit/Audit and Risk Committee, its Appointments Committee and its previous and current Council) as well as the adequacy of those bodies' scrutiny of that information, about: our previous investigation report; the whistleblower's disclosure; and the outcome of the actions that the GDC took in response to the whistleblower's disclosure.**

- We have found that the presentation of information by the executive management team to the (former and current) Council and Committees about our previous investigation report and the whistleblower's disclosure was deficient. That gave rise to a risk of hindering the Council's and committees' effective oversight of the performance of the GDC in relation to the support for the Investigating Committee and/or in understanding the risks that the work of the Investigating Committee posed to the GDC. We also concluded that the Committees and the Council did not always sufficiently challenge the information provided to them.

**Section three: The adequacy of the GDC's whistleblowing policy and the operation of this policy as evidenced by: its response to a disclosure from the whistleblower and the operation of the policy as evidenced by its management of a complaint by the whistleblower of detrimental treatment because of their disclosure.**

2.2 We have found that:

- We considered whether it was reasonable for the whistleblower to conclude that, following their whistleblowing disclosure, concerns and a formal complaint were deliberately raised about the whistleblower by members of the Investigating Committee Secretariat in retaliation for the disclosure. We were unable to reach a view on the balance of probabilities as to the motivation of the relevant individuals, due to the inadequate investigation that was undertaken at the time by the former Director of Governance. However, we can understand why the whistleblower drew the conclusion that the concerns

and formal complaint were made in retaliation for their disclosure, given the relevant timings.

- The GDC's Chief Executive and the former Chair of the Appointments Committee made some decisions regarding how to handle the formal complaint about the whistleblower (particularly in relation to their decisions to accept the complaint out of time) that were not appropriate in the circumstances. We have no evidence to suggest that these decisions were made in order to prejudice the whistleblower and indeed we recognise that both the Chief Executive and the former Chair of the Appointments Committee took legal advice before reaching those decisions, and that they have both said that one of their concerns was to ensure fairness. It appears to us that those decisions arose from misapplication of and/or misinterpretation or misunderstanding of the GDC's policies.
- The GDC did not treat the whistleblower in accordance with its own whistleblowing policy during the course of Penningtons' investigation. The GDC breached the whistleblower's confidence by revealing their identity both to the Investigating Committee Secretariat and to the Investigating Committee membership. In addition the former Chair of the Appointments Committee revealed what we consider to be an unnecessary amount of information about the complaint to the Appointments Committee. These breaches of confidentiality resulted in a further loss of confidence in the GDC by the whistleblower.
- The Chair of the Council's decision to delay investigating the complaints of detrimental treatment that the whistleblower had made was not appropriate in the circumstances. In reaching the decision to delay the investigation, the Chair of the Council took account of factors which were irrelevant, such as a perceived need to await the outcome of Penningtons' investigation into the whistleblower's disclosure.
- The Chair of the Council made a decision to appoint the former Director of Governance to undertake the investigation into the whistleblower's complaints of detriment that was not appropriate in the circumstances. The former Director of Governance was placed in a difficult position as they were charged with investigating the actions of one of their team (the Head of Corporate Legal), one of their peers (the former Director of Regulation) and their line manager (the Chief Executive). The former Director of Governance's views about their appointment to this role as set out to us in interview can be found at paragraphs 5.284-5.285 below. The former Director of Governance had also, prior to their appointment as investigator, made statements about the validity of one aspect of the whistleblower's complaints - which understandably caused the whistleblower to have doubts about their ability to investigate the complaints of detriment impartially.
- The investigation carried out by the former Director of Governance was not thorough. The former Director of Governance did not consider all the material evidence, appropriately test the evidence they did consider, interview all the relevant individuals, consider all the allegations contained within the complaint in their totality, or properly apply the test of detriment as set out in the whistleblowing policy. The failure to investigate all the relevant matters fully meant that some of the former Director of Governance's findings were not

reasonable, and that we are unable to evaluate whether their report reached the correct conclusion. We accept however that the former Director of Governance acted in good faith and on the basis of the legal advice they had received.

- The GDC did not take adequate steps to follow up the recommendations in the former Director of Governance's report or in the Chair of the Council's letter which accompanied the report (despite that letter referring to various follow up actions to be taken). This appears partly to be a result of a lack of ownership/managerial oversight within the GDC. The GDC also failed to take appropriate action following receipt of comments made about the accuracy of the report by a key individual (the former Chair of the Appointments Committee). We consider that these comments highlighted material errors in the former Director of Governance's report and that the receipt of those comments should have resulted in a re-assessment of the relevant aspects of the report. The lack of attention to the follow up to this report adds to the impression that the GDC was not committed to treating the whistleblower's complaints of detrimental treatment seriously or to ensuring that they were thoroughly investigated.
- The revised whistleblowing policy is unsatisfactory. We have identified some clear areas for improvement particularly in relation to the clarity and accuracy of the content which we consider could lead to poor application of the policy in the future if not addressed.

### 2.3

We consider that there are lessons the GDC could learn from its management of the disclosure by the whistleblower and its response to the whistleblower's complaints of detrimental treatment, and make the following recommendations:

- The disciplinary procedure for statutory committee members should be amended to set out clearly: what the internal complaints procedures are and how they apply; and the factors that should be considered when deciding whether a complaint should be referred to the Appointments Committee. The views of those who use the disciplinary procedure should be sought when making the amendments.
- The disciplinary procedure for statutory committee members should be amended to set out the types of factors that should be considered when deciding if a complaint should be accepted out of time because of 'exceptional circumstances'. The views of those who use this procedure should be sought when making the amendments.
- The disciplinary procedure for statutory committee members should be amended to set out the circumstances in which it is acceptable for information about a complaint to be disclosed to members of the Appointments Committee, whether in order to allow a decision to be made about the suspension or removal of the member, or otherwise.
- Any complaints about statutory committee members (either those complaints dealt with under the internal complaints procedures, or formally by the Appointments Committee) should be appropriately documented and records stored in one central and secure location (with safeguards in place to ensure that access to each record is appropriately restricted) in order to enable an audit trail of events and decisions to be kept.

- The GDC should develop guidance for staff on how the whistleblowing policy should be operationalised. This should include matters such as the need to agree how often a whistleblower is updated on any investigation into their disclosures, the management of matters relating to maintaining a whistleblower's confidentiality, and how any complaints of detrimental treatment should be managed, investigated and reported on internally. The GDC should also develop similar guidance for whistleblowers. The views of those who have used or may use this procedure should be sought when developing this guidance. We also recommend that the GDC should seek external advice from experts in whistleblowing management. Staff should be trained on how to use the guidance and the policy.
- The GDC should formally apologise to the whistleblower for the inappropriate disclosure of the whistleblower's identity to both GDC staff and members of the GDC's former Investigating and Appointments Committees.
- The GDC's Council and Audit and Risk Committee should review the current whistleblowing policy in light of the concerns that we have raised about its clarity and factual accuracy and consider adopting a revised policy as necessary.

#### **Overall recommendation**

- 2.4 The GDC's Council, executive management team and the relevant committees should consider this report in full, both individually and collectively, in order to identify all the lessons that should be learnt in particular in relation to governance, accountability and management oversight, as well as the actions the GDC should take to address our recommendations.

### 3. Section One: The processes and support for the Investigating Committee since February 2013

3.1 In this section of the report we examine:

- The adequacy of the GDC's management of its processes and support for its Investigating Committee in the period since publication of the 2013 Investigation Report in February 2013; and
- The GDC's response to the recommendation made within that report to 'review the processes and support that [it has] in place for [its] investigating committees, including the arrangements for gathering and monitoring feedback received'.

3.2 In Section Two we consider whether the oversight of the Appointments Committee, Audit and Risk Committee (and the previous Audit Committee) and the Council (both the previous Council that left office in October 2013 and the current Council) was sufficient following the 2013 Investigation Report and the whistleblower's disclosure.<sup>9</sup>

#### What led us to investigate?

3.3 On 26 September 2013 the whistleblower contacted the Authority and informed us of their disclosure to the GDC which related to the concerns about the management and support processes of the Investigating Committee. The whistleblowing disclosure raised a number of serious concerns about the practices of the Investigating Committee Secretaries and the behaviour and attitude of the former Head of Investigating Committee Services<sup>10</sup> (who managed the Investigating Committee Secretaries). The whistleblower alleged that the evidence given to the Authority by the GDC for the purposes of the 2013 Investigation Report did not accurately reflect current practice in relation to the support provided to the Investigating Committee. The whistleblower also alleged that they had been subjected to detrimental treatment by the GDC. In this section of the report we focus on the concerns raised about the management and support processes of the Investigating Committee.

3.4 Following contact by the whistleblower we met and corresponded with the GDC over a number of months to assess the adequacy of the steps that it was taking to address the disclosure made by the whistleblower. During this time, the GDC commissioned and received an external report from Penningtons Manches LLP (Penningtons) into the concerns raised within the disclosure. This report validated the concerns raised by the whistleblower about the practices of the Investigating Committee Secretariat before, during and after Investigating Committee meetings. The report identified a number of serious deficiencies in the processes and arrangements that were in place in 2013 to support the Investigating Committee, some of which had the potential to compromise the independence of the Committee. Several of the concerns identified in the Penningtons report related to

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<sup>9</sup> The roles of the Committees and the Council are set out at paragraph 4.6 - 4.9.

<sup>10</sup> Their formal title was Head of Fitness to Practise Committee Services. They are referred to in this report as the former Head of the Investigating Committee



behaviour/practices that appeared to be the same or similar in nature to behaviour/practices that we had commented on in the 2013 Investigation Report (as summarised in paragraph 3.17 – 3.19 below).<sup>11</sup> The Penningtons report was received by the GDC in late December 2013 alongside a second report by Penningtons concerning the specific events that occurred during an Investigating Committee meeting on 18 September 2013. Following receipt of these reports, the GDC developed an action plan which it implemented between January 2014 and July 2014.

- 3.5 Throughout this period we continued to receive information from the whistleblower which we considered raised matters of concern. We also received a letter from the then Chair of the Health Select Committee who asked: ‘Whether the Authority proposes to monitor the implementation of the [Penningtons] recommendations, either as part of the annual performance review of the GDC or otherwise?’ and ‘What is the Authority’s assessment of the adequacy of the GDC’s policies governing the handling of concerns raised by members of the GDC and its Committees?’. On the basis of all the information we had gathered, in March 2014 we decided to carry out a risk assessment in line with our published process.<sup>12</sup> The outcome of a second risk assessment (in April 2014, following receipt of further information) was a decision to carry out an investigation into the areas of concern raised by the whistleblower, as described above.

#### **The basis for our investigation**

- 3.6 We decided to investigate because, whilst we considered it appropriate that the GDC had commissioned an external investigation into the matters raised in the disclosure and we did not have any doubts about the quality and thoroughness of that investigation or the resulting report, we did have outstanding concerns about the adequacy of the response from the GDC and its ability or willingness to properly address the failings identified in the Penningtons report. Those concerns stemmed from the similarities that we noted in the issues raised by the whistleblowing disclosure and those examined in chapter five of the 2013 Investigation Report<sup>13</sup> indicating to us that the GDC had not appropriately and promptly addressed the findings of that report. Our concerns also stemmed from information that we had obtained between September 2013 and April 2014 which led us to question whether the GDC fully understood the seriousness of the findings of the Penningtons reports, and/or whether the GDC was able and willing to address in full the need for change highlighted by Penningtons’ findings. We were concerned that if the GDC did not understand the seriousness of the findings, it would not be in a position to prevent the objectionable practices that had been identified as part of those findings from being continued and/or repeated in future.

#### **How have we investigated?**

- 3.7 We examine below the various objectionable practices being operated by the Investigating Committee Secretariat during 2013 (and subsequently), with

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<sup>11</sup> We explain in the relevant paragraphs below which of the behaviour/practices were the same or similar to those we had commented on in the 2013 Investigation Report.

<sup>12</sup> <http://www.professionalstandards.org.uk/docs/special-reviews-and-investigations/risk-assessment-tool.pdf?sfvrsn=0>

<sup>13</sup> <http://www.professionalstandards.org.uk/docs/special-reviews-and-investigations/130204-gdc-investigation-report-final.pdf?sfvrsn=0>

reference to the findings within the Penningtons reports, as well as by reference to information we have been provided with by relevant individuals during the course of this investigation. As several of the objectionable practices that were in operation during 2013 had their origins in procedures or behaviours that developed before February 2013, we have included, where relevant, findings from the 2013 Investigation Report. We also consider the adequacy of the remedial actions that were taken by the GDC in response to the Penningtons reports.

3.8 We then go on to examine the GDC's management of the processes for support of the GDC's Investigating Committee that were in place during 2013 (and which were addressed in the Penningtons reports) by considering the extent to which the senior GDC staff with ultimate responsibility for assuring delivery of the fitness to practise function (primarily the former Director of Regulation and the Chief Executive) were aware of the problems with those processes and/or their application both during 2013 and, where relevant, earlier; as well as considering in Section Four of this report the level of oversight that was provided by the Appointments Committee, the Audit and Risk Committee (and its predecessor Audit Committee) and the Council during this period.

3.9 To investigate we have:

- Met with the Chair of the Council, the Chair of the Audit and Risk Committee (who was also the Chair of the Audit Committee), the former Chair of the Appointments Committee<sup>14</sup>, the former Director of Regulation<sup>15</sup>, the former Head of the Investigating Committee, the Chief Executive, the former Director of Governance, the Head of Corporate Legal, various Investigating Committee Secretaries in post in 2014, the Senior Committee Secretary, the seconded Head of the Investigating Committee team (from 27 January 2014 to 27 March 2015), one former and one current Investigating Committee Chair and the whistleblower.
- Considered documentation provided by the GDC, including papers presented at and the minutes of Appointments Committee, Audit and Risk Committee (and previous Audit Committee) and Council meetings during the relevant period (redacted by the GDC where those documents are not in the public domain<sup>16</sup>), as well as documentation provided by the former and current Investigating Committee Chairs, the former Chair of the Appointments Committee and the whistleblower.
- Reviewed the two reports concerning the functioning of the Investigating Committee during 2013 which were provided to the GDC by Penningtons in December 2013; as well as the subsequent review of the GDC's implementation of the recommendations from those reports that was conducted by Penningtons in 2014 in accordance with the GDC's instructions.
- Reviewed the 2013 Investigation Report.

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<sup>14</sup> This individual became a member of the Appointments Committee in November 2009 and took over as Chair in summer 2012. Their term of office ended in December 2014.

<sup>15</sup> This individual became Director of Regulation in February 2011 and left the GDC in November 2014.

<sup>16</sup> The GDC has asked us to make it clear that wherever in this report we note that we were only provided with a redacted version of Council/Committee minutes, such redactions were made by the GDC in order to protect confidential information and the GDC would have been content to allow the Authority staff to attend its offices to read the minutes in full, on an undertaking that the Authority made no onward disclosure of the contents of the minutes.



- Shared our draft investigation report on two occasions with key individuals we interviewed and revised it following careful consideration of their comments.

### Terms of Reference

- 3.10 In order to make a judgement on term of reference 1(a) (the adequacy of the GDC's management of its processes and support for its Investigating Committee in the period since the publication of our report in February 2013), we have considered:
- (1) The recruitment, training and supervision of the staff who were acting as Investigating Committee Secretaries immediately before, during and after 2013, as their experience and behaviours were central to the practices that the Penningtons reports identified as being objectionable.
  - (2) The practices identified within the Penningtons reports as being in operation in 2013 which had the potential to compromise the independence of the Investigating Committee and the effectiveness of the actions taken by the GDC during 2014 to attempt to correct the deficiencies identified.<sup>17</sup> These practices were:
    - i. Discussions about cases between Investigating Committee Secretaries and Investigating Committee Chairs prior to Investigating Committee meetings.
    - ii. Advance drafting of Investigating Committee decision documents/reasons by Investigating Committee Secretaries.
    - iii. Provision of legal advice by Investigating Committee Secretaries to the Investigating Committee during Investigating Committee meetings.
    - iv. Inappropriate interventions/undue influence by Investigating Committee Secretaries during Investigating Committee meetings.
    - v. Inappropriate communication with other Investigating Committee staff during Investigating Committee meetings.
    - vi. Amendment of Investigating Committee decision documents after Investigating Committee meetings by Investigating Committee Secretaries without appropriate authorisation.
- 3.11 In order to make a judgement on term of reference 1(b) (which related to the GDC's response to the recommendation to review the processes and support that it has in place for the Investigating Committee, including the arrangements for gathering and monitoring feedback received) we have specifically examined the GDC's response to addressing the failings identified in its feedback mechanisms in the 2013 Investigation Report. The GDC's review of the other processes and support it had in place for the Investigating Committee is also referred to in the section of this report that addresses the level of oversight applied by the GDC's governance mechanisms.
- 3.12 In order to properly assess whether the GDC adequately managed the processes and support for its Investigating Committee since February 2013, in Section Two of this report, we have also considered the level of oversight provided by the executive management team, the Appointments Committee, the Audit and Risk

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<sup>17</sup> Penningtons found that while there had been no actual compromise to the independence of the Investigating Committee as a result of the objectionable practices, there had been the potential for such compromise and/or for inappropriate influence on the Investigating Committee's decision making as a result of some of those objectionable practices. Penningtons recommended that a number of the practices should cease/change.

Committee (and previously the Audit Committee) and the Council (both the previous Council and the current Council). We did this because the concerns that we and the Penningtons reports identified had the potential to damage confidence in the GDC as a regulator and therefore this area of work should have been scrutinised by each of the aforementioned governance mechanisms.

### Summary of findings and recommendations

3.13 We have found that:

- The approach taken by the GDC to recruiting, training and supervising the Investigating Committee Secretaries is likely to have contributed to the development/continuance of objectionable practices. We recognise that the GDC has undertaken a considerable volume of remedial training and other work since the Penningtons reports were finalised at the end of 2013. However, when we interviewed various members of the Investigating Committee Secretariat in mid-2014<sup>18</sup> we were not satisfied that the approach being taken to training and supervision of the Secretaries was providing sufficient support or guidance to staff who carry out a key role in the fitness to practise process. In our view it is for the GDC to demonstrate that the processes it put in place from early 2014 onwards have removed any risk of repetition of the objectionable practices that Penningtons found were occurring during 2013.
- Penningtons found that each of the objectionable practices was in operation during 2013 and in the months following the publication of the 2013 Investigation Report. We consider that those practices were allowed to develop for two reasons:
  - 1) there was a lack of either adequate knowledge of the extent of the objectionable practices and/or understanding or agreement by both the former Head of the Investigating Committee and the Director of Regulation that each of those practices were objectionable; and
  - 2) there was a lack of proper scrutiny of the work of the Investigating Committee during 2013, including in the months following the publication of the 2013 Investigation Report. In our view, these practices made it possible for the Investigating Committee Secretaries to exert excessive control over the wording of individual decision documents. We are pleased that Penningtons found that these practices had ceased by autumn 2014. However, we recommend that, to ensure that proper practices are embedded, the training that has been provided to the Investigating Committee Secretaries during 2014 on their core role is regularly repeated, and that this training covers the rationale for their role being advisory and facilitative to the Investigating Committee rather than managerial and directive. We also recommend that the GDC maintains a comprehensive induction programme for new Investigating Committee Secretaries, as well as robustly monitoring and supervising their work.
- There was no formal review of the processes in place to gather feedback from Investigating Committee members after publication of the 2013 Investigation

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<sup>18</sup> Including four individuals who became Investigating Committee Secretaries during 2014, as well as two other Investigating Committee Secretaries and the Senior Committee Secretary

Report, despite our recommendation that such a review should be undertaken (although the Appointments Committee did provide scrutiny of the feedback processes and obtained assurances from the executive management team about their operation, as detailed in paragraphs 3.256 and 4.18 below). This failure appears to have resulted from a belief that the system that had been introduced in early – mid 2013 was working effectively. This was not the case and the fact that the system was not operating effectively in the first half of 2013 should have been apparent to senior staff within the GDC from the information about the impact of resourcing and other difficulties on the Secretariat's capacity to deal with feedback which the former Head of the Investigating Committee provided to the Appointments Committee at the meetings that took place between February and September 2013, as described in paragraph 3.256 below. This is further evidenced by the fact that throughout 2013 (including after the whistleblowing disclosure) the GDC received team review forms from Investigating Committee members which highlighted the objectionable practices which were in operation - but that feedback was either not reviewed, or if it was reviewed, its significance was not appreciated. We note that an almost entirely new Investigating Committee came into office in autumn 2014 following a scheduled appointments process conducted by the GDC, in which competency in giving and receiving constructive feedback was a mandatory competency for appointment. We also note that the induction programme for the new Investigating Committee in autumn 2014 included a presentation by a member of the Appointments Committee on the (mandatory) development review process and the GDC's commitment to continuous improvement and learning, as well as training on giving and receiving feedback. It is to be hoped that the new Investigating Committee members will continue to be encouraged to engage pro-actively in both the team review process and the additional individual feedback process that has been set up, and that the GDC will work to ensure that the responses to their feedback (and/or any outputs which result from the identification of themes within the feedback) are made visible to the Investigating Committee members in terms of training and development plans. We also expect the GDC to institute a system of sharing feedback received from the Investigating Committee members with the executive management team and the Audit and Risk Committee and, so far as it relates to members' training and development, the Appointments Committee. In response to seeing a draft of this report, the former Chair of the Appointments Committee told us that the seconded Head of the Investigating Committee team had provided the Appointments Committee with an assurance that all feedback will be actioned and the Investigating Committee members will be told what actions are being taken.

- We consider that the focus of the former Director of Regulation and the former Head of the Investigating Committee was on the speed of case throughput and the consistency of decision-making, to the detriment of considering the propriety of the practices that were operated. The Chief Executive placed a degree of reliance that was subsequently established as being ill-founded on the information they were given by the former Director of Regulation about the processes in operation and their propriety. However, we consider that the Chief Executive did take the Penningtons reports' findings seriously, and acted appropriately on receipt of those reports – both issuing instructions that all

objectionable practices should be stopped immediately, and sourcing an independent external lawyer (the seconded Head of the Investigating Committee team) to lead on the remedial work. The GDC told us that it also gave consideration to taking additional interim measures both at the time of receipt of the Penningtons reports and previously (at the time when Penningtons were commissioned to investigate the matters referred to in the whistleblower's disclosure) and that those decisions were taken by various senior decision-makers and/or based on external legal advice (see paragraph 3.321). In our view, it would have been prudent to take interim preventative steps earlier than on receipt of the Penningtons reports, given the potential significance of the objectionable practices alleged by the whistleblower on the legality of the Investigating Committee's decisions and on confidence in the Investigating Committee process were those allegations to be found proved, and given the likely impact on efficiency of the remedial measures that would then be required. The reasons that the GDC did not take such action as well as our views about its approach are explained in more detail at paragraphs 3.321-3.324.

- The deficiencies in the presentation of information by the executive management team to the (previous and current) Committees/Council may have hindered those bodies' effective oversight of the performance of the GDC in relation to the support for the Investigating Committee and/or their understanding of the risks that the work of the Investigating Committee posed to the GDC. This, alongside the fact that we consider that there were weaknesses in the Audit/Audit and Risk Committee and the previous and current Council's challenging of the information provided to them (as set out at Section Three below) meant that the level of oversight provided by the relevant bodies was inadequate. We note that the Chief Executive maintains that both the findings and the recommendations made within the 2013 Investigation Report were the subject of careful review and were taken into account in the action plan that was put in place. The Chief Executive has told us that in their view there was "no inaccurate information provided" and "no holding back of information". We comment at paragraphs 4.64 – 4.67 below on our view of the deficiencies in the presentation of information about the 2013 Investigation Report's findings (or the analysis of that information) to the GDC's (previous) Council and Committees. We comment at paragraphs 4.116-4.127, 4.141-4.144 and 4.163-4.170 on our view of the deficiencies in the presentation of information about the findings made by Penningtons after their investigation into the concerns raised in the whistleblower's disclosure.

### Chronology

- 3.14 Below is the chronology of the key events relating to the matters considered in this section of the report. For ease of reference, separate chronologies are included in each of Sections Two and Three of the report (there is some overlap in the key events recorded in each).
- 3.15 **December 2012** – The Authority shares a final draft of the 2013 Investigation Report with the GDC, and with those that contributed to the investigation. The draft report was considered by the Audit and Risk Committee.
- 3.16 **2 January 2013** – Publication of the GDC's Indicative Outcomes Guidance for the Investigating Committee, setting out general principles and details in relation

to common types of cases and providing the Investigating Committee with 'benchmarks and thresholds' against which certain types of cases should be measured.<sup>19</sup>

3.17 **11 February 2013** – The Authority publishes the 2013 Investigation Report. Chapter Five of the Report (which was over 30 pages in length) addressed eleven concerns that had been raised about various practices being operated by the staff supporting the Investigating Committee.<sup>20</sup> Five of those concerns are, in our view, directly relevant to the present investigation, as they were continued (in some form) even after the 2013 Investigation Report which had drawn attention to them was published. Those five concerns were:

- Attempts by GDC staff to influence the Investigating Committee during meetings. We found that it was not appropriate for GDC staff to interfere in the Investigating Committee's deliberations. It is important for the independence of the Investigating Committee to be maintained. The GDC told us that it had resolved the problem by removing casework staff from Investigating Committee meetings and introducing legally qualified Investigating Committee Secretaries.
- GDC staff pressurising Investigating Committee Chairs to change the reasons set out in the Investigating Committee's decision documents after meetings had concluded. We accepted that this was being resolved by the GDC by the introduction of legally qualified Investigating Committee Secretaries. The expectation was that they would produce better quality recorded decision documents, which would reduce the need for any changes to be made after the Committee meetings.
- GDC staff unilaterally changing the reasons given in Investigating Committee decision documents after meetings had concluded, without reference to the Chair. In the 2013 Investigation Report we noted that following an internal investigation into an allegation about an Investigating Committee decision document being changed, the former Director of Governance had recommended that all changes to decision documents should be confirmed in writing with the relevant Committee Chair.
- The provision of (incorrect) legal advice by GDC staff at Investigating Committee meetings. We accepted that this was being addressed by the introduction of the legally qualified Investigating Committee Secretaries, and by removing casework staff from Investigating Committee meetings.
- The incorrect recording of the allegations/the Investigating Committee's decisions by the Investigating Committee Secretary. We stated that it is important to ensure that decisions are accurately recorded at the time, as it is vital that the parties to the case can rely upon the records of those decisions. We accepted that the GDC was taking action to improve the quality of decision

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<sup>19</sup> As described in the paper considered by the previous Council in December 2012 relating to the planned introduction of the Indicative Outcomes Guidance. The current version of the Guidance can be found here: <http://www.gdc-uk.org/Aboutus/Thecouncil/committeedocs/IOG%20-%20December%202014.pdf> (accessed on 27 March 2015).

<sup>20</sup> The concerns about the operation of the Investigating Committee process examined in the 2013 Investigation Report were brought to our attention in autumn 2011. This chapter of the 2013 Investigation Report concluded that the various weaknesses in the operation of the Investigating Committee process had been present since at least mid-2010 (paragraph 5.104).



documents by the introduction of legally qualified Investigating Committee Secretaries.

- 3.18 The 2013 Investigation Report also addressed a concern that had been raised during the course of the investigation by one staff member and one Investigating Committee Chair that Investigating Committee Secretaries were preparing detailed draft decision documents in advance of Investigating Committee meetings. The 2013 Investigation Report (at paragraphs 5.81, 5.97 and 5.116) recorded the former Director of Regulation’s assurances to us that the Investigating Committee’s reasoned decision documents were not pre-prepared in advance of meetings, but were drafted by the Investigating Committee Secretary during the Investigating Committee meeting. We concluded (at paragraph 5.116) that we would not have concerns about the preparation of decision templates (including standardised wording) in advance of Investigating Committee meetings, but that we would be concerned if there was any evidence that the content of the Investigating Committee’s decision documents was being inappropriately influenced by GDC staff.<sup>21</sup> The 2013 Investigation Report noted that no concerns had been raised with us that any pre-drafting that was taking place had influenced the Investigating Committee’s decision-making, and stated that the GDC should address any such inappropriate influence as a priority in the event that evidence of it emerged.
- 3.19 Also relevant to this report’s substantive findings are the concerns which the 2013 Investigation Report recorded as having been described by one Investigating Committee Chair as being ongoing: frequent mention by GDC staff as well as Investigating Committee members of the threat of judicial review<sup>22</sup>; continued interruptions in Investigating Committee meetings by GDC staff and a blurring of the line between interventions about the legal and regulatory processes and interventions which might influence the Investigating Committee’s decision-making (see paragraph 5.95 of the 2013 Investigation Report); and the use of formulaic language by Investigating Committee Secretaries in writing up the Investigating Committee’s decision documents (see paragraph 5.96 of the 2013 Investigation Report).
- 3.20 **12 February 2013** – The GDC’s Investigating Committee members were told in an email by the former Head of the Investigating Committee that:
- Counsel had advised that decision-making could be more efficient if the Investigating Committee’s decisions were recorded briefly at the meetings and then written up in full after the meetings and sent to the Chair for approval.<sup>23</sup>
  - The Investigating Committee Secretariat was under “some bombardment” from dental defence organisations as to the powers of the Investigating Committee and the justification for certain Investigating Committee decisions. As a result,

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<sup>21</sup> Our view is supported by the Court’s decision in Jennifer Colman (1) and John Patrick Hickey (2) v General Medical Council [2010] EWHC 1608 (QB).

<sup>22</sup> See paragraph 5.94 of the 2013 Investigation Report.

<sup>23</sup> Penningtons noted that there is no written advice to support this assertion and we have seen no evidence of what the instructions to Counsel were or when, why or by whom the advice was given or what it consisted of. The former Head of the Investigating Committee has told us that a note of a consultation with Leading Counsel was provided to Penningtons. They have also told us that this was only one suggestion that was made (out of several) and that it was never progressed. The GDC has told us that it does not have a copy of such written advice.

the Investigating Committee Secretaries had been ‘briefed to press for details within reasons and to ask, where appropriate, challenging questions’.

- The Investigating Committee Members were requested to leave issues that were ‘more style than substance’ to the Investigating Committee Chair and Secretary to resolve (or to leave them to be looked at towards the end of the Investigating Committee meeting if there was time), in view of the potential impact on the time left to consider other cases if members became ‘locked into particular stylistic issues’.
- The Indicative Outcomes Guidance had been approved by the Council and its contents formed GDC operational policy and provided the Investigating Committee with ‘clear indications’ as to the GDC’s policy in relation to the majority of issues which arose during Investigating Committee meetings. While the Guidance did not seek to fetter the Investigating Committee’s discretion, if the Committee decided on an outcome that fell outside the Guidance it would need to provide much fuller and more detailed reasons for its decision.

- 3.21 **February to July 2013** – Concerns were identified by individual Investigating Committee Chairs about the extent to which the Investigating Committee Secretaries were overstepping the appropriate boundaries of their role by seeking to influence or control the decisions made by the Investigating Committee. Some of these were fed back to the GDC’s Investigating Committee Secretariat using the Investigating Committee’s ‘team review’ process. However, it appears from the reports made to the Appointments Committee that feedback during this period was not systematically reviewed or responded to, due to a lack of available staff resources and that in some cases (due to an issue with a superseded email address) not all feedback was received (see paragraph 3.256 below).
- 3.22 **March 2013** – A training day was held for Investigating Committee members. At this training day, the former Head of the Investigating Committee set out the need for the Committee to be consistent in its decision-making and to draft clear, accessible and defensible reasons. This was said to have been highlighted because of increased scrutiny by dental defence bodies of Investigating Committee decisions and increased threats of judicial review.<sup>24</sup>
- 3.23 **June 2013** – There was an Appointments Committee meeting at which the risk of Investigating Committee members ‘refusing to accept guidance’ was first highlighted to the Appointments Committee by the executive management team following the Committee’s request in February 2013 to be made aware of such

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<sup>24</sup> The former Head of the Investigating Committee has told us that reference was also made to comments made both by the Authority during initial stages audits and the GDC’s own auditors about the consistency of decisions and the need for provision of detailed reasoning.

risks<sup>25</sup> (that risk had been added to the operational risk register in September 2012).<sup>26 27</sup>

- 3.24 **14 July 2013** – One of the Investigating Committee Chairs emailed the other Investigating Committee Chairs referring to their concerns about the extent of the work being done by the Investigating Committee Secretaries both before and after Committee meetings. The Investigating Committee Chair suggested that, as a group, the Investigating Committee Chairs should start to gather evidence about what was happening.
- 3.25 **17 July 2013** – A training day for the Investigating Committee members was held. The Chief Executive and the Chair of the Audit Committee attended the first session of the training day (as agreed on 27 March 2013) to talk to the Investigating Committee members as a group about the governance developments that had taken place as well as about the legislative changes that the GDC was hoping to introduce, and to let members know that they could feed back any concerns about the GDC’s Investigating Committee directly to them.<sup>28</sup> At that session a few of the Investigating Committee members asked questions which raised concerns about the level of influence wielded by the Secretaries at Investigating Committee meetings. The former Chair of the Appointments Committee attended the whole of the training day and described to us the “frostiness” that was evident as between Investigating Committee members and the Investigating Committee Secretaries. The former Chair of the Appointments Committee alerted the former Director of Regulation to the concerns that had been raised by one or two Investigating Committee members about the Investigating Committee Secretariat being “rude, directive and not transparent”.
- 3.26 **25 July 2013** –The whistleblower sent an email to the former Chair of the Appointments Committee, copied to the Chair of the Audit Committee referring to continuing concerns about the Investigating Committee processes, including in particular concerns about whether the appropriate boundaries were understood, respected and applied by the Investigating Committee Secretaries. Their concerns

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<sup>25</sup> This information was provided to us by the former Chair of the Appointments Committee. The versions of the minutes of the February and June 2013 Appointments Committee meetings that we have seen are redacted and the un-redacted portions do not include these matters.

<sup>26</sup> The minutes of the subsequent Appointments Committee meeting on 12 November 2013 record the fact that the former Chair of the Appointments Committee had contacted the former Director of Governance following the Committee’s June 2013 meeting in order to express concern about the delay in informing the Appointments Committee about this risk. The former Director of Regulation advised the Committee in response that although the risk had been identified in September 2012 ‘mitigating actions had been embedded since then and there had been no need to inform the [Appointments Committee]. The [Penningtons] report due at the end of November would also pick up any further risks and the register would need to be updated accordingly’.

<sup>27</sup> The former Head of the Investigating Committee has told us that this risk may in fact have first been added to the operational risk register in September 2011 rather than September 2012. They have also told us that the risk registers were reviewed at every Appointments Committee meeting. We have been unable to verify whether or not there is any reference to the risk registers in the minutes of Appointments Committee meetings prior to June 2013 as we have only been provided with extracts or redacted versions of the minutes.

<sup>28</sup> The Chief Executive and the Chair of the Audit and Risk Committee attended because there was an awareness amongst senior staff of minor tensions between Investigating Committee members and Investigating Committee staff by mid-2013, including apparent difficulties that some Investigating Committee members were said to be encountering in adapting to the Indicative Outcomes Guidance (the IOG) that had been introduced in early 2013 - which was considered to be perceived by some Investigating Committee members as representing unnecessary interference in their work - as well as about the level of work the Investigating Committee members were expected to do, and their remuneration. It is of note that the risk register from at least September 2012 apparently recorded as a specific risk ‘IC members refuse to accept Guidance’.



were subsequently escalated under the whistleblowing procedure on 31 July 2013, after the whistleblower became aware that the former Head of the Investigating Committee had advised the Investigating Committee Secretaries about why they considered it was not appropriate to grant a request by an Investigating Committee Chair for sight of the original decision sheet on which the Investigating Committee Secretary had recorded the Investigating Committee's reasoning during the Committee meeting (so that the Chair could compare that document against the draft decision they had subsequently been sent by the Investigating Committee Secretary). The former Head of the Investigating Committee explained that the decision sheets should not be shared because they contained material that should not be disclosed to the Committee, including: draft paragraphs that had been prepared in advance; notes from other Investigating Committee Secretaries and the former Head of the Investigating Committee as well as privileged advice from solicitors; and preparatory work 'which if disclosable would limit the ability of the Secretary to adapt or provide assistance to the Committee'. They also acknowledged that changes were made to Investigating Committee decision documents after meetings.

- 3.27 **31 July 2013** – The whistleblower made an email disclosure under the GDC's whistleblowing policy following correspondence with the Chair of the Audit Committee (copied to the former Chair of the Appointments Committee) regarding their concerns about the way in which the Investigating Committee was being managed. The Chair of the Audit Committee sent that email onto the Chief Executive, who shared it with the Head of Corporate Legal. The whistleblower's concerns related to:
- The potential for compromise of the Investigating Committee's independence.
  - The potential for inappropriate influence by the Investigating Committee Secretariat on the Investigating Committee's decision-making.
  - Non-compliance with the Investigating Committee Guidance Manual<sup>29</sup>.
  - The potential for consequential damage to the GDC by way of judicial review proceedings.
- 3.28 **2 August 2013** – The former Chair of the Appointments Committee emailed the former Director of Regulation referring to their understanding that the former Director of Regulation had been informed about the fact that the whistleblower had raised concerns initially with the former Chair of the Appointments Committee and the Chair of the Audit Committee, and then in the form of a whistleblowing disclosure.<sup>30</sup>
- 3.29 **4 August 2013** – The first 'Investigating Committee Bulletin' (the Bulletin) was circulated to Investigating Committee members, setting out procedures for the drafting of Investigating Committee decision documents pre and post-Committee meetings.<sup>31</sup> It indicated that significant drafting was being undertaken by Investigating Committee Secretaries prior to Investigating Committee meetings;

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<sup>29</sup> The current version of the Investigating Committee's Guidance Manual can be found here: <http://www.gdc-uk.org/Aboutus/Thecouncil/committeedocs/IC%20Guidance%20Manual%20-%20April%202015.pdf> (accessed 27 March 2015)

<sup>30</sup> We note that at interview the Chief Executive when asked when they had told the former Director of Regulation and the former Head of the Investigating Committee about the whistleblowing disclosure answered that they would have to check, but expected that they would have done so straight away.

<sup>31</sup> The former Head of the Investigating Committee has told us that drafting of the first Investigating Committee Bulletin was done in July 2013, and that it was reviewed by various senior GDC staff before being signed off by the former Director of Regulation.

that draft decision documents were reviewed by other members of the Investigating Committee Secretariat after Committee meetings before being sent to the relevant Investigating Committee Chair for approval; and suggested that the Investigating Committee Chair did not always have final sign off of the decision document.<sup>32</sup> The whistleblower subsequently (on 15 August) sent the Bulletin to the Head of Corporate Legal asking them to pass it on to the person who was to investigate their concerns as evidence of their concerns.

- 3.30 **6 August 2013** – The whistleblower met with the Director of Human Resources and the Head of Corporate Legal. The Chief Executive attended the first part of the meeting and explained that an independent investigator would investigate their concerns under the whistleblowing policy. The Director of Human Resources explained that the purpose of the meeting was to check understanding of the scope of the whistleblower’s concerns and to establish the terms of reference for the investigation. They also explained that the GDC would keep the matter as confidential as possible only making disclosure to staff or Investigating Committee members and Chairs on a need to know basis.
- 3.31 **15 August 2013** –The Director of Human Resources met with the former Head of the Investigating Committee and the former Director of Regulation and explained the investigation process that would be carried out, and the fact that Penningtons were being appointed to investigate. The Director of Human Resources instructed the former Director of Regulation to inform the Investigating Committee team about the complaint by the end of that week and to emphasise that the matter must remain confidential. The former Head of the Investigating Committee referred to concerns that they had already raised with the former Chair of the Appointments Committee and said that the Investigating Committee staff might express concerns about the whistleblower during the course of any investigation interviews (which the Director of Human Resources said was acceptable). The Investigating Committee team were subsequently informed by the former Director of Regulation about the whistleblowing disclosure.
- 3.32 **16 August 2013** – Penningtons were commissioned by the GDC to conduct an investigation into the Investigating Committee’s management and support processes, as a consequence of the whistleblower’s disclosure.
- 3.33 **19 August 2013** – The Director of Human Resources wrote to the former Director of Regulation confirming the matters discussed at their meeting on 15 August, informing them of the interview arrangements and requesting them not to discuss their evidence or the substance of the whistleblowing disclosure with any member of staff or of the Investigating Committee.<sup>33</sup>
- 3.34 **26 August 2013** – The first Investigating Committee Secretary emailed the former Head of the Investigating Committee making a formal complaint about the whistleblower’s conduct at an Investigating Committee meeting on 13 June.
- 3.35 **29 August 2013** – Investigating Committee members were notified of the whistleblowing disclosure.
- 3.36 **3 September 2013** – Following discussion of the whistleblowing complaint by an Investigating Committee Chair at an Investigating Committee meeting, the Head

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<sup>32</sup> The former Head of the Investigating Committee has told us that while the wording of the Investigating Committee Bulletin may be open to that interpretation, the intention (and practice) was that Investigating Committee Chairs always had final sign-off of decision documents

<sup>33</sup> The GDC has informed us that a similar letter was sent to the former Head of the Investigating Committee

of Corporate Legal emailed all Investigating Committee Chairs and Members reminding them of the need for confidentiality.<sup>34</sup>

- 3.37 **4 September 2013** – The Chief Executive reported to the Audit Committee that a member of the Investigating Committee had made a whistleblowing disclosure about the implementation of the relevant guidance by Investigating Committee staff and set out the terms of reference for Penningtons’ investigation. The minutes of the meeting record that the incoming Chair of the Council had been informed.
- 3.38 **18 September 2013** – An Investigating Committee meeting took place which was suspended part way through by the former Director of Regulation. Later Penningtons were instructed to investigate the events that led to the Investigating Committee meeting being suspended (Penningtons provided their report of that investigation to the GDC at the same time as their report into the Investigating Committee’s management and support processes).
- 3.39 **26 September 2013** – The whistleblower contacted the Authority to raise their concerns about the management and support processes for the Investigating Committee.
- 3.40 **2 October 2013** – The former Head of the Investigating Committee sent an email to the former Chair of the Appointments Committee about the empanelment of Investigating Committee members.
- 3.41 **16 October 2013** – The former Chair of the Appointments Committee wrote to the Chief Executive (copied to the current Chair of the Council) raising the Committee’s ‘significant concern’ about the email sent by the former Head of the Investigating Committee on 2 October 2013, noting that that email could ‘reasonably be interpreted as GDC staff taking, or planning to take, decisions about the deployment of IC members which only the AC can and should take and of which, in the interests of natural justice, the members concerned should be told. That could be construed as the GDC seeking to influence IC decisions and so compromise the independence of IC members. This possibility is of grave concern to the AC’. The letter stated that the Appointments Committee was ‘seeking an explanation of the issues raised...and assurance that the independence of IC members has not and will not be compromised in any way’.
- 3.42 **17 October 2013** – The former Chair of the Appointments Committee emailed Penningtons about “an emerging concern about the ‘management’ action of the GDC in deploying [Investigating Committee] members to Committees. The Appointments Committee has now decided formally to raise this concern with the Registrar”. The email went on to say that the former Chair of the Appointments Committee had spoken to the Chief Executive (and Registrar) who ‘has informed me that [they] will ask you to include this in your review and confirmed that [they] will formally refer this to you’. No such formal referral was made – Penningtons report said they had not been instructed to investigate the issue, referred to the written correspondence and said that Penningtons understood that the matter was being considered internally by the GDC.
- 3.43 **23 October 2013** – The whistleblower complained to the Chair of the Council that they had been subjected to a detriment. The detriment alleged was that a complaint had been made about them by a staff member who worked in the team their whistleblowing disclosure related to, that that complaint concerned a matter

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<sup>34</sup> We have not seen the email from the Head of Corporate Legal that is referred to.

that had happened some months previously, and that it had been handled in a disproportionate manner by the GDC.

- 3.44 **25 October 2013** – The Chair of the Council informed the whistleblower that the GDC would investigate their complaint of detriment after Penningtons had reported on the matters raised by their whistleblowing disclosure.
- 3.45 **3 November 2013** – The whistleblower raised concerns with the Chair of the Council about the number of Investigating Committee meetings they had been empanelled to sit on during the second half of 2103 and questioned the process that had been used.
- 3.46 **12 November 2013** – An Appointments Committee meeting took place at which the former Chair of the Appointments Committee said that they had contacted the former Director of Governance following the Committee’s June 2013 meeting in order to express concern about the delay in informing the Appointments Committee about this risk. The former Director of Regulation advised the Committee in response that although the risk had been identified in September 2012 ‘mitigating actions had been embedded since then and there had been no need to inform the [Appointments Committee]. The [Penningtons] report due at the end of November would also pick up any further risks and the register would need to be updated accordingly’.
- 3.47 **22 November 2013** – The whistleblower made a second complaint to the Chair of the Council that they had been subject to a detriment as a result of their whistleblowing disclosure. The detriment alleged was that the number of Investigating Committee meetings offered to the whistleblower had reduced since their whistleblowing disclosure had been made.
- 3.48 **3 December 2013** – The former Director of Governance replied to the whistleblower saying that they did not believe the whistleblower had reasonable grounds for making a complaint of detriment in relation to empanelment, but that they would review their request for an investigation once Penningtons had reported on their investigation.
- 3.49 **23 December 2013** – The final version of the Penningtons report into the Investigating Committee’s management and support processes was received by the GDC.
- 3.50 **17 January 2014** – The Investigating Committee members were told by the former Director of Regulation that the Investigating Committee Secretariat would no longer pre-draft the Investigating Committee’s decision documents; they would address any comments during Investigating Committee meetings through the Chairs; and that the Investigating Committee’s decision documents would be drafted and agreed by the Investigating Committee on the day. Only typographical errors would be amended after meetings, and any changes would be notified to the Chair. The Investigating Committee members were also told that the recommendations of the Penningtons report would be implemented.
- 3.51 **20 January 2014** – The Chair of the Council wrote to the whistleblower to confirm that the former Director of Governance would now investigate the two complaints of detriment.
- 3.52 **27 January 2014** – An external lawyer was brought in on secondment, initially with the remit of overseeing implementation of the recommendations contained within the Penningtons report’s recommendations (reporting to the former Director of Regulation). That secondment was in due course extended and in May 2014

the individual (the seconded Head of the Investigating Committee team) took over responsibility for managing the Investigating Committee team (including both the Secretariat and staff responsible for empanelment, listings and administration), after the former Head of the Investigating Committee had been seconded voluntarily to a different role in a project team within the fitness to practise function of the GDC.

- 3.53 **2 February 2014** – The whistleblower wrote to the Chief Executive expressing concern at the way in which Penningtons' findings had been applied by the Investigating Committee Secretary at an Investigating Committee meeting on 30 January 2014. The whistleblower highlighted the length of time taken to draft the Investigating Committee's decision documents at that meeting, in the absence of any pre-prepared content. No reply was received to this letter. (Similar concerns were also sent on 23 February 2014).
- 3.54 **11 February 2014** – An email on behalf of the former Director of Regulation was sent to Investigating Committee members providing further information about the implementation of the Penningtons recommendations. Attached to that email was a copy of the plan that had been produced in relation to the implementation. (Similar emails were sent on 28 February, 1 April and 25 May 2014 with the addition of some guidance attached for consultation).
- 3.55 **28 February 2014** – The former Director of Governance sent the whistleblower their proposed terms of reference for the investigation into the allegations of detriment. The whistleblower did not respond.
- 3.56 **26 March 2014** – The former Director of Governance reported the outcome of their investigation to the Chair of the Council, the executive management team and the whistleblower. The conclusion was that no detriment had been suffered.
- 3.57 **March/April 2014** – Training sessions were run for Investigating Committee members and the Investigating Committee Secretariat; new feedback mechanisms were introduced; a pilot of the use of two (rather than one) Investigating Committee Secretaries ('dual secretaries') at each Investigating Committee meeting was initiated; and on 2 April 2014 an email was sent from the former Director of Regulation setting out the limit of the changes that could be made to Investigating Committee decision documents after meetings.
- 3.58 **16 April 2014** – Draft Investigating Committee guidance documents were circulated for consultation.
- 3.59 **July 2014** – All the revised Investigating Committee guidance and process documents were approved by the Council.
- 3.60 **October 2014** – Penningtons provided the GDC with a follow up report on the effectiveness of the steps taken by the GDC to implement the recommendations made in the earlier Penningtons report. The follow up report noted evidence of improvement across all the relevant areas. The report stated that 'the steps taken by the GDC to implement our recommendations as described in this Report coupled with the GDC's commitment to maintain the improvements (as evidenced by the new Guidance and plans for ongoing training) mean that the public and stakeholders in the GDC's fitness to practise processes can, in our view, have confidence in the independence of the GDC's Investigating Committee'.

## Background

### *The role of the Investigating Committee and the Investigating Committee Secretary*

- 3.61 Before addressing the substance of this section of the report, we set out below some information on the role of the Investigating Committee and the Investigating Committee Secretaries.
- 3.62 Section 27A(1) of the Dentists Act 1984 (as amended) provides that the role of the Investigating Committee is to ‘...investigate the allegation and determine whether the allegation ought to be considered by a Practice Committee [that is, the Professional Conduct Committee, Professional Performance Committee or the Health Committee]’.
- 3.63 The Investigating Committee Guidance Manual in place at the time of the events relevant to this report provided that in order to carry out its role, the Committee must ‘...determine whether the allegation ought to be considered by a Practice Committee...In considering a case the IC determines whether there is a ‘real prospect’ of the facts, as alleged, being found proved and if so whether or not there is a ‘real prospect’ of a finding of current impairment being made...’<sup>35</sup> if the case were to be considered at a hearing before a fitness to practise committee. The current version of the Investigating Committee Guidance Manual (issued April 2015) makes it clear that the Investigating Committee also determines whether or not there is a ‘real prospect’ of the particular statutory ground of impairment being established. The test is similar to the test used by decision makers at other health and social care professional regulators and is commonly referred to as the ‘realistic prospect’ test. It means that a case will not be referred for a hearing by a fitness to practise committee unless there is a ‘realistic prospect’ that the panel, at such a hearing, would make a finding that the practitioner’s fitness to practise is currently impaired.
- 3.64 The role of the Investigating Committee Secretary was summarised in paragraph 56 of the Investigating Committee Guidance Manual (November 2011) as being: ‘A Committee Secretary will be present at the IC meeting to help capture the Committee’s decision in each matter and the reasons for the decision. The Committee Secretary plays no part in the Committee’s deliberations or its decision but may remind members of the content of this Guidance and provide assistance to the Committee and advise on issues relating to GDC policy and procedure. Although he or she may be legally qualified, the Committee Secretary is not a legal adviser to the IC’.

### **Concern 1 (a) (1) The recruitment, training and supervision of the Investigating Committee Secretaries before, during and after 2013**

- 3.65 One of the key changes implemented by the former Director of Regulation (in 2011) was the introduction of ‘legally qualified’ Investigating Committee Secretaries. It was anticipated by the GDC that the continued use of legally qualified Investigating Committee Secretaries would assist in addressing some of the weaknesses in supporting the Investigating Committee that were identified in the 2013 Investigation Report. This included: removing the risk of staff inappropriately interfering in the Investigating Committee’s decision making and/or

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<sup>35</sup> GDC. 2011. Investigating Committee Guidance Manual. Paragraphs 5 and 6.



providing legal advice inappropriately, and improving the accuracy and quality of the decision documents drafted for the Investigating Committee. In this section we look at how that introduction of 'legally qualified' Investigating Committee Secretaries was implemented.

### The evidence

#### *The recruitment, training and supervision of Investigating Committee Secretaries prior to 2013*

- 3.66 The practices that were operated by the Investigating Committee Secretaries during 2013 were largely based upon practices that had been developed by the former Head of the Investigating Committee during 2011/2012 (at the time when they were acting as one of the first two Investigating Committee Secretaries who were required to be 'legally qualified'). It is therefore important to understand the background to the former Head of the Investigating Committee's development of the role.
- 3.67 We interviewed both of the Investigating Committee Secretaries who were recruited by the former Director of Regulation in August 2011 (including the individual who subsequently became the Head of the Investigating Committee, and who is referred to throughout this report as the former Head of the Investigating Committee) during the course of our investigation. Neither of them had any previous experience of working with an Investigating Committee, although they had experience of working with other committees within the fitness to practise process. They told us that they did not have any formal induction, but that they had a brief handover with the external lawyers who were at that time undertaking the Investigating Committee Secretary role. The former Head of the Investigating Committee told us that at the time of the recruitment of these two Investigating Committee Secretaries, there was no Investigating Committee Guidance in place, or at least "none that was useful" and that one of the initial tasks was to put such guidance in place and give the Investigating Committee enough time to make and explain sensible decisions. Both the former Head of the Investigating Committee and the former Director of Regulation told us that at the time of the recruitment of the two Investigating Committee Secretaries in mid-2011 there were no GDC staff who had relevant experience of the Investigating Committee's work who could provide them with training on the operation of the existing processes.
- 3.68 When we interviewed the former Director of Regulation they told us that they largely left these two new Investigating Committee Secretaries to "get on with" the day to day running of the Investigating Committee, having first set the broad parameters and direction.
- 3.69 By the end of 2011 one of the new Investigating Committee Secretaries<sup>36</sup> had taken on responsibility for more of the managerial work involved in providing support to the Investigating Committee (including responsibility for the training and development of Committee members) while the other Investigating Committee Secretary (the second 2011 Secretary) took on the bulk of the Secretary's work during Committee meetings. Both of them attended Investigating Committee

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<sup>36</sup> The individual referred to throughout this report as the former Head of the Investigating Committee - they were appointed to the role of Head of the Investigating Committee in March 2013 (i.e. after publication of the 2013 Investigation Report) and had no formal managerial responsibility until the time of that appointment.

meetings and the former Head of Investigating Committee told us that they also assisted with the drafting of the Investigating Committee decision documents.<sup>37</sup>

*The recruitment, training and supervision of Investigating Committee Secretaries during 2013*

- 3.70 At the end of 2012 the second 2011 Investigating Committee Secretary left the GDC on a period of planned leave. Between January and June 2013 the former Head of the Investigating Committee recruited four new Investigating Committee Secretaries. The number of Secretaries increased due to the growth in the workload.
- 3.71 The former Head of the Investigating Committee told us that the original plan to recruit to permanent (rather than fixed term) Secretary posts was changed while they were away on leave, and that the recruitment schedule was delayed. By the time of their return in December 2012, the other permanent Investigating Committee Secretary was about to leave the GDC on a period of planned leave. That left the former Head of the Investigating Committee (then in the role of the sole permanent Investigating Committee Secretary) running the Investigating Committee and handling related operational matters, as well as being responsible for the newly recruited Secretaries. The Secretaries who were recruited in 2013 did not have any previous experience of working with an Investigating Committee, or of working within UK healthcare regulation. The former Head of the Investigating Committee acknowledged this but said that they considered that they had relevant transferable skills, that they were “bright” and that they represented “bums on seats”. In response to seeing a draft of this report, both the former Head of the Investigating Committee and the former Director of Regulation said to us that it was not possible to recruit individuals who had direct experience of Investigating Committee work.<sup>38</sup> The former Head of the Investigating Committee told us that the Secretaries had practised as solicitors in other jurisdictions and that one had experience of healthcare regulation in another jurisdiction. The former Head of the Investigating Committee also told us that there was no opportunity to carry out a planned induction of the newly recruited Secretaries, due to the delay in their appointment, as well as organisational delays and matters outside of their control.
- 3.72 We were told by both the Investigating Committee Secretaries whom we interviewed who were still in post in 2014 (as well as by the former Head of the Investigating Committee, as referred to above) that they did not receive any formal induction or training for the role. Instead they were given some material to read by the former Head of the Investigating Committee. The former Head of the Investigating Committee told us that this included the Investigating Committee Guidance Manual and the Indicative Outcomes Guidance, and they said that the Investigating Committee Secretaries had been told about the relevant legislation and case law. The former Head of the Investigating Committee also told us that they provided both group and individual training to the Investigating Committee Secretaries during weekend training sessions after they had taken up their posts. The Investigating Committee Secretaries had also observed relatively more

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<sup>37</sup> They were formally appointed to the role of Head of the Investigating Committee in 2013 (after the publication of the 2013 Investigation Report).

<sup>38</sup> The former Director of Regulation has clarified that what they meant by this was that when the posts were advertised in accordance with the GDC’s human resources processes and at the appropriate points on the GDC’s pay scales, there were no applicants “who conform to the PSA’s view of what was required”.



experienced Investigating Committee Secretaries in the Committee meetings. This was for a period of between three and eight weeks and so covered a very small number of meetings. We note therefore that each of the Investigating Committee Secretaries had observed the practices that had been taught by the former Head of the Investigating Committee during 2012/2013. In terms of ongoing training, we were told by the Investigating Committee Secretaries whom we interviewed and by the former Head of the Investigating Committee that they were able to attend external training sessions and shared the learning from that training with their colleagues.

- 3.73 We asked the former Head of the Investigating Committee what the Investigating Committee Secretaries had been told about the 2013 Investigation Report. The former Head of the Investigating Committee initially said that they did not know if the Investigating Committee Secretaries had been told about it and if so how, or what they were told, but went on to say that the 2013 Investigation Report would have been something they gave the Investigating Committee Secretaries to read along with other documents that were in the public domain. One of the Investigating Committee Secretaries we interviewed could not confirm what they had been told about the 2013 Investigation Report when they started work at the GDC, and in fact the comments they made to us about the 2013 Investigation Report suggested that they were actually referring to the report of the Authority's 2013 audit of the initial stages of the GDC's fitness to practise process. Another Investigating Committee Secretary whom we interviewed said that they had not read the 2013 Investigation Report at the time they became an Investigating Committee Secretary, nor was it drawn to their attention as part of their induction or training. They told us that, at the time, they did not realise that the Investigating Committee processes had been examined as part of the 2013 Investigation Report. Having read the 2013 Investigation Report subsequently, they had then identified that a number of the concerns examined within it were similar to the concerns highlighted in the Penningtons reports.
- 3.74 In terms of supervision, the Investigating Committee Secretaries were managed by the former Head of the Investigating Committee. The former Head of the Investigating Committee told us that they did not sit in on Investigating Committee meetings after February 2013 (other than occasionally) - which meant that they had little opportunity to observe the conduct of the Investigating Committee Secretaries during the meetings. Further, the evidence we were given by two of the Investigating Committee Secretaries was that there were no formal debrief meetings after Investigating Committee meetings to discuss any issues or learning points, although one to one meetings (where issues could be raised) took place (the former Head of the Investigating Committee told us that such meetings took place once a week), as well as team meetings (which the former Head of the Investigating Committee told us took place every three weeks and which included discussion of "lessons learned").
- 3.75 However, the former Head of the Investigating Committee did meet with the Investigating Committee Secretaries before Investigating Committee meetings as well as after Investigating Committee meetings had finished for the day, in order to discuss cases. The former Head of the Investigating Committee told us that at those meetings they would, when asked, give their views on the case outcomes expected (with reference to the Indicative Outcomes Guidance), and quality assure the Investigating Committee decision documents that the Investigating Committee Secretaries drafted. The former Head of the Investigating Committee

told us that this process was part of the training provided for the Investigating Committee Secretaries.

- 3.76 The former Head of the Investigating Committee told us that if some Investigating Committee Secretaries acted against explicit instructions (e.g. by using wholly directive phrases or suggesting that there was only one proper course of action) that was a matter beyond their control, and of which they were unaware until the Penningtons report was available. The former Head of the Investigating Committee also informed us that they had been alerted by Investigating Committee Chairs to two instances of inappropriate interventions during meetings by Investigating Committee Secretaries during 2013, which the former Head of the Investigating Committee had addressed, and that the former Head of the Investigating Committee had taken formal disciplinary action in relation to one of the Investigating Committee Secretaries who was deliberately flouting instructions and not tracking changes made to decision documents before sending them to Investigating Committee Chairs for approval.
- 3.77 One of the Investigating Committee Secretaries who was appointed in 2013 was promoted to the new role of Senior Committee Secretary at the end of 2013 and then took over the management of the three other Investigating Committee Secretaries who were in post at that time. The Senior Committee Secretary told us that they had no previous experience of being a line manager (and had not been provided with any training in line management by the GDC at the time of our interview with them some 10 months later in August 2014).<sup>39</sup> They had also not been provided with any induction training in relation to their new responsibilities.
- 3.78 The view of one of the two Investigating Committee Chairs whom we interviewed in 2014 was that the level, training and competence of the Investigating Committee Secretaries in post during 2013 was generally “not good” and that their role was clearly modelled on that adopted by the former Head of the Investigating Committee when they worked as an Investigating Committee Secretary. The other Investigating Committee Chair told us that the Investigating Committee Secretaries were inexperienced and had been forced to learn on the job, which was not fair to them. They said that the Investigating Committee Secretaries had rapidly “gone native” as a result of their dependency on the former Head of the Investigating Committee. One of the Chairs described the new Investigating Committee Secretaries as “clones in [the former Head of the Investigating Committee]’s mould” and said that they attempted to “lead” the Investigating Committee rather than to simply seek clarification if they did not understand the Committee’s reasons. Further, one of the Investigating Committee Chairs said that in early 2013 they noted a “sea change” in the practices of the Investigating Committee Secretaries. They said that the Secretaries became increasingly directive about decision-making and drafting.

*The recruitment, training and supervision of Investigating Committee Secretaries in 2014*

- 3.79 In January/February 2014 several changes occurred in the Investigating Committee Secretariat:

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<sup>39</sup> The seconded Head of the Investigating Committee team told us in August 2015 that the Senior Committee Secretary was enrolled on a leadership programme in November 2014.

- The second 2011 Secretary returned from their planned leave (they had been away for the whole of 2013).
  - One of the two Investigating Committee Secretaries appointed in 2013 left the GDC.
  - Four new Investigating Committee Secretaries were appointed.
- 3.80 Of the four new appointees, one was a UK qualified solicitor with regulatory experience. The others were either overseas qualified lawyers (without relevant UK healthcare experience) or individuals who held UK law degrees/vocational qualifications but who had no experience of practising as UK lawyers.
- 3.81 In terms of training, we were told by the Investigating Committee Secretaries appointed in early 2014 that there was no structured induction process for them. They learnt the role by reading documentation and discussing with the other Investigating Committee Secretaries the processes and procedures to be followed. They also observed other Investigating Committee Secretaries at four or five Investigating Committee meetings before they acted as sole Investigating Committee Secretary themselves. One of these Investigating Committee Secretaries told us that they had felt “thrown in at the deep end” when they joined the Investigating Committee Secretariat, and several of them told us that they did not know either if there were personal development plans in place for them or what the GDC’s training and development policy was. We understand from our interviews with the relevant staff in mid-2014 that (over and above the re-training that was provided as part of the implementation of the Penningtons report’s recommendations) there was no ongoing structured training programme in place for the Investigating Committee Secretaries at that time, but that each individual’s continuing professional development needs were collated and centrally assessed. The seconded Head of the Investigating Committee team provided us in August 2015 with further information about the training programme during 2014/15, which is set out at paragraph 3.95 below.
- 3.82 Additional Investigating Committee Secretaries were appointed in autumn 2014. We have not interviewed those individuals during the course of this investigation. However, we understand from the Senior Committee Secretary (who was the person responsible for inducting and training them) that their induction was very similar to that provided for those appointed in 2013 and earlier in 2014.
- 3.83 From the evidence the Investigating Committee Secretaries gave to us at interview, it appears that the 2013 Investigation Report was not drawn to the attention of the Investigating Committee Secretaries appointed in 2014, and that most of them were in fact unaware of its contents.
- 3.84 When we asked the former Director of Regulation what the newly appointed Investigating Committee Secretaries were told about the 2013 Investigation Report in 2013 and 2014, the former Director of Regulation told us that they did not know. However they said that they would have expected that the Investigating Committee Secretaries would not necessarily have been briefed about the exact background, but that they would have been told what they were there for, including “to ensure the Investigating Committee did not go off on a frolic”. The former Director of Regulation told us that their approach was that they wanted to “bury and forget” the background to the 2013 Investigation Report and “there was no need to tell them about that”, just the lessons learnt.
- 3.85 In terms of supervision, while the Senior Committee Secretary told us that they had scheduled monthly one to one meetings with each Investigating Committee

Secretary, the Secretaries appointed in 2014 whom we interviewed told us that these meetings took place on an ad hoc basis. We were also told by the 2014 Investigating Committee Secretaries that it was still the practice (in July/August 2014, when we interviewed them) that there were no debrief sessions after Investigating Committee meetings, and that it was up to individual Investigating Committee Secretaries to raise queries with their colleagues. The seconded Head of the Investigating Committee team (the external lawyer seconded into the GDC from 27 January 2014) also told us that the Senior Committee Secretary sat in on Investigating Committee meetings on occasion, largely as support for new staff.

### The Penningtons reports

- 3.86 At the end of January 2014 an external lawyer was seconded to the GDC with a specific remit to oversee implementation of the recommendations made in the Penningtons reports. They also provided support to the Investigating Committee Secretariat in terms of implementation of the Penningtons report's recommendations, while operational management responsibility for the Secretariat remained with the Senior Committee Secretary and former Head of the Investigating Committee. From mid-May 2014 (after the former Head of Investigating Committee had moved to a different role within the GDC) that secondee took over the role of Head of the Investigating Committee and effectively took over management of the Investigating Committee Secretariat function.
- 3.87 All of the Investigating Committee Secretaries were only provided with the Executive Summary of the Penningtons report into the Investigating Committee's processes and support (rather than the full version of that report). This appears to have been because the GDC considered that it was not possible to provide anyone with the full report without obtaining the consent of all those individuals who were referred to or identifiable from the information contained in that report, even though staff members and Council/committee members would have been bound by obligations of confidentiality. In response to our draft investigation report, the GDC told us that the Head of Corporate Legal had attempted to produce a version of the Penningtons report from which names and personal data had been redacted, for onward provision to such individuals, but that doing so proved impossible. We note that at least one of the Investigating Committee Secretaries appeared not to appreciate the relevance of its findings to their role. That individual told us that "[they] did not think the findings directly affected [them] so [they] had not thought about the [Penningtons] report in great depth but understood from [the former Director of Regulation] that it essentially stated that there were 'things that they could do better' in relation to the Investigating Committee and the role of the Investigating Committee Secretariat".
- 3.88 In January 2014 the former Director of Regulation met with the Investigating Committee Secretaries as a group to communicate to them that the practices that had been identified as objectionable in the Penningtons report must stop immediately. One of the Investigating Committee Secretaries who was in post at that time told us that the issue was also raised at team meetings<sup>40</sup> and that an

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<sup>40</sup> We note that the Senior Committee Secretary told us at interview that while team meetings were scheduled to take place every month, none had actually been held as at the date of their interview in August 2014. They have subsequently told us that their calendar shows that such meetings did in fact take place.

emphasis was placed on the seriousness of Penningtons' findings and that the Secretaries should "stick to doing to things properly or else".

- 3.89 The training for the Investigating Committee Secretaries that had been recommended in the Penningtons report commenced in March 2014 and was completed in July 2014. Similarly the process of drafting (or revising) the required guidance documents began in early 2014, and was completed when the revised Investigating Committee Guidance was approved by the Council in July 2014. This revised guidance was published and given to the Investigating Committee Secretaries in August 2014 (we note that some of them told us that while they had been given the draft guidance, they either had not had sufficient time to comment on it or felt that their comments had not been taken proper account of).<sup>41</sup>
- 3.90 In terms of supervision of the Investigating Committee Secretaries' behaviour following receipt of the Penningtons report, the seconded Head of the Investigating Committee team told us in 2014 that they were meeting with the Senior Committee Secretary for one hour once a month to talk through any issues and to check that the new guidance that had been introduced following the Penningtons report was being followed. The seconded Head of the Investigating Committee team's understanding was that the Senior Committee Secretary dip sampled preparatory documents/Investigating Committee decision documents in order to provide feedback in team meetings, and that if any particular Investigating Committee Secretary was found to be regularly making errors that would be addressed separately.
- 3.91 The Senior Committee Secretary told us that they did not have regular scheduled one to one meetings with the seconded Head of the Investigating Committee, but only met them on an ad hoc basis to discuss specific issues. The Senior Committee Secretary does not accept the account provided to us by the seconded Head of the Investigating Committee both that meetings took place every month and as to the matters discussed in those meetings, as set out in paragraph 3.90 above.
- 3.92 The Senior Committee Secretary told us that they are responsible for monitoring the Investigating Committee Secretaries' work. The Senior Committee Secretary told us that their approach is to "come down hard" on anyone using their own precedent wording in preference to using either the central template and precedent bank that was introduced in June 2014 or drafting bespoke wording to reflect the Investigating Committee's specific reasoning. The Senior Committee Secretary told us that they dip sample Investigating Committee decision documents and provide feedback to individual Investigating Committee Secretaries in one to one meetings. When we asked the Senior Committee Secretary how they monitored the Investigating Committee Secretaries' knowledge and understanding of the correct processes to be followed, they said that the Secretaries' role had (as at August 2014), since the implementation of the recommendations made in the Penningtons report, become so constrained that their knowledge and understanding does not matter so much as their ability to capture reasons and make them cogent. The Senior Committee Secretary told us that they pass on any grievances raised by the Investigating Committee

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<sup>41</sup> The seconded Head of the Investigating Committee team told us that in fact the Investigating Committee Secretaries were given two opportunities to comment on the draft guidance (the first consisting of a three week period in March 2014, followed by a further seven week period between mid-April until early June 2014) and that all comments received were taken into account.



Secretariat to the current Head of Investigating Committee. When we asked the Senior Committee Secretary whether there was a plan in place to provide the current Investigating Committee Secretaries with general guidance about the new processes and how they fit together, they replied that in their view the GDC had shifted its attention to introducing case examiners and winding down the Investigating Committee, and that the Investigating Committee was being left to “fend for itself”.<sup>42</sup> We recognise that this view was expressed to us in autumn 2014 and may no longer be held by that individual (we have not re-interviewed them or asked them to confirm). We also acknowledge that it is a view that the GDC robustly rejects as being inaccurate.

3.93 One of the Investigating Committee Secretaries told us (when we interviewed them in August 2014) that their view was that, as a group the Secretaries were not being supported well by management, and that there had been a lack of recognition of how difficult it was for the Secretariat to adapt to all the changes that had been introduced to their processes during 2014. They told us that the changes to processes and precedents had created “a massive amount of pressure”, that occasional errors had been treated harshly, and that in early 2014 there was “constant fear” amongst the Investigating Committee Secretaries about whether someone had done something wrong. They told us that there was no dip sampling of the Investigating Committee Secretaries’ work when they joined the team in early 2014, and that they felt that there was no feedback unless the Investigating Committee Secretary requested it.

3.94 On a different matter, we note that the whistleblower raised a concern with us in May 2014 about the Investigating Committee Secretaries lacking knowledge of the correct application of the legal test the Investigation Committee applies. This concern arose from the whistleblower’s observations about four Investigating Committee meetings they had attended in the period from the end of March to May 2014. When we asked the Investigating Committee Secretaries at interview about that legal test, only one of them explained it correctly; similarly only two explained the approach to be taken to Rule 10 applications<sup>43</sup> correctly. We note that our interviews took place after the external training provided to Investigating Committee members and Secretaries in March and June 2014 in response to the Penningtons report’s recommendations had taken place, and that the former Director of Regulation has told us that these points were addressed thoroughly at the training sessions and that the attendees confirmed afterwards their understanding of the training.

#### *The training of Investigating Committee Secretaries after mid-2014*

3.95 The seconded Head of the Investigating Committee team provided us in August 2015 with updated information about the staff training provided in 2014/15. They told us that, in addition to joint member and staff training days in March and April 2014, there were further such joint events held in October 2014 and March 2015, which all Investigating Committee Secretaries and Investigating Committee

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<sup>42</sup> The legislative change to introduce case examiners has yet to be enacted.

<sup>43</sup> Following a referral by the Investigating Committee of a case to a hearing in front of a fitness to practise panel, an application may be made to reconsider the complaint and close the case. The application may be made by the registrant, by the GDC or by an FTP panel, under what is known as the ‘Rule 10’ procedure. The Investigating Committee will only close a case as the result of a Rule 10 application in circumstances where it concludes that it is no longer the case that the legal test for a referral is met (for example because new evidence indicates that the registrant’s fitness to practise is no longer impaired).

members were encouraged to attend. The seconded Head of the Investigating Committee team also told us that they had provided training to the Investigating Committee Secretaries (in November 2014 and January 2015) concerning recommendations made in the post implementation Penningtons review, and that training had also been provided in February 2015 on “clear writing and drafting”. Finally, they told us that in September/October 2014 the Senior Committee Secretary had asked their team to identify any individual training needs they might have and a budget was set aside to allow for attendance at relevant training events.

### Our view

- 3.96 The introduction of ‘legally qualified’ Investigating Committee Secretaries was one of the key changes the former Director of Regulation introduced in 2011. It was expected that this would not only improve the quality of the Investigating Committee’s decision documents, but that it would also ensure that objectionable practices that had occurred prior to 2011 (such as caseworkers interfering in the Investigating Committee’s deliberations) did not recur.
- 3.97 In fact, while the two individuals who were brought in to perform the Investigating Committee Secretary role in 2011 were legally qualified, they had no experience of Investigating Committee work, there were no staff in place at the time who could induct or train them in the operation of the Investigating Committee processes, and they only received a brief handover from the external lawyers who had been seconded in to act as Investigating Committee Secretaries previously. This pattern of recruiting individuals without directly comparable experience and providing them with inadequate induction was repeated when additional Investigating Committee Secretaries were recruited in 2013 and 2014. In addition, some of the individuals who were recruited in 2013 and 2014 not only had no experience of Investigating Committee work, they had no experience of working in the UK healthcare regulation environment.
- 3.98 This lack of experience across almost all of those recruited to the Investigating Committee Secretary role between 2011 and 2014 made it almost inevitable that the practices that had been developed during 2011/2012 were adopted and perpetuated by most of them (those practices also formed the basis of any informal induction and training provided to them). We note that Penningtons also concluded that the lack of experience of the Investigating Committee Secretaries who were in post during 2013 may have been one factor in the development of objectionable practices. We also note that after February 2013 the former Head of the Investigating Committee largely stopped sitting in on Investigating Committee meetings, and was therefore not in a position to observe directly the behaviour of the newly recruited Investigating Committee Secretaries during those meetings.
- 3.99 Even in January 2014, recently recruited Investigating Committee Secretaries were still effectively being left to learn “on the job”, largely by observing others who had themselves been trained by the former Head of Investigating Committee. Some of the Investigating Committee Secretaries whom we interviewed raised concerns with us about the adequacy of their induction and supervision. They also raised concerns about the support available to them in early 2014 at a time when they were new in post, and when all the Investigating Committee Secretaries were being expected to adjust to a wholesale revision of the guidance and protocols previously in place.

- 3.100 While the objectionable practices that were in operation during 2013 should have been eradicated by the new guidance and training provided during 2014, we retain a degree of concern about the 'apprentice' model used for induction of Investigating Committee Secretaries. This is because of the potential it creates for the perpetuation of bad practice, particularly in circumstances where no one within the Investigating Committee Secretariat has significant relevant previous experience of a similar role (which we recognise may no longer be the case at the GDC). We also note that whilst new guidance has been introduced which was intended to minimise the risk of the Investigating Committee Secretaries acting inappropriately, this will only be effective in eliminating the objectionable practices that Penningtons found had been in operation during 2013 if adherence to the processes and guidance is properly monitored. Given the mixed views conveyed to us about the level of supervision and monitoring, we consider that it is for the GDC to demonstrate that there is sufficiently robust supervision and monitoring of the Investigating Committee Secretaries' work in place to ensure that aspects of the previous objectionable practices cannot recur in future.
- 3.101 It does not appear that the existence or contents of chapter five of the 2013 Investigation Report was drawn to the attention of any of the Investigating Committee Secretaries. Had that happened during 2013, it is possible that at least one of the Investigating Committee Secretaries in post during 2013 might have appreciated that the practices in operation at the time were objectionable, prior to the whistleblower making their disclosure.
- 3.102 Similarly, none of the Investigating Committee Secretaries we spoke to had been provided with access to the full Penningtons report into the Investigating Committee processes and support. We comment above about our views on the GDC's rationale for restricting disclosure of the full report. We note that one of the Investigating Committee Secretaries whom we interviewed displayed a limited understanding of the findings of the Penningtons report and of the relevance of those findings to their role. It is unclear to us why the GDC said that it found it impossible to redact/anonymise any personal details from the Penningtons report into the Investigating Committee processes and support (or extract the relevant content), so as to enable it to be provided to the Investigating Committee Secretaries as a group, thereby providing them with valuable understanding of the background facts that led to the introduction of the new processes and guidance in 2014.
- 3.103 In our view, informing the Investigating Committee Secretaries about the findings from the Penningtons report and the 2013 Investigation Report (in so far as the findings of the latter concerned the operation of the Investigating Committee) is likely to have provided them with useful context in which to understand the rationale for the changes to process that were being implemented in early 2014 and to enable them to identify any objectionable practices. This is likely to have had the effect of reducing the risk of them developing similarly objectionable practices in future. We do not agree with the view expressed to us by the Chief Executive that the main points of relevance for the Investigating Committee staff within the 2013 Investigation Report were the conclusions and recommendations – in our view it was important that these were seen within the context of the report's findings.
- 3.104 We consider that the approach taken by the GDC to recruiting, training and supervising the Investigating Committee Secretaries is likely to have contributed



to the development and continuance of objectionable practices. We recognise that the GDC has undertaken a considerable volume of remedial training and other work since the Penningtons reports were finalised at the end of 2013. However, when we interviewed various members of the Investigating Committee team in mid-2014 we were not convinced that the approach being taken to training and supervision of the Secretaries was providing sufficient support or guidance to staff that carry out a key role in the fitness to practise process. In our view it is for the GDC to demonstrate that the processes it put in place from early 2014 onwards, in particular to provide routinely adequate training and supervision on appointment as well as ongoing effective monitoring of the Investigating Committee Secretaries' actions and behaviours, have removed any risk of repetition of the objectionable practices that Penningtons found were occurring during 2013.

### **Concern 1 (a) (2) Objectionable practices**

- 3.105 Below we set out each of the objectionable practices, noting the extent of any similarity to the behaviours/practices examined in the 2013 Investigation Report<sup>44</sup>, what the Penningtons investigation found, the remedial action the GDC took, and whether that remedial action appears to be sufficient to address the deficiencies identified.

#### **(i) Discussions about cases between Investigating Committee Secretaries and Investigating Committee Chairs prior to Investigating Committee meetings**

##### **The evidence**

##### *The 2013 Investigation Report*

- 3.106 This was not a matter which we identified in the 2013 Investigation Report, nor was it brought to our attention during our investigation in 2012/13.

##### *The Penningtons report*

- 3.107 The evidence collected by Penningtons (from their interviews with Investigating Committee Chairs and Investigating Committee Secretaries) indicated that the practice of the Investigating Committee Secretaries discussing expected case outcomes with Investigating Committee Chairs prior to the relevant Investigating Committee meetings had developed in or about spring 2013. Penningtons established that some Investigating Committee Secretaries had been very direct in telling the Investigating Committee Chairs what they felt the correct case outcomes were (sometimes by reference to the Indicative Outcomes Guidance and/or their understanding of what outcome the former Head of the Investigating Committee expected). The Investigating Committee Secretaries told Penningtons that the purpose of such discussions was to assist in the structuring of the discussion that would take place at the Investigating Committee meeting, rather than to influence the case outcome. The Investigating Committee Chairs told

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<sup>44</sup> The concerns about the operation of the Investigating Committee process examined in the 2013 Investigating Report were brought to our attention in autumn 2011. Chapter five of the 2013 Investigation Report concluded that the various weaknesses in the operation of the Investigating Committee process had been present since at least mid-2010 (paragraph 5.104).

Penningtons that they had been clear that the outcome of each case was a matter for the Investigating Committee to determine.<sup>45</sup>

- 3.108 Penningtons reported that there was a general feeling among the Chairs that where Secretaries may have strayed into giving their (or the former Head of Investigating Committee's) views about case outcomes (based on the Investigating Committee Secretaries' pre-meeting discussion with the former Head of the Investigating Committee), that was likely to have been due in part to their lack of experience. Penningtons expressed the hope that, as the Investigating Committee Secretaries became more experienced, they would understand more fully the scope of their role. Penningtons observed that it was sometimes the less experienced Secretaries who had been the more direct in the comments they had made to the Chairs.<sup>46</sup>
- 3.109 Penningtons concluded that any substantive discussions about cases between an Investigating Committee Secretary and one member of the Investigating Committee (i.e. the Chair) outside of a meeting of the whole Investigating Committee had the potential to compromise the independence of the Investigating Committee. They found that there was no evidence that the Investigating Committee Chairs had actually felt under pressure or had been inappropriately influenced by anything the Investigating Committee Secretaries had said about case outcomes in these pre-meeting discussions. That said, they did find that some of the Chairs had seemed comfortable about discussing outcomes with the Secretaries while others had expressly stated that outcomes were for the Investigating Committee alone to decide.
- 3.110 Penningtons recommended that details of cases and possible outcomes should not be discussed during such pre-meeting conversations between Investigating Committee Chairs and Secretaries, and that such conversations should be restricted to 'housekeeping' matters in order to maintain both the independence of the Investigating Committee and perceptions of its independence.
- The views of the former Head of the Investigating Committee and the former Director of Regulation*
- 3.111 The former Head of the Investigating Committee told us that when they and the other Investigating Committee Secretary who was appointed in mid-2011 were recruited, there was already a practice in place of holding telephone discussions with some Investigating Committee Chairs in advance of Committee meetings to discuss housekeeping matters and potentially provide them with assistance in locating relevant sections of guidance, and that any discussion about potential case outcomes was initiated by Investigating Committee Chairs rather than staff. The former Head of the Investigating Committee clearly denies any awareness of any Investigating Committee Secretary then or subsequently using wholly directive phrases or suggesting that there was only one potentially appropriate outcome to a case.
- 3.112 The former Director of Regulation told us that while they were aware that pre-meeting telephone discussions took place, their understanding at that time (and

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<sup>45</sup> Paragraph 28 of Penningtons report.

<sup>46</sup> This observation does not sit well with the evidence we saw which suggested that on at least some occasions, it was more experienced Investigating Committee Secretaries who sought to inappropriately influence the case outcomes, e.g. by making extensive alterations to draft Investigating Committee decisions without authorisation.

until receipt of the Penningtons report) was that such discussions related only to housekeeping matters. They agree that discussions about potential outcomes or reasons are objectionable.

*The remedial action taken by the GDC*

- 3.113 We have been told by the former Director of Regulation and some of the Investigating Committee Secretaries that in January 2014 it was made clear that all of the objectionable practices identified in the Penningtons report into the Investigating Committee processes and support should cease. We have also been told that this issue was addressed in the joint training sessions provided to Investigating Committee Secretaries and Investigating Committee members in March and April 2014.<sup>47</sup>
- 3.114 The GDC also made amendments to its Investigating Committee Guidance Manual during 2014 (the revised version of the Guidance was published in August 2014) – to make it clear that any preliminary discussions between the Secretariat and the relevant Investigating Committee Chair prior to a meeting are to be limited to ‘housekeeping’ matters (such as discussing the legibility of documents, missing documents and agenda planning). The Guidance was further revised in April 2015 and now also permits preliminary discussions to include discussing obvious typographical errors in the allegation. The current Guidance states that, ‘As such discussions do not involve the other members of the IC there should not be any discussion between the Chair and the Committee Secretary about the substance or detail of cases, including any reference to possible outcomes, to avoid any possibility or perception of the IC’s independence being compromised by way of the IC as a whole not having been involved in all the discussions about a case’. The current Guidance also makes it clear that the Investigating Committee members may not discuss the substance/detail of a case in advance of the Committee meeting either with each other or with the Investigating Committee Secretary.

*The post implementation Penningtons review*

- 3.115 Based on their discussions with members of the Investigating Committee Secretariat and Investigating Committee members, Penningtons concluded that the practice of pre-meeting discussions about potential case outcomes between the Investigating Committee Chairs and Secretaries had ceased. Penningtons also reviewed the Guidance that had been revised and published in August 2014 and found that it was comprehensive, appropriate and helpful. They concluded that the GDC did not need to take any further action.
- 3.116 Penningtons noted that the Investigating Committee Secretaries should not be discouraged from holding pre-meeting telephone calls with the Investigating Committee Chairs, provided those calls remained within the parameters of the revised Guidance, and suggested that the lack of such routine calls might be impacting upon efficiency. We note that the GDC has taken account of this in the subsequent revision to the Guidance (published on 15 December 2014) in that it

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<sup>47</sup> We consider the training slides contained useful, accurate and comprehensive information and dealt with all the recommendations for training made by Penningtons. We have seen feedback given to the GDC about this training and an evaluation summary of that feedback produced. These show that generally the training was very well received by those who attended.

has removed the previous reference to such discussions ‘ideally’ taking place via email.

### Our view

- 3.117 The development of the practice of some Investigating Committee Secretaries discussing possible case outcomes with some Investigating Committee Chairs created a risk of an Investigating Committee Chair being accused of prejudice or bias, as well as compromising the independence of the Investigating Committee as a whole.
- 3.118 The 2011 Investigating Committee Guidance Manual specifically referred to the importance of observing the independence of the Investigating Committee and the possible impact on natural justice and human rights of any breach of that independence, which could undermine public confidence and expose the GDC to criticism and legal challenge. It is not clear to us that senior members of staff within the GDC either were aware of the extent of what was happening prior to some Investigating Committee meetings (the former Director of Regulation told us that their understanding was that such discussions extended only to “housekeeping matters”) or if they were aware, appreciated why it was objectionable (we discuss at paragraph 3.313 and 3.297 the former Director of Regulation’s knowledge about the objectionable practices prior to the whistleblowing disclosure). We would have expected any legally qualified Investigating Committee Secretary who had relevant knowledge or experience of fitness to practise or regulation to have appreciated the risks associated with such a practice.
- 3.119 It is also a matter of concern that Penningtons concluded that at least some of the Investigating Committee Chairs seemed to be comfortable discussing potential outcomes with the Investigating Committee Secretaries in advance of meetings. This indicates a lack of training/understanding on the part of the Investigating Committee Chairs about the importance of the appropriate separation of powers between the administrative function carried out by the Investigating Committee Secretariat and the decision making function of the Investigating Committee itself, as well as a lack of understanding about the risks associated with any perception that the Investigating Committee’s decision-making had been inappropriately influenced by the views of the GDC staff.<sup>48</sup>
- 3.120 We are pleased to note that in autumn 2014 Penningtons found that this objectionable practice had ceased. We agree with Penningtons that the revisions to the Investigating Committee Guidance Manual introduced in August 2014 introduced appropriate restrictions to prevent such discussions occurring in the future. However, it is essential that both the current and any future staff and Investigating Committee members are trained on the rationale behind that guidance, in order to ensure that similar practices do not develop in future. It is also important that those in the role of Senior Committee Secretary and the Head of the Investigating Committee remain vigilant to ensure that such practices do not recur.

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<sup>48</sup> We note that the majority of the Investigating Committee members in place at the time have since left the GDC as the GDC recruited a new Investigating Committee in the second half of 2014.

(ii) Advance drafting of Investigating Committee decision documents/reasons by Investigating Committee Secretaries

*The 2013 Investigation Report*

- 3.121 The 2013 Investigation Report stated that the GDC's former Head of Prosecutions had alleged that the Investigating Committee Secretaries were preparing Investigating Committee decision documents in advance of Investigating Committee meetings (paragraph 5.97). That allegation was supported by the account of one of the Investigating Committee Chairs at the time, who reported their suspicions that pre-drafting of Investigating Committee decision documents had taken place.
- 3.122 The former Director of Regulation rejected that allegation, and told us (in 2012) that the Investigating Committees' decision documents were not prepared in advance. The former Director of Regulation told us that the Investigating Committee's' decisions were written during the Investigating Committee meetings, and approved by the Investigating Committee at the time. The 2013 Investigation Report stated that while we would not have a concern about the use of template decision documents which included standard wording, we would be concerned if there was any evidence that the content of Investigating Committee decision documents was being inappropriately influenced by GDC staff (paragraph 5.116). The report stated 'We have not been told of any concerns that such pre-drafting has inappropriately influenced the [IC]'s decision-making...Should the GDC identify any evidence of such inappropriate influence, we would expect them to address this as a priority'.

*The whistleblower's disclosure*

- 3.123 In July 2013 the whistleblower raised a concern in their letter to the former Chair of the Appointments Committee about '...the influence [Investigating Committee Secretaries] have on the recorded decisions of the IC' and said that 'IC decisions are 'second guessed', i.e. drafted in advance by [Investigating Committee Secretaries] using the [former Head of the Investigating Committee]' and [their] staff's interpretation of the evidence and their application of law and guidance in each case – the drafts going beyond the preparation of decision templates as envisaged by the [2013 Investigation Report] and verging on inappropriate influence on IC decision-making'. The whistleblower also alleged that, 'Detailed pre-drafting goes far beyond the acceptable limits of 'assisting' the IC with the drafting of their reasoned decisions which should be limited to assistance on the structure and the presentation of the reasons but not on the reasons themselves'.
- 3.124 On 26 September 2013 the whistleblower provided the Authority with a copy of the Bulletin (referred to in paragraph 3.29) which they had been sent by the GDC on 4 August 2013. The Bulletin expressly stated that advance drafting of Investigating Committee decision documents was taking place: 'The [IC Secretary] will...draft likely determinations and reasons based upon the [Indicative Outcomes Guidance] and any other relevant guidance and standards...Where the guidance is unclear or there is a potential that the IC may wish to distinguish a case from the provisions of the [Indicative Outcomes Guidance] the [Investigating Committee Secretary] will, within reason, draft a number of decision options based on their experience. That being said no finalised version is prepared until the IC meet and make a collective decision...No Committee member will ever be provided with any of the [IC Secretary]'s draft preparation notes'. The former Director of Regulation



had authorised publication of the Bulletin. The former Head of the Investigating Committee told us that they had been “involved in the drafting” of this section of the Bulletin.

*The views of the former Director of Regulation*

- 3.125 The former Director of Regulation expressed the view that pre-drafting which might influence or be used to influence the Investigating Committee is objectionable – the former Director of Regulation does not agree that such pre-drafting was in fact taking place, but nevertheless issued instructions for all pre-drafting to stop following receipt of Penningtons report.
- 3.126 In response to seeing a draft of this report the former Director of Regulation provided us with a full account of their views about this practice, as set out at paragraph 3.297. The former Director of Regulation told us that it was only when they saw the Bulletin that they became aware of the extent of the pre-drafting process in operation (they did not suggest to us that at that point they became concerned about it). The former Director of Regulation told us that issuing the Bulletin to all Investigating Committee members, senior staff within the fitness to practise team, the Appointments Committee and the executive management team provided those interested parties with an opportunity to raise any concerns about the extent of the pre-drafting processes in operation as described within the Bulletin or their potential to influence the Investigating Committee’s decision documents. The former Director of Regulation told us that no negative feedback was received in response to the issue of the Bulletin – and that was confirmed by the former Head of the Investigating Committee (save for their recollection that one Investigating Committee Chair had described the Bulletin as “useless”).

*The Penningtons report*

- 3.127 Penningtons reported that the Investigating Committee Secretaries had all described their very careful and structured preparation for each meeting. This included (depending on the individual Investigating Committee Secretary’s preference) preparing draft or skeleton Investigating Committee decision documents, with aide memoires identifying variously where evidence was to be found, potential problem areas, clinical matters, remediation, cross-references to the Indicative Outcomes Guidance etc. In terms of anticipating the outcome, different approaches were taken by different Investigating Committee Secretaries. Sometimes, draft decision documents were prepared based on what were perceived to be the range of likely outcomes. In other cases, particularly where the Investigating Committee Secretary was very uncertain over what the outcome was likely to be, different draft decision documents were prepared, each relating to a different potential outcome.
- 3.128 Penningtons reported that one reason for the pre-drafting of the Investigating Committee decision documents was to ensure consistency in decision-making. A lack of consistency had been said by the former Head of the Investigating Committee to have been a problem highlighted by recent audits undertaken of the Investigating Committee’s decision making and by the increased scrutiny of those decisions by dental defence bodies (and threats of judicial review). The former Head of the Investigating Committee also told Penningtons that once the Indicative Outcomes Guidance was in place (from January 2013) it provided a framework in which the pre-drafting of Investigating Committee decision documents could take place.

- 3.129 The Penningtons report into the Investigating Committee support and processes reached the same conclusion as that reached in the 2013 Investigation Report, i.e. that there was no objection to the preparation of formal and factual passages of text to be included in an Investigating Committee decision document, but that any attempt to persuade the Investigating Committee to use words they were unhappy with was problematic both in terms of propriety and efficiency. Penningtons also reiterated the comment recorded in the 2013 Investigation Report that the ‘voice’ of the Investigating Committee should be audible in its decision documents. Penningtons noted concerns that the amendment of pre-prepared draft Investigating Committee decision documents on occasion meant that the draft decision document placed before the Investigating Committee to consider at the meeting did not match what the Investigating Committee had agreed, and required substantial re-wording. There was also a concern that the draft decision documents given to the Investigating Committee to consider often included reasoning which had not formed part of the Committee’s discussion.
- 3.130 The Penningtons report acknowledged that draft decision documents were not intended to be shown to the Investigating Committee but referred to accounts from various Investigating Committee members of several occasions on which that had in fact happened, including one occasion when the document that had been shared with the Investigating Committee contained wording that, ‘The Secretariat instructs the IC’ – which was perceived by the Investigating Committee Chair who reported the incident to Penningtons as indicating “a deep culture of the Secretariat wanting to control the IC’s decision-making”. In relation to this, Penningtons found that the advance drafting of Investigating Committee decision documents was one of the ways in which the former Head of the Investigating Committee’s perceived strong views on the appropriate outcomes of cases tended to permeate Investigating Committee discussions.<sup>49</sup>
- 3.131 We note that the Investigating Committee Guidance Manual (2011), which was in place throughout 2012-2013, did not provide for any advance drafting of decision documents by Investigating Committee Secretaries and instead referred to their being present during Investigating Committee meetings ‘to help capture the Committee’s decision in each matter and the reasons for the decision’. The former Head of the Investigating Committee told us that once the Indicative Outcomes Guidance was put in place, it became possible to start drafting decision documents in advance of Investigating Committee meetings because it then became more straightforward to predict likely case outcomes and to draft reasoning that accorded with the Indicative Outcomes Guidance (IOG), but that such advance drafting did not take place prior to the introduction of the IOG. We note that the former Head of the Investigating Committee has always denied that they had any interest in ensuring that particular outcomes were achieved in any case and said that their concern was to ensure that the Investigating Committee produced decisions that were consistent with the IOG – or if they departed from the IOG, that they contained clear reasoning to explain why.
- The remedial action taken by the GDC*
- 3.132 We were told by the former Director of Regulation that the Investigating Committee Secretariat were told to cease pre-drafting decision documents of the

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<sup>49</sup> The former Head of the Investigating Committee described what had emerged as part of the Penningtons investigation as being that certain Committee Secretaries had not been following explicit instructions, and that whilst that was regrettable, it was beyond their control.

Investigating Committee in early January 2014. The accounts we have been given at interview by members of the Investigating Committee Secretariat who were in post at the time support the account given by the former Director of Regulation that such practices were stopped at that time.

3.133 Further action that the GDC took included the provision of training for Investigating Committee Secretaries in March 2014 and revision of the relevant guidance. From August 2014 the Investigating Committee Guidance Manual has included explicit instructions on what the Investigating Committee Secretaries are permitted to prepare in advance of Investigating Committee meetings. For example, the Guidance states that the Investigating Committee Secretary can draft a 'brief summary of the factual background to the case'. However, it explicitly states that they cannot 'prepare in advance any reasoning relating to the decision on the real prospect test (in relation to the facts or as to impairment), as to the relevance of any fitness to practise history, or relating to the ultimate disposal of the case by the IC including any commentary as to the relevant factors that the IC may wish to consider'.

3.134 The Penningtons report envisaged a scenario where some advance pre-drafting work would be done, in terms of populating standard paragraphs about introductory and factual matters. This recommendation echoed the findings in the 2013 Investigation Report. The GDC took a more 'risk averse' approach to the issue in the immediate aftermath of the Penningtons report, and instead mandated that absolutely no pre-drafting was to be done. Once the entirety of the drafting had to be undertaken during Investigating Committee meetings, that led to delay and to reduced efficiency at each Committee meeting. The absolute prohibition on any pre-drafting was relaxed to some extent on 11 February 2014 when the former Director of Regulation communicated to the Investigating Committee members that Investigating Committee Secretaries would from mid-February be undertaking some limited preparatory drafting: an introductory/synopsis paragraph; identification of relevant evidence; introductory sentences in relation to each allegation and grouping of related allegations; reference to other factual matters such as any ongoing/past fitness to practise matters. In April 2014, the GDC introduced the use of dual Secretaries at Investigating Committee meetings (following the piloting of this system from February 2014).

#### *Post implementation Penningtons review*

3.135 Based on their discussions with members of the Investigating Committee Secretariat and Investigating Committee members, Penningtons found that the practice of advance drafting of decision documents had ceased in early 2014. They found that the revised Guidance for the Investigating Committee Secretaries was comprehensive, appropriate and helpful and concluded that the GDC did not need to take any further action.

#### **Our view**

3.136 Whilst the aim of improving consistency of decision-making is proper, and a degree of advance preparation of decision text may assist with efficiency during Investigating Committee meetings, it is inappropriate for GDC staff members to be drafting the entirety or the majority of Investigating Committee decision documents and reasons in advance of the decision maker (the Committee as a whole)



meeting to discuss each case.<sup>50</sup> We had highlighted the risk of GDC staff having an inappropriate level of influence on the content of Investigating Committee decision documents in the 2013 Investigation Report. Nevertheless the former Head of Investigating Committee trained the Investigating Committee Secretaries who were appointed from January 2013 onwards to draft parts of the Committee decision documents in advance of Investigating Committee meetings and indeed (on their account, as well as on the account of the former Head of the Investigating Committee) met with them in advance of the meetings and discussed anticipated case outcomes. Further, the fact that the Investigating Committee Secretaries were preparing text for use in the decision documents in advance was acknowledged in the Bulletin (see paragraph 3.124) which was drafted/co-ordinated by the former Head of the Investigating Committee. The Bulletin was authorised for issue by the former Director of Regulation. We reject the suggestion implicit within the former Director of Regulation's evidence to us that the absence of any objections by those to whom the Bulletin was sent about the processes described in the Bulletin either meant that those processes were appropriate or somehow lessened the former Director's responsibility for ensuring their propriety.

- 3.137 The risks involved in the practice of pre-drafting relate to confidence in the regulatory process, bias, and the perception of bias. It is for the Investigating Committee to make its own decisions without interference or undue influence from anyone else, including GDC staff. It is not for GDC staff to second guess the Investigating Committee's decisions or reasoning in advance - not least because doing so may lead them, consciously or subconsciously (and even if the draft decision documents are not actually shown to the Investigating Committee) to influence the Investigating Committee's discussions at the meeting and/or impact upon the drafting of the final Investigating Committee decision document which is inappropriate, whether or not it is recognised as problematic by the Investigating Committee members during the meeting. Further, whilst there is a place for encouraging consistency (and indeed we encourage regulators to improve consistency in decision-making and to ensure that decisions set out adequate reasoning), we agree with Penningtons that the aim of consistency cannot justify infringement upon the independence of the statutory decision maker (i.e. the Investigating Committee). The members of the Investigating Committee are appointed to make their own decisions on the facts and circumstances of each case and any promise that cases will in effect all be dealt with consistently would potentially compromise the Investigating Committee's role and responsibility to decide each case fairly on its own merits.
- 3.138 When combined with the meetings that took place in advance of Investigating Committee meetings at which likely outcomes could be discussed between the Investigating Committee Secretaries and the former Head of Investigating Committee, and the objectionable practices set out in this part of the report, this practice of advance drafting of decision documents raises considerable concerns

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<sup>50</sup> We report at paragraph 3.308 that in contrast to the reported view of the former Head of the Investigating Committee in the Penningtons report that advance drafting was a quality improvement measure, the Chief Executive believes the former Director of Regulation considered it to be an efficiency measure. Both these individuals have commented that these were not their sole aims and that in any event, the two aims are not mutually incompatible, as we note at paragraph 3.315.

about the degree of possible control the Investigating Committee Secretaries could exercise over the decisions of the Investigating Committee.

- 3.139 However, we are pleased to note that Penningtons found that this objectionable practice had ceased in early 2014. We agree with Penningtons that the revisions to the Investigating Committee Guidance Manual that were introduced in August 2014 set appropriate explicit restrictions to prevent advance drafting recurring. However, it is essential that both the current and any future Investigating Committee Secretariat staff and Investigating Committee members are trained on the rationale behind that guidance, in order to ensure that similar practices do not develop in future. It is also important that those in the role of Senior Committee Secretary and the Head of the Investigating Committee remain vigilant to ensure such practices do not recur.

**(iii) Provision of legal advice by Investigating Committee Secretaries to the Investigating Committee during Committee meetings**

*The 2013 Investigation Report*

- 3.140 The 2013 Investigation Report concluded that the concern that had been raised with the Authority by Investigating Committee Chairs about the provision of incorrect legal advice by GDC staff was being addressed by the introduction of the legally qualified Investigating Committee Secretaries, and by removing casework staff from Investigating Committee meetings. It was expected that this would resolve the problem, as the newly recruited legally qualified Committee Secretaries would have a better understanding of the limitations of the advice they could provide.

*The Penningtons report*

- 3.141 Penningtons were told that the Investigating Committee Secretaries provided guidance on relevant case law and matters relating to the legislative framework and on procedure. Penningtons were also told that, in the event that legal advice was required, it was usually provided by the former Head of the Investigating Committee, who would have sourced it from others within the GDC's Fitness to Practise department.
- 3.142 The Penningtons report confirmed that neither the Investigating Committee Secretaries nor the former Head of the Investigating Committee were entitled to provide the Investigating Committee with legal advice, under the relevant legislative framework. It also noted that the 2011 version of the Investigating Committee Guidance Manual made it clear that the Investigating Committee Secretaries could not act as legal advisers to the Investigating Committee.
- 3.143 Penningtons report recorded the former Head of the Investigating Committee as saying that while anyone can give legal advice, the Investigating Committee Secretaries cannot give formal legal advice that can be relied upon by the Investigating Committee, as that would not accord with the legislative framework (and also in relation to those Investigating Committee Secretaries who do have current Practising Certificates, it would not be compliant with the requirements of the Legal Services Act 2007). However, the former Head of the Investigating Committee suggested that the Investigating Committee Secretaries could highlight the risk of a judicial review of a particular decision, or signpost the Investigating Committee members to a particular passage in the Indicative Outcomes Guidance or the Investigating Guidance Manual or any training materials or, for example,

paraphrase the legal test for dishonesty (as that is a matter the Investigating Committee members had been trained on). The former Head of the Investigating Committee also told Penningtons that it would not be improper for an Investigating Committee Secretary to remind the Investigating Committee of previous advice, guidance, policy documents or training materials or guide them to a relevant document they have been provided with and that 'If, within the realms of amplification or clarification, assistance or explanation is provided to the Committee this would not be legal advice but advice on the law'. Penningtons noted that they did not understand the distinction the former Head of the Investigating Committee was seeking to draw. The former Head of the Investigating Committee also said that it might be necessary for the Committee Secretary to interject and provide advice if, as a result of an Investigating Committee member referring to out of date practices or case law, there was a danger that the Committee would rely on incorrect law and as a result reach an unsafe decision or misdirect itself. The Investigating Committee Secretaries whom Penningtons interviewed understood that they could not give 'legal advice' and explained that if legal advice was required, it would be sought from outside the meeting room – either from the former Head of the Investigating Committee or from external lawyers. Both the former Head of the Investigating Committee and one Investigating Committee Secretary told Penningtons that Secretaries were permitted to refer to caselaw (as the Investigating Committee Members had been given training on it) as well as to sections of the Indicative Outcomes Guidance that set out legal principles and/or definitions. A number of the Investigating Committee members believed that the Investigating Committee Secretaries were allowed to provide legal advice.

- 3.144 Penningtons noted a concern about this situation, in particular the confusion about the extent of any 'legal advice' it was permissible for the Investigating Committee Secretaries (or anyone other than a legal adviser within the legislative framework) to give to the Investigating Committee. In addition, Penningtons established misunderstandings on the part of the Investigating Committee Secretaries in relation to some important legal principles. The report made a 'strong recommendation' that training from an external provider should be given jointly to both Investigating Committee members and the Investigating Committee Secretaries to explain the parameters of the advice it is permissible for them to give, as well as to address some of the areas which Penningtons had established were misunderstood.

*The views of the former Head of the Investigating Committee*

- 3.145 The former Head of the Investigating Committee told us that if formal legal advice was required it was obtained from an external solicitor or from the GDC's Corporate Legal team, or from someone within the fitness to practise team who was entitled to provide such advice. They also told us that they had never suggested that an Investigating Committee Secretary could or should advise on a novel or unique point of law.
- 3.146 The former Head of the Investigating Committee continues to maintain the distinction that they drew when explaining their views to Penningtons – that while only appointed Legal Advisers can provide formal legal advice to the Investigating Committee, others can provide "advice on the law" and signpost the Committee to

guidance/training materials and case law on which they have already received training.

*The views of the former Director of Regulation*

- 3.147 The former Director of Regulation expressed the view to us that Investigating Committee Secretaries should not offer legal advice to the Investigating Committee and said that they had not been aware that that was happening until receipt of the Penningtons report. In response to seeing a draft of this report the former Director of Regulation provided us with a full account of their views about the objectionable practices, as set out at paragraph 3.313 and 3.297.

*The Investigating Committee Guidance Manual (November 2011 version)*

- 3.148 The Investigating Committee Guidance Manual (November 2011 version) stated that the Committee Secretary might 'remind members of the contents of this Guidance and provide assistance to the Committee and advise on issues relating to GDC policy and procedure'. It explicitly stated that 'although he or she may be legally qualified, the Committee Secretary is not a legal adviser to the IC'. It also stated that the Fitness to Practise legal team (prosecution lawyers) could not provide legal advice to the Investigating Committee.

*The remedial action taken by the GDC*

- 3.149 The remedial action taken by the GDC was to provide training to the Investigating Committee Secretaries and the Investigating Committee members, in line with the Penningtons recommendation noted above.
- 3.150 The revised version of the Investigating Committee Guidance Manual (published in August 2014) made it clear that the Investigating Committee Secretaries are not legal advisers and must not provide legal advice. The Guidance also provides that in the event that the Investigating Committee Secretary becomes concerned that a serious procedural irregularity in the Investigating Committee proceedings may occur, or the Investigating Committee may make a decision that is wrong in law, the appropriate process is for them to suggest through the Chair that legal advice should be sought.
- 3.151 During summer 2014 we asked the Investigating Committee Secretaries in post during 2014 about how they would go about obtaining legal advice if the need for such advice was identified during an Investigating Committee meeting. None of them were able to articulate the correct process to us, or to provide a consistent explanation as to who would provide the advice (whether internally or externally), and they all said they would have to ask the Senior Committee Secretary or the Head of the Investigating Committee about the procedure if the need for advice arose.
- 3.152 The Senior Committee Secretary told us (in July/August 2014) that a standard operating procedure for adjourning for the purposes of obtaining legal advice was being developed. The Senior Committee Secretary also told us that such advice could be sourced from the GDC's Corporate Legal department. They said that on one occasion they had personally provided written legal advice for an Investigating Committee meeting (they have a current Practising Certificate) and that they had then ensured that they did not act as the Investigating Committee Secretary at that meeting.
- 3.153 The former Head of the Investigating Committee told us that they therefore encouraged Investigating Committees to adjourn for advice, rather than to adjourn

for ‘legal advice’ (they said that adjourning for advice meant that the Investigating Committee Secretariat could then decide how to source such advice). The Investigating Committee Secretary would then seek that advice from either the GDC’s Corporate Legal team (on occasion) or the fitness to practise team, or one of the GDC’s external legal advisers.<sup>51</sup> The former Head of the Investigating Committee told us that during 2011 the Investigating Committee Secretaries had been asked not to use the appointed Legal Advisers unless absolutely necessary due to the small pool of such individuals (which was shared with the Hearings function) and the potential for a problem to arise in locating a Legal Adviser at a hearing who was different to any Legal Adviser who had been involved at the Investigating Committee stage.

- 3.154 At interview, the Head of Corporate Legal told us that any request for advice from the Investigating Committee would be dealt with by the Corporate Legal team. The GDC has since confirmed that the Corporate Legal team would consider whether they have the competence to provide the advice requested – and if not, they would outsource the request to external lawyers. At interview (in 2014) the seconded Head of the Investigating Committee team told us that such advice would be sourced from the GDC’s Corporate Legal team if appropriate, or otherwise externally. They advised that there had been some confusion about how that advice would be obtained outside of Committee meetings, and told us that they were drafting a procedural document which would be communicated to the Secretariat staff.

#### *Post implementation Penningtons review*

- 3.155 Penningtons found that the changes that had been made to the Guidance (as published in August 2014) were helpful, comprehensive and appropriate. They also found that the Investigating Committee Secretaries were fully aware that they must not themselves provide legal advice to the Investigating Committee, and reported that the Investigating Committee Chairs and members had confirmed that the Investigating Committee Secretaries do not give such advice. Penningtons view was that it appeared that, where legal or similar advice has been required, it had been properly sourced in accordance with the revised Investigating Committee Guidance Manual. Penningtons concluded that no further work needed to be undertaken by the GDC.

#### **Our view**

- 3.156 It was the former Director of Regulation’s intention that the introduction of legally qualified Investigating Committee Secretaries would address various concerns that were examined in the 2013 Investigation Report, including a concern about casework staff and the Investigating Committee Secretary providing conflicting and/or incorrect legal advice during Investigating Committee meetings. Unfortunately the introduction of legally qualified Investigating Committee Secretaries did not resolve the irregularities around the provision of legal advice during Investigating Committee meetings, due to what appears to have been a misunderstanding by the Investigating Committee Secretaries and various Investigating Committee members as to what amounts to ‘legal advice’ and who was entitled to provide it to the Investigating Committee. Elements of this misunderstanding appears to have been perpetuated by the former Head of the

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<sup>51</sup> The former Head of Investigating Committee told us that this was due to the legal constraints involved in and arising from the provision of legal advice to the Investigating Committee.



Investigating Committee, who continues to maintain that a valid distinction can be drawn between 'formal legal advice' on novel points of law (which may only be given by appointed Legal Advisers) and 'advice on the law' including referring the Committee to training and guidance materials, the legislative framework, and case law on which the Committee had been trained (and who was of course responsible for training those Investigating Committee Secretaries who were appointed during 2012 and 2013). This is despite the fact that the Investigating Committee Guidance Manual (which had been in place since November 2011) made it clear that legal advice should not be given by Investigating Committee Secretaries, and the 2013 Investigation Report also highlighted the provision of legal advice during Investigating Committee meetings as an area of concern.

- 3.157 We note Penningtons' conclusion that the revised Investigating Committee Guidance Manual contains appropriate guidance on this matter. However we consider that it would have been helpful to include in the Guidance a reference to the extent to which it is permissible for the Investigating Committee Secretariat to clarify any matters contained in materials that have been provided to the Investigating Committee (such as the Investigating Committee Guidance Manual) and/or to signpost Investigating Committee members to relevant case law. This was a problem identified in the Penningtons report in 2013, and we are not clear that the amended Guidance (as published in April 2015) has resolved it. We also note that appropriate guidance was in place from 2011 but that did not prevent the practice of providing 'legal advice' developing. We recommend that the GDC monitors this area closely through, for example, review of Investigating Committee members' feedback forms and that it also ensures that refresher training in this area is provided regularly.
- 3.158 When we interviewed the current Investigating Committee Secretaries in mid-2014 they were unable to provide us with a clear explanation of the process that they would use to obtain legal advice if such advice were required. We have asked the GDC to confirm that it has now finalised the standard operating procedure that was under development in autumn 2014 so that there is no confusion about obtaining legal advice. Staff members should be trained on its use, and their adherence to the process should be monitored.

#### **(iv) Inappropriate interventions/undue influence by Investigating Committee Secretaries during Investigating Committee meetings**

##### *The 2013 Investigation Report*

- 3.159 The 2013 Investigation Report examined allegations that GDC staff were intervening inappropriately during Investigating Committee meetings. Those allegations had been made by a former Chair of the Investigating Committee who told us that several of the GDC's casework staff interrupted Investigating Committee members during meetings and argued with the decisions reached by the Investigating Committee. They provided us with an email they had sent to the former Director of Regulation about this in March 2011. Another former Investigating Committee Chair told us that it was routine for casework staff to make comments and give advice during Investigating Committee meetings. A third Investigating Committee Chair (who was a current Investigating Committee Chair at the time) told us that interruptions by casework staff began to take place from mid-2010 onwards, and included casework staff telling Investigating Committee

members that they could not take certain actions. The other Investigating Committee Chairs whom we interviewed during that investigation gave mixed reports of the extent of any intervention by casework staff during Investigating Committee meetings and confirmed that it had not had any influence on their decision-making.

- 3.160 The version of the Investigating Committee Guidance Manual that was in existence in 2011 made it clear that GDC staff were to play no part in the Investigating Committee's decision-making or its deliberations.
- 3.161 The 2013 Investigation Report commented that it was not appropriate for GDC staff to interfere in the Investigating Committee's deliberations and that it was important for the independence of the Investigating Committee to be maintained. The 2013 Investigation Report recorded that the GDC had said (via the former Director of Regulation) that it had resolved the problem by removing the casework staff from Investigating Committee meetings and replacing them with legally qualified Committee Secretaries.
- 3.162 While the 2013 Investigation Report recorded that all the Investigating Committee Chairs we had spoken to during the course of that investigation considered that there had been significant reduction of inappropriate interventions by GDC staff during Investigating Committee meetings following the introduction of the legally qualified Investigating Committee Secretaries, it also noted (at paragraph 5.95) that one Investigating Committee Chair did not consider that the introduction of legally qualified Investigating Committee Secretaries had completely resolved the issue. That individual raised a concern that the interruptions by the Secretaries appointed in mid-2011 (i.e. the former Head of the Investigating Committee and the other Investigating Committee Secretary appointed at the same time) in relation to legal/regulatory matters, while accurate, might be blurring the line between corrections as to procedure and interventions that might influence the Committee's decision-making.

#### *The whistleblowing disclosure*

- 3.163 The whistleblower alleged to the Chair of the Appointments Committee that:
- "There is concern over the influence [Investigating Committee Secretaries] have on the recorded decisions of the IC".
  - "The distinction between guidance, direction and control are not always properly understood or applied".
  - "The [former Head of the Investigating Committee] does not always recognise the critical difference between the roles of a decision maker and an adviser and has a tendency to stray into matters that are for the IC alone to decide by becoming involved in discussions and expressing a view".
  - "Within IC meetings considerable pressure is applied on members to adopt previously drafted decisions. [The former Head of the Investigating Committee] can be quite vociferous ....".
  - "Discussion can sometimes be about the decision itself with repeated references to 'consistency', 'internal audit' and even 'explaining ourselves to the GDC if the decision is questioned' being made in order to challenge and influence the views of IC members".

*The Penningtons report*

- 3.164 The Penningtons report into the Investigating Committee processes and support noted that in early 2013, following the introduction of the Indicative Outcomes Guidance, the former Head of the Investigating Committee sent an email to all Investigating Committee members notifying them that, as a result of increased activity on the part of defence bodies, the Investigating Committee Secretaries had been 'briefed to press for details within reasons and to ask, where appropriate, challenging questions'.
- 3.165 The Penningtons report stated that while some Investigating Committee Secretaries' comments during Investigating Committee meetings were structured, courteous and helpful, other Investigating Committee Secretaries had different styles and could be confrontational and stray from their role of advising and facilitating. Some Investigating Committee Chairs and members also told Penningtons of circumstances in which Investigating Committee Secretaries had become too involved in case discussions at Committee meetings, even including speaking without being invited to do so, and interrupting others.
- 3.166 The Investigating Committee Chairs and members said that some of the Investigating Committee Secretaries' interventions appeared to be aimed at making it clear to the Investigating Committee that they considered the Committee's approach to be misguided.
- 3.167 The Penningtons report stated that some individuals had alleged an 'almost overriding concern on the part of some Secretaries for the IC to decide cases in line with the [Indicative Outcomes Guidance]... seem to have formed their own view of how a case should be decided by reference to the [Indicative Outcomes Guidance] and seem reluctant to accept that there may be two different outcomes which can both be correct'. The report found that some Investigating Committee Secretaries were perceived to have treated the Indicative Outcomes Guidance as a tariff rather than a guide, and made 'constant' references to it in a prescriptive way which had 'an inhibiting effect on the IC in terms of its ability to make its own judgment'. The report recorded views of interviewees that, 'Where the IC are proceeding to make a decision contrary to what the Secretary had anticipated ... Secretaries have been seen to tell the IC what they personally would have done in terms of outcome ...'. with some Investigating Committee Secretaries being 'very direct', reportedly referring to the former Head of the Investigating Committee's actual or likely views and appearing to display 'a certain amount of fear ... that the [former Head of the Investigating Committee] might not like a particular decision'.
- 3.168 The Penningtons report noted that the former Head of the Investigating Committee accepted that in February/March 2013 there was a problem with both the 'unrectified direct style of the Secretaries' and that they had spoken to both of the Secretaries in place at that time. The former Head of the Investigating Committee had instructed the newly appointed Secretaries that they must not interrupt Investigating Committee members in their deliberations, that their questions must be open, and that if they perceived that the Investigating Committee were about to move in a direction which was contrary to the Indicative Outcomes Guidance, they could ask the Committee to articulate how they were distinguishing the case from similar cases referred to in the Guidance. Penningtons stated that the former Head of the Investigating Committee was correct to instruct the Investigating Committee Secretaries that they could ask the



Investigating Committee to identify where they found the evidence in support of the decision they were intending to make.

- 3.169 However, the Penningtons report found that one of the ways in which the former Head of the Investigating Committee's 'strong views' about the appropriate outcomes of cases permeated the Investigating Committee's discussions was through the direct and indirect communication of those views by way of the Investigating Committee Secretaries' interjections in the Committee's discussions.<sup>52</sup> Penningtons concluded that while the former Head of Investigating Committee 'accepts that [they are] not the decision-maker and does not seek to usurp that role...However [they have] not hesitated to make [their] views known either directly or indirectly...'
- 3.170 The Penningtons report did not make any specific recommendations to address the issues of the Investigating Committee Secretaries' interventions in Committee meetings, over and above the recommendation for the development of a written protocol setting out the Investigating Committee Secretaries' role.
- 3.171 Notably, Penningtons were commissioned to provide a second report for the GDC focusing on the events that occurred at a particular Investigating Committee meeting on 18 September 2013. At that meeting actions by an Investigating Committee Secretary (including their discussion about a procedural matter with the former Head of the Investigating Committee by telephone outside of the meeting room) resulted in the Investigating Committee leaving the meeting room in order to seek legal advice.<sup>53</sup> At that point the Investigating Committee staff contacted the former Head of the Investigating Committee, who in turn contacted the former Director of Regulation. While the various accounts of precisely what was said by the former Director of Regulation differ, it is clear that the former Director of Regulation told the Investigating Committee members that the Committee meeting was suspended and that the incident would be reported to the Appointments Committee. While the former Director of Regulation told us that any referral of the Investigating Committee members to the Appointments Committee under the disciplinary procedure could only have been made by the Chief Executive<sup>54</sup>, and that no such referral was in fact made (instead the matter was referred to Penningtons for investigation) we note that the former Head of the Investigating Committee nevertheless wrote to the Investigating Committee members concerned on 24 September 2013 notifying them that they were being referred to the Appointments Committee for investigation pursuant to the

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<sup>52</sup> The relevant section of the Penningtons report (paragraph 292) stated 'Although the Head of IC has stated that [they] could not care less what the IC says or how it says it, as long as it is defensible and understandable, the view expressed by Chairs, IC members and Secretaries was that [they give] the impression of having strong views on what the appropriate outcomes of cases should be and what reasoning would be required to support outcomes whether those outcomes are anticipated or not. These perceived views have tended to permeate IC discussions in a number of ways, both direct and indirect, beginning with [their] input when Secretaries are preparing for IC meetings and ending with [their] comments on determinations post-meeting. In the middle of the process we see [their] views being communicated, both directly and indirectly through their interventions in discussions, preparation of wording for draft determinations and, on occasion, in securing [their] input in one form or another during meetings. There has been a perception by IC Members and Secretaries that the Head of IC will react negatively to a decision which is not consistent with [their] own view...'

<sup>53</sup> We note that while the former Head of the Investigating Committee said to us that the Investigating Committee members told the Investigating Committee staff that they wished to discuss the case in private, the accounts given to us by the individuals who were present at the time agree that no such statement was made, and that the Investigating Committee members indicated that they intended to return in due course.

<sup>54</sup> This is factually correct.

disciplinary procedure, and inviting them to withdraw from participating in Investigating Committee meetings until the conclusion of that investigation.<sup>55</sup> The former Head of the Investigating Committee told us that they sent that email having first been instructed to do so and having obtained advice as to its contents from the Corporate Legal/Governance team.

3.172 Penningtons related the learning from this specific meeting back to the general lessons for the GDC, as set out in their report into the Investigating Committee processes and support, e.g. in relation to the need for training on:

- The extent to which an Investigating Committee may be guided/directed by the Investigating Committee Secretary with regard to its decision-making.
- The extent to which influences from outside the Investigating Committee meeting room should have any bearing on the Investigating Committee's decisions.
- The circumstances in and stage at which the Secretariat may withdraw a case from the Investigating Committee on the basis of their discussions and/or the decision they appear to be reaching.
- In relation to the above three issues, the need to ensure that a genuine and commendable concern to ensure that Investigating Committee decisions are capable of withstanding subsequent challenge does not jeopardise or appear to jeopardise the independence of the Investigating Committee's decision-making process.
- The extent to which an Investigating Committee may take into account, when considering the case against one registrant, a previous decision regarding another registrant, against whom proceedings have been brought on the basis of the same factual circumstances.

#### *The remedial work undertaken by the GDC*

3.173 The revisions made to the Investigating Committee Guidance Manual in July 2014<sup>56</sup> (which remain in place in the current edition, published in April 2015) include the addition of various paragraphs which explain that during an Investigating Committee meeting the Investigating Committee Secretary may at the request of the Committee explain GDC policy and procedure, facilitate discussion (including assisting with the location of evidence, referring to relevant GDC Standards or the Investigating Committee Guidance Manual or the Indicative Outcomes Guidance) and identify any matter the Investigating Committee may have overlooked. Any other input which the Investigating Committee Secretary wishes to make should only be made with the permission of the Committee Chair. The Guidance explicitly states that Investigating Committee Secretaries:

- Should ask only open questions.
- Should not, with a view to attempt to persuade the Investigating Committee to alter its view, refer to the fact that Investigating Committee's decisions are subject to scrutiny (internally and externally) and possibly challenge (e.g. by

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<sup>55</sup> The former Chair of the Appointments Committee has told us that the Appointments Committee had no knowledge of the email sent by the former Head of the Investigating Committee on 24 September 2013 and that no such reference to the Committee was made. The former Chair of the Appointments Committee has also asked us to note that the former Head of the Investigating Committee was not authorised to refer statutory committee members directly to the Appointments Committee, or to invite them to withdraw from sitting.

<sup>56</sup> The GDC has asked us to note that standard operating procedures were also in place, as was training.

way of judicial review) or take part in Investigating Committee discussions on the same footing as Investigating Committee members.

- Should avoid giving the impression that they are seeking to steer the Investigating Committee in any given direction; and
- If they refer to guidance they should do so only once.

3.174 We note that a prohibition which was set out in the Guidance published in August 2014 preventing Investigating Committee Secretaries from expressing their personal or the Secretariat's view on matters which it is for the Investigating Committee to decide has been deleted from the current (April 2015) version, as has an express prohibition on interrupting Investigating Committee members while they are speaking.

3.175 The Guidance allows the Investigating Committee Secretary to ask the Investigating Committee to explain its reasoning in the event that they become concerned that the Investigating Committee's decision may be contrary to the Indicative Outcomes Guidance or other guidance, including asking the Investigating Committee to identify the relevant evidence. They are also permitted to ask the Investigating Committee to provide evidence-based reasoning to assist in drafting the Committee decision document.

3.176 One of the Investigating Committee Secretaries told us that the Secretaries have (since the training that was provided and the development of the revised Investigating Committee Guidance Manual in 2014) changed the way in which they interact with Investigating Committee members. For example, they now direct any questions through the Investigating Committee Chair, rather than asking the Committee directly, and there has been a reduction in their participation in the Investigating Committee's discussions. All of the Investigating Committee Secretaries we spoke to who were in post in 2014 told us that they were aware that they were to address any questions through the Investigating Committee Chair and gave us no cause for concern that they would do otherwise.

3.177 However when we interviewed one former Investigating Committee Chair in September 2014, we asked them for their impressions of the behaviour of the Investigating Committee Secretaries during 2014, i.e. in the period since the retraining has taken place and the changes have been made to processes following the Penningtons report. The former Investigating Committee Chair told us that some of the 2014 Investigating Committee Secretaries have a habit of "badgering" and that one of the 2014 Investigating Committee Secretaries interrupts the Investigating Committee's discussions and is "very bullish". Their comments were supported by the view of the other former Investigating Committee Chair whom we interviewed (who raised concerns about the behaviour of the same individual, without prompting). They reported however, that at least one other Investigating Committee Secretary's behaviour had become more appropriate since the Penningtons report. The GDC has told us that no concerns about this behaviour were reported at the time.

#### *Post implementation Penningtons review*

3.178 Penningtons post-implementation review in autumn 2014 concluded that the revised Guidance (the version published in August 2014) is helpful, comprehensive and appropriate. It was Penningtons' firm view that one of the important contributory factors to what was described by one of the Investigating

Committee Chairs as a ‘marked sea change’ in the way the Investigating Committee Secretaries were conducting themselves in Investigating Committee meetings was the fact that there is very limited (if any) discussion of cases between Secretaries and other GDC staff when Secretaries are preparing for an Investigating Committee meeting. Penningtons noted that this was a change in arrangements from 2013 – at which time the Investigating Committee Secretaries used to meet with the former Head of Investigating Committee routinely before each Committee meeting in order to discuss the forthcoming cases and the expected outcomes.

3.179 Penningtons also found that the Investigating Committee Secretaries’ preparation for Committee meetings now does not focus at all on outcomes. It is instead focussed on the Secretary familiarising himself/herself with the facts and evidence, and identifying (for example) whether there are any unusual aspects of dentistry involved. Penningtons considered this to be the appropriate way to prepare for an Investigating Committee meeting.

3.180 Penningtons said in autumn 2014 that they were entirely satisfied that the Investigating Committee Secretaries were conducting themselves in accordance with the Guidance and no longer attended meetings with the intention of voicing any pre-conceived ideas or expressing other people’s views about the appropriate outcomes. These comments may provide the rationale behind the GDC’s deletion from the current (April 2015) Guidance of two of the express prohibitions that were contained in the previous version referred to in paragraph 3.174 above. We note that the prohibition on interrupting members was highlighted in Penningtons’ review as something that might be the subject of future change (an observation had been made to and accepted by Penningtons during the post-implementation review that an instruction to that effect would not usually be contained in such a document).

#### **Our view**

3.181 It is disappointing that the introduction of legally qualified Investigating Committee Secretaries did not stop the objectionable practice of GDC staff members intervening inappropriately in Investigating Committee deliberations and discussions. Our view about this practice was made clear in the 2013 Investigation Report – such interventions are not appropriate.

3.182 While the former Head of the Investigating Committee’s proposed approach as set out at paragraph 3.168 above, is appropriate, that was not the approach adopted by some of the Investigating Committee Secretaries. Whilst some of the difficulties the Investigating Committee members experienced may have been due to communications failures, we consider that the core of the problem was the expectation (as reported to Penningtons as being perceived by the Investigating Committee Secretaries at the time as coming from the former Head of the Investigating Committee) that the Investigating Committee’s decisions should always conform with the Indicative Outcomes Guidance and that it was appropriate for the Investigating Committee Secretaries to challenge the Investigating Committee members robustly to provide clear and detailed reasons if they appeared likely to reach a decision that did not conform with that Guidance. The relevance of the fact that the Indicative Outcomes Guidance was guidance rather than rules, and that it was supposed to be ‘indicative’ only appears to have been overlooked by the Investigating Committee Secretaries during 2013.

- 3.183 Some of the other practices examined in this report are also of direct relevance to the issue of the influence wielded by the Investigating Committee Secretaries during Investigating Committee meetings, and to the nature of their interventions at those meetings. For example, the process of pre-drafting the Investigating Committee's decision documents (which is considered in more detail at paragraphs 3.123 – 3.139 provided an indication that the Investigating Committee Secretaries may often have gone into Committee meetings with their own expectations about the appropriate outcome of each case from the preparatory work they had done; and those expectations may (consciously or subconsciously) have influenced their behaviour during the meetings. Our findings in relation to amendments made to Investigating Committee decision documents by the Secretariat after meetings (see paragraphs 3.190 – 3.221) are also relevant – in that they similarly indicate that at least some of the Investigating Committee Secretaries had a clear expectation not only about the appropriate outcome for each case but also about the reasoning that the Committee should rely upon to justify that outcome. Additionally, it also shows that the Secretaries were prepared to intervene after Committee meetings had finished in order to achieve the result that they considered to be correct, in the sense of making substantive changes to the Investigating Committee's decision documents.
- 3.184 However, we consider that the Investigating Committee Secretaries during 2013 were put in a difficult position – they were expected by senior GDC staff to ensure that the Investigating Committee's decisions were not vulnerable to challenge due to their poor reasoning by, if necessary, asking questions of the Investigating Committee. At the same time, they were carrying out what is essentially a service function at Investigating Committee meetings. Further, they had not received proper training or supervision, and therefore were not necessarily aware that they were overstepping the boundary of their role as an adviser and facilitator.
- 3.185 The actions taken by the GDC during 2014 and 2015 appear to be sufficient to minimise the risk that in future Investigating Committee Secretaries will intervene inappropriately during Committee meetings. However, given the concerns identified by the two Investigating Committee Chairs whom we interviewed in 2014 about some Investigating Committee Secretaries' behaviour (even after the implementation of the recommendations from the Penningtons reports, the training provided and the revisions made to the Investigating Committee Guidance Manual)<sup>57</sup> we recommend that the GDC takes additional measures to assure itself that all of the Investigating Committee Secretaries consistently behave appropriately during Committee meetings, and in particular that they address all questions through the Committee Chair, as opposed to interjecting unprompted or interrupting Committee members.

**(v) Amendment of Investigating Committee decision documents after Investigating Committee meetings by Investigating Committee Secretaries without appropriate authorisation**

*The 2013 Investigation Report*

- 3.186 The 2013 Investigation Report recorded the concerns raised with us by a former Investigating Committee Chair in 2012 about post-meeting amendment of

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<sup>57</sup> The seconded Head of the Investigating Committee team told us that no such concerns had been brought to their attention while they had responsibility for the Investigating Committee team.



Investigating Committee decision documents. They told us that it was routine for GDC staff to seek to make alterations to Investigating Committee decision documents after the meetings, to correct errors. They told us that some changes were made unilaterally by GDC staff and provided documentary evidence of this from February 2011. Similarly a concern was raised about the 'voice' of the Investigating Committee being lost, as a result of the Investigating Committee Secretariat's use of formulaic language. None of the other current Investigating Committee Chairs raised similar concerns with us at that time.

- 3.187 In the 2013 Investigation Report we noted that the former Director of Regulation had told us that the Investigating Committee Secretaries reviewed the Investigating Committee decision documents for typographical errors, before providing them to the Investigating Committee Chairs to approve (paragraph 5.81). During the course of the 2013 investigation the former Director of Regulation told us that it was not unusual for Investigating Committee Chairs to be asked to approve minor typographical corrections to Investigating Committee decision documents, and that they were not aware of any recent instances of GDC staff unilaterally changing Investigating Committee decision documents.
- 3.188 During that investigation the Chief Executive notified us about a whistleblowing complaint made by a GDC staff member about the alteration by another staff member of an Investigating Committee decision document, outside of the appropriate process. During our investigation we reviewed the internal investigation the GDC had conducted, and reported that as a result of the investigation, a protocol had been developed setting out how post-meeting changes to Investigating Committee decision documents should be made (it provided that all changes should be tracked and notified to the Investigating Committee Chair).
- 3.189 The 2013 Investigation Report concluded that it is not appropriate for GDC staff to seek to intervene in Investigating Committee decisions and that the actions reported to us could not be condoned. It also referred to the importance of ensuring that the Investigating Committee's decisions are accurately recorded at the time. The 2013 Investigation Report noted the former Director of Regulation's assurance to us that the change to using legally qualified Investigating Committee Secretaries in future, together with better management and training, should minimise the need for subsequent amendment of Committee decision documents (paragraph 5.81).

*The whistleblower's disclosure*

- 3.190 In their letter to the former Chair of the Appointments Committee the whistleblower referred to a concern about the extent of the review of Investigating Committee decision documents being undertaken by staff after Investigating Committee meetings. They said that this appeared to go beyond the process set out in paragraph 194 of the Investigating Committee Guidance Manual (November 2011) (which provided for review of draft Investigating Committee decision documents only for 'inaccuracies, typographical errors, grammar, clarity of English, unnecessary repetition, genuine mistakes etc'). Two of the other concerns they raised are also relevant to the issue of post-meeting amendment of Investigating Committee decision documents – their concern that 'The GDC's responses to the [2013 Investigation Report] do not accurately reflect current

practice...' and, 'There is concern over the influence Committee Secretaries have on the recorded decisions of the IC'.

*The Penningtons report*

- 3.191 The former Head of the Investigating Committee told Penningtons that between January and February 2013 their practice was to review the draft Investigating Committee decision documents as part of the recently appointed Investigating Committee Secretaries' training. The relevant Investigating Committee Secretary would review the draft Investigating Committee decision documents on the day following the Committee meeting, and then send the drafts to the former Head of the Investigating Committee for comment. The former Head of the Investigating Committee told Penningtons that they were 'hands on' with comments and suggestions and would provide the Investigating Committee Secretary, where appropriate, with re-worked paragraphs of individual Investigating Committee decision documents (for example to include relevant paragraphs from the Indicative Outcomes Guidance or Standards Guidance within the reasoning). The former Head of the Investigating Committee and the Investigating Committee Secretary would then meet to go through the draft decision documents. The former Head of the Investigating Committee told Penningtons that their expectation was that if the Investigating Committee had discussed the Indicative Outcomes Guidance but reference to it had not been included in the original draft decision document, the Investigating Committee Secretary would suggest its inclusion to the Investigating Committee Chair. By contrast, if the Investigating Committee had not discussed such an issue, their expectation was that the Investigating Committee Secretary would not suggest the inclusion of it to the Investigating Committee Chair. The former Head of the Investigating Committee also told Penningtons that they might recommend removal of any text within the decision document which in their view should not have been included if retaining it created a substantial risk (for example, if there was a reference to allegations that the Investigating Committee had not been asked to consider, or if the phrasing suggested that the Investigating Committee had made findings of fact), and that they expected the Investigating Committee Secretary to point out the relevant risk to the Investigating Committee Chair. The former Head of the Investigating Committee told Penningtons that they did not know whether the Investigating Committee Secretaries in fact acted as expected - as due to the former Head of the Investigating Committee's wish to avoid 'contaminating the process' they had no involvement in the Investigating Committee Secretaries' interactions with the Investigating Committee Chairs after each Committee meeting.
- 3.192 The former Head of the Investigating Committee told Penningtons that, as individual Investigating Committee Secretaries became more experienced, they would discuss cases with the Secretaries before the Committee meetings. While those Investigating Committee Secretaries would still send the former Head of the Investigating Committee draft Investigating Committee decision documents to review after the meetings (this continued until November 2013, when the Senior Committee Secretary took over management of the Investigating Committee Secretaries), the level of the former Head of the Investigating Committee's input would be reduced, because the Investigating Committee Secretaries tended simply to be asking for advice on whether sufficient detail had been included. The former Head of the Investigating Committee told Penningtons that 'recently' (i.e. around the time when they were interviewed by Penningtons) the Investigating

Committee Secretaries had flagged where they had questions ‘as opposed to [the former Head of the Investigating Committee] going through all the determinations line by line’.

3.193

In August 2013 the Head of the Investigating Committee circulated the Bulletin, which included a detailed description about the process used by the Investigating Committee Secretariat to draft and review Investigating Committee decision documents before they were finalised. The process as described in the Bulletin included:

- The Investigating Committee Secretary conducting a check of the Investigating Committee decision documents the day after the meeting to check typographical and grammatical errors and clarity of English, as well as inaccuracies, unnecessary repetition and genuine mistakes ‘which might include inconsistencies or errors of reasoning’. They would ‘also double check things like dates, or references to other documentation, as well as quotations from guidance’.
- The Investigating Committee Secretary looking ‘for errors and inconsistencies in relation to each individual case as well as looking at the [decision documents] as a whole. In doing so they will consider the various audiences... In carrying out the review these stakeholders and any commitments made to them will be taken into account’.<sup>58</sup>
- A second Investigating Committee Secretary reviewing each Investigating Committee decision document before they were sent to the Investigating Committee Chairs ‘to check that there is both consistency and clarity as well as having a ‘fresh eyes’ review to ensure that the [decision document] stands on its own, is accessible, robust and quotes (or distinguishes) the relevant details of the [Indicative Outcomes Guidance]’. This was described as being ‘an extremely helpful process which has avoided a number of potential obvious errors and judicially reviewable issues being published’. The Bulletin stated that the Secretary would consider any suggestions made by the reviewer and might therefore discuss clinical issues with the Investigating Committee where appropriate, prior to providing the finalised draft decision documents for cross-checking by the Investigating Committee Chair.
- The Investigating Committee Secretary making clear that ‘Any substantive changes will be highlighted and if considered helpful an explanation provided. Substantive changes are for example where there is supplementary reasoning added which was discussed on the day but which was not captured in the initial reasons or where there is insufficient detail ... In considering any issues raised ... the Chair can discuss the matters with the [Investigating Committee] members although in our experience the Chairs are usually content to give a view on behalf of the [Investigating Committee]’.
- The Investigating Committee Secretary asking the Investigating Committee Chair to assist and to ensure that the final draft accurately reflects the Investigating Committee’s decision. The Investigating Committee Secretary considered any comments and suggestions provided by the Chair on the

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<sup>58</sup> This was a reference to explaining clinical issues in sufficient detail, apparently in response to comments made by the Authority and dental defence bodies.



amended draft decision documents ‘and [would] implement them where considered appropriate prior to finalising the drafting’ and recorded that for completeness a copy of the final decision document would be emailed to the Chair.

- 3.194 The only circumstance in which it was envisaged that the Investigating Committee Secretary would always contact the whole Committee was where there was a perceived error in the decision document.
- 3.195 The former Head of the Investigating Committee told Penningtons that the process (as set out in the Bulletin) had operated since December 2011. The former Head of the Investigating Committee told Penningtons that when they were acting as Investigating Committee Secretary during 2012, they would have alerted the relevant Investigating Committee Chair to any substantive change they proposed to make to the wording of an Investigating Committee decision document, but that they would not have alerted the Chair if the former Head of the Investigating Committee had ‘simply tightened up the decision’. The former Head of the Investigating Committee told Penningtons that there was nothing in the Bulletin that was not already articulated in the Investigating Committee Guidance Manual (2011) and/or which was not in place in 2011 (albeit undocumented). The Bulletin was authorised for publication by the former Director of Regulation. The former Head of the Investigating Committee told us that if amendments to a decision document were so extensive as to require approval from the full Committee, it would have been for the Chair to circulate the decision document to them – and that it would have been a breach of long-established protocol for the Investigating Committee Secretariat to do so.<sup>59</sup>
- 3.196 The Investigating Committee Secretaries interviewed by Penningtons in autumn 2013 maintained that they checked each draft Investigating Committee decision document for structure, sense, grammatical and spelling errors (or asked a colleague to carry out similar checks) and that they might also include additional reasoning in a draft Investigating Committee decision document if it had been discussed by the Investigating Committee at the time. They said that all draft Investigating Committee decision documents were sent to the former Head of the Investigating Committee as a matter of routine. They said that any suggested changes would be tracked on a version of the draft decision document that was then sent to the Investigating Committee Chair, so that the Investigating Committee Chair could see what had been done or proposed by way of changes.
- 3.197 The Investigating Committee Chairs we spoke to were not aware that this ‘fresh eyes’ review process was in place until the Bulletin was published, although they (and other Chairs) had become concerned during the first half of 2013 about the extent of the amendments being made to Investigating Committee decision documents after the meetings by the Investigating Committee Secretaries. As a result, they had agreed as a group to start compiling evidence of this in mid-2013 (shortly before the whistleblower raised their concerns and the Penningtons investigation was then commenced).
- 3.198 While the Investigating Committee Secretaries who were interviewed by Penningtons stated that any changes that were suggested to decision documents

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<sup>59</sup> The Investigating Committee Guidance Manual (November 2011) that was in place at the time did not envisage substantive amendment of a decision after the Investigating Committee meeting had ended, and therefore contained no details about the circumstances in which (and the process by which) it might be appropriate for an amended decision document to be circulated to the full Committee.

after Investigating Committee meetings were marked as tracked changes, in fact Penningtons' own review of documented Investigating Committee decisions made at five different Investigating Committee meetings during July and August 2013 identified that 'significant' changes had been made outside of four of those Investigating Committee meetings to various Investigating Committee decision documents, some of which had not been highlighted to the relevant Investigating Committee Chair when they were asked to approve the final decision documents, and some of which were not circulated to the entire Investigating Committee in circumstances when they should have been. Penningtons described this as being of 'significant concern' because even though the Investigating Committee decisions about the outcome of each case had not changed following the Investigating Committee meetings, the reasoning behind the Investigating Committee's decisions had changed, and 'the reasons are necessarily an integral part of decisions' which not only should the Chair have agreed, but with which the entirety of the Investigating Committee had to agree.

3.199 Penningtons' investigation established that not only had considerable changes been made to some of the draft Investigating Committee decision documents sent to Investigating Committee Chairs, but on some occasions 'very frank' comments had been included about the decisions and the reasoning for them. Penningtons rejected the suggestion made by the former Head of the Investigating Committee that those comments were for 'training purposes' for the relevant Investigating Committee Secretary – noting that they were in fact sent to the Investigating Committee Chair, including directly by the former Head of the Investigating Committee on one occasion in July 2013 (when covering for the absence of one of the Investigating Committee Secretaries) without indicating which of the comments were intended to lead to amendments being made to the decision documents. The former Head of the Investigating Committee told Penningtons that they had left it to the Investigating Committee Secretaries to decide whether or not to pass their suggestions on, but Penningtons report noted their 'strong suspicion' that the Investigating Committee Secretaries felt some pressure to procure that the decision documents were amended to reflect the former Head of the Investigating Committee's views. One Investigating Committee Secretary apparently told Penningtons that, prior to June 2013, the volume of rewording of decision documents that was suggested by the former Head of the Investigating Committee was such that that Secretary did not highlight the suggested changes to the Investigating Committee Secretary out of a concern not to damage their self-confidence.

3.200 The Penningtons report noted that, in response to one set of changes proposed by the former Head of the Investigating Committee, the relevant Chair had replied 'I am happy with [the Head of the Investigating Committee's] suggested changes to the wording ... while this goes a little further than the IC's actual reasoning, as Chair I am satisfied that it remains within the spirit of our decision and that had this form of words been proposed it would have been accepted by the IC'. The whole Investigating Committee was not asked to approve the changes made to the decision document.<sup>60</sup>

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<sup>60</sup> The former Head of the Investigating Committee has told us that it would have been a gross breach of long-established protocol for the Investigating Committee Secretaries to send a draft decision document to the whole Investigating Committee, rather than to leave this as a matter for the Chair's discretion.

- 3.201 On other occasions, large amounts of re-drafting had been done but significant changes had not even been highlighted to the Investigating Committee Chair, let alone brought to the attention of the entire Investigating Committee (although on some occasions other changes had been drawn to their attention - which may have implied that the highlighted changes were the only changes that had been made) and as a result it appears that wholesale changes were agreed without due scrutiny or authorisation. It is notable that Penningtons found that this took place even after the whistleblower's concerns had been raised.
- 3.202 The Penningtons report questioned whether it was legitimate for amendments to be made to Investigating Committee decision documents after the Investigating Committee meeting, when the Investigating Committee had already reached its decision and identified its reasoning during the meeting, particularly in view of the wording of the Investigating Committee Guidance Manual (2011). Penningtons expressed the view that only very limited changes should be permitted (and in particular that the substance should not be altered) once the Investigating Committee had reached its decision and formulated its reasoning. The report referred to 'significant concern as to the extent to which decisions have been altered post-meeting by the IC Secretary and/or [the former Head of the Investigating Committee]... the reasons have on a number of occasions been amended significantly. This has apparently happened routinely without the whole IC being asked to consider the re-drafting. While there has been no effect on the disposal of the case, the manner in which amendments have been made in our view has the potential to compromise the independence of the IC'. Penningtons also highlighted that while it was commendable to seek to avoid the risk of a challenge being made to the Investigating Committee's decisions due to lack of reasoning, the 'greater risk of challenge' arose from decision documents not being drafted and approved by the Investigating Committee as a whole, particularly in circumstances where alterations made by the Investigating Committee Secretaries had not been highlighted to the Chairs.
- 3.203 The former Head of the Investigating Committee commented to us that there were only two Investigating Committee Secretaries who had made changes to decision documents which they had not highlighted when sending them to the Investigating Committee Chairs – and that one of those individuals had taken significant shortcuts and had been subject to disciplinary action.
- The views of the former Director of Regulation*
- 3.204 The former Director of Regulation expressed the view to us that post-meeting amendments should be clearly identified in any re-drafted decision document and should be agreed by the Chair and/or the whole Committee (where the amendments are more substantive). The former Director of Regulation believed that this was in fact taking place until receipt of the Penningtons report. In response to seeing a draft of this report the former Director of Regulation provided us with a full account of their views about the various objectionable practices, as set out at paragraph 3.313 and 3.297.
- The Investigating Committee Guidance Manual (November 2011)*
- 3.205 The Guidance Manual (which was in operation throughout 2012 – 2013) stated that a Committee Secretary would be present at the meeting to help capture the Committee's decision in each matter and the reasons for the decision, that 'Each member of the IC should check to ensure that the reasons given properly reflect

the decision reached by the Committee' and that, 'The Committee as a whole will see and approve the substantive reasons during the meeting'.

*The remedial action taken by the GDC*

- 3.206 There were a number of activities undertaken by the GDC following receipt of the Penningtons findings. As referred to above, early in 2014 the former Director of Regulation instructed the Investigating Committee Secretaries to cease all the practices identified as objectionable in the Penningtons report. The Investigating Committee Secretaries also attended training, both on their own and with the Committee members, during the course of which, drafting of decision documents was addressed.
- 3.207 The Investigating Committee Guidance Manual was revised during 2014 to make it clear that any post-meeting review of Investigating Committee decision documents was to be confined to identifying typographical errors and marking those as tracked changes for review by the Investigating Committee Chair. On 2 April 2014, the former Director of Regulation issued a list of 'permissible typographical amendments' in order to provide clarity about what changes could or could not be made after a Committee meeting had concluded.
- 3.208 On 15 December 2014, a revised version of the Guidance (the current Guidance) was issued – permitting a greater range of post-meeting amendments to Investigating Committee decision documents than that envisaged in the August 2014 Guidance (effectively it reinstated some of the categories of permitted amendment referred to in the November 2011 Guidance). The December 2014 Guidance and the current Guidance (published April 2015) permits the correction of 'any inaccuracies, typographical errors, grammar, unnecessary repetition or genuine mistakes' to be marked up as tracked changes by the Committee Secretary (or other Secretariat member) and sent to the Chair for review. It also permits the Chair to suggest corrections of a similar nature, which they may circulate to the other Investigating Committee members for approval. It also expressly states that 'The Chair's decision on what post-IC meeting corrections are to be made, as communicated to the Committee Secretary will be final'. These changes post-date the post implementation Penningtons review and were made as a result of it.

*The post implementation Penningtons review*

- 3.209 When Penningtons conducted their review in 2014 they found that the practice of making substantial alterations to decision documents after Investigating Committee meetings had ceased, that no amendments to decision documents after meetings were being made other than changes of a minor, typographical nature, and that all changes were being flagged up so that the Chairs could see precisely what changes had been made, even if they were only of a minor nature.
- 3.210 However, Penningtons also reported that the prescriptive nature of the list of permissible changes that had been issued by the former Director of Regulation on 2 April 2014, had made it very difficult for the Investigating Committee itself to correct obvious errors and/or tidy up its decisions, and that it had resulted in erroneous wording being included in finalised Investigating Committee decision documents and in one instance referred to by Penningtons in a published warning. This was consistent with information we were given during our investigation, one of the Investigating Committee Chairs whom we spoke to expressed their

frustration at the approach being taken by the Investigating Committee Secretariat (including the seconded Head of the Investigating Committee team) in refusing to permit common sense changes simply because they fell outside the 'list of permissible changes', even in circumstances where that meant the Investigating Committee decision document itself would be factually wrong. We acknowledge that there was no suggestion that erroneous documents had been published either deliberately or knowingly. We put this issue to both the Chief Executive and the seconded Head of the Investigating Committee team at interview. The Chief Executive appeared to be surprised to hear of the problem and agreed it would be ridiculous to allow decision documents to be finalised which contained errors (the Chief Executive was not aware that the use of the list of permissible changes had resulted in any decisions containing erroneous wording). The seconded Head of the Investigating Committee team assured us that the 'list' of permissible changes would be kept under review.

3.211 Penningtons' post-implementation review suggested that, as a consequence of seeking to implement their earlier recommendations about amending Investigating Committee decision documents, the GDC may have 'gone too far'. The review reiterated the previous recommendations that minor changes were permissible, provided they were identified to the Investigating Committee Chair for their consideration; and that if more substantial changes were proposed, they would need to be authorised by the entire Investigating Committee. The review noted that the changes made to the Investigating Committee Guidance Manual in 2014 had, in effect, placed additional restrictions on the changes that an Investigating Committee Chair could authorise, and that this was unnecessary. Penningtons' view was that the Investigating Committee should be permitted to agree changes to its own decisions. The review recommended various specific changes be made to the Investigating Committee Guidance Manual. We note that the seconded Head of the Investigating Committee team informed us that such changes were in fact made in the Guidance that was published on 15 December 2014, including expanding the permissible corrections to include 'inaccuracies, typographical errors, grammar, unnecessary repetition or genuine mistakes'. We note that the current Guidance (published in April 2015) uses (with only minor changes) the wording proposed in the Penningtons post-implementation review.

#### **Our view**

3.212 The 2013 Investigation Report (at paragraph 5.119) recorded concerns about amendments being made to Investigating Committee decision documents after Investigating Committee meetings by GDC staff. The 2013 Investigation Report stated that 'it is not appropriate for GDC staff to intervene in Committee decisions and we do not condone such actions'. At that time we were told that this was being addressed through the introduction of legally qualified Committee Secretaries. The scope of permissible changes to Investigating Committee decision documents outside of Committee meetings was clear from the Investigating Committee Guidance Manual that was in place from November 2011 onwards. We are very concerned therefore that the practice of making significant changes to decision documents was developed by the former Head of the Investigating Committee in 2012 and was in routine use by the Investigating Committee Secretaries throughout 2013 (as referred to in the Bulletin). This indicates to us that the former Director of Regulation's assurance to us (referred to within the 2013 Investigation Report) that the change to using legally qualified



Investigating Committee Secretaries, together with better management and training, would minimise the need for subsequent amendment of Committee decision documents was not borne out in practice.

- 3.213 In developing a more extensive process of reviewing draft Investigating Committee decision documents before finalisation, the former Head of the Investigating Committee appears to have been motivated by a wish to improve the consistency and quality of the Investigating Committee's decision documents overall, which is a worthwhile aim. However, expanding the scope of the review by the Investigating Committee Secretaries of the Investigating Committee decision documents after the Investigating Committee meeting had finished in this way created the risk that the amendments made would fundamentally change the reasoning and therefore that the amended decision document would no longer properly reflect the Investigating Committee's decision. This risk was realised and made all the more serious by the fact that, on occasion, the amendments that were made by the Investigating Committee Secretariat were not transparent to the Investigating Committee Chairs and they were therefore unable to give proper consideration to them, despite the fact that a protocol had been put in place which required all proposed amendments to be confirmed by the Investigating Committee Chairs. We note that on the former Head of the Investigating Committee's own account to us, two out of the four Investigating Committee Secretaries in post during 2013 had made amendments to decision documents that were not highlighted to the relevant Investigating Committee Chairs. In addition, as the Penningtons report made clear, where substantive changes were being proposed, those changes should have been approved by the full Investigating Committee that considered the case, not just by the Chair alone.
- 3.214 The former Head of the Investigating Committee told us that they had agreed with the former Director of Regulation between March and July 2013 that only "substantial" changes to Investigating Committee decisions should be tracked. The former Head of the Investigating Committee did not sit in on Investigating Committee meetings after February 2013, and told us that they did not get involved in the post-Investigating Committee correspondence between the Investigating Committee Secretaries and the Chairs. It appears therefore that the former Head of the Investigating Committee was not in a position to know (unless Investigating Committee members brought concerns to their attention) whether or not the Investigating Committee Secretaries were making substantive changes to decision documents after Investigating Committee meetings (either changes that they had identified, or changes that the former Head of the Investigating Committee had suggested) which were not being highlighted to the Investigating Committee Chairs. The former Head of the Investigating Committee said that one of the two Investigating Committee Secretaries who had acted outside of their instructions and made amendments without highlighting them, had been subject to disciplinary action. In our view, as the manager responsible for recruiting, inducting, training and supervising the Investigating Committee Secretaries as of March 2013 onwards, the former Head of the Investigating Committee should have taken steps to check that the Investigating Committee Secretaries were acting in compliance with their instructions (particularly in relation to the individuals who had previously been non-compliant), for example by dip sampling a number of decision documents in a similar manner to Penningtons' review of the decision documents produced after five Investigating Committee meetings.

- 3.215 An important principle of professional regulation is the appropriate separation of powers. In the context of fitness to practise complaints, that means that it is important that the decision maker on a case is independent of the staff who have investigated and prepared the case, in order to avoid any accusation of bias. Allowing GDC staff to alter the Investigating Committee decision documents represents a significant infringement of that principle. It is risky, even if the Investigating Committee and/or the Investigating Committee Chair approve the alterations, but in circumstances where they do not authorise them (because the alterations are not brought to their attention), it is completely unacceptable. It appears that the problematic nature of the review process that was put in place apparently from the end of 2011 onwards, and which was publicised in the Bulletin in August 2013 was not appreciated by any of the Investigating Committee Secretariat staff (including the former Head of the Investigating Committee) although in our view, it should have been apparent to anyone with appropriate experience of fitness to practise or regulation.
- 3.216 It is also a matter of some concern that the Investigating Committee Secretaries considered that what they were doing was appropriate and did not appreciate that it amounted to interference with the independent decision-making of the Investigating Committee (even when Investigating Committee Chairs refused to make the amendments they suggested). It is also concerning that some Investigating Committee Chairs were apparently willing to accept significant changes to draft decision documents that were made without the input of the whole Investigating Committee.
- 3.217 Penningtons reported their suspicions: that the Investigating Committee Secretaries 'felt some pressure to procure that the [decision documents] were amended to reflect the [former Head of the Investigating Committee]'s views'; and that the former Head of the Investigating Committee hoped that the changes to decision documents which they had suggested would then be proposed by the Investigating Committee Secretaries in their communications with the Investigating Committee Chairs (and noted that such changes were in fact proposed by the Secretaries to the Chairs). Penningtons also commented on a perception by the Investigating Committee Members and the Investigating Committee Secretaries that the former Head of the Investigating Committee 'will react negatively to a decision which is not consistent with [their] own view'. We note that the former Head of the Investigating Committee's statement that they only added changes to decision documents for training purposes and did not know whether or not the Investigating Committee Secretaries fed them back to the Investigating Committee Chairs is also inconsistent with evidence that we have seen that demonstrates that on at least one occasion (in July 2013) the former Head of the Investigating Committee sent such changes to an Investigating Committee Chair (when covering for the absence of an Investigating Committee Secretary).
- 3.218 The former Director of Regulation should have identified the risks from the Bulletin - which they signed off prior to publication. We consider it inherently unlikely that the former Director of Regulation regarded the issue of the Bulletin in early August 2013 as effectively an invitation to the Investigating Committee members (and others) to raise any matters of concern about its contents, as the former Director of Regulation suggested to us on seeing a draft of this report.

- 3.219 The former Director of Regulation’s apparent failure to recognise the risks when they saw the Bulletin (or to take appropriate action at that stage) is of particular concern because the former Director of Regulation told us that they were confident that the protocol that had been put in place (following an incident referred to in the 2013 Investigation Report) which required any changes to draft Investigating Committee decision documents to be tracked was being complied with. The former Director of Regulation told us that they had obtained an assurance from the former Head of the Investigating Committee to that effect after the whistleblower’s disclosure was made (i.e. after the end of July 2013) (see paragraph 3.297). We note that the former Head of the Investigating Committee, on their own account, may have been unaware until Penningtons reported of any infringements of the protocol that had occurred, as they had no involvement in the Investigating Committee Secretaries’ communications with the Investigating Committee Chairs to finalise the decision documents after meetings – the former Head of the Investigating Committee’s involvement was limited to providing their comments on the decision documents before the Investigating Committee Secretaries sent them to the Chairs.
- 3.220 We are concerned that, once the Penningtons report had established that (in the limited number of Investigating Committee decision documents that Penningtons had reviewed) unauthorised changes had been made to the reasoning, the GDC did not conduct any wider review of the other Investigating Committee decision documents that had been issued during 2013. The GDC has told us in response to seeing a draft of this report that it decided that such a review was unnecessary on the basis of external legal advice – and that it was considered highly relevant that Penningtons’ investigation had not revealed any decision documents where the outcome that had been decided upon by the Investigating Committee during its meeting (as opposed to the reasoning) had been changed after the event. We are concerned that such reasoning fails to take account of the fact that Penningtons had only reviewed a subset of Investigating Committee decision documents from a small number of Committee meetings out of all those that had taken place during the period when the objectionable practices were in operation. The advice given by Penningtons only related to the decision documents that they had reviewed. Penningtons were not advising, and could not advise about any risk of judicial review arising in relation to any Investigating Committee decision document they had not had access to. We note that in response to our concern about the GDC’s decision not to undertake a wider review of the Investigating Committee decision documents during the relevant period, the Chief Executive told us that the organisation’s entire focus following receipt of the Penningtons report was to “root out the objectionable working practices and all efforts were devoted to that.”
- 3.221 The changes introduced to training in 2014 and to guidance in 2014 and 2015 should be effective to prevent future usurping of the Investigating Committee decision-making role by the Secretariat staff. The rigorous insistence (following 2 April 2014) that only certain changes can be made (in accordance with a fixed list) does appear to have led to unfortunate results in some cases, where Investigating Committee decision documents were issued containing errors which had been identified but not corrected. We are pleased to note that the GDC expanded the list of permissible amendments (as of December 2014) and that the relevant section of the Guidance was also amended to allow for a wider range of amendments to be made to decision documents. The seconded Head of the



Investigating Committee team has informed us that the list was not in use after December 2014. We hope that the GDC will keep under review the extent to which appropriate amendments are made to Investigating Committee decision documents prior to their finalisation.

**Concern 1 (b) The GDC's response to addressing the failings identified in its feedback mechanisms in the 2013 report.**

**The evidence**

*The 2013 Investigation Report*

- 3.222 The 2013 Investigation Report noted (at paragraph 5.107) that, from mid-2010, due to staff changes, there was no GDC staff member who had responsibility for addressing the concerns that the Investigating Committee Chairs (at the time) had been raising about the processes and support for the Investigating Committee. This meant that the various weaknesses in those processes and support were left unaddressed. This finding reflected concerns raised by various former and current (at that time) Investigating Committee Chairs to whom we spoke during the investigation. For example, one then current Investigating Committee Chair told us that they had given the GDC feedback on three distinct occasions during 2010 about their concerns around the Investigating Committee processes and the level of support available during training sessions or when they were sent consultation documents. They said that they were not aware of having received any substantive formal response to those concerns from senior management within the GDC, nor were they aware of any senior manager to whom the Investigating Committee members could provide such feedback directly.
- 3.223 The 2013 Investigation Report (paragraph 5.84) recorded the former Director of Regulation's assurance that formal systems of recording feedback received from the Investigating Committee members and Chairs had been put in place from August 2011.
- 3.224 The 2013 Investigation Report highlighted the fact that there were inadequate systems in place to ensure that any concerns highlighted by Investigating Committee members or staff could be escalated, in the event they were not resolved at a local level. Paragraph 5.110 stated '...the GDC should have had systems in place for staff and or committee panellists to escalate any concerns that remained unaddressed to the CE or the Council'. The 2013 Investigation Report noted with concern that the GDC had been unable to collate all the feedback that had apparently been submitted by Investigating Committee members/staff for the purposes of the investigation, which in itself indicated a lack of a systematic approach to collecting and acting on feedback.
- 3.225 The 2013 Investigation Report concluded that 'there were deficiencies in the support and operation of the GDC's Investigating Committee which impacted on the efficiency and effectiveness of the Committee from at least mid-2010 until early 2011. Whilst mindful of the organisational difficulties facing the GDC at that time, we do not consider that these weaknesses should have been allowed to remain unaddressed for such a significant period of time, particularly given the amount of feedback provided to GDC staff in the governance department in relation to these concerns'.
- 3.226 The 2013 Investigation Report made one recommendation to all health and care professions regulators that was specific to the operation of all their fitness to

practise processes, and which is relevant to this report – to ‘Review the processes and support that they have in place for their investigating committees, including the arrangements for gathering and monitoring feedback received’.

*The whistleblower’s disclosure*

- 3.227 It was noted by both the Audit and Risk Committee and the Council that the whistleblower had not used the feedback processes available in mid-2013, but had instead raised their concerns with the former Chair of the Appointments Committee and the Audit Committee, before making a formal disclosure under the whistleblowing policy.

*The feedback mechanism in place during 2013:*

- 3.228 At the time of the publication of the 2013 Investigation Report, the formal mechanism that was in place to allow Investigating Committee members to provide feedback to the GDC was a team review form that was completed by the Chair at the end of any Investigating Committee meeting, following contributions from other members.

*The Chief Executive’s views*

- 3.229 We asked the Chief Executive what actions were taken following publication of the 2013 Investigation Report in respect of mechanisms for Investigating Committee members or staff to escalate unaddressed feedback to them or to the Council. The Chief Executive told us that they were confident that there was a mechanism in place for Investigating Committee members to provide feedback, as the GDC had introduced a range of measures which were aimed at significantly boosting the support for the Investigating Committee processes. The Chief Executive referred us to annex three of the paper presented to the Audit Committee at its meeting in March 2013 (please see paragraph 4.53).
- 3.230 When we asked specifically about any mechanism for escalating unaddressed feedback, the Chief Executive said that if there was a concern regarding Investigating Committee staff or member behaviour, this would be something they would expect the former Head of the Investigating Committee or the former Director of Regulation to identify immediately and if it was not resolved by them, to escalate it either to the Appointments Committee (if it concerned a Committee member) or to HR and to the Chief Executive (if it concerned staff behaviour). The Chief Executive also said that they would have expected the former Director of Regulation to have received a summary of the feedback from the Investigating Committee on a regular basis so that they could monitor performance – although they had not explicitly said so to the former Director of Regulation.
- 3.231 We asked the Chief Executive directly whether, following publication of the 2013 Investigation Report, any review of the feedback process had been undertaken and whether any consideration had been given to making any changes to it. The Chief Executive told us that the team review feedback process was itself a fairly new process at the time and that it did not need to be reviewed because it had already been “modernised” – by which the Chief Executive said that they meant that it had been put in place by the former Director of Regulation to reflect the needs of a modern Investigating Committee and that it had been designed to “spotlight” the issues raised in the 2013 Investigation Report. The Chief Executive also noted that it ran alongside the whistleblowing procedure for GDC staff and associates (including Investigating Committee members). The Chief Executive

told us that they had no reason in 2013 to think that this relatively recently introduced mechanism would be ineffective.

- 3.232 The Chief Executive told us that no concerns had in fact been escalated to them and that, until 2014, they had never seen any of the Investigating Committee feedback forms.<sup>61</sup>
- 3.233 We asked the Chief Executive if they had concerns about the effectiveness of the feedback process, given that the whistleblower had not felt able to use those processes and instead made a disclosure. The Chief Executive said that once the whistleblower made their disclosure in July 2013 the Chief Executive had concluded that, “clearly the feedback process had not been working effectively in all cases”, but said that when they had questioned the former Director of Regulation about this, the former Director of Regulation had said that the decision to use the whistleblowing procedure was “more about the individual concerned” rather than the functionality of the process itself and the Chief Executive had been made to believe that there was not an ongoing general issue.
- The former Director of Regulation’s views*
- 3.234 We asked the former Director of Regulation about the development of the feedback mechanism. The former Director of Regulation told us that this had been a gradual evolution during 2012/13 and that the team review process was in place by the time the 2013 Investigation Report was published in February 2013 (although they were unable to clarify when the processes for formally logging and responding to that feedback were introduced).
- 3.235 The former Director of Regulation told us at interview that the GDC may have “tweaked one or two things” in relation to the team review process on reading the 2013 Investigation Report, but that they could not remember what (if any) changes had in fact been made. The former Director of Regulation referred to a “paragraph by paragraph” review of the 2013 Investigation Report that they said had been conducted by the former Head of the Investigating Committee<sup>62</sup>, which had led both of them to conclude that “a lot” of the issues in the 2013 Investigation Report had already been addressed. The former Director of Regulation also said that the former Head of the Investigating Committee had then prepared a table of recommendations “from various sources” and “went about ticking them off”.<sup>63</sup> The same team review process was still in place in July 2013 (the time when the whistleblower made their disclosure). On seeing a draft of this report, the former Director of Regulation amended their account to say that they cannot recall when the “list” came into existence but confirmed that it was not produced in reaction to the disclosure made by the whistleblower.
- 3.236 The former Director of Regulation was unable to confirm what instructions the Investigating Committee Secretaries were given about escalating any feedback that they received from Investigating Committee members, but “imagined” that the former Head of the Investigating Committee would have instructed them to escalate to them any feedback they were unable to address (or any serious

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<sup>61</sup> The GDC has asked us to clarify that it was not part of the Chief Executive’s or the Audit/Audit and Risk Committee’s role to review such forms.

<sup>62</sup> That individual was not appointed to that post until after publication of the 2013 Investigation Report, in March 2013.

<sup>63</sup> The former Director of Regulation’s account differs from that of the former Head of the Investigating Committee, as set out below.

feedback). The former Director of Regulation then told us that it would then have been for the former Head of the Investigating Committee to decide whether any concerns should be escalated to the former Director of Regulation.

- 3.237 The former Director of Regulation told us that there was an “open invitation” to Investigating Committee members to approach them or the former Head of the Investigating Committee with any concerns, and that that was made clear during meetings and training. When we asked the former Director of Regulation whether any Investigating Committee members had in fact approached them with concerns, they said that they did not do so very often, other than perhaps at a training session, and that it would be more appropriate for them to approach the former Head of the Investigating Committee, who had day to day operational management of the Investigating Committee processes.
- 3.238 The former Director of Regulation told us that the concerns about Investigating Committee staff behaviour during Committee meetings that the whistleblower had raised were not matters that anyone had fed back to the former Director of Regulation previously<sup>64</sup>, and although the former Director of Regulation had been aware of a previous incident concerning the amendment of an Investigating Committee decision document after a Committee meeting, they thought that had been “sorted out”.
- 3.239 We asked the former Director of Regulation whether they thought that the whistleblower had raised their concerns through the whistleblowing procedure rather than through the feedback mechanism because that feedback mechanism was not fit for purpose. The former Director of Regulation said that in their view the whistleblower had “set out to cause a ruck for historic reasons” and that the whistleblower would never have approached either the former Director of Regulation or the former Head of the Investigating Committee, which was unfortunate, and which the former Director of Regulation suggested was because the whistleblower regarded them as being responsible for various changes to processes which they disliked.

#### *The former Head of the Investigating Committee’s views*

- 3.240 The former Head of the Investigating Committee told us that most of the 2013 Investigation Report was not relevant to their role. At the date of publication, that individual was still in the role of Investigating Committee Secretary and had no management responsibility, and told us that they were not involved in any internal discussions about the 2013 Investigation Report or any action plan arising from it. The former Head of the Investigating Committee had concluded that none of it really applied, as the GDC had already implemented all the recommendations. They said that there were no actions that they were asked to take which directly came out of the 2013 Investigation Report, and that they did not know what actions had been taken by the GDC in response to it. They told us that when they drafted the table of recommendations at the request of the former Director of Regulation (which they said took place in late 2013/early 2014, rather than shortly after publication of the 2013 Investigation Report as the former Director of Regulation told us) they were “not trying to fit in what the GDC had done in response to the [2013 Investigation Report] the actions recorded in the table were already in place by early 2013”. The former Head of the Investigating Committee

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<sup>64</sup> We note that they later contradicted this statement, by reference to the issues that had been raised immediately after the 17 July 2013 Investigating Committee members training day.

told us that they believed that the former Director of Regulation had asked for this piece of work to be undertaken either in order to address a request from the Authority for information about action taken to implement the 2013 Investigation Report's recommendations<sup>65</sup> or as part of the implementation of the recommendations arising from the Penningtons report. The former Head of the Investigating Committee also denied that they had "ticked off" any of the recommendations, as stated to us by the former Director of Regulation.

- 3.241 The former Head of the Investigating Committee told us that in addition to the team review forms, there was a discussion at the end of each Investigating Committee meeting, when any administrative or casework issues could be raised (and recorded by staff). The former Head of the Investigating Committee also referred to the Investigating Committee member peer reviews completed as part of the personal development plan process, and to the ability of Investigating Committee members to approach them, the former Director of Regulation or the Chief Executive with any concerns. The former Head of the Investigating Committee told us that they had rolled out the feedback process relating to the Investigating Committee which had been designed and approved by the Appointments Committee.
- 3.242 The former Head of the Investigating Committee told us that between October 2011 and 2012 they and the other Investigating Committee Secretary received all the Investigating Committee members' feedback and that it went into a "black hole" as not much was being done in terms of responding to the feedback received. However, the former Head of the Investigating Committee also said that the feedback was taken into account in the training that was provided to the Investigating Committee. The former Head of the Investigating Committee told us that a system for dealing with feedback was put in place in late 2012 but did not go live until mid to late 2013, when there was a process in place for another member of the Investigating Committee Secretariat to create an action plan in respect of any feedback received and to circulate that to the relevant Investigating Committee Secretaries and members.<sup>66</sup> From July 2013, the former Head of the Investigating Committee said that their role in reviewing feedback forms was then limited to assisting with specific queries, checking forms where an Investigating Committee Secretary had alerted them to a particular issue, and carrying out some dip sampling on a monthly basis. The former Head of the Investigating Committee also said that, by the end of 2013, a system was in place to log issues so that they could be fed into training plans.
- 3.243 In terms of the feedback processes for Investigating Committee Secretaries, the former Head of the Investigating Committee told us that there was no formal policy or process for dealing with such feedback. However, whilst there was no formal feedback process, the Secretaries would come and speak to the former Head of the Investigating Committee if there were issues. The former Head of the Investigating Committee would then deal with them as appropriate, either

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<sup>65</sup> That request was made on 26 March 2014.

<sup>66</sup> We note that the information supplied to the Appointments Committee by the former Head of Investigating Committee during this period stated that staff who had been recruited to run the feedback process had had to be diverted elsewhere within the Investigating Committee team, and that some feedback might not have been received at all, due to the failure to update Investigating Committee members about a change of the relevant email address. It was not until its meeting in November 2013 that the Appointments Committee was provided with an assurance that feedback was being analysed and fed into training.



informally through “a quiet word” or by asking for advice from the former Chair of the Appointments Committee or the former Director of Regulation.

- 3.244 In terms of the whistleblower’s use of the whistleblowing policy, the former Head of the Investigating Committee suggested that there was a question about whether the whistleblower should have gone “up the management line” (i.e. that using the whistleblowing procedure was excessive and potentially delayed action being taken about the practices in question).

*The whistleblower’s views*

- 3.245 We asked the whistleblower why they had chosen to approach the former Chair of the Appointments Committee and the Chair of the Audit Committee with their concerns initially, and then to make a disclosure under the whistleblowing policy, instead of utilising the team review mechanism or speaking informally to either the former Head of the Investigating Committee or the former Director of Regulation. The whistleblower referred to the independence of the Appointments Committee from the GDC and also said that they would not have approached either the former Head of the Investigating Committee or the former Director of Regulation because “...it would have fallen on deaf ears. I didn’t trust either of them to deal with it, and the principal reason for that was the [2013 Investigation Report], it was said, “This is not happening, if it did happen we would jump on it” and in fact it was happening and it just got worse. So why would I go to speak to people who would do that?”

- 3.246 The whistleblower told us that they had never met the former Director of Regulation prior to an Investigating Committee training session which the former Director attended in July 2013.<sup>67</sup> The whistleblower told us that they were unlikely to have approached the former Director of Regulation with any feedback as the former Director was not readily visible to the Investigating Committee membership. In the whistleblower’s view this was particularly the case if the feedback was about the processes instituted by the former Head of the Investigating Committee. It was the whistleblower’s perception that the former Director of Regulation had given the former Head of the Investigating Committee “carte blanche” and that the former Head of the Investigating Committee would be unlikely to respond to feedback. Our views on the feedback mechanisms and management arrangements between the former Director of Regulation and the former Head of the Investigating Committee are set out at paragraphs 3.283 – 3.289, 3.261-3.271, 3.291-3.297 and 3.313-3.314.

- 3.247 The whistleblower referred us to one matter that they had escalated to the former Director of Regulation, concerning a delay in responding to an issue raised by the whistleblower about payment of fees (in early 2013). The whistleblower told us that their perception of the former Director of Regulation’s approach when they escalated this matter was that “[they were] defensive and protective throughout”. We have not investigated this incident.

*The Investigating Committee Chairs’ views*

- 3.248 One of the Investigating Committee Chairs whom we spoke to during the investigation told us that they had provided feedback to the former Director of Regulation in 2011 shortly after they were first appointed, after a training day in

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<sup>67</sup> The former Director of Regulation’s account is that they had met the whistleblower at a training session in 2010/early 2011.

March 2011. They told us that after that day, the former Director of Regulation was generally not available at Investigating Committee training days and became a “background figure” so that they did not have much further contact with them until 2013.

- 3.249 In February 2013, on behalf of all the Investigating Committee Chairs, one Investigating Committee Chair wrote to the then Chair of the Appointments Committee setting out concerns about the development review process in 2012 and the actual competencies needed for Investigating Committee Chairs.<sup>68</sup> That Investigating Committee Chair told us that whilst the Appointments Committee had welcomed their involvement initially, the Investigating Committee Chair was subsequently informed that while the Investigating Committee Chairs would be involved in the process, “ownership” belonged to the former Head of the Investigating Committee. In July 2013 that Investigating Committee Chair forwarded their correspondence about this to their fellow Investigating Committee Chairs, expressing the view that their offer to review the competencies had simply been ignored.<sup>69</sup>
- 3.250 That Investigating Committee Chair told us that it was their belief that during 2012 there had been an admission by the former Head of the Investigating Committee that they and their team did not have time to read the team review forms and that they “went into a black hole”, i.e. no action was taken in respect of them. The Chair told us that during 2013 the impression that the Investigating Committee Chairs had was that various processes around feedback, training and appraisals were taking place but “didn’t go anywhere or have much relevance”. This impacted on their willingness to engage with the feedback process. The Chair told us that Investigating Committee members had not felt inclined to “press hard enough” with their feedback because initially such feedback had not been actioned. We note that this reflects the findings in the 2013 Investigation Report about the GDC’s failure to respond to feedback in the period preceding 2013.
- 3.251 The other Investigating Committee Chair whom we spoke to in 2014, had provided the GDC with feedback in 2010 and 2011, which was responded to by both the former Director of Regulation, the former Director of Governance and (another) former Chair of the Appointments Committee. That Chair told us that the need for a formal feedback mechanism for Investigating Committee Chairs and members was first agreed at a training day in March 2011 (this is consistent with the account given to us by the GDC staff). Once the legally qualified Investigating Committee Secretaries were appointed in 2011, the Investigating Committee Chairs then directed any feedback to them. We have seen examples of feedback provided during November 2011 and March 2012 about the behaviour of certain Investigating Committee members, to which that Chair told us they received no substantive response.<sup>70</sup>

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<sup>68</sup> The former Head of the Investigating Committee said to us in response to seeing a draft of this report that they consulted the Investigating Committee members about the competencies before drafting them for the Appointments Committee to consider. The former Head of the Appointments Committee also told us that they were unaware of this correspondence between the Investigating Committee Chairs and the Appointments Committee.

<sup>69</sup> The former Chair of the Appointments Committee’s account of their interaction with the Investigating Committee Chairs on this issue is set out at paragraph 3.255 below.

<sup>70</sup> The former Head of Investigating Committee has told us that at the time such feedback would have been a matter for the Appointments Committee, and that it would have been inappropriate for the Investigating Committee Secretariat to respond.



- 3.252 Another example that Chair provided of their feedback being ignored was as follows. After an Investigating Committee meeting in January 2013 (at which the former Head of the Investigating Committee was acting as Secretary to the Committee) the former Investigating Committee Chair raised concerns about two of the Investigating Committee members with the former Head of the Investigating Committee. The former Investigating Committee Chair also documented their concerns about the competencies of the two members on the team review form. The former Investigating Committee Chair told us that the former Head of the Investigating Committee then said that they would meet with each of the members concerned. When the former Investigating Committee Chair next met with the former Head of the Investigating Committee (one month later at a training event) the former Head of the Investigating Committee told the Chair that they had spoken by phone to both the Investigating Committee members concerned and dealt with the matter. However one of the two members concerned spoke to the former Investigating Committee Chair the following day and confirmed that no such conversation with the former Head of Investigating Committee had taken place.<sup>71</sup>
- 3.253 That Investigating Committee Chair also told us that as far as they were aware there had never been any link between performance in the Investigating Committee meetings (as recorded in any feedback) and training, and that the statement in the action plan provided to the Audit Committee in March 2013 (see paragraph 4.44) about the Investigating Committee Secretaries speaking to each Investigating Committee member and compiling feedback did not reflect actual practice.<sup>72</sup> That Chair also told us that they stopped completing the team review form following each Investigating Committee meeting because “nobody took any notice”.
- 3.254 We note that the Penningtons report recorded that two Investigating Committee members had expressed concern that the Investigating Committee were not informed about what action was taken in respect of feedback they provided.
- The former Chair of the Appointments Committee’s views*
- 3.255 The former Chair of the Appointments Committee told us that the concerns raised by the Investigating Committee Chairs in February 2013 (referred to in paragraph 3.249 above) were treated very seriously by the Appointments Committee, and were discussed at its meeting on 22 February 2013 (as recorded in the minutes). The former Chair of the Appointments Committee told us that they then replied (on behalf of the Committee) on 12 March 2013: explaining the Appointments Committee’s role in approving the learning and development plans and the GDC staff’s role in the development review process; agreeing that the competency framework for Investigating Committee members should be reviewed; and setting out the steps that the Appointments Committee had initiated with regard to the

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<sup>71</sup> The former Head of the Investigating Committee’s account of these events is different. They told us that when they met the Chair on the occasion described what the former Head of the Investigating Committee said was that they had been waiting for confirmation as to the approach to be taken from up the chain of command, that they would be looking at the issues at a local level, and that they had spoken to or would be speaking to the relevant Investigating Committee members, probably by telephone. The former Head of the Investigating Committee denied having told the Chair that they had already spoken to the two Investigating Committee members concerned.

<sup>72</sup> The former Head of the Investigating Committee told us that they were not involved in drafting this action plan.

concerns raised about the quality of the training provided for the Investigating Committee. The reply suggested that the Investigating Committee Chairs should provide further information and be engaged in the review of competencies and in the development of the learning plan. The former Chair of the Appointments Committee told us that there was then further correspondence with the Investigating Committee Chair in July 2013, which stated that the competencies that the Investigating Committee staff had developed would be shared with the Investigating Committee Chairs for comment, and which referred to the learning plan that had been presented to the Committee at its June 2013 meeting. The competencies were then discussed at the Investigating Committee training session held on 17 July 2013 and the former Chair of the Appointments Committee gathered the Investigating Committee members' feedback, after which the competencies were revised and finalised at the Appointments Committee meeting held in November 2013. The former Chair of the Appointments Committee has told us in response to seeing the draft of this report that, contrary to the understanding of the Investigating Committee Chair set out at paragraph 3.249 above, it was the Appointments Committee that had "ownership" of the development review process and the competency framework required for Investigating Committee Chairs and the Investigating Committee staff were merely involved in the development process.

3.256 The former Chair of the Appointments Committee told us that the minutes of the Appointments Committee meeting held in February 2013 record that the former Head of the Investigating Committee outlined the processes in place at that time to address and record informal feedback from Chairs/members about individual performance, in response to which the Appointments Committee raised a number of concerns about procedural fairness as well as about consistency with the disciplinary procedure which "already documented a mechanism for providing informal feedback". The former Chair of the Appointments Committee also said that the former Head of the Investigating Committee had told the Appointments Committee at this meeting that there were insufficient staff resources currently in place to review and act on the feedback provided, but that recruitment was under way to address this issue.<sup>73</sup> At the next Appointments Committee meeting, in June 2013, the Appointments Committee discussed potential changes to the feedback process. The former Chair of the Appointments Committee told us that the minutes of that meeting state that, 'the Chair stressed the importance of staff acting on the feedback and recalled that in the past some IC members had stopped commenting because they felt they had not been heard. The [former Head of the Investigating Committee] confirmed that all team review feedback would be read and acted on'. The former Chair of the Appointments Committee told us that the Appointments Committee followed up on the issue of feedback received from Investigating Committee members at its meeting in November 2013 – when the former Head of the Investigating Committee explained that a change of email address in early 2013 had resulted in some team review forms being sent to an out of date address until Investigating Committee members were notified of the changed address in May 2013, before going on to describe some of the themes that had emerged from an analysis of the feedback forms and explaining whether those themes had subsequently been addressed in training.

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<sup>73</sup> We have been unable to verify that this comment about staff resourcing/recruitment is recorded in the minutes of the meeting, as we have only seen an extract from those minutes.

3.257 We have seen the letter that the former Chair of the Appointments Committee wrote in confidence on behalf of the Appointments Committee to the Chair of the Audit Committee on 11 March 2013 in relation to the recommendations about follow up action from the 2013 Investigation Report. The letter set out the Appointments Committee's concerns about the accuracy of some aspects of annex five to the paper that had been presented to the Audit Committee on 8 February 2013. Within the letter the former Chair of the Appointments Committee said that, 'feedback from the recent DRP reviews suggest that learning and action may not necessarily follow. For example feedback from IC members that team reviews are not actioned and the admission by IC staff that they are not resourced to do this'. The letter also recorded that, 'last year the [Appointments Committee] fed back to the Council that we were unable to assure the effectiveness of training' and commented that Investigating Committee Chairs had provided feedback about training being generic and 'unrelated to the [Investigating Committee] work' and being 'provided by people who have little understanding of the work of the [Investigating Committee]'. The letter suggested that the Appointments Committee should consider, with the Investigating Committee staff, the response to the 2013 Investigation Report and that the Appointments Committee's comments and assurance or concerns should be included within the GDC's response to the 2013 Investigation Report.

#### *Feedback forms*

3.258 We reviewed the team review forms submitted by Investigating Committee Chairs to the GDC in 2013 and highlight below some of content of the forms, which if read and properly considered, should have caused the GDC staff members concern. We note that these were submitted by different Chairs over the course of the year.

3.259 **7 March 2013** – 'The panel welcomes advice from the Secretary, but was concerned that on a number of occasions panellists were inappropriately interrupted during the course of their deliberations. It is important that any input from the Secretary is appropriately worded and timed, and supports the robustness of the statutory decision-making'.

3.260 **18 April 2013** – 'Good challenging arguments by Committee secretariat to ensure robust decisions and letters'.

3.261 **6 June 2013** – 'The panel Secretary was inexperienced, and had found that [they] had not been able to make the time to prepare structured drafts for all the decisions. This contributed to longer than usual being spent on drafting reasons, and the need to adjourn several cases through lack of time. The panel welcomes advice from the Secretary, which supports the robustness of the statutory decision-making process. It is, however, important that any input from the Secretary is appropriately phrased and timed as assistance or advice, and does not come across as an interruption or an attempt to influence the panel's professional judgment'.

3.262 **25 July 2013** – '[The Investigating Committee Secretary] was well prepared again and [they] had spent considerable time analysing the cases and preparing [their] thoughts on each one. [They] also discussed the cases in detail with me the day before although not in ideal circumstances as I was on a train and both reception and confidentiality poor'.

- 3.263 **19 September 2013** – ‘The drafting was time consuming but [the Investigating Committee Secretary] should be thanked for all their work both before and after the meeting in drafting the decisions’.
- 3.264 **10 December 2013** – ‘[The Investigating Committee Secretary] was well prepared again and [they] had spent time analysing the cases and preparing [their] thoughts on each one. [They] listened well to all the reasoning before [they] expressed [their] advice, comment and recommendations.’

*The feedback mechanism during 2014:*

*The Chief Executive’s views*

- 3.265 The Chief Executive told us that they rely upon the seconded Head of the Investigating Committee team to interpret the feedback from the Investigating Committee members and staff and report to them as appropriate. The Chief Executive told us that the intention was that completed feedback forms would be subject to “rigorous monitoring” by the line manager of whichever Investigating Committee Secretary had attended the relevant Investigating Committee meeting, as well as being reviewed by the Head of the Investigating Committee.

*The seconded Head of the Investigating Committee team’s views*

- 3.266 The seconded Head of the Investigating Committee team told us that a new feedback mechanism was introduced in March 2014. It involves each member/ Investigating Committee Secretary completing an online form after each Investigating Committee meeting. This is the first time a formal feedback mechanism for staff to raise issues has been used (as opposed to them approaching the former Head of the Investigating Committee with any concerns).<sup>74</sup> The individual feedback is collated after a week and distributed to relevant staff for comments, and then a response is provided. A system for collating and responding to feedback at a higher level (e.g. regarding requests for training or recommendations for general improvements) had not yet been put in place at the date of our interview with the seconded Head of the Investigating Committee team, although it was anticipated that this would happen prior to the new Investigating Committee members taking office (in October 2014). It was anticipated that the feedback would be reported in the regular Investigating Committee bulletin.
- 3.267 The seconded Head of the Investigating Committee team told us that any significant concerns arising from the feedback would be escalated to the former Director of Regulation<sup>75</sup>, who would also receive a quarterly report (in due time). The seconded Head of the Investigating Committee team acknowledged that (as at the date of our interviews with them in August 2014) there had been differing levels of engagement with the new process, in the run up to the change in the Investigating Committee membership as a result of the reappointment process in autumn 2014.

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<sup>74</sup> A feedback mechanism had previously been in place for Investigating Committee members to raise any issues, as described in paragraph 3.228 above.

<sup>75</sup> The post of Director of Regulation no longer exists at the GDC and we assume therefore that this aspect of the role is now conducted by the Director of Fitness to Practise.

### *The former Director of Regulation's views*

- 3.268 The former Director of Regulation told us that the addition of an individual feedback mechanism had not been prompted by the 2013 Investigation Report, but by concerns that certain Investigating Committee members were “dictating” the team review feedback, although other Investigating Committee members did not agree with their views. We asked the former Director of Regulation about the arrangements for reporting feedback to them under the new process. The former Director of Regulation could not confirm at interview with us what that process was to be, or how often they would receive such reports. The former Director of Regulation noted that no issues had as yet been escalated to them. When we showed the former Director of Regulation a review form that referred to an Investigating Committee member changing a peer review in order to avoid any adverse impact on their prospects of appointment to the new Investigating Committee/empanelment, the former Director of Regulation told us that while they had made an inquiry about this, it was a matter which had been left with the Appointments Committee<sup>76</sup>, given its remit in relation to the development review process.
- 3.269 The former Director of Regulation also told us that the Investigating Committee members “had had their say” on a number of matters such as the revisions to the Guidance produced following the Penningtons report, the use of dual secretaries at Investigating Committee meetings, and the caseload per meeting, and that this might explain why they were not all fully engaging with the new feedback process. The former Director of Regulation also expressed the view that as serious matters had not been raised previously by Investigating Committee members through the feedback mechanisms available, they did not regard reviewing the feedback/reporting systems as a priority. The former Director of Regulation described the reasons given to us by the whistleblower and Investigating Committee Chairs during our investigation for their unwillingness to provide feedback directly to the former Director of Regulation as “perverse”, in light of the hierarchy of the GDC and the “open invitation” to provide such feedback.
- 3.270 In response to seeing a draft of this report, the former Director of Regulation told us that the feedback mechanism had in fact been reviewed prior to the publication of the 2013 Investigation Report, and that the process that was then in place was not regarded as a “finished product” and that it was kept under constant review throughout 2012 and 2013. The former Director of Regulation said that a full-scale review of the feedback process was not a priority at the time and suggested that that was “at least in part” a matter for the Appointments Committee.
- 3.271 The former Director of Regulation also told us that in the period from January – March 2013, staff who had been taking responsibility for the feedback process since October 2012 were diverted to other tasks, as the recruitment of additional

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<sup>76</sup> The former Chair of the Appointments Committee told us that the Appointments Committee considered this matter in May 2014 when it was reported as part of the Appointments Committee’s annual survey of Investigating Committee members in relation to the development review process (rather than being reported to the Committee by the GDC). They told us that the Appointments Committee was concerned about this matter, but concluded that it was not necessary to take any action, as the current Investigating Committee members had been assured that their records would not be referred to during the appointment exercise (which had by then been completed) and as the Investigating Committee member concerned would not be continuing in the role. We were unable to verify this from the extract of the minutes of the May 2014 Appointments Committee that has been provided to us by the GDC.



Investigating Committee Secretaries had been delayed. The former Director of Regulation told us that by mid-2013 feedback was being summarised for every Appointments Committee meeting and that the Investigating Committee staff were sending responses to every piece of feedback.

*The Investigating Committee Secretaries' views*

3.272 It is not clear that (as at mid-2014 when we interviewed them) all the Investigating Committee Secretaries were aware of the new mechanism for noting any concerns they may have. Two of those we interviewed told us that they would raise any concern with their line manager first. Another said they were not aware of any formal process for raising a concern about an Investigating Committee member, and that they were not aware what would happen if they raised a concern with their line manager or with the seconded Head of the Investigating Committee team. The Senior Committee Secretary told us that they would expect an Investigating Committee Secretary to raise any concern about an Investigating Committee member's behaviour with them, and they would then escalate it to the seconded Head of the Investigating Committee team and upwards to the former Director of Regulation. The Senior Committee Secretary believed that the concern would then be sent on to the Appointments Committee if the Chief Executive considered it to be potentially serious.

3.273 The Senior Committee Secretary also told us that, prior to the introduction of the individual feedback forms, although Investigating Committee staff had raised concerns about the behaviour of some Investigating Committee members which had been escalated to the former Head of the Investigating Committee/the seconded Head of the Investigating Committee and by them on to the former Director of Regulation, no action had been taken because (according to what the former Director of Regulation told the Senior Committee Secretary) the Appointments Committee "did not want to do anything with it". The Senior Committee Secretary also expressed a concern that the new process allows the submission of anonymous feedback – which then creates an issue about how that feedback can be used.

*The former Chair of the Appointments Committee's views*

3.274 The former Chair of the Appointments Committee told us that the former Director of Regulation told the Appointments Committee at its meeting in February 2013 that the feedback processes were adequate and that they would be reviewed independently.

3.275 The former Chair of the Appointments Committee also told us that they were not made aware of any concern that certain Investigating Committee members were "dictating" the team review feedback, or that this was the reason for proposing changes to the feedback mechanism, as per the account given to us by the former Director of Regulation.

3.276 The former Chair of the Appointments Committee told us that they were not aware that any of the concerns about Investigating Committee members referred to by the Senior Committee Secretary in paragraph 3.273 above had ever been raised with the Appointments Committee.<sup>77</sup> The route of referral of such concerns by staff

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<sup>77</sup> The Senior Committee Secretary said such concerns had been raised with the former Head of the Investigating Committee/the seconded Head of the Investigating Committee team and the former Director of Regulation.

members would be through the Chief Executive.<sup>78</sup> The former Chair of the Appointments Committee said that the first time any concerns about the conduct of an Investigating Committee member had been raised with the Appointments Committee was on 5 August 2013, when the former Head of the Investigating Committee emailed the former Chair of the Appointments Committee setting out concerns about the whistleblower (see paragraphs 5.92-5.95 and 5.123 below). The former Chair of the Appointments Committee when replying to the former Head of the Investigating Committee on 14 August 2013 explained the appropriate process for raising such concerns but then heard nothing further from the former Head of the Investigating Committee about the matter (see paragraph 5.125 below).

3.277 The former Chair of the Appointments Committee told us that Appointments Committee members attended all Investigating Committee training events, as well as participating in the Investigating Committee members' development review process and that, on occasions, Investigating Committee members raised concerns directly with the Appointments Committee (including at the Investigating Committee training day in July 2013 – following which the former Chair of the Appointments Committee fed those concerns back to the former Director of Regulation). We note that the whistleblower initially raised their concern with the former Chair of the Appointments Committee (and the Chair of the Audit Committee) subsequent to their attendance at the Investigating Committee training day in July 2013, before deciding to make a whistleblowing disclosure. We understand that the whistleblower did so both because of a lack of faith in the impartiality of the executive, and because they considered it more appropriate to approach the Appointments Committee due to its independence from the GDC.

3.278 The minutes of the June 2013 Appointments Committee meeting record (in the context of a discussion about the changes being made to the development review process for Investigating Committee members) a comment from the former Chair of the Appointments Committee about the importance of staff acting on feedback and referring to past occasions when some Investigating Committee members 'had stopped commenting because they felt they had not been heard', in response to which the former Head of the Investigating Committee confirmed that all team review feedback forms would be read and acted on.

*The Investigating Committee Chairs' views*

3.279 We note that feedback provided to the former Director of Regulation in early 2014 by the two Investigating Committee Chairs whom we interviewed was responded to, albeit they were not fully satisfied by the contents of the responses. However, an email that one Investigating Committee Chair sent to the Chair of the Council during this period did not receive any response either from the Chair or from the member of GDC staff their email was complaining about.<sup>79</sup>

3.280 The Investigating Committee Chairs whom we spoke to both indicated that they did not always receive responses to feedback when they sent it directly to individual GDC staff members, and that the way in which the team review forms

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<sup>78</sup> At interview the Chief Executive told us that no such concerns about an Investigating Committee member had been formally raised with them.

<sup>79</sup> The GDC has told us that the Chair of the Council has no recollection of this email and that it may not have been brought to the Chair's attention, and that it would not have been appropriate for the Chair to respond to it personally, as it concerned the fitness to practise process.



were used in terms of identification of training topics was never explained to them. They had no perception that the information collated on the team review forms was used at all by the GDC. This perception was correct, as noted by the former Head of the Investigating Committee, and as illustrated by the views of the former Director of Regulation that no feedback had been received about staff behaviour prior to the whistleblowing disclosure being made.

- 3.281 It is noteworthy that the Chief Executive, the former Director of Regulation and the former Head of the Investigating Committee all told us that there was effectively an “open invitation” to Investigating Committee members to bring matters of concern to them directly. We have considered the reasons why the Investigating Committee members whom we spoke to during the course of our investigation (we acknowledge that this represents only a sub-set of the Investigating Committee membership at the time) did not feel able to act on that invitation, based on what they told us in interview. It appears from the evidence the two Investigating Committee Chairs and the whistleblower gave us that they had little general engagement with the former Director of Regulation (who was often unable to attend their training days, and who did not attend Investigating Committee meetings). They therefore did not approach the former Director of Regulation with their concerns. They also all told us of their perception that the former Director of Regulation had a close working relationship with the former Head of Investigating Committee and might therefore have been thought to be unwilling to accept criticism of that individual or of the practices they had put in place. Similarly, it appears that they felt that the former Head of the Investigating Committee was unlikely to listen to concerns about the practices that they had instituted within the Investigating Committee Secretariat.<sup>80</sup>

#### *Feedback forms*

- 3.282 From our review of the feedback forms submitted in the first half of 2014, we can see that the Investigating Committee Chairs were engaged with the process. They submitted details of their concerns about the quality of casework preparation and the length of time taken to draft decision documents (amongst other things). However, we note that from our review of the feedback forms submitted in the first half of 2014, there does appear to have been an increasing level of disengagement by Investigating Committee members during that time, evident from June 2014.

#### *Our view*

- 3.283 We have concluded that there was no formal or substantive review of the process that was already in place to gather feedback from Investigating Committee members after publication of the 2013 Investigation Report, as recommended in that report, although (as described above at paragraph 3.256 – 3.257) it is clear that the Appointments Committee enquired about the operation of the feedback process, made the Audit Committee aware of the position as at March 2013, and emphasised the importance of feedback being acted upon including at its meeting in June 2013. It appears that both the former Director of Regulation and the Chief Executive took the view that to carry out such a review was unnecessary,

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<sup>80</sup> In response to seeing a draft of this report the GDC has told us that the Chief Executive regarded the former Director of Regulation as being accessible and responsive and would have expected any general concern about this within the Investigating Committee membership to have been raised with them or with the former Chair of the Appointments Committee.

although the former Director of Regulation apparently told the Appointments Committee at its meeting in February 2013 that an independent review would be undertaken.<sup>81</sup> As highlighted above, the Chief Executive told us that their view was that there was no need to carry out a review at that time, because the feedback mechanism had recently been introduced and represented a “modernised” approach and the former Director of Regulation told us that the GDC had simply “tweaked a few things” in response to the 2013 Investigation Report. In fact, the GDC was aware at the time of publication of the 2013 Investigation Report that feedback sent by Investigating Committee members was not being actioned – this was apparently initially due to a lack of staff resources pending recruitment to additional posts (as the former Head of the Investigating Committee told the Appointments Committee in February 2013).<sup>82</sup> The former Director of Regulation told us that it was due to staff who had been recruited for this purpose being used as Investigating Committee Secretaries instead. Subsequently it was due to feedback being sent to a superseded email address, as the Appointments Committee was told in May 2013. It was only in November 2013 that the former Head of the Investigating Committee was able to assure the Appointments Committee that the feedback received from Investigating Committee members was being analysed and fed into the training programme.

- 3.284 The non-use of the feedback provided by the Investigating Committee during the first half of 2013 appears to be because of a resourcing issue, which meant that until additional staff were recruited and systems set up for logging feedback, the forms were not regularly reviewed and acted upon. This was despite the 2013 Investigation Report highlighting the importance of feedback to the continuous improvement of the Investigating Committee’s performance.
- 3.285 It is unfortunate that at least some members of the Investigating Committee (we refer to the whistleblower and the two Investigating Committee Chairs whom we interviewed) were not willing to raise their concerns about the Investigating Committee Secretariat either with the former Head of the Investigating Committee or with the former Director of Regulation, for the reasons set out above. We have no reason to doubt the reasons they gave us. We recognise that it would not be appropriate to conclude on the basis of these accounts that other Investigating Committee members had similar reasons for not raising concerns either with the former Head of the Investigating Committee or the former Director of Regulation. We also recognise that we have no evidence about why either of the Investigating Committee Chairs whom we interviewed might have been unwilling to raise concerns directly with the Chief Executive instead.
- 3.286 The wider significance of the weaknesses in the operation of the feedback mechanisms during 2013 is that they meant that opportunities to identify poor practices were missed by the GDC. We have earlier noted that concerns were raised by various Investigating Committee Chairs about inappropriate interventions by Investigating Committee Secretaries before and on the day of the Committee meeting, and that there was pre-drafting of decision documents taking place. If the feedback forms had been read and the significance of their content realised, the objectionable practices might have ceased earlier. The GDC might have also realised that these practices were continuing even after Penningtons

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<sup>81</sup> We have been unable to verify this as we have not seen the relevant section of the minutes

<sup>82</sup> The former Chair of the Appointments Committee’s letter to the Chair of the Audit and Risk Committee dated 13 March 2013 also explained that feedback was not being actioned,

had been commissioned to investigate the whistleblower's disclosure about those very practices.

- 3.287 Another apparent effect of the failures in the operation of the feedback system was disengagement by Investigating Committee members.<sup>83</sup> An effective feedback system can help to identify risks, which means that action can be taken to mitigate them. We note that an almost entirely new Investigating Committee came into office in autumn 2014. It is to be hoped that they are being encouraged to engage pro-actively in both the team review process and the additional individual feedback process that has been set up, and that the GDC are working to ensure that the outputs from feedback are made visible to the Investigating Committee members in terms of training and development plans. We also expect the GDC to institute (if it has not already done so) a system of sharing feedback received from the Investigating Committee members with the executive management team and the Audit and Risk Committee.
- 3.288 Any weakness in gathering and responding effectively to feedback from Investigating Committee Chairs or members about flaws in the processes for supporting the Investigating Committee is an issue that should have been prioritised for remediation following the 2013 Investigation Report. It is seriously concerning that no formal substantive review of the feedback mechanism was conducted following publication of the 2013 Investigation Report, and therefore the GDC encountered further problems during 2013 that might have been highlighted at an earlier stage in the year had the feedback mechanisms worked effectively.
- 3.289 We note that, in response to seeing a draft of this report, the GDC said that no review of the feedback process needed to be carried out because it had only recently been introduced, there was no empirical basis for such a review, and no complaints or concerns had been received about it. The GDC has also told us that it had reviewed the system prior to publication of the 2013 Investigation Report, having seen an early draft of that report.

*Executive oversight of the Investigating Committee's management and support processes*

- 3.290 In this section of the report we comment on the extent to which the former Director of Regulation and/or the Chief Executive appear either not to have known about the practices in question, or to have failed to appreciate (or agree) that they are objectionable. We also comment on the impact of that lack of knowledge or understanding on their part on the development and/or continuance of those practices during 2013.

*The former Head of the Investigating Committee's views*

- 3.291 The former Head of the Investigating Committee stated that they did not do anything in their role without the former Director of Regulation's approval in advance, or without their knowing about it. The former Head of the Investigating Committee stated that there were occasions when the former Director of Regulation would "disappear into the world of casework", and there were then

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<sup>83</sup> We acknowledge the alternative explanation put forward by the seconded Head of the Investigating Committee team – who referred to the fact that the majority of the Investigating Committee members were due to leave office at the end of October 2014, and therefore that they may have been less willing to devote time to providing feedback during the last few months of their membership.

occasions when they would have to act without the former Director of Regulation's authorisation. The former Head of the Investigating Committee added that they knew the former Director well enough to "know how [they] think and what [they] would be happy with". The former Head of the Investigating Committee said that if they were not sure about something they would not do it, but if they were sure about it then they would do it and tell the former Director of Regulation afterwards. The former Head of the Investigating Committee stated that there was very little that they did which did not have the former Director of Regulation's oversight. The former Head of the Investigating Committee said that they regarded the former Director of Regulation's approval as meaning that they had the Chief Executive's approval as well.

- 3.292 We were told by the former Head of the Investigating Committee that "in August we had a big team meeting after the whistleblowing disclosure, with [the Director of HR and the former Director of Regulation]". At that meeting the former Director of Regulation said to the Investigating Committee Secretariat, "It will be investigated. We are not doing anything wrong as far as I'm aware or as far as I think, so therefore keep doing what you are doing but respect – questions are good but be mindful of Chairs' needs et cetera et cetera."
- 3.293 We asked the former Head of the Investigating Committee if the former Director of Regulation had approached them before the staff briefing about the whistleblowing disclosure to ask about the practices that were operating at the time. The former Head of the Investigating Committee said that the former Director of Regulation would have known what was going on with the Investigating Committee Secretariat, because there was nothing the former Head of the Investigating Committee did not tell the former Director of Regulation about, nor was there anything the former Head of the Investigating Committee did without the former Director of Regulation's advance approval or knowledge, and the former Head of the Investigating Committee could not recall the former Director of Regulation approaching them in any event.
- 3.294 We asked the former Head of the Investigating Committee if the whistleblowing disclosure had led to any reconsideration of the practices operating in September 2013. The former Head of the Investigating Committee said that it had not. They said that they had told the Investigating Committee Secretariat to ensure that all changes to Investigating Committee decision documents were tracked and that if this did not happen, "they would be out". However, the former Head of the Investigating Committee said that at that time they did not believe that there was much advance drafting or post-meeting amendment by the Investigating Committee Secretariat.

#### *The former Director of Regulation's views*

- 3.295 The former Director of Regulation told us that they took over responsibility for the Investigating Committee soon after their appointment to the role in February 2011. They said that one of the initial changes which they introduced was the recruitment of legally qualified Investigating Committee Secretaries, who they said would recognise adverse interference with the Committee's processes and decision-making.
- 3.296 The former Director of Regulation told us that they had set the strategic direction for the Investigating Committee and the broad parameters and direction for the two Investigating Committee Secretaries in post (one of whom was the former

Head of the Investigating Committee). However, the former Director of Regulation let the former Head of the Investigating Committee get on with the “day to day” running of the Investigating Committee Secretariat. The former Director of Regulation also said that they had worked closely with the former Head of the Investigating Committee between 2011 and 2013 and that the former Director of Regulation was more involved in the detail of the operation of the Investigating Committee than they would have liked.

3.297

We asked the former Director of Regulation what they knew about the objectionable practices identified by Penningtons before the whistleblowing disclosure was made. In summary the former Director of Regulation said:

- They would not have been surprised if some Investigating Committee members were averse to the Investigating Committee Secretaries’ practice of bringing the need to reference the Indicative Outcomes Guidance in decisions to their attention. They said that a lot of the members felt it was not the role of the Secretaries to do that. The former Director of Regulation noted that it is a difficult task for the Investigating Committee Secretaries to stay out of the decision-making but refer to relevant standards and that it requires subtlety. They said that they were made aware of some difficulties with the Investigating Committee Secretaries’ approach to intervening in Committee meetings after the 17 July 2013 training day, but thought that this had been resolved by the former Head of the Investigating Committee speaking to a particular Secretary soon after. The former Director of Regulation told us that they had not attended the whole of an Investigating Committee meeting, as their ultimate responsibility for casework meant that their attendance would have infringed upon the proper separation of functions (it might have been seen as an inappropriate attempt to put pressure on the Investigating Committee). As such, the former Director of Regulation would not have had an opportunity to observe whether or not the Investigating Committee Secretaries were reminding the Committee in an appropriate way about the need to explain any departure from the Indicative Outcomes Guidance, or whether they were doing so in a way that was overly directive or even bullying – as that behaviour was characterised by some of the Committee Chairs/members interviewed by Penningtons.
- That the Investigating Committee Secretaries did not draft Investigating Committee decision documents in advance. The former Director of Regulation said that the Secretaries prepared possible outcomes according to the Indicative Outcomes Guidance, and then they would slot the prepared text into the decision reasoning on the day of the meeting. The former Director of Regulation said that as long as the Investigating Committee did not see the advance drafting, there was no cause for concern, and suggested that it is not possible to complete a large volume of cases without some element of advance preparation by the Secretary. (We note that this view was echoed by the former Head of the Investigating Committee.) The former Director of Regulation also told us that they were not aware of the extent of the pre-drafting that was taking place until they read the Bulletin.
- The former Director of Regulation was not aware of the issues highlighted by Penningtons in terms of post-meeting amendments to the Investigating Committee decision documents. The former Director of Regulation said that after the whistleblowing disclosure had happened, they did ask for an



assurance from the former Head of the Investigating Committee that the Secretariat were doing things in accordance with the established and formal protocol.<sup>84</sup> The former Director of Regulation said that they were given that assurance by the former Head of the Investigating Committee.

- The former Director of Regulation was not aware that Investigating Committee Secretaries were offering legal advice during Investigating Committee meetings and said that they were given assurances that the Secretaries would not offer any opinions on novel legal questions raised by Investigating Committee members.

- 3.298 We asked the former Director of Regulation whether any consideration had been given to taking any immediate action once Penningtons had been instructed. The former Director of Regulation said that they did not want to pre-empt the findings of the Penningtons report, so no action was taken.
- 3.299 We asked about the steps taken after the Penningtons report had been received. The former Director of Regulation told us that they had not had any say about whether or not to accept Penningtons' recommendations. They said that they had met with Penningtons and pointed out the "need to keep the show on the road" and the need to avoid "bankrupting" the GDC with the recommendations, and said that their comments had not been taken into account. The former Director of Regulation expressed the view that the people who gave evidence to the Penningtons investigation were "self-selecting", which meant that a particular view was presented of the Investigating Committee Secretaries' behaviour during Investigating Committee meetings.<sup>85</sup> The former Director of Regulation has told us that they did not agree with all the recommendations made by Penningtons. In particular, they do not accept that pre-drafting that might have influenced decision-making was occurring.
- 3.300 We have commented earlier in this report on the two main problems that arose following implementation of the Penningtons report: a decrease in the number of cases considered at each Investigating Committee meeting (until the use of dual Secretaries was adopted); and during 2014 the finalisation of decision documents/warnings that included errors – due to strict adherence to the permissible list of post-meeting changes. The former Director of Regulation said to us that the first consequence had been remedied through the introduction of the use of dual Secretaries at each meeting, and that the former Director of Regulation monitored throughput of cases through the regular reports they received on adjournment rates and the number of cases considered at each meeting. In terms of the quality of decision documents, the former Director of Regulation said that the 'list' of permissible changes had to remain in place because as soon as anything was left open to interpretation, it could lead to the possibility of inappropriate influence. The former Director of Regulation did not receive any reports which would highlight concerns about the quality of decision documents (such as the outcome of compliance checks) but told us that they would have been aware of any challenges to Investigating Committee decisions brought by complainants and/or defence bodies, as well as any concerns raised

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<sup>84</sup> The former Head of the Investigating Committee told us that they did not recall that any such assurance was sought from them at that time. They said that the former Director of Regulation knew about the practices in operation in any event.

<sup>85</sup> The Penningtons report indicates that Penningtons interviewed all the Investigating Committee Chairs then in post, as well as several other Investigating Committee members.

by Investigating Committee staff. There was no mechanism for regular compliance checks of the quality of Investigating Committee decision documents during the period when the list of permissible changes was in effect, as the audit and quality assurance team which had been introduced following the appointment of the former Director of Regulation was initially focussed on auditing the quality of casework.

- 3.301 We asked the former Director of Regulation if they had identified any parallels between the 2013 Investigation Report and the matters raised in the whistleblower's disclosure. The former Director of Regulation said that they had not identified any such parallels, as they considered that all of the issues identified in the 2013 Investigation Report had been dealt with by the time it was published. Further, the former Director of Regulation considered that the message from the 2013 Investigation Report was that the GDC should put structures in place so that people know what they are entitled to do – and, by contrast, the whistleblower was concerned that the Investigating Committee did not have enough freedom.
- 3.302 We note that the former Director of Regulation said that they had regular one to one meetings with the Chief Executive and that they never had any problems gaining access to the Chief Executive.

*The Chief Executive's views*

- 3.303 The Chief Executive explained that their view is that Directors are appointed for a reason and that the Chief Executive placed a great deal of reliance on Directors' judgement on a day to day basis. The Chief Executive referred to the former Director of Regulation as being a highly experienced individual with particular knowledge of modern fitness to practise processes that they had gained at another healthcare regulator. The Chief Executive said that they had relied on the former Director of Regulation to make recommendations and adjustments to improve the fitness to practise process. The Chief Executive said that the former Director of Regulation tackled the problems that were evident within the GDC's fitness to practise process in a credible way in the improvement plan which they put in place upon their arrival at the GDC (which was overseen by the Audit Committee) and that the Chief Executive thought the changes the former Director of Regulation had introduced were standard amongst other health and care regulators and that they were all perfectly reasonable. The Chief Executive said that they had met with the former Director of Regulation regularly and responded positively to their requests for additional resources.<sup>86</sup> The Chief Executive said that, in hindsight, they recognised that assurances had been given by Investigating Committee staff that they "now knew [they were] not entitled to rely on".
- 3.304 The Chief Executive said that they knew of the process changes that the former Director of Regulation had introduced, but that their knowledge of the application of these processes was a different matter. The Chief Executive described the steps taken to deal with the findings of the 2013 Investigation Report as part of a wider programme of root and branch review of the fitness to practise processes at the GDC.

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<sup>86</sup> This account differs from that of the former Head of the Investigating Committee who commented to us that during 2012 they "repeatedly" requested additional staff resources from the executive management team without success.



- 3.305 We asked what the Chief Executive’s understanding was of the issues raised by the whistleblower at the time of the disclosure. The Chief Executive said that all their knowledge of the Investigating Committee came from the former Director of Regulation, and that the first they knew of the issues was when the whistleblower made their disclosure. We noted that the Chief Executive had attended the first session of the training day on 17 July 2013 at which concerns had been raised by members of the Investigating Committee about the use by the Secretariat of the Indicative Outcomes Guidance to influence their decision-making.<sup>87</sup> The Chief Executive said to us at interview that they had been advised in advance of the training day by the former Director of Regulation that a query might be raised about the application of the Indicative Outcomes Guidance, and that at the training day itself they had not seen the question that was raised as relating to staff influence, and had made it clear that the Indicative Outcomes Guidance was not intended to fetter the Investigating Committee’s independence, but that if the Investigating Committee intended to depart from the Guidance they would need to set out their reasons in detail.<sup>88</sup>
- 3.306 The Chief Executive went on to say that if the Investigating Committee members had ongoing concerns about staff behaviour, then the Chief Executive would have expected them to have told the former Director of Regulation of those concerns. In response to seeing a draft of this report the GDC told us that ‘nobody at the training day expressed concern that the Guidance was being strongly pushed at them or that there was inappropriate behaviour by staff’ and noted that no concern about this was raised with the Chief Executive after the event. This does not appear to be wholly consistent with the account given to us by a former Investigating Committee Chair, who told us at interview that their notes from the training day recorded that concerns were raised (after the Chief Executive had left the training day) about the “increasing lack of recognition of the independence of IC members and the increasing active involvement by panel secretaries in decision-making”.
- 3.307 We asked the Chief Executive if they had given any consideration to taking immediate action in relation to the Investigating Committee processes and support once Penningtons had been instructed in August 2013. The Chief Executive said that they had asked the former Director of Regulation numerous questions to make sure they knew what was going on, and that if there were poor practices, to ensure that they were stopped right away. The Chief Executive said they could not do more than that until they had received Penningtons’ conclusions. The GDC has told us, in response to seeing a draft of this report, that consideration was in fact given to taking additional further steps at the time that the Penningtons report was commissioned, but that a decision was taken (agreed by the Chair of the Council, the Chief Executive the Head of Corporate Legal and the former Director of Governance) not to take action until the outcome of the report was known, due to concerns about taking action before it was known whether the whistleblower’s concerns were verified and, about ‘balancing the competing rights of members of

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<sup>87</sup> In response to seeing a draft of this report the GDC told us that the concern raised at the training day was about the risk of the independence of the Investigating Committee being compromised if strict adherence to the Indicative Outcomes Guidance was insisted upon.

<sup>88</sup> We note that in response to seeing a draft of this report the former Chair of the Appointments Committee has said that it was clear from what the Investigating Committee members told the Chief Executive and the Chair of the Audit and Risk Committee at this meeting that while there was a difficult line to hold between advice and inappropriate influence, that line had been crossed by some Investigating Committee staff.

staff and members of the [Investigating Committee] and the public interest', the ramifications on staff morale and productivity and potential legal action, a risk of 'the two endeavours' (remedial action and the Penningtons' investigation) diverging, and a concern about not disrupting performance of the GDC's regulatory functions. The GDC has also said that it relied upon Penningtons to raise any significant concerns as soon as they arose (the Head of Corporate Legal told us at interview that they had asked Penningtons to do so) and that the Chief Executive had instructed the former Director of Regulation "to be particularly vigilant and inform [the Chief Executive] of anything untoward".<sup>89</sup>

3.308 The Chief Executive commented that it was fair to say that the former Director of Regulation had expressed the view that some of the matters complained about were not of concern to them. The Chief Executive's understanding of the former Director of Regulation's views was:

- Pre-drafting of Investigating Committee decision documents was an efficiency measure and not intended to influence the Investigating Committee's thinking.
- The Investigating Committee Secretaries were experienced, good people who would only contribute for a good reason.
- Investigating Committee members were not given legal advice by the Investigating Committee Secretaries but were only given "information relating to the processes, which was a different matter".
- Post-meeting amendment of Investigating Committee decision documents was a serious concern but the former Director of Regulation had no reason to believe that amendments were being made outside of the agreed protocol.<sup>90</sup>

3.309 The Chief Executive said that they (i.e. the Chief Executive) had created a climate, following the whistleblowing disclosure, where both the former Head of the Investigating Committee and the former Director of Regulation knew that serious questions were being asked at every level of the organisation about the application of the processes in the Investigating Committee. The Chief Executive also told us that they made it plain to the former Director of Regulation that, whatever the former Director of Regulation's views about the seriousness of the allegations made in the whistleblowing disclosure, the Chief Executive expected the former Director of Regulation to take whatever interim steps were necessary to ensure that any bad practices, in particular around the alteration of Investigating Committee decision documents outside of Investigating Committee meetings, stopped immediately.

3.310 We asked for the Chief Executive's views once they received the Penningtons report. The Chief Executive said that they were very concerned at that point. They said that the former Director of Regulation had told them that "[they were] unaware of some of the practices that were proved to be happening". In the Chief Executive's view, the former Director of Regulation "ought to have been aware",

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<sup>89</sup> The GDC also told us about the Chief Executive being sited near to the Fitness to Practise team as of March 2014 for part of every day 'so as to tackle the issues that were identified in the Initial Stages Audit' and of them increasing their scrutiny over the internal compliance team. It is not clear to us that either of these measures is relevant to the issue of whether the GDC took appropriate action at the time Penningtons were commissioned – in August 2013.

<sup>90</sup> We note that the Chief Executive's account of the former Director of Regulation's views is not entirely consistent with the account given to us by the former Director of Regulation either at interview or following their seeing a draft of this report.

and that if they were not so aware, “as [they] had placed reliance on someone who was quite senior”, then the implementation of Penningtons’ findings was, in the Chief Executive’s opinion, the former Director of Regulation’s “opportunity to put things right”.

3.311 The Chief Executive said that their immediate concern on receipt of the Penningtons report was to implement the recommendations (which were added to by the Audit and Risk Committee) as soon as possible. The Chief Executive did not rely upon the former Director of Regulation to undertake implementation of the recommendations but instructed an external solicitor to implement the recommendations.<sup>91</sup> The Chief Executive said that they were aware that the former Director of Regulation did not agree with all of the Penningtons recommendations. The Chief Executive told us that it was the former Director of Regulation’s view that the impact of the recommendations was that Investigating Committee Secretaries “were being told to know their place”. The Chief Executive’s view was that the Secretaries “were being reminded of the boundaries of their role and being reminded to stay within those”. The Chief Executive said “it was fair to say that we regarded the findings with a different level of seriousness”. However, the Chief Executive’s primary concern was to ensure that the GDC was doing things properly. The Chief Executive said that previously too great a reliance had been placed on putting processes in place, rather than ensuring that they were being applied properly. In response to seeing a draft of this report the GDC has told us that the Chief Executive decided to instruct an external solicitor to implement the recommendations for three reasons: because the Chief Executive’s confidence in the former Director of Regulation had been shaken following receipt of the Penningtons report; because it was necessary for the implementation plan to be independent for it to secure Investigating Committee members’ confidence in the process; and because the implementation plan could only be given the degree of attention it required by using an additional resource, due to the ongoing pressure of the day to day business.

3.312 In terms of the implementation of the Penningtons recommendations, the Chief Executive told us that they had known that case progression would slow down once there was no advance drafting permitted, but they had needed to act. The Chief Executive said that this had been remedied by the introduction of the dual Secretaries. The Chief Executive said that they believed that the Investigating Committee Secretaries were subject to oversight by the seconded Head of the Investigating Committee team. The Chief Executive said that they had not been aware of the problems around the use of the permissible list of changes to Investigating Committee decision documents, and said that they would seek to resolve those problems. The Chief Executive said that Penningtons’ post-implementation review<sup>92</sup> would provide quality assurance of the training provided and the induction of staff.

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<sup>91</sup> This was a reference to the external lawyer who was seconded in to the GDC from 27 January 2014, initially to oversee implementation of the Penningtons recommendations, and who subsequently took over the management of the Investigating Committee Secretariat until 27 March 2015.

<sup>92</sup> Our interview took place before that post implementation review was complete

## Our view

- 3.313 It is clear that the former Director of Regulation knew of the objectionable practices that were in operation during 2013 (other than the extent of the post-meeting amendment of Investigating Committee decision documents<sup>93</sup>). The former Director of Regulation told us that they knew discussions were taking place prior to meetings between Chairs and Secretaries, but assumed these related to housekeeping matters only. The former Director of Regulation had been aware that some Investigating Committee Secretaries had been over-zealous during Investigating Committee meetings but had been assured that this had been dealt with by the former Head of the Investigating Committee. The former Director of Regulation had been surprised at the extent of the behavioural concerns raised by the whistleblower and identified by Penningtons, as the former Director of Regulation would have expected concerns about such behaviour to have been fed back to them. The former Director of Regulation knew that pre-drafting was taking place but considered this to be at an acceptable level. To the extent described above, the former Director of Regulation considered these practices to be acceptable.
- 3.314 We have set out above the account given to us by the former Director of Regulation about the extent to which they were aware of each of the objectionable practices and whether or not they consider that each practice is in fact objectionable. From the evidence given to us by the former Head of the Investigating Committee, it appears they did not agree, at the dates we interviewed them (in July and October 2014) that all of the practices criticised in the Penningtons report are in fact objectionable – in particular the former Head of the Investigating Committee did not consider that the Investigating Committee Secretaries were actually giving ‘legal advice’ during meetings; and it appears that they did not regard the pre-drafting of decision documents as problematic, provided those drafts were not shown to the Committee; nor did they regard the making of substantive amendments to decision documents outside of meetings as improper, provided that such amendments were approved by the Committee Chair. In response to seeing a draft of this report the former Head of the Investigating Committee has told us that their views on some practices have since changed. The former Head of the Investigating Committee was responsible for introducing some of the objectionable practices and for overseeing the Investigating Committee Secretariat staff who carried them out (from March 2013). It appears to us that the former Head of the Investigating Committee’s aim was improving the consistency of decision-making, whilst the former Director of Regulation’s primary focus appears to have been on efficiency of case progression.<sup>94</sup> Neither the former Director of Regulation nor the former Head of Investigating Committee appear to have appreciated the seriousness of the consequences of the adoption of these practices on the Investigating Committee’s independence and the potential damage to the reputation of the GDC.

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<sup>93</sup> The former Head of the Investigating Committee had assured the former Director of Regulation that all changes to Investigating Committee decision documents were being tracked and brought to the attention of the Investigating Committee Chairs.

<sup>94</sup> Both the former Head of the Investigating Committee and the former Director of Regulation have told us in response to seeing a draft of this report that these were not their sole aims, and they were not mutually incompatible. In particular, the former Director of Regulation has commented that they were also concerned about the quality of decision-making.

- 3.315 It is clear that the former Director of Regulation did not consider that there was any need to take any interim action when the whistleblowing disclosure was made (the former Director of Regulation thought it more appropriate to wait until Penningtons had reported) and that they did not agree with all of the recommendations made in the Penningtons report about how the issues should be addressed. At interview with us, the former Director of Regulation seemed to believe that if several Investigating Committee members were not concerned about the practices, then by definition those practices were not a problem (and the former Director of Regulation implied that the views of those members who had raised concerns about the Investigating Committee Secretaries' behaviour during Penningtons' investigation were somehow less valid by referring to them as being "self-selecting"). The former Director of Regulation's focus appeared to us to have been on maximising the efficiency of the Investigating Committee decision-making process in order to improve the rate of throughput of cases – as illustrated in their comments to Penningtons and by the fact that, even after implementation of the Penningtons recommendations, the focus of the monitoring activity they undertook continued to be solely about case progression. We consider that this focus on case progression and throughput meant that there was a failure to give due consideration to ensuring the proper application of the Investigating Committee processes.
- 3.316 We agree with the view expressed by the GDC in response to seeing a draft of this report that it would have been incorrect for an assumption to be made by the former Head of the Investigating Committee that if they copied the former Director of Regulation into an email, that was sufficient to imply not only their oversight and approval, but also that of the Chief Executive.
- 3.317 We consider that the Chief Executive placed a degree of reliance that was subsequently established as being ill-founded upon what they were told by the former Director of Regulation about the processes in operation and their propriety, and about the source of any tension in the relationships between Investigating Committee members and the Secretariat, and that the Chief Executive did not enquire sufficiently into the application of the processes. Further, when a concern was brought to the Chief Executive's attention at the 17 July 2013 Committee training day, although they responded to that concern appropriately by making it clear that the GDC wanted to listen to Investigating Committee members' concerns, they interpreted the concern as being a manifestation of resistance on the part of the Investigating Committee members to accepting the Indicative Outcomes Guidance, rather than exploring whether or not it indicated any problems with the GDC staff's behaviour.<sup>95</sup> This was despite the comment that had been made in the 2013 Investigation Report<sup>96</sup> some five months earlier that the GDC should act promptly to put matters right if there was any evidence of inappropriate influence on the decision making of the Investigating Committee.
- 3.318 The former Director of Regulation said that at the time that Penningtons were instructed to investigate, they were content to rely on assurances from the former Head of the Investigating Committee as to the practices of the Investigating

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<sup>95</sup> While the former Director of Regulation's view is that that concern was explicitly only about the Indicative Outcomes Guidance, the former Chair of the Appointments Committee's view is that the concern was clearly about some Investigating Committee staff breaching the appropriate boundary between advice and inappropriate influence.

<sup>96</sup> Paragraph 5.116 of the 2013 Investigation Report.



Committee Secretaries (although we note that the former Head of the Investigating Committee does not recall giving any such assurances). The Chief Executive in turn relied on assurances from the former Director of Regulation at that time – as noted above, the Chief Executive instructed the former Director of Regulation “to be particularly vigilant and inform [the Chief Executive] of anything untoward” – but was therefore reliant upon the former Director of Regulation’s assessment of the situation and view as to what was, and what was not, untoward. No interim action or monitoring was taken immediately after the instruction of Penningtons or during their investigation, notwithstanding the potential seriousness of the matters raised by the whistleblowing disclosure, the contents of the Bulletin (which effectively provided evidence about some of the objectionable practices in operation) and the proximity, in time and content, of the matters raised as concerns by the whistleblower to the findings and recommendations made by us in February 2013. The GDC has told us that the decision to take no interim action was agreed by the Chair of the Council, the Chief Executive, the Head of Corporate Legal and the former Director of Governance, for the reasons set out at paragraph 3.321 below.

3.319 Further, the GDC allowed the individual whose practices were raised in the whistleblowing disclosure and who had direct involvement in the training and management of the persons to whose behaviour the disclosure related and who had introduced and enforced most of the practices in question to continue to manage the Investigating Committee Secretariat without external scrutiny or support. That individual (the former Head of the Investigating Committee) told us that no changes were made to the practices in operation immediately after the whistleblowing disclosure. The former Director of Regulation appears to have given the Chief Executive assurances that at least some of the practices that Penningtons later established were objectionable either were not happening or were not cause for concern. This may have been because the former Director of Regulation did not know the full extent of what was going on (although the former Head of the Investigating Committee told us that there was nothing that they did which the former Director of Regulation was unaware of) or because (as is clear from the evidence we have seen) the former Director of Regulation did not regard at least some of the practices as being objectionable either at the time or after Penningtons’ report had been received. While the former Director of Regulation said to the former Chair of the Appointments Committee in an email sent on 31 October 2013, that the former Director of Regulation would be ‘taking an even closer interest in the [former Head of the Investigating Committee]’s interaction with the IC members and others for the time being’, that was in response to a concern about the former Head of the Investigating Committee’s approach to empanelling Investigating Committee members<sup>97</sup>; and we have seen no evidence that the former Director of Regulation took any other steps to monitor the practices in operation by the Investigating Committee Secretariat during the period between the whistleblowing disclosure and the receipt of Penningtons’ report, some four months later.

3.320 It is our view that consideration should have been given to bringing in external legal support for the Investigating Committee meetings, either while the Penningtons investigation was under way and/or once the Penningtons reports had been received, until such time as the retraining and other recommendations

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<sup>97</sup> See paragraph 4.131.



had been fully implemented. It would have been relatively straightforward to ask external solicitors to act as/sit in with Investigating Committee Secretaries for a limited period of time (particularly as using external solicitors in that capacity had been done in 2011, prior to the recruitment of the former Head of the Investigating Committee and the other Investigating Committee Secretary recruited at that time). Taking such action might have reduced the risk of any harm occurring as the result of repetition of objectionable practices during the period when those practices were still thought to be acceptable by the Investigating Committee Secretariat generally, as well as during the period before the new guidance and training could be fully implemented. We consider that it is also likely that using external legal support for Investigating Committee meetings during some or all of the period from January – July 2014 might have avoided or at least reduced the scale of the problem that the GDC encountered, in terms of the slowdown in throughput of cases at each Investigating Committee meeting as a consequence of the advance drafting of Investigating Committee decision documents being stopped.

- 3.321 In response to seeing a draft of this report, the GDC has told us<sup>98</sup> that the possibility of taking such a step was considered at the time that Penningtons were commissioned to investigate the whistleblower's allegations, but that the Chair of the Council, the Chief Executive, the Head of Corporate Legal and the former Director of Governance agreed that it was appropriate to await the outcome of the Penningtons investigation to see whether the whistleblower's concerns were verified, before taking action. In response to seeing a draft of this report, the GDC told us it was concerned to balance the rights of members of staff and the Investigating Committee and the public interest, and that in its view the potential ramifications (on delivery of the GDC's regulatory function, productivity and in terms of legal action) of taking premature action were grave, and that there was also a concern not to skew the investigation's findings by amending procedures pending receipt of the Penningtons reports. The GDC (in particular, the Head of Corporate Legal) told us that they relied upon Penningtons to alert the GDC to any significant issues that they found while investigating and prior to the investigation report being finalised. In response to seeing a draft this report the GDC told us that it took 'commensurate' action at the time of commissioning Penningtons' investigation. The GDC told us that following the whistleblower's disclosure (in July 2013) the Chief Executive instructed the former Director of Regulation to be particularly vigilant and to inform them about anything untoward, and that the Chief Executive also increased their own vigilance of the former Director of Regulation's work.<sup>99</sup>
- 3.322 Further the GDC told us that, had the Chief Executive recommended bringing in external legal support for Investigating Committee meetings, the Chair of the

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<sup>98</sup> We received a letter from the Chair of the Council (in response to our request for individual comments about the factual accuracy of our draft investigation report) which attached two Annexes, each containing comments on our draft investigation report. Annex 1 was described in the letter as containing 'the preliminary submissions of the GDC', amongst which was included this account of why the GDC did not take additional steps at the time Penningtons were commissioned to investigate the whistleblower's allegations.

<sup>99</sup> The GDC also referred to the physical siting of the Chief Executive in proximity to the fitness to practise team for part of every day from March 2014, and an increased level of scrutiny by the seconded Head of the Investigating Committee after their appointment on 27 January 2014 (they attended some Investigating Committee meetings). Obviously these measures could not have addressed the objectionable practices in operation during the period from July – December 2013.

Council would have questioned the practical consequences of such an action, the expense, and the potential diversion of resources from other pressing issues. The GDC remains of the view that the actions it took were proportionate, while recognising that use of external support might have reduced the risks of harm occurring.

3.323 While we recognise that the GDC did consider taking interim action pending the outcome of the investigation, in our view the reasons the GDC relied on when rejecting that option should have been outweighed by a proper consideration of the potential seriousness of the impact on the legality and robustness of the Investigating Committee's decisions and confidence in the Investigating Committee process of continuing to operate in the same way for several months after the whistleblowing disclosure was made, in the event that the whistleblower's concerns were found to be borne out. We note that there was prima facie evidence of some of the practices that the whistleblower had complained about in the Bulletin that had been circulated by the GDC in August 2013 (although we accept that the former Director of Regulation and the former Head of the Investigating Committee may not have been aware of the extent to which individual Investigating Committee Secretaries were making amendments to Investigating Committee decision documents without appropriate authorisation and against protocol). The real issue was the extent to which those practices were recognised as being objectionable, prior to receipt of the Penningtons reports. There were also other indications, of which both the former Director of Regulation and the Chief Executive had knowledge, that attempts were being made by Investigating Committee Secretariat staff to exercise an inappropriate degree of control over the Investigating Committee members<sup>100</sup>, which should, in our view, have carried some weight in reaching a decision about what, if any, action should be taken pending the outcome of Penningtons' investigation. For example, the emails that the former Head of the Investigating Committee had sent to the former Chair of the Appointments Committee about the whistleblower on 5 and 7 August 2013 and another email (26 September 2013) proposing that the former Head of the Investigating Committee could decide to stop using a particular Investigating Committee member, suggested a problematic approach to the independence of the Investigating Committee on the part of the individual with responsibility for the recruitment, training and management of the Investigating Committee Secretariat. In addition, on 18 September 2013, the lack of trust between Investigating Committee members and the Investigating Committee Secretariat resulted in a situation where the Investigating Committee adjourned their consideration of a case in order to seek independent legal advice, and the meeting was then stopped by the former Director of Regulation. In our view at that stage the GDC would have been well-advised to reconsider its decision not to take interim action pending the outcome of the investigation.

3.324 In response to seeing a draft of this report, the GDC has told us that the Chief Executive did recognise prior to receipt of the Penningtons reports that the practices in operation were objectionable, and instructed the former Director of Regulation that the practices must cease immediately. That statement is not entirely consistent with what the Chief Executive said to us at interview – which was that they had instructed the former Director of Regulation once the whistleblowing disclosure was made that “if there are any practices that are going

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<sup>100</sup> For further detail about this please see paragraphs 5.39, 5.42 and 5.46.

on that are wrong [to] ensure that they are stopped right away” and that at that time, the former Director of Regulation did not accept that most of the practices which Penningtons subsequently reported as being objectionable either were taking place or were problematic if they were in fact taking place. The Chief Executive said to us that at the time Penningtons were commissioned, the former Director of Regulation did not believe that Investigating Committee Secretaries were behaving inappropriately during Investigating Committee meetings or that they were offering legal advice, or that the extent of the pre-drafting they were doing was objectionable or that they were breaching the protocol on post-meeting amendment of Investigating Committee decision documents.<sup>101</sup> The Chief Executive told us that, pending receipt of the Penningtons reports, they considered that the only action they could take was to ask questions about and obtain assurances from the former Director of Regulation about the practices in operation, although they recognised subsequently that they could have taken additional monitoring measures such as observing Investigating Committee meetings.

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<sup>101</sup> We have set out above the former Director of Regulation’s views as expressed to us during our investigation about the extent to which the practices criticised in the Penningtons report are objectionable.

## 4. Section Two: Scrutiny by the GDC's committees and Council

4.1 In this section of the report we consider the adequacy of the information provided by the GDC executive to the GDC's committees and Council specifically its Audit and Risk Committee (and the predecessor Audit Committee), its Appointments Committee and the Council (both the previous Council that left office in October 2013 and the current Council) about the:

- a) 2013 Investigation Report
- b) Whistleblowing disclosure in September 2013 and the findings of the investigation by Penningtons following that disclosure
- c) The post-implementation review conducted by Penningtons in 2014.

4.2 We also consider the extent of the scrutiny those bodies appear to have applied to the information provided.

### **The basis of our investigation**

4.3 These matters are directly relevant to the aspect of our current investigation which is focused on assessing the adequacy of the GDC's response to the 2013 Investigation Report's recommendation, and the GDC's management of its processes and support for its Investigating Committee since publication of the 2013 Investigation Report. Any failure by the executive to provide relevant information to the GDC's governance mechanisms, and/or any failure of those mechanisms to conduct effective scrutiny of the executive's actions would clearly increase the risk of failure by the GDC as an organisation to address effectively the issues arising from the 2013 Investigation Report and/or to manage effectively its processes and support for the Investigating Committee.

4.4 A summary of our substantive findings in relation to: the steps taken by the GDC in response to the 2013 Investigation Report; and the adequacy of the GDC's management of its processes and support for its Investigating Committee in the period since publication of our Investigation Report can be found at paragraph 2.1. We have cross-referenced our findings about these matters below, where relevant.

### **How we carried out our investigation**

4.5 To investigate the above matters we have:

- Met with the current Chair of the Council<sup>102</sup>, the Chair of the Audit and Risk Committee, the former Chair of the Appointments Committee, the former Director of Regulation, the former Head of the Investigating Committee, the Chief Executive, the former Director of Governance, and the Head of Corporate Legal.
- Considered documentation provided by the GDC, specifically including redacted versions of reports made to the Appointments Committee/Audit and Risk Committee (or the Audit Committee)/Council and redacted versions of the

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<sup>102</sup> We have not met with any members of the Council other than the Chair and the Chair of the Audit and Risk Committee. Nor have we met with any of the members of the previous Council (which left office in October 2013, other than the current Chair of the Audit and Risk Committee, who was also a member of the previous Council).

minutes of the Appointments Committee/Audit and Risk Committee/Audit Committee/Council meetings.<sup>103</sup> Where we have commented below on the actions of the previous Council, our comments are based solely on the agreed Council meeting minutes.

- Reviewed the 2013 Investigation Report.
- Shared our draft investigation report on two occasions with key individuals we interviewed and considered carefully their comments.

### **The role and purpose of each of the GDC's governance mechanisms**

- 4.6 The Appointments Committee is a statutory committee of the GDC. Its members are appointed by the GDC's Council and may not be either GDC employees or members of the GDC's Council. The Appointments Committee is accountable to the GDC's Council and reports to it on an annual basis. Both the GDC and the former Chair of the Appointments Committee told us that the Appointments Committee is regarded as being independent. The former Chair of the Appointments Committee told us that in their experience the GDC had always respected that independence.
- 4.7 The Appointments Committee's powers are set out in the General Dental Council (Constitution of Committees) Rules 2009, which provide for the Appointments Committee to 'assist the Council in connection with the exercise of any function relating to the appointment of [statutory committee] members, including the recruitment, selection, appraisal and disciplining of members or particular members'. The Standing Orders governing the work of the Appointments Committee that applied from 2012-2014 provided that the Appointments Committee was to appoint members of the GDC's statutory committees (including the Investigating Committee), to determine their terms of office, to appoint chairs of those statutory committees, to approve the learning and development policy for them and receive assurances from the executive as to the effective implementation of it, to deal with issues relating to the conduct and performance of the statutory committee members in accordance with the disciplinary procedure, including suspending/removing them from office in accordance with the relevant statutory instrument, to obtain external legal or other professional advice as necessary and to assist with the recruitment of other officers at the Council's request, to report annually to the Council in respect of the Appointments Committee's activity and to bring any pertinent issues to the Council's attention, and periodically report on its own effectiveness. The Standing Orders provide that the Appointments Committee will meet at least three times each year. The former Chair of the Appointments Committee told us that the Appointments Committee has no operational role and no authority over GDC staff and that its only regular contact with GDC staff is with the Committee's secretary (who is a GDC employee). The former Chair of the Appointments Committee told us that the Appointments Committee members were independent non-executives who were retained to attend up to six meetings per year and that the former Chair was retained to do two days work per month. The former Chair also told us that the Appointments Committee's papers are held in separate confidential files by its Secretary, which are not accessible to the GDC, and similarly that GDC records are not available to the Appointments Committee other than on request.

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<sup>103</sup> See footnote 16.

- 4.8 The Audit and Risk Committee’s key purpose, as described on the GDC’s website is to monitor the integrity of financial statements, to review the GDC’s governance, internal control and risk management systems and to review the internal and external audit services. The Audit and Risk Committee has powers delegated to it by the Council to investigate any activity within its terms of reference. The Committee’s terms of reference in relation to “Governance, risk management and internal control” are (in summary) to: review the delegated authorities and governance structure annually, report to the Council on whether they are adequate and make any recommendations to the Council; monitor the integrity of the system of internal controls; assess the scope and effectiveness of the management systems to identify, assess, manage and monitor significant risks; to advise the Council on matters of corporate governance (at the Council’s request); and to report quarterly to the Council (in private session) on the GDC’s ‘top 10 risks’. Its terms of reference in relation to ‘Whistle-blowing, fraud and investigations’ include: review the GDC’s arrangements for employees, Council Members and associates to raise concerns about possible wrongdoing in financial reporting or other matters and ensure that they allow proportionate and effective investigation. These terms of reference became effective from 17 October 2013, i.e. after some of the events examined in this report. The Chair of the Audit and Risk Committee provided us with some further information about the Committee’s approach to monitoring risks, and about its previous remit at interview. We note that the GDC has stated in response to seeing a draft of this report that we have ‘fundamentally misunderstood the role and responsibilities of the Audit and Risk Committee’ and has suggested that we have made unjust criticisms of the level of scrutiny applied by the Committee. The GDC said that the Audit and Risk Committee is only responsible for ensuring that there are adequate systems in place for identifying and escalating risks, rather than for identifying or investigating particular ‘transgressions and that it is entitled to rely upon others for evidence of what is happening “on the ground”’.
- 4.9 The Council’s role (according to the GDC’s website) is to ensure the GDC carries out its core functions efficiently and in ways that ensure the safety of patients. The Council is responsible for setting the strategy and direction of the GDC and ensuring that all major decisions are in line with the strategy, taking major policy decisions, and ensuring and monitoring financial integrity. The current Council came into office in October 2013.

### Chronology

- 4.10 **5 December 2012** – The Audit Committee considered the final draft 2013 Investigation Report.
- 4.11 **8 February 2013** – The Audit Committee met and were briefed on the actions and learning points arising from the 2013 Investigation Report (set out in more detail at paragraphs 4.41-4.52 below).
- 4.12 **11 February 2013** – We published the 2013 Investigation Report. Chapter five of the 2013 Investigation Report addressed the concerns that had been raised about the investigation stages of the GDC’s fitness to practise process – and was largely unchanged from the draft version that had been provided to the GDC in late 2012.
- 4.13 **14 February 2013** – At a closed session of Council (the previous Council, which left office in October 2013) a verbal update was given by the Chair of the Audit and Risk Committee in advance of the Committee’s detailed consideration of the



2013 Investigation Report. The GDC told us that the next day the Chair of the Audit and Risk Committee sent the relevant section of the report the Committee (at that time, the Audit Committee) had received to the former Chair of the Appointments Committee.

- 4.14 **22 February 2013** – An Appointments Committee meeting took place at which the former Director of Governance (at the former Chair of the Appointments Committee's request) provided a verbal report to the Committee about the 2013 Investigation Report and reported that the executive and Council would consider and act upon all the recommendations.<sup>104</sup>
- 4.15 **11 March 2013** – the former Chair of the Appointments Committee wrote to the Chair of the Audit Committee in confidence, setting out three concerns about the accuracy of the information that had been provided to the Audit Committee at its meeting on 8 February 2013 about actions and learning points arising from the 2013 Investigation Report. In that letter, the former Chair of the Appointments Committee noted that Investigating Committee staff had admitted that feedback had not been actioned, and suggested that the Appointments Committee should consider with the Investigating Committee Secretariat their response to the 2013 Investigation Report (further detail is provided at paragraph 4.35).
- 4.16 **13 March 2013** – A report was made to the closed session of the Audit Committee about the 2013 Investigation Report. The report was drafted by the former Director of Governance and set out a list of actions that were being taken in response to issues regarding the Investigating Committee's support that had been identified in the Report.
- 4.17 **28 March 2013** – A report was made to the open session of the (previous) Council about the 2013 Investigation Report by the Chair of the Audit and Risk Committee (the Audit Committee at the time). Insofar as the section on the Investigating Committee is concerned, the report was in identical terms to that which had been presented to the Committee on 13 March 2013 and it appears that none of the comments made in the Appointments Committee's letter dated 11 March 2013 to the Chair of the Audit Committee had led to any changes to the relevant sections of the relevant annex.
- 4.18 **18 June 2013** – The Appointments Committee met. The minutes record that, amongst other items, the Committee received a report from the former Head of the Investigating Committee outlining the training framework and development review process for the Investigating Committee in 2013. The minutes record that changes had been made to the development review process for the Investigating Committee, including the introduction of a form for completion by each member which it was hoped would 'allow all members to feel that their input was being heard and also allow monitoring of commitment by all members to the DRP process'. The minutes record that the former Chair of the Appointments Committee 'stressed the importance of staff acting on the feedback and recalled that in the past some IC members had stopped commenting because they felt they had not been heard' and that the former Head of the Investigating Committee confirmed that all team review feedback would be read and acted on. It was also agreed that further work should be done on the revised competencies for Investigating Committee members prior to discussion at the Investigating Committee training day on 17 July 2013.

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<sup>104</sup> Further detail is set out at paragraph 4.33.

- 4.19 **24 July 2013** – The Audit Committee met and received a report about actions on learning points from the 2013 Investigation Report (the minutes we have seen show that that this concerned an amendment to be made to the disciplinary procedure for Council members within the governance manual). The minutes record that the Chair of the Audit and Risk Committee also reported that on the 17 July 2013 Investigating Committee training day they and the Chief Executive had discussed with the Investigating Committee members the potential risks around the Investigating Committee’s work, and that they stated that full feedback from Investigating Committee members about the training day was awaited from the (then) Chair of the Appointments Committee.
- 4.20 **31 July 2013** – The whistleblower made a disclosure under the GDC’s whistleblowing policy regarding their concerns about the way in which the Investigating Committee was being managed.
- 4.21 **16 August 2013** – Penningtons were commissioned to undertake an investigation of the matters raised by the whistleblower’s disclosure.
- 4.22 **4 September 2013** – A report was made by the Chief Executive to the Audit Committee about the whistleblowing disclosure. The minutes recorded that the Chief Executive had informed the current Chair of the Council of the disclosure.<sup>105</sup>
- 4.23 **21 November 2013** – The Chief Executive reported to the Audit and Risk Committee about the ongoing Penningtons investigation, including setting out the terms of reference of the investigation and summarising actions taken at that point. The report referred to the staff complaint about the whistleblower which had been ‘referred to the Appointments Committee which deals with matters concerning statutory committee members’, as well as the whistleblower’s complaint to the Chair of the Council about aspects of the handling of that complaint and stated that ‘the complaint has been resolved’). The report set out the timetable for receipt of Penningtons report and the intention for the report to be sent to the Committee along with a plan for implementation of recommendations, and for the Council to be notified about the whistleblowing incident and the investigation into the whistleblowing disclosure at its meeting in December 2013.
- 4.24 **5 December 2013** – Open session of Council. No indication that the whistleblowing disclosure or the 2013 Investigation Report was discussed. The minutes of the closed Council session on the same date record a briefing being provided by the Chief Executive about a whistleblowing incident that was being investigated by an external lawyer which had been reported to the Audit and Risk Committee. The minutes record that the Audit and Risk Committee planned to meet to discuss the matter once the investigation report was available, and that a report would be made to the Council in February 2014.
- 4.25 **23 December 2013** – The final version of the Penningtons reports were received by the GDC.
- 4.26 **22 January 2014** – A closed Audit and Risk Committee meeting took place at which a paper by the Chief Executive setting out the executive’s plans to implement the recommendations arising from Penningtons’ investigation into the concerns raised by the whistleblower was discussed. The paper summarised the

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<sup>105</sup> In response to seeing a draft of this report, the GDC has said that the Chair of the Council has no particular recollection of being told about this, and that they believe there to be no record of it (and that many discussions between the Chair and the Chief Executive or the former Director of Governance were not recorded).

whistleblower's concerns, outlined Penningtons' conclusions and recommendations, and attached a copy of the Penningtons reports and Executive Summary. The Committee's discussion is summarised at paragraphs 4.91-4.101 below.

- 4.27 **12 February 2014** – A meeting took place of the Appointments Committee at which the Chief Executive presented a confidential report on the 'key conclusions and recommendations' from Penningtons' investigation (further information about this is set out at paragraph 4.136-4.138). At that meeting, the former Director of Regulation also presented (as part of a report about risks relevant to the work of the Committee) 'relevant extracts' from the Investigating Committee operational risk register and informed the Committee that it included risks arising from the implementation of Penningtons' findings, which were being monitored and not expected to remain 'red'.<sup>106</sup>
- 4.28 **20 February 2014** – A report by the Chief Executive to a closed session of Council stated that the whistleblowing disclosure arose from a background of tension between the Investigating Committee members and staff and that the whistleblower had used the whistleblowing policy to by-pass other possible reporting routes.
- 4.29 **5 March 2014** – An update was provided to the Audit and Risk Committee on the implementation of Penningtons' recommendations.
- 4.30 **1 April 2014** – A report was made to the open session of Council on the implementation of Penningtons' recommendations. The minutes refer to increased oversight by the Council of wider issues relating to fitness to practise.

#### (a) Scrutiny of the findings of the 2013 Investigation Report

##### **Background**

- 4.31 On 11 February 2013 we published our advice to the Department of Health following an investigation into concerns raised by a former Chair of the GDC. Information about the findings from the 2013 Investigation Report which are relevant to this investigation is set out at paragraphs 3.17 – 3.19 above.

##### *Scrutiny by the Appointments Committee*

- 4.32 The former Chair of the Appointments Committee told us that they met with the Chair of the Audit and Risk Committee (the Audit Committee at the time) on 6 February 2013. At that meeting the Chair of the Audit and Risk Committee told the former Chair of the Appointments Committee that the Committee had received assurances about training and changes following the 2013 Investigation Report that were relevant to the Appointments Committee's role, and therefore it was agreed the following day by the Chief Executive that the former Chair of the Appointments Committee would be provided with a copy of the recommendations about follow up action that was being provided to the Audit Committee, so that the Appointments Committee would be in a position to comment on those recommendations and to provide assurance about the action being taken to prevent recurrence. The GDC has told us that on 15 February 2013 the Chair of the Audit and Risk Committee sent the former Chair of the Appointments Committee the relevant part of the report that had been provided to the Audit

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<sup>106</sup> We have only seen limited extracts from the meeting minutes and are therefore unable to confirm whether any other matters relevant to this report are recorded as having been discussed.

Committee about the 2013 Investigation Report on 8 February 2013. The former Chair of the Appointments Committee told us that they shared that extract with the rest of the Appointments Committee.

- 4.33 At the Appointments Committee's meeting on 22 February 2013 the former Director of Governance (following a request made by the former Chair of the Appointments Committee) gave a verbal report on the publication of the 2013 Investigation Report. The minutes of the meeting record the former Director of Governance referring to the overall conclusion of the 2013 Investigation Report, and stating that 'previous deficiencies in process had now been addressed and the necessary changes made'. The former Director of Governance went on to say that 'One area of concern had been the provision of support to the IC, however resources were now committed to addressing this. Improvements were being made to the way data was recorded and potential problems could now be identified much earlier and monitored'. The minutes also record the former Director of Governance stating that the executive and the Council would carefully consider and act upon all the recommendations in the 2013 Investigation Report. We were not permitted by the GDC to have access to the remainder of the minutes for that meeting unless we undertook to make no disclosure of them. We therefore have no information about any questions or discussion of this matter by the Appointments Committee.
- 4.34 The 2013 Investigation Report was in the public domain and available from the Authority's website from 11 February 2013. The former Chair of the Appointments Committee told us that the Appointments Committee members were not provided with a copy of the report by the GDC. It would however have been easy for the Committee members to read a copy of it and the former Chair of the Appointments Committee has told us, in response to seeing a draft of this report, that the Committee did so and read it for themselves.
- 4.35 The former Chair of the Appointments Committee told us that the Committee fed back its concerns about the recommendations as to follow up actions to the Chair of the Audit and Risk Committee in a confidential letter dated 11 March 2013. That letter set out two areas of concern about the accuracy of annex 5 of the paper presented to the Audit Committee on 8 February 2013. First, the letter said that 'the IC team liaises with the AC in relation to the training of members' was not entirely accurate, and noted the need for clarity about the relative roles and responsibilities of the Appointments Committee and the Investigating Committee staff. Second, it noted that while the processes referred to were in place, feedback from the survey of the development review process 'suggest that learning and action may not necessarily follow. For example, feedback from IC members that team reviews are not actioned and the admission by IC staff that they are not resourced to do this'. In addition, the letter set out ongoing concerns that the Appointments Committee (as had been fed back to the Council in 2012) was not able to assure the effectiveness of training, and referred to comments made by the Investigating Committee Chairs that training 'often seems generic and unrelated to the IC work' and 'provided by people who have little understanding of the work of the IC'. The letter said that the Appointments Committee regarded the provision of effective training as 'work in progress'. It suggested that the Appointments Committee should consider with the Investigating Committee staff 'the IC response' (which appears to be a reference to the contents of annex 5)

and that the Appointments Committee's comments and assurance or concerns should be included within the response to the 2013 Investigation Report.

- 4.36 It does not appear that the Appointments Committee's concerns were discussed at the Audit Committee's subsequent meeting on 13 March 2013 or reflected in the report presented to the Council at its meeting on 28 March 2013.

#### **Our view**

- 4.37 We are unable to assess the extent to which the minutes of the 22 February 2013 Appointments Committee meeting detail the Committee's scrutiny of the analysis of the Report's findings that was provided at the meeting (or whether they referred to the content of the 2013 Investigation Report itself) as we have not seen the relevant section of the minutes.<sup>107</sup> As noted above, the Appointments Committee fed back to the Chair of the Audit and Risk Committee concerns about the accuracy of some aspects of annex 5 to the report presented to the Audit Committee on 8 February 2013 (which was subsequently presented to the Council on 28 March 2013). The Appointments Committee's concerns about annex 5 related to its remit of holding responsibility for the training and development of Investigating Committee members.
- 4.38 We make no criticism of the Appointments Committee's scrutiny of the 2013 Investigation Report. The Committee took appropriate steps to ensure that the GDC reported to it on the actions being taken in response that were relevant to the Appointments Committee's remit, and it also took steps to correct the information that had been presented to the Audit Committee on 8 February 2013.

#### **Scrutiny by the Audit and Risk Committee (and the previous Audit Committee)**

- 4.39 The Chair of the Audit and Risk Committee (who was also the Chair of the Audit Committee) told us, at interview, that the approach taken by the Audit Committee (prior to the coming into effect of the current Terms of Reference for the Audit and Risk Committee, in October 2013) was different to the role of a traditional audit committee (which is how they described the role of the current Audit and Risk Committee). The Chair of the Audit and Risk Committee told us that previously the Audit Committee played a more "hands on" role, during a period when there was an absence of other committees/controls within the GDC and that when a former Chair left the organisation (in May 2011) the Committee took on a more active role in relation to managing associated risks.
- 4.40 The Chair of the Audit and Risk Committee also explained to us the Committee's role in relation to the management of risk at the GDC. The Chair of the Audit and Risk Committee explained that the Committee regularly reviews and updates the organisation's strategic risk register and that risks are escalated for inclusion in that register from operational risk registers by the relevant directors first escalating the risk to the executive management team to decide whether or not the risk should be included on the strategic risk register. The Chair of the Audit and Risk

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<sup>107</sup> The GDC has asked us to record that any decision it made not to share information with us during the course of this investigation was reached after careful consideration of the legal principles and supported by sound reasoning, including statutory obligations, the relevance of the material and data protection issues. The GDC has also asked us to record that it would have allowed us access to the unredacted documents at its offices provided that we undertook not to make any onward disclosure of that material. We declined to view the documents on that basis as it would have prevented us from making reference to the material in this report.

Committee also confirmed that the Committee has access to the operational risk registers, and told us that in relation to risks relating to the Investigating Committee, the Audit and Risk Committee relies upon both the executive and the Appointments Committee to report relevant risks.

8 February 2013, Audit Committee meeting:

*Documentary evidence*

- 4.41 The Audit Committee at a meeting on 8 February 2013 (three days before publication of the 2013 Investigation Report) considered a report from the GDC's former Director of Governance titled, 'PSA Inquiry – Actions and learning points'. The stated purpose of the report was to note: 'actions which have already been taken in relation to matters leading to the PSA inquiry and processes which received critical comments in the course of the PSA inquiry' and 'the learning points regarding governance...and update the Committee on the GDC's compliance with those recommendations'.
- 4.42 The body of the report to the Audit Committee focused on the recommendations contained at the end of the 2013 Investigation Report. It did not include any information about the findings of the 2013 Investigation Report about the GDC's Investigating Committee process, other than a reference to 'various criticisms [which] were made of other GDC processes which predated and/or were separate from the matters leading to the former Chair's resignation'.
- 4.43 Annex two to the report to the Audit Committee set out the GDC's 'actions taken in respect of other processes'. Only two of the eleven concerns investigated and reported on in chapter five of the 2013 Investigation Report were referred to in annex two, namely: a general concern about the inadequacy of the support for the Investigating Committee; and a concern about a data protection breach. The actions that annex two recorded had been taken in order to address the concern about the general inadequacy of the support for the Investigating Committee were: the transfer of support for the Investigating Committee from the Governance department to the Regulation directorate; the introduction of a new support structure; and the issuing of new guidance. Those actions were recorded as having occurred in 2011 or (in relation to the guidance) in 2012. The report to the Audit Committee did not explain why the GDC considered that these actions had remediated any or all of the concerns contained within the 2013 Investigation Report. For example, there was no reference to the text within the 2013 Investigation Report about the extent to which each concern had been resolved by the date of the report's publication.
- 4.44 Annex five to the report to the Audit Committee recorded the actions the GDC had taken in respect of the 2013 Investigation Report's recommendations to the health and care professions regulators. In relation to the recommendation about reviewing the processes and support for the Investigating Committee, annex five recorded that: 'The processes and support for the Investigating Committee have been reviewed and enhanced (see Annex 2 above)'. Annex five then listed 12 activities said to be undertaken by the staff team supporting the Investigating Committee – the inference being that those activities demonstrated an improvement in the processes and support previously provided to the Investigating Committee (although we note that no statement to that effect was actually made). None of the activities listed concerned the interaction of staff with Investigating Committee members/Chairs during meetings, or the role of staff in



pre-drafting Committee decision documents. There is a reference to staff conducting a 'sense check' of decision documents, but no detailed explanation as to the process involved. Several of the activities listed are directly relevant to one of the issues addressed in the 2013 Investigation Report concerning the use of feedback from Investigating Committee members.<sup>108</sup>

- 4.45 Another paper that was considered by the Audit Committee was on communications handling around the 2013 Investigation Report. It listed one of the key messages as being 'To ensure a positive message to staff that firmly places these events in the past and emphasise the improvements that have been made' and also states that 'Adverse coverage about the performance of the GDC could undermine public confidence. The GDC's statement [on publication of the 2013 Investigation Report] must therefore emphasise the improvements that have been made and seek to draw a line under past difficulties'. The paper also referred to the potential for reputational damage and future problems should the GDC fail to make timely changes identified either by the Authority or the GDC. In response to seeing a draft of this report the GDC has told us that it was the Audit Committee's role to manage the reputational and procedural issues connected with the 2013 Investigation Report 'so that these came to the Council in a useful format that identified the risks'.
- 4.46 The minutes of the Audit Committee meeting on 8 February 2013 state that the Audit Committee's role was not to discuss the contents of the 2013 Investigation Report in detail but to consider the risk implications for the GDC and its response to the recommendations made in the Report.
- 4.47 The minutes state that annex 2 of the report sets out the 'actions taken by the GDC to address various criticism made during the PSA inquiry...'. They also record the Chief Executive explaining, in response to a query about how the (previous) Council was kept informed about the management of risks relating to the Investigating Committee, that: one set of risks regarding the Investigating Committee 'had been addressed by improved support and guidance' for the Committee and that the other set of risks 'was being addressed through agreement with the Appointments Committee that IC members were aware of the risks for the GDC'.<sup>109</sup> There was no reference to any actions being taken in relation to the findings made about the behaviour of GDC staff.
- 4.48 The minutes also record that the Chair of the Audit and Risk Committee would report to the (previous) Council on 14 February 2013 on behalf of the Committee, and that the Chair of the Audit and Risk Committee would inform the Council that a 'full paper on the actions and learning points from the PSA Inquiry' (a compilation of the report and annexes presented to the Audit and Risk Committee

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<sup>108</sup> Concerns were subsequently raised about some of the statements made in this document, by means of a letter to the Chair of the Audit and Risk Committee from the former Chair of the Appointments Committee sent on 11 March 2013. We were alerted to other concerns about the accuracy of some of the statements made within this document (and the version of it ultimately presented to the Council on 28 March 2013) by one of the two Investigating Committee Chairs we interviewed as part of our investigation. See paragraphs 4.15, 4.35 and 4.60 for further detail.

<sup>109</sup> The former Chair of the Appointments Committee has said that they do not understand this reference to the Appointments Committee's role, and that as at the date of the Audit Committee's meeting on 8 February 2013, no report had been made to the Appointments Committee about the 2013 Investigation Report. They told us that this reference to the Appointments Committee had not been discussed or approved by the Appointments Committee, and that they had drawn this to the attention of the Audit and Risk Committee Chair.

on 8 February 2013) would be presented to the Council by the former Director of Governance in March 2013.

- 4.49 The minutes also record that the Chair of the Audit and Risk Committee had met with the Chair of the Appointments Committee to discuss training for the Investigating Committee members on the learning points from the 2013 Investigation Report and how the Investigating Committee should move forward, and that they proposed to hold a further meeting on this subject which would also involve the Chair of the Council and the Chief Executive. The minutes also record that the Chair of the Audit and Risk Committee requested approval to ask the Appointments Committee to comment on the 'learning points' related to the recommendations contained in the 2013 Investigation Report for regulators to review the processes and support in place for Investigating Committees, including the arrangements for gathering and monitoring feedback (annex five). The minutes also record that the Chair of the Audit and Risk Committee was to discuss with the 'new Head of HR' the inclusion within the whistleblowing procedure of an option for staff of approaching a non-executive about a concern, and that training for Investigating Committee members about appropriate boundaries in relation to fitness to practise matters was ongoing.

#### **How the report was produced**

- 4.50 The former Director of Governance told us that the Regulation directorate had provided content for this report to the Audit Committee. The former Director of Regulation told us that they may have been asked to provide material for the report, but that they could not recall if that was in fact what had happened. The Chief Executive told us that they would have read the paper going to the Audit Committee thoroughly and discussed it with its author, before it was provided to the Committee.

#### **The contents of the report**

##### *The views of the Audit and Risk Committee Chair*

- 4.51 The Chair of the Audit and Risk Committee told us that at the 8 February 2013 meeting the Audit Committee knew "in broad terms" what the 2013 Investigation Report's findings were and that it was only considering the report at a high level because it had not seen the final version.<sup>110</sup> We asked the Chair of the Audit and Risk Committee how the transfer of support for the Investigating Committee to the Regulation directorate in 2011 could have addressed the concerns raised in the 2013 Investigation Report. The Chair of the Audit and Risk Committee's view was that the transfer to the Regulation directorate was relevant to the need for increasing support for the Investigating Committee because it "meant that there were secretaries assisting the Investigating Committee who would have an understanding of the Investigating Committee process". In response to seeing a draft of this report, the GDC has commented that the Chair of the Audit and Risk Committee did not regard the transfer as an answer to the concerns that had been

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<sup>110</sup> The minutes of the Committee meeting record that the Committee had considered the draft 2013 Investigation Report at its previous meeting on 5 December 2012, and that at the meeting on 8 February 2013 the Committee was provided with information about any changes that had been made subsequently prior to publication of the finalised version. We note that the findings in chapter five of the 2013 Investigation Report did not change significantly in the period between the Committee's consideration of the draft version in December 2012 and February 2013 when the final report was published.

investigated, and that the transfer was a purely operational issue. In response to seeing a draft of this report, the GDC has also commented that the purpose of the transfer of responsibility for the Investigating Committee from the Governance directorate to the Regulation directorate was because the function would be a better fit within the Regulation directorate, provided adequate separation was in place.

*The Chief Executive's views*

- 4.52 We asked the Chief Executive how the transfer of support for the Investigating Committee to the Regulation directorate in 2011 could have addressed the concerns raised in the 2013 Investigation Report. The Chief Executive told us that the transfer to the Regulation directorate was not an answer to the concerns that had been investigated and that the report to the Audit Committee on 8 February 2013 “was not intended to refer to it as a response to the [2013 Investigation Report]’s recommendations”. The Chief Executive told us that it was the increased level of support for the Investigating Committee that had been put in place at the same time as the transfer to the Regulation directorate that the report to the Committee was alluding to – i.e. the removal of caseworkers from Investigating Committee meetings, the introduction of two legally qualified Committee Secretaries in 2011, followed by an expansion of the support team and, in January 2013 the introduction of the Indicative Outcomes Guidance for the Committee and “a greater emphasis on training and feedback”.

*13 March 2013, Audit Committee meeting:*

*Documentary evidence*

- 4.53 At its meeting on 13 March 2013, prior to the (previous) Council meeting on 28 March 2013, the Audit Committee considered a paper from the former Director of Governance on the actions and learning points from or related to the 2013 Investigation Report. The report provided an update to the Committee on the GDC’s compliance with the recommendations from the 2013 Investigation Report, and noted actions which had already been taken by the GDC in respect of support for the Investigating Committee. These were as set down in the paper considered at the earlier meeting. There is no reference in the minutes to the letter sent by the former Chair of the Appointments Committee on 11 March 2013 raising concerns about some aspects of annex five to the paper presented to the Audit Committee at its meeting on 8 February 2013 (concerning the actions being taken that would address the learning points from the 2013 Investigation Report). Nor have we seen any evidence that those concerns were addressed in the version of the paper that was ultimately presented to the Council on 28 March 2013.
- 4.54 The “Rolling Action List” from that meeting included the action listed at the 5 December 2012 meeting that the (then) Chair of the Council could be asked to tell the Council at the next Council meeting (to be held on 6 December 2012) that the contents of the 2013 Investigation Report were not going to be discussed, and that the recommendations arising and risk implications would be considered at the February 2013 Council meeting, when the executive would present reports. The Rolling Action List also records that it was agreed that the Committee would report to the February 2013 Council meeting, setting out an action plan to address the recommendations in the report.

### *The views of the Audit and Risk Committee Chair*

- 4.55 We asked the Chair of the Audit and Risk Committee why it was agreed that the (then) Chair of the (previous) Council would tell the Council that the contents of the 2013 Investigation Report were not going to be discussed. The Chair of the Audit and Risk Committee told us that this was part of the approach they were taking where they intended to focus on implementing the recommendations from the 2013 Investigation Report rather than “gossip” about issues relating to the former Chair of the Council. In response to seeing a draft of this report, the GDC has said that the intention was to avoid the Council discussing the factual detail of the past history in relation to the former Chair of the Council (as this would be a distraction from the proper business of the GDC) and instead to focus on the recommendations from the 2013 Investigation Report.
- 4.56 In response to seeing a draft of this report, the GDC has also said that the Chair of the Audit and Risk Committee had read the full 2013 Investigation Report prior to the meeting on 13 March 2013, and that they would have expected all of the other Audit Committee members to have done the same, and that it was not apparent at the meeting that any of the Committee had not in fact done so.
- 4.57 The Chair of the Audit and Risk Committee told us at interview that they met with the Chief Executive and the Chair of the Appointments Committee (but not the then Chair of the Council<sup>111</sup>) about the training for Investigating Committee members on 27 March 2013. The outcome of that meeting was an agreement to hold a training day for Investigating Committee members, which the Chair of the Audit and Risk Committee would attend in order to provide reassurance to the Investigating Committee that changes would be made and Investigating Committee support improved, and in order to review whether the feedback process had improved. The Chair of the Audit and Risk Committee also told us at interview that, at the 17 July 2013 training day they told the Investigating Committee members that they could be approached if there were any continuing concerns about Investigating Committee matters. The Chair of the Audit and Risk Committee told us that they made this statement following the initial presentation by the Chief Executive and the Chair of the Audit and Risk Committee and the discussion of whether the Indicative Outcomes Guidance was fettering the Investigating Committee’s discretion (after which they both left the training day).
- 4.58 The Chair of the Audit and Risk Committee told us that the (previous) Council in March 2013 had delegated to the Audit Committee the responsibility for monitoring implementation of the recommendations from the 2013 Investigation Report, and that the Committee decided to ask the former Director of Regulation to attend all future Audit Committee meetings to provide reports about fitness to practise (and that it was through those reports that the Audit Committee became aware of the issue of the increasing caseload which was subsequently referred to at the meeting on 22 January 2014 – see paragraph 4.94).
- 4.59 In response to seeing a draft of this report, the GDC has told us that the Audit Committee properly relied upon the executive management team to consider the points in the 2013 Investigation Report and ‘bring them to’ the Audit Committee and that it considered that all the issues were in fact being addressed. The GDC has also said (in reference to the comments by two Investigating Committee

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<sup>111</sup> See paragraph 4.49 above

Chairs (at paragraph 4.60) about the accuracy of the information presented in annex five to the paper) that the Audit Committee's role is not to check on the accuracy of what it is told, unless there are grounds for suspicion. The Chair of the Audit and Risk Committee told us at interview that the Audit Committee was subsequently surprised at the time of the Penningtons report (in January 2014) to find that, despite the steps taken in response to the 2013 Investigation Report, there were continuing problems with the Investigating Committee processes of which the Audit Committee had previously been unaware.

#### *The Investigating Committee Chairs' views*

- 4.60 The two Investigating Committee Chairs whom we interviewed in 2014 told us that their understanding was that some of the items listed in annex five to the report to the Audit Committee (as described in paragraph 4.44 above) as being enhancements that had been made to the support for the Investigating Committee following a review of the processes as recommended in the 2013 Investigation Report had not happened in reality. For example, they both said that although the document states that feedback gathered by the Investigating Committee Chair after each Investigating Committee meeting 'allows issues to be identified and fed into [the members'] training and development' that was not happening as at February 2013 – and (as noted at paragraph 3.253 above) one of them said to us that there had "never been any link between performance in the Investigating Committee and training. And that is why weaknesses have not been addressed". That Investigating Committee Chair also told us that they had stopped compiling the feedback forms after each meeting as "nobody took any notice of the feedback".
- 4.61 The GDC, in response to seeing a draft of this report, objected to any reliance being placed upon those statements to evidence that some of the items listed had not in fact happened, and has commented that it is not surprising that Investigating Committee Chairs would not have complete visibility of what happened in practice. While we recognise that the Investigating Committee Chairs would not necessarily have had complete visibility of activities that involved only the Investigating Committee staff, rather than also involving Investigating Committee members directly, their evidence described above about the absence of an effective feedback process is entirely consistent with the other evidence referred to in paragraphs (3.228-3.289) of this report.
- 4.62 We also note that the former Chair of the Appointments Committee wrote to the Chair of the Audit and Risk Committee on 11 March 2013 setting out the Appointments Committee's concerns about the accuracy of some of the content of annex five to the report that had been presented to the Audit Committee on 8 February 2013. It does not appear that the concerns raised by the Appointments Committee were taken into account in preparing the report that was then presented to the Council by the Chair of the Audit and Risk Committee (having been drafted by the former Director of Governance) on 28 March 2013.
- 4.63 We also note that in response to seeing a draft of this report the GDC has not provided evidence to demonstrate that each of the other actions/processes listed in annex five had in fact taken place or been implemented effectively as described.



## Our view

- 4.64 The Audit Committee had been provided with a copy of the draft of the 2013 Investigation Report in December 2012, and was informed about the changes that had been made subsequently. The paper that the Audit Committee considered at its meeting on 8 February 2013 contained virtually no information about the detail of the findings of the 2013 Investigation Report relating to the operation of the GDC's Investigating Committee process. In our view, given the length of the 2013 Investigation Report, it would have been helpful for the Audit Committee to be presented by the GDC executive with a summary of those concerns and findings (or to have made a request for such a summary if one was not offered by the GDC) rather than simply being asked to consider recommendations and learning points. Further, the Committee was referred in annex two of the report to a number of steps that had been taken which do not appear, without further explanation, to address all of the concerns that were investigated. The statement contained in annex five that, 'The processes and support for the Investigating Committee have been reviewed and enhanced' was misleading (whether intentionally or not) in that it was made in reference to a recommendation made in the 2013 Investigation Report (that recommendation being for the GDC to review the processes and support in place for the Investigating Committee, including the arrangements for gathering and monitoring feedback) – and in fact, as has become clear during our investigation, no such review had taken place subsequent to that Report's publication.
- 4.65 We were surprised that the minutes do not record any discussion by the Audit Committee as to how the actions listed in annex two had addressed/would address the weaknesses in the Investigating Committee support structure which were acknowledged by the executive management team to be present. It is unclear to us how some of the steps taken demonstrated any improvement in the quality of the Investigating Committee support or processes.
- 4.66 We note an additional concern that the evidence of the two Investigating Committee Chairs whom we spoke to during the course of this investigation indicated that not all of the activities listed in annex two actually happened in practice, as set out at paragraph 4.60. This suggests that the Audit Committee was provided with factually incorrect information. Similarly we have seen a letter from the former Chair of the Appointments Committee to the Chair of the Audit Committee sent on 11 March 2013 in which they raised concerns about the accuracy of some aspects of this document (see paragraph 3.257 for details). From our review of the report that was ultimately presented to the Council on 28 March 2013, it appears that no changes were made to the document that had been presented to the Audit Committee on 8 February 2013 to reflect the comments about its accuracy that the former Chair of the Appointments Committee had made on 11 March 2013. It is a matter of concern that neither the Audit Committee nor the executive ensured that the issues around the accuracy of some of the information were addressed before that information was then presented to the Council. In response to this report the GDC has informed us that the Chair of the Audit and Risk Committee responded to that letter on 13 March 2013.
- 4.67 The Audit Committee met twice subsequently to this meeting before the whistleblowing disclosure was made (which the GDC told us then superseded the 'foundation of the primary concerns'): on 15 May 2013 and on 24 July 2013. We



have not seen the minutes of the 15 May 2013 meeting and therefore do not know whether there was any further discussion by the Committee of the 2013 Investigation Report or the steps taken to implement the recommendations at that meeting. The section of the minutes of the meeting on 24 July 2013 that we have seen only records, in relation to the 2013 Investigation Report, a report by the former Director of Governance that an amendment remained to be made to the disciplinary procedure to make it clear that investigation outcomes were to be reported to the Audit Committee, and stated that this change would be made in the governance manual. There is no indication of any further discussion of the 2013 Investigation Report or implementation of actions as a result of it.

### *Scrutiny by the Council*

#### *14 February 2013, Council meeting:*

- 4.68 At its meeting on 14 February 2013 the GDC's (previous) Council received a verbal update from the Chair of the Audit and Risk Committee about the publication of the 2013 Investigation Report, as well as information that the Audit Committee would present a paper about the relevant actions and learning points at the Council meeting on 28 March 2013.
- 4.69 The closed minutes of the Council meeting record that Council members raised a number of questions and comments, and that 'some concern was expressed that the Council had not had a full opportunity to discuss the substance of [the 2013 Investigation Report] and what had actually happened' and that 'It was recognised that it was important for the Council to reflect on what had happened but that the focus should be on learning the lessons, implementing the recommendations and moving on'. As noted above, the Chair of the Audit and Risk Committee told us that this was a reference to Council members feeling that they had not had sufficient time to digest the section of the 2013 Investigation Report that concerned the former Chair of the Council, and being discouraged by the then current Chair of the Council from attempting to do so – i.e. the Chair of the Audit and Risk Committee's view is that the Council members felt that they had a proper/adequate opportunity to discuss the fitness to practise issues arising from the 2013 Investigation Report.
- 4.70 The minutes also record the Chief Executive stating that '...the GDC had, independently of the PSA, identified many of the areas of necessary improvement and had pressed on with implementing these. However a major constraint on the GDC's ability to be a modern and efficient regulator lay in the current statutory framework'.
- 4.71 In response to seeing a draft of this report the GDC has told us that, had it been the case that the (previous) Council members had wanted to discuss the substance of the 2013 Investigation Report further, despite the then Chair's statement that the Council should not do so and should instead focus on the recommendations, the Council would have had such a discussion because it was 'not subservient'.

#### *28 March 2013, Council meeting:*

##### *Documentary evidence*

- 4.72 At the Council meeting on 28 March 2013 the (previous) Council received a paper prepared by the former Director of Governance (in line with the recommendations

made by the Audit Committee) reporting on ‘the actions and learning points arising from or related to the PSA inquiry’. Council members were also provided by the GDC with copies of the 2013 Investigation Report.

- 4.73 As with the paper presented to the Audit Committee on 8 February 2013, the body of the paper presented at the 28 March 2013 Council meeting contained no reference to the 2013 Investigation Report’s findings in respect of the GDC’s Investigating Committee processes. It instead focussed solely upon the findings that related to the allegations made by the former Chair of the GDC, the concerns about the GDC’s governance, and the specific recommendations made in the 2013 Investigation Report (either addressed to the GDC or, more generally, to all of the health and care regulators that the Authority oversees). The GDC has said in response to seeing a draft of this report that that paper summarised ‘the most salient aspects’ of the 2013 Investigation Report.
- 4.74 Annex one to the paper was in the form of a table setting out the ‘PSA recommendations to the health professions regulators’ which included the specific recommendation made in the 2013 Investigation Report that related to the Investigating Committee processes, which was to ‘review the processes and support that they [i.e. the regulator] have in place for their Investigating Committees, including the arrangements for gathering and monitoring feedback received’. Annex one recorded that the related issues were ‘All IC members may not be aware of appropriate boundaries in respect of fitness to practise matters (Training delivered by Appointments Committee – 2011 and to be ongoing<sup>112</sup>)’ and ‘Inadequacies of the statutory system for handling the early stages of FTP complaints’. It contained no reference to any of the behaviour by GDC staff that had been highlighted in chapter 5 of the 2013 Investigation Report. Annex one also recorded that the ‘GDC current position’ was that, ‘The processes and support for the Investigating Committee have been reviewed and enhanced’, specifically referring to ‘IC support transferred to Regulation (2011); New support structure put in place (2011); New guidance on process and outcomes issued (2011 and 2012)’. It cross-referred readers to annex three, which set out a description of the activities of the ‘IC staff support team’ (examined further below).
- 4.75 Annex one also stated that the actions to be completed in respect of this recommendation concerned: providing better visibility of risks and assurances about mitigation to the Appointments Committee<sup>113</sup>; and seeking legislative change ‘to introduce greater flexibility in the management of the early stages of the FTP process, thus reducing reliance on ICs’.
- 4.76 Annex three to the paper set out a number of actions referred to as being taken by the GDC’s Investigating Committee support staff in relation to: gathering feedback and using it in the training and development of Investigating Committee members; liaison internally between different GDC staff teams to deal with feedback about Investigating Committee decisions or aspects of case-handing and the use of an Investigating Committee Risk Register. As noted at paragraph 4.60 the two Investigating Committee Chairs we spoke to told us that they were not aware that

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<sup>112</sup> The former Chair of the Appointments Committee has commented that it was not the Appointments Committee’s role to deliver training, and said that this reference appears to have been made without the knowledge of the Appointments Committee.

<sup>113</sup> The former Chair of the Appointments Committee has told us that this reference was not, to their knowledge, shared with the Appointments Committee, and that the Appointments Committee was itself seeking greater visibility of risks, rather than doing so at the GDC’s instigation.

several of these activities actually happened in practice. As detailed at paragraph 3.257, the Appointments Committee had raised concerns about the accuracy of some aspects of the contents of this document by means of a letter to the Chair of the Audit Committee on 11 March 2013. It appears that those concerns did not result in any changes to the relevant text which was then presented to the Council on 28 March 2013.

4.77 At that meeting the (previous) Council also considered and approved a request for additional resources within the Investigating Committee support team<sup>114</sup> (as well as within other staff teams handling fitness to practise cases). The paper stated that the number of scheduled Investigating Committee meetings needed to increase in order to address a backlog of cases, as well as an ongoing rise in the number of cases requiring consideration by the Committee. There was no reference to any other reason for requesting additional resources. In response to seeing a draft of this report the GDC has said that ‘it is self-evident that the provision of additional resources is intended to ensure the quality of decisions’ and that it is erroneous to suggest that additional resources were only requested in order to ensure caseload through-put.

4.78 The minutes of the (previous) Council meeting on 28 March 2013 record that the Chair of the Audit and Risk Committee ‘advised that the recommendations from the PSA’s report had been captured and actioned. The Audit Committee provided assurance that all of the recommendations had been reviewed and an action plan was in place, with many of the actions completed or in train’. The GDC has told us in response to seeing a draft of this report that the message that the Chair of the Audit and Risk Committee communicated to the (previous) Council was that the executive had provided such an assurance, not that the assurance came from the Audit Committee itself, and that that would have been understood by the Council members at the time.

*Fitness to Practise Review Board reports to the (previous) Council*

4.79 The GDC established a Fitness to Practise Review Board in April 2011, chaired by the former Director of Regulation, to monitor the delivery of a programme of planned improvement work within fitness to practise. Phase one of the work of the Board was completed in May 2012 (as reported to the previous Council in September 2012) and phase two of the project was initiated in May 2012 and completed in August 2013 (as reported to the previous Council in September 2013).<sup>115</sup> The reports to the (previous) Council about each phase do not contain any reference to any work to address the eleven specific concerns identified in the 2013 Investigation Report (which was published in February 2013, i.e. mid-way through phase two). The project appears to have been focused on implementing procedural changes in order to address the ongoing rise in the number of fitness to practise complaints received, and in order to achieve improvements suggested in external audit reports, as well as on introducing legislative changes to the GDC’s fitness to practise framework. The report on the closure of phase one contains reference to the recruitment of ‘two legally qualified solicitors’ to provide support to the Investigating Committee and new guidance for the Investigating

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<sup>114</sup> The additional posts identified were: two legally qualified Investigating Committee Secretaries, two Committee Co-ordinators and three Senior Committee Co-ordinators.

<sup>115</sup> <http://www.gdc-uk.org/Aboutus/TheCouncil/Meetings%202012/Item%2010%20Update%20on%20FtP%20Changes.pdf>

Committee, but does not specifically refer to any other work relating to the interaction between the Investigating Committee and the staff within the support team. In response to seeing a draft of this report the GDC has said that it believed it had introduced improvement measures specifically designed to address the issues referred to in the 2013 Investigation Report, and that those issues were in fact being addressed.

### Our view

- 4.80 There is evidence in the minutes of the (previous) Council meeting of 14 February 2013 that at least some (previous) Council members had concerns about the extent of the opportunity they had been provided with to discuss the contents of the 2013 Investigation Report. As we have not interviewed all those individuals we are not in a position to comment on whether the Chair of the Audit and Risk Committee's assessment of the general perception of the Council members at that meeting (see paragraph 4.69) is correct. We note that as the 2013 Investigation Report had only been published three days before that meeting took place, it is possible that at least some of them had not had an opportunity to read the published Report in full as at the date of that meeting (many of them had however had the opportunity to read it in draft previously, as set out below).
- 4.81 The papers that were provided to the (previous) Council at its subsequent meeting on 28 March 2013 did not contain any summary or information about the findings made in the 2013 Investigation Report that related to the eleven concerns about the operation of the Investigating Committee process. Instead they focused the (previous) Council's attention on other aspects of the 2013 Investigation Report, and consideration of the specific recommendations made in the 2013 Investigation Report.
- 4.82 Many of the then Council members not only had access to the full 2013 Investigation Report through the GDC once it was published (six weeks before the (previous) Council meeting on 28 March 2013) but those who had contributed to the investigation had also already received copies of the draft version in December 2012 in advance of publication. They therefore were in a position to challenge the executive's presentation of the 2013 Investigation Report at the March 2013 meeting, had they felt it appropriate to do so.<sup>116</sup> However what the (previous) Council members were not in a position to do was to challenge the accuracy of some of the information that was presented by the executive to describe the activities that were already taking place and which were relevant to the matters examined in the 2013 Investigation Report. It is therefore of some concern that, despite being alerted on 11 March 2013 to alleged inaccuracies in the description of some of those activities within the report that had been presented to the Audit Committee on 8 February 2013 (by means of a letter from the Chair of the Appointments Committee to the Chair of the Audit and Risk Committee) the same description was presented to the Council on 28 March 2013.

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<sup>116</sup> As the GDC has commented to us in response to seeing a draft of this report, several of the (previous) Council members had also been interviewed as part of the investigation, which would have given them an additional degree of familiarity with some aspects of the 2013 Investigation Report. However no (previous) Council members were asked at interview about the issues examined in chapter five of the 2013 Investigation Report (relating to the support and processes for the Investigating Committee) and it is therefore unlikely that their previous involvement had led to any additional familiarity with those issues.

- 4.83 We consider that there is no evidence from the paper presented to the (previous) Council and the minutes that the (previous) Council applied an effective level of scrutiny to the 2013 Investigation Report at its meeting on 28 March 2013. We consider it likely that at that meeting the (previous) Council's level of scrutiny of the 2013 Investigation Report was influenced by the limited extent of the analysis presented to it by the executive, as well as by the statements made by the Chair of the Audit and Risk Committee and the then Chair of the Council to the effect that the (previous) Council should focus on the actions being taken in response to the recommendations. We are unable to comment on whether (previous) Council members understood that the assurance provided by the Chair of the Audit and Risk Committee came from the executive management team rather than from the Audit Committee, as the GDC has told us in response to seeing a draft of this report (see paragraph 4.78). In response to our conclusions about this, the Chief Executive has told us that it was natural for the (previous) Council at this meeting to focus on the future, having gone through two years of investigation, and the reports made to the (previous) Council reflected that. We consider that while it was appropriate for the (previous) Council to focus on the improvements being introduced, encouraging it to do so in isolation from a full understanding of the 2013 Investigation Report's findings meant that any Council member who had not read the 2013 Investigation Report in full for themselves would have had insufficient understanding of the facts to allow them to identify and monitor future risks. Further, it appears that there may have been inaccuracies in some of the information presented to the Council about the activities that were already being undertaken, despite the fact that those inaccuracies had already been highlighted to the Chair of the Audit and Risk Committee. Such inaccuracies may have impacted on the (previous) Council's ability to evaluate the ongoing risks. We do not accept the GDC's assertion that the reference to the requirement for additional resources that was made at the 28 March 2013 Council meeting related to improvement of the quality of decisions made, as well as reducing a backlog that had developed/catering for increasing case numbers. This is not evident from the minutes of that meeting and there is no obvious link between improving the quality of decision making and the measures being taken to deal with the increased quantity of cases being considered. We also note that there is no evidence that the (previous) Council considered the GDC's response to the 2013 Investigation Report again after the 28 March 2013 meeting, nor that the current Council (once it came into office) reviewed the progress that had been made in implementing the outstanding 'actions and learning arising from or related to the [2013 Investigation Report]' that the previous Council had been assured in March 2013 were 'in train'.
- 4.84 In relation to our comment that the (previous) Council did not consider the GDC's response to the 2013 Investigation Report further after the 28 March 2013 meeting, the GDC has told us that the Chief Executive notes that there was a need for the Council to 'consider further related challenging priorities... concerning the IC, namely the pressing issue of adequate resources to ensure it managed a vastly expanded caseload effectively without which the system would not function at all'. We do not consider that to be adequate reason for the failure to follow up on progress.
- 4.85 In response to seeing a draft of this report, the GDC has said that the suggestion that the (previous) Council members were "utterly reliant" on the executive to



inform them about the relevant aspects of the 2013 Investigation Report<sup>117</sup> is ‘divorced from reality’, as is the conclusion that the (previous) Council gave the report inadequate scrutiny at this meeting. The GDC’s comments on this have not led us to change our view as set out in paragraph 4.83 above about the apparent inadequacy of the Council’s scrutiny and the likelihood that this was influenced by the approach taken by the executive and the Audit Committee.

#### **(b) The whistleblowing disclosure in 2013 and the findings from the external investigation by Penningtons following that disclosure**

- 4.86 In July 2013, a whistleblower made a formal whistleblowing disclosure. The GDC commissioned an external investigation by a law firm, Penningtons Manches LLP, into the whistleblower’s allegations. The report that was produced in December 2013 following that external investigation highlighted a number of serious deficiencies in the operation of the Investigating Committee processes, including those identified by the whistleblower. The findings made are detailed above at paragraphs 3.105-3.203.

#### **Scrutiny by the Audit and Risk Committee (and the previous Audit Committee)**

##### 4 September 2013, Audit Committee:

- 4.87 The Chair of the Audit and Risk Committee was aware of the background to the commissioning of the Penningtons report at the time the arrangements were made, because they were one of those contacted by the whistleblower at the time of their disclosure, and they were then party to discussions with the Chief Executive about those matters. The full Audit Committee was formally informed about the whistleblower’s disclosure and the arrangements that had been put in place to investigate the concerns raised at its meeting on 4 September 2013 (the minutes of that meeting also record that the current Chair of the Council had been informed about the matter).

##### 21 November 2013, Audit and Risk Committee meeting:

##### Documentary evidence

- 4.88 The Chief Executive’s report to the Audit and Risk Committee on 21 November 2013 stated that a disclosure had been made under the whistleblowing policy which ‘related to procedures applied to the IC and the way the IC is advised and managed by the relevant staff team’. It went on to say that the Chief Executive had decided that, given the nature of the disclosure and ‘the fact that it raised concerns that staff may be overstepping the line to the detriment of good decision-making’ the matter should be investigated externally. It set out the terms of reference for the Penningtons investigation, and reported on progress since initiation. This included the receipt of a complaint from a staff member about the whistleblower (which had been referred to the Appointments Committee) and the whistleblower’s subsequent complaint to the Chair of the Council about aspects of the handling of that complaint about them. The report went on to say that, ‘The complaint has been resolved’. At that time the whistleblower’s complaint to the Chair of the Council had not been resolved, as this wording might have been

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<sup>117</sup> Neither in this report nor in previous drafts have we said that the previous Council was “utterly reliant” on the executive.



understood to mean (in fact its handling had been delayed pending the conclusion of the investigation by Penningtons). The only complaint that had been resolved was the staff member's complaint about the whistleblower. The report stated that the Council was to be informed about the whistleblowing disclosure and the investigation at its meeting in December 2013. It invited the Audit and Risk Committee to consider scheduling an additional meeting at which it could consider the Penningtons report, once received.

- 4.89 The minutes of the meeting record the Chief Executive as stating that, pending receipt of the Penningtons report '...work with the IC was continuing as usual, although the investigation inevitably created stresses for those involved. This was being closely monitored'.
- 4.90 The Audit and Risk Committee agreed to meet to consider the Penningtons report, once it had been finalised. The Committee also agreed to review the GDC's whistleblowing policy in March 2014, in light of concerns about whether or not it was sufficiently clear in terms of identifying who a whistleblowing disclosure should be made to.

22 January 2014, Audit and Risk Committee meeting:

*Documentary evidence*

- 4.91 The Audit and Risk Committee held an extraordinary meeting on 22 January 2014 specifically to consider the Penningtons reports<sup>118</sup> (which had been received on 23 December 2013) as well as the Authority's recently-published 2013 audit report on the initial stages of the GDC's fitness to practise process.
- 4.92 The minutes of the meeting record that the Chair of the Audit and Risk Committee highlighted 'the concerns felt by the Committee that in each case issues were being identified which had not been reported by the GDC's current audit and reporting mechanisms. The work of the Committee and staff over the next few months would be to rectify the issues identified and also to clarify why the issues had been missed and improve our controls and reporting'.<sup>119</sup>
- 4.93 At that meeting the Audit and Risk Committee considered a paper titled 'Report into concerns raised about the Investigating Committee process' which had been written by the Chief Executive. We understand from the Chief Executive that the report would have been compiled in collaboration with others, including the Head of Corporate Legal, the former Director of Governance and possibly the former Director of Regulation, and that its authors assumed that the Audit and Risk Committee members would have read the Penningtons reports and Executive Summary in full. The stated purpose of the paper was to present the plan for implementation of Penningtons' recommendations, and to assess the risks for the GDC arising from Penningtons' investigation findings. This paper attached the Penningtons reports and Executive Summary and set out:
- The background to the investigation conducted by Penningtons.

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<sup>118</sup> Penningtons had provided two reports – one report that addressed the overall issues, and the other which examined the events that had occurred during and shortly after a particular Investigating Committee meeting on 18 September 2013. It is the first report that is referred to as "the Penningtons report" throughout.

<sup>119</sup> In response to seeing a draft of this report, the GDC has told us that this concern was not an implied criticism of the executive, but demonstrated the system working and was an example of the Audit Committee carrying out its role. It has also told us that the real point is that no one at the GDC had been aware of the objectionable practices in operation, prior to receipt of the Penningtons report.

- A summary of Penningtons' findings, as well as the GDC's analysis that because Penningtons had not made a finding that the Investigating Committee's independence had in fact been compromised, it was not necessary to review all the cases considered by the Investigating Committee during the relevant period.
- The associated risks (including the risk of reputational damage to the GDC were the two Penningtons reports to go into the public domain, as well as the risk of the whistleblower being dissatisfied with the response to their complaints of detrimental treatment and the risks associated with the Authority potentially taking action.
- The action plan for implementation of the recommendations made in the Penningtons report (which the Audit and Risk Committee approved).

- 4.94 The minutes of the 22 January 2014 Audit and Risk Committee meeting record the Committee's discussion that the '[Audit and Risk Committee] had been aware of the increasing volume of the IC caseload but was not previously aware of the other IC issues set out in the [Penningtons] report. The [Audit and Risk Committee] was concerned (a) that the report stated that in a number of respects there was potential for the independence of the IC to be compromised and (b) that it had taken a whistleblower to point this out'.
- 4.95 The minutes record reference to the changes that had been introduced in the past to improve the consistency of the Investigating Committee's decision-making and an acknowledgment by the Chief Executive that 'the investigation into the whistleblowing matter had shown examples of working practice which overstepped the boundaries and thereby threatened the integrity and independence of the IC process'. It was also stated that 'the GDC could take steps to improve issues such as the attitudes of IC staff and IC members' and that '...some of the IC members had worked with the previous system when the caseload was lower and there was less intervention by IC staff. That situation had changed with the developing role of the IC staff and the introduction of indicative sanctions guidance. Some IC members found that change difficult and some resentment had contributed to tensions with IC staff'. The Audit and Risk Committee was told, in response to a question about the recruitment and skills of the Investigating Committee Secretaries that 'Council had approved the appointment of legally qualified IC secretaries. Their role was difficult, requiring subtlety and diplomacy to balance their responsibilities with those of IC members. There was a higher than average staff turnover rate which reduced the level of experienced IC staff'.
- 4.96 The minutes also record an acknowledgement that there was no transparent route that Investigating Committee members could use to raise issues – while they could report issues to the Appointments Committee<sup>120</sup>, to the former Head of the Investigating Committee, to the former Director of Regulation, or the Chief Executive, none of the issues in the whistleblowing disclosure had in fact been reported using any of these routes.<sup>121</sup>

<sup>120</sup> The Appointments Committee's remit is set out at paragraphs 4.6 and 4.7. Members of the Investigating Committee had raised informally with the former Chair of the Appointments Committee at the training day in July 2013 concerns about the manner of intervention by some Investigating Committee staff – which an Investigating Committee Chair had communicated to the former Director of Regulation.

<sup>121</sup> In fact the whistleblower did initially raise their concerns with the former Chair of the Appointments Committee as well as with the Chair of the Audit and Risk Committee. The whistleblower only invoked the whistleblowing procedure a few days later, once they had obtained additional evidence relevant to their

- 4.97 The Audit and Risk Committee agreed that the roles and responsibilities of all those involved in the Investigating Committee process should be defined, and training provided to both Investigating Committee staff and members, in order to ensure that everyone involved should have a shared understanding of their own and others' roles and responsibilities. The Audit and Risk Committee stated that the Appointments Committee had a significant role to play with the executive in this regard, and to help Investigating Committee members to develop trust and confidence in the Investigating Committee staff and the GDC.
- 4.98 The Audit and Risk Committee also agreed that the process for Investigating Committee members to report concerns should be clarified and communicated to them<sup>122</sup>, and that the Council should be informed of the 'potential risks of this stage of the IC process, as highlighted by the report and be made aware of its difficulties and the need for the guidance approved by the Council to be used appropriately by IC members and IC staff. The Council also needed to be aware that some of the problems in the IC process were clearly linked to the increased volume of the caseload'.
- 4.99 The Audit and Risk Committee also agreed that the Council should 'be advised to make clear that the IC and its members are accountable to the GDC ...' and ... 'recommended that the Council now consider making a clear statement of what it required the IC to do and the standards to be achieved' and added to the action plan to the effect that Council's statement about this would form 'an important part of the action plan to address the report's recommendations'. The Committee approved the executive's action plan and made some further additions to it, including: a greater degree of involvement in the actions/processes of the Investigating Committee and the Appointments Committee<sup>123</sup>; a proposal that a Council member should attend an Investigating Committee members' training day and discuss the action plan; and that the regularisation of the process for Investigating Committee members' to report concerns should be done quickly and discussed with the Investigating Committee members.
- 4.100 Finally, the Audit and Risk Committee agreed that it should receive a further report 'on what improvements were proposed to make sure that these types of risks were identified by staff and escalated to the appropriate level'.
- 4.101 The Audit and Risk Committee agreed that the paper presented to it at this meeting should form the basis of a paper to be presented to the Council at its next meeting, together with the Committee's minuted recommendations and confirmation of implementation of the executive's action plan, as approved/amended by the Committee. The Audit and Risk Committee also agreed that the Council members should be sent the Executive Summary of the Penningtons report and be given access to the full report if they wished.

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concerns. This reference to none of the various routes being used by the whistleblower therefore appears to be incorrect.

<sup>122</sup> The Chair of the Audit and Risk Committee told us at interview that this had been achieved by including in the new whistleblowing policy encouragement to raise issues through management initially, and by clarifying the processes for raising concerns in the training provided to new Investigating Committee members.

<sup>123</sup> The Chair of the Audit and Risk Committee told us that this was achieved by sharing the draft whistleblowing policy (as well as other new guidance and policy documents) with the Investigating Committee and Appointments Committee.

### *The Chair of the Audit and Risk Committee's view*

- 4.102 We asked the Chair of the Audit and Risk Committee why the volume of cases and the GDC's legislation were relevant to the findings of Penningtons' investigation. The Chair of the Audit and Risk Committee said that neither was an excuse for what had happened, but it was part of the ongoing narrative in the GDC about the state of its fitness to practise function. The Chair of the Audit and Risk Committee said to us that the executive's "first line of defence" was the pressure of the increasing caseload and the problem of introducing new procedures to "a difficult set of people" (the Investigating Committee members). The Chair of the Audit and Risk Committee told us that the link the executive made between caseload pressures and the objectionable practices highlighted in the Penningtons report was that in a steady state organisation a manager has time to manage and set in place improvements and to carry out monitoring of this work as well as regular reviews of progress. The Chair of the Audit and Risk Committee told us that the former Director of Regulation had "made the case that where a manager is swamped or overworked, they do not have time to do things properly or to check it is being done properly by others". The Chair of the Audit and Risk Committee also said that the Committee had inquired as to why they had not known that the objectionable practices were in use and was told that it was because the "people on the ground had not understood and had failed to manage the new processes".
- 4.103 We asked the Chair of the Audit and Risk Committee whether the minutes reflected the full discussion that took place at this meeting. The Chair of the Audit and Risk Committee told us that they did not, and that the Committee also discussed the behaviour of GDC staff. The Chair of the Audit and Risk Committee said that the premise was that the Chief Executive had accepted the Penningtons report and all its recommendations, therefore there was no doubt within the Committee that the issues with staff were being addressed. The Chair of the Audit and Risk Committee said that this was a very productive meeting that "got to the bottom of issues" and that they were annoyed that the approved minutes did not reflect this.
- 4.104 In response to seeing a draft of this report the GDC told us of several reasons why the Audit and Risk Committee minutes did not reflect the full discussion about staff behaviours that took place at the meeting. First, the GDC said that the Audit and Risk Committee would always avoid discussion of staff issues being minuted, in order to avoid creating employment law problems. Second, the GDC told us that the Audit and Risk Committee would not hold detailed discussions about operational staff management issues, or 'blame' individual members of staff. Finally, the GDC told us that the Audit and Risk Committee properly looked to the Chief Executive to put matters right, rather than engaging in detailed discussions about staff matters. The GDC also told us that the Audit and Risk Committee members had carefully considered the full Penningtons reports.

### *The Chief Executive's view*

- 4.105 We asked the Chief Executive why the volume of cases and the GDC's legislation were relevant to the findings of the Penningtons investigation. The Chief Executive said that the caseload was relevant because the whole team was under pressure and that people in that situation were more likely to make mistakes and to step outside of processes if they were not well managed or supported.

However, the Chief Executive said that this was not an excuse for the misapplication of process. In terms of the legislation, the Chief Executive said it was reiterated to the Committee that the GDC wanted to move away from reliance on the Investigating Committee system. We asked the Chief Executive whether the minutes reflected the full discussion that took place at this meeting. The Chief Executive told us that they did not, and that the Committee had also discussed the behaviour of GDC staff.<sup>124</sup>

#### *The former Director of Regulation's views*

- 4.106 We asked the former Director of Regulation why the volume of cases and the GDC's legislation were relevant to the findings of the Penningtons investigation. The former Director of Regulation said that they were relevant, as they meant an increase in staff, which meant that there were inexperienced staff working for the Investigating Committee and this, alongside an imperative from within the executive to get the job done, meant that individuals' decision-making was coloured. The former Director of Regulation said that the legislation was relevant because it was outmoded and slowed the process down.
- 4.107 We asked the former Director of Regulation if, at this meeting, the Audit and Risk Committee had discussed the Investigating Committee staff behaviours highlighted in the Penningtons reports. The former Director of Regulation said that the Chair of the Audit and Risk Committee had 'grilled [them]' about this, and what they were doing to ensure that staff would behave appropriately in the future.

#### *The Head of Corporate Legal's views*

- 4.108 We asked the Head of Corporate Legal why the volume of cases and the GDC's legislation were relevant to the findings of the Penningtons investigation. The Head of Corporate Legal said that the relevance of the caseload was that it increased the pressure on staff, and such pressure can affect their behaviour. In terms of the reference to outdated legislation, the Head of Corporate Legal explained that this was relevant because the GDC had been working to change how this part of the process functioned for some time.

#### *5 March 2014, Audit and Risk Committee meeting:*

- 4.109 The Audit and Risk Committee received a further update about progress in implementing the action plan at its meeting on 5 March 2014. The Audit and Risk Committee was told that the bulk of the guidance that was to be drafted had been sent to the Investigating Committee members for comment, and that work on the revisions to the Investigating Committee Guidance Manual and the Indicative Outcomes Guidance was due to begin. Training (from an external legal firm) for the Investigating Committee Secretaries had been scheduled for early March, to be followed by joint training for Investigating Committee members and Secretaries. The Audit and Risk Committee was also informed that a pilot of using dual Investigating Committee Secretaries at each Investigating Committee meeting (in order to minimise any wastage of time while full Committee decision documents were drafted during meetings) was due to commence, and was

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<sup>124</sup> In response to seeing a draft of this report the GDC has said that it is inherent in the nature of minutes that they do not reflect the full discussion that takes place at a meeting.



informed about the steps the GDC had taken to inform the Authority of the investigation outcome and plans for implementing its recommendations.<sup>125</sup>

- 4.110 The minutes also record that the Audit and Risk Committee considered the steps that had been taken to prevent a recurrence of the 'event' reported by the whistleblower. In that context, the minutes record that the Audit and Risk Committee was told by the former Director of Regulation that 'some pre-drafting was considered acceptable practice and was used by most regulators' (although the Chief Executive clarified that any pre-drafting had been suspended following receipt of the Penningtons report, until the recommended training had been undertaken) and that the GDC had an established protocol concerning post-drafting amendments, which the Penningtons investigation had discovered had been departed from in some cases.
- 4.111 The minutes record that while the Penningtons report had investigated staff actions, 'it did not examine the actions of IC members including IC Chairs' although it recommended that the roles and responsibilities of everyone involved in the process should be clarified and training provided for both staff and Investigating Committee members.
- 4.112 The minutes record the Audit and Risk Committee highlighting the need for a clear policy and route for raising concerns, including concerns that are not serious enough to fall within the whistleblowing policy.
- [14 May 2014, Audit and Risk Committee meeting:](#)
- 4.113 A further update report was provided for the Audit and Risk Committee meeting on 14 May 2014. This report recorded that the training for Investigating Committee Secretaries and members had been completed; that the work on the revised Investigating Committee Guidance Manual and Indicative Outcomes Guidance was due to be completed in July 2014, and it proposed that the use of dual Investigating Committee Secretaries should be adopted as a permanent measure. That report also noted that the Authority had commenced an investigation, following the whistleblower's raising of concerns with both the Authority and the Health Select Committee that they had suffered detriment as a result of their disclosure.
- 4.114 The minutes of the meeting record that the Audit and Risk Committee also received action plans to address recommendations made in the Authority's initial stages audit report and draft performance review report, and that the Chief Executive explained that the draft performance review report had assessed the GDC as meeting three out of the ten fitness to practise standards. As a consequence, the Audit and Risk Committee questioned the executive management team about the controls and processes in place and how compliance was measured, and the Chief Executive said she would discuss with the internal auditors the importance of forensic internal audits to provide independent assurance to the Committee. The Audit and Risk Committee decided to meet with the individual directors to discuss compliance measurement in their directorates, and noted advice from the former Director of Governance about the need to avoid becoming inadvertently involved in operational matters.

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<sup>125</sup> In response to seeing a draft of this report, the GDC has told us that the Chair of the Audit and Risk Committee noted that these issues would appear in the Audit and Risk Committee's strategic risk register. We can see no reference to that in the redacted minutes we have been provided with.



2 July 2014, Audit and Risk Committee meeting:

4.115 At its meeting on 2 July 2014 the Audit and Risk Committee received a further update report on implementation of the action plan arising from the recommendations made in the Penningtons report. The report to the Audit and Risk Committee recorded that the work to implement the recommendations was largely complete. The finalised versions of the Investigating Committee Guidance Manual and Indicative Outcomes Guidance were to be prepared and considered by the Council later that month, following a period of internal consultation. The Audit and Risk Committee asked about lessons that had been learned from the Penningtons investigation and from implementation of the recommendations arising out of the investigation, and was told by the Chief Executive that feedback from each Investigating Committee meeting was being carefully considered and that staff management was improving. The report recorded that further training for Investigating Committee members and staff had been conducted, that standard operating procedures were under review, and that preparation of a new induction programme for Investigating Committee staff was in progress to ensure that new staff were provided with appropriate training.

**Our view**

4.116 We have significant concerns about the summary of the information presented to the Audit and Risk Committee on 22 January 2014. These concerns also extend to the level of scrutiny undertaken by the Audit and Risk Committee following its consideration of that paper and its attachments (which included the Penningtons reports and Executive Summary).

4.117 The specific concerns we identified with the content of the paper on 22 January 2014 are set out below.

4.118 The paper included a summary of the Penningtons report's recommendations for change across each of the aspects of the Investigating Committee Secretaries' activities that Penningtons found to be problematic. What the paper did not do was:

- Acknowledge that nearly all of the practices which were found to be objectionable were occurring as a matter of routine, rather than by virtue of an error/misunderstanding by individual staff members.
- Make it clear that some of the practices had been designed and /or endorsed by senior staff and were set out in detail in the Bulletin which was published in August 2013.
- Address the impact of the training and supervision provided to the relevant staff members on their adoption of these practices.

4.119 The paper's limited description of the objectionable practices is not helpful in terms of the Audit and Risk Committee's ability to assess their potential seriousness. For example, the paper does not detail the nature of the Investigating Committee Secretaries' interjections during Committee meetings, or therefore how those interjections were or might be perceived by the Investigating Committee members. In our view the paper in effect (regardless of whether that effect was intended) downgrades Penningtons' analysis of the level of seriousness of several of the practices found to be occurring, for example, by suggesting that only the advance drafting of Investigating Committee decision

documents and post-meeting amendment of decision documents were considered to be serious issues (the paper described the advance drafting and post-meeting amendment of decision documents as ‘...the area in which the report expressed significant concern’) and by not properly addressing the cumulative effect of all the objectionable practices on the independence of the Investigating Committee. In response to our concerns, the Chief Executive has said that the GDC had no difficulty seeing where responsibility lay, and recognised very clearly the role of the staff in the poor practices identified in the Penningtons report. The Chief Executive has said that it was not inappropriate also to recognise the antiquated nature of the regulatory process at a time of sharply rising caseloads, the background of ongoing change within the fitness to practise process and the fact that some Investigating Committee members were resistant to guidance which contributed to a difficult environment. The Chief Executive also said that the paper presented to the Committee did not and was not intended to “downgrade” Penningtons’ analysis and that there was no intention to withhold information, to mask the role of GDC staff or to “play down” the risk of judicial review.

- 4.120 Our most serious concern about the paper presented to the Audit and Risk Committee is that it states that Penningtons’ finding was that a challenge by way of judicial review of any decision document that had been substantially re-drafted after an Investigating Committee meeting would have no merit and therefore would be unlikely to succeed. No such statement was included in the Penningtons report. The Penningtons report described the changes made to the Investigating Committee decision documents as being of ‘significant concern’ noting that ‘even if the disposal of the case remains unchanged ...the reasons are necessarily an integral part of decisions and unless the IC as a whole has decided on all the reasons in support of its decisions they cannot be said to be their decisions’. The Penningtons report stated that there had been potential for compromise to the Investigating Committee’s independence and that ‘if that potential were to be realised, this would necessarily entail vulnerability to challenge [by way of judicial review]’. Further, the report stated that ‘Even without realisation of the potential however, there is still a risk of challenge by way of judicial review. The greatest vulnerability to challenge in our view arises from a perceived interference by non-IC members in the functions of the IC namely by the involvement of IC Secretaries in pre-meeting discussions on substantive issues ...interjections by and involvement of IC Secretaries in discussions at IC meetings and re-drafting by IC Secretaries post-meeting. Of these, the greatest area of concern ... is the substantial re-drafting of [IC decisions] after meetings have concluded, without such changes being shown to the whole IC or flagged to Chairs. Whilst the independence of the IC has not in our opinion been compromised as a result, there is a risk of challenge on the basis that the reasons given for a decision are not in fact the reasons of the IC’. The Penningtons report went on to say that as Penningtons had found no evidence that any outcome had been affected, Penningtons did not consider that there would be any real merit in any judicial review proceedings that might be initiated. In our view, it should have been apparent from this wording that Penningtons’ advice was based on the fact that they had not found any case outcomes that had been changed as a result of the objectionable practices. Penningtons had only reviewed case outcomes from five Investigating Committee meetings, and were therefore not in a position to (and did not) offer any assurance about the potential merits of any judicial review proceedings in relation to any case outcomes they had not reviewed.

- 4.121 We recognise that all Audit and Risk Committee members were provided with access to the complete Penningtons report. We have been told by the GDC in response to seeing a draft of this report that the understanding of the Chair of the Audit and Risk Committee was that all the Committee members had read the report in full prior to the meeting on 22 January 2014 and that they considered the paper presented by the executive in light of their own understanding of the issues. In response to seeing a draft of this report the GDC has told us that the Chair of the Audit and Risk Committee does not have any criticism of the executive's presentation of the Penningtons report.
- 4.122 Alongside the concerns about the paper presented to the Audit and Risk Committee on 22 January 2014, we were also concerned about the apparent level of discussion about the issues.
- 4.123 The inference from the minutes of the Audit and Risk Committee meeting is that the Audit and Risk Committee did not appreciate (either from the paper presented or from any verbal account given by the executive management team at the meeting) that the Penningtons report had established that the risks to the independence of the Investigating Committee process were caused by the behaviours of the Investigating Committee Secretaries and other staff, not by the Investigating Committee members. It was not, as the Audit and Risk Committee minutes suggest, the Investigating Committee members' unreasonable reactions to the changes to process that had been introduced had resulted in the objectionable practices being operated.
- 4.124 While the minutes record that questions were asked by the Audit and Risk Committee about the skills and experience of the Investigating Committee Secretaries, none of the actions agreed by the Audit and Risk Committee related to addressing the behaviour of the Investigating Committee staff (other than the recommendation for training and guidance for both Investigating Committee staff and members on respective roles and responsibilities, and a reference to the Council being made aware of the risks around the use of guidance by both members and staff). This is despite the fact that the Penningtons report clearly highlighted that the risks arose from the practices adopted by the Investigating Committee staff in interfering in the Investigating Committee's decision-making process before, during and after Committee meetings.<sup>126</sup> In response to seeing a draft of this report the GDC has told us that it was apparent to the Audit and Risk Committee that the behaviour of staff members was at the heart of the failings, despite the fact that this is not made clear in the minutes of the meeting. We accept that it would have been inappropriate for the minutes to record detailed discussions about individual staff members, but that does not mean that the minutes could not have recorded the risks arising from the practices and behaviour of the Investigating Committee Secretariat as a whole.
- 4.125 Similarly, the Penningtons report provides no basis for a conclusion that the risks identified were 'clearly linked to the increased volume of the caseload', and the Audit and Risk Committee's decision to refer to that factor when explaining the situation to the Council is one of the reasons we are concerned about the Audit

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<sup>126</sup> The only potential area for criticism of the Investigating Committee members that emerges from the Penningtons report being some Investigating Committee Chairs' failure to stop the Secretaries from seeking to discuss case outcomes in advance, some members' misunderstanding of who could provide legal advice, and/or any failure to prevent significant post-meeting changes to Investigating Committee decision documents being made by the Secretaries without the Investigating Committee's agreement.

and Risk Committee's analysis of the situation, based on the presentation of the situation by the executive at this meeting. We are unable to agree with the GDC's view as expressed in response to seeing a draft of this report that the increased caseload was a relevant factor (despite the fact that it was not considered by Penningtons). The GDC has said that it 'would have an obvious bearing on the quality of service in this area'.

- 4.126 We have been told by both the Chair of the Audit and Risk Committee and the Chief Executive that the minutes do not reflect all the issues discussed at the Audit and Risk Committee meeting on 22 January 2014. That is in itself an unsatisfactory explanation, particularly given that parts of the minutes stipulated how the matter would be reported to the Council, and the matters that the Council should consider in response. We note that those minutes were approved by the Audit and Risk Committee and reported to the Council.
- 4.127 The GDC said to us that the fact that the Audit and Risk Committee at its meeting in January 2014 added to the actions to be implemented following Penningtons' recommendations is a demonstration of the adequacy of the Audit and Risk Committee's scrutiny of the issues. We are unable to agree that this demonstrates that the Audit and Risk Committee had given effective scrutiny to the seriousness of the issues in the Penningtons report and therefore to the proposed remedial actions.

### *Scrutiny by the Appointments Committee*

#### *12 September 2013, Appointments Committee meeting:*

- 4.128 The former Chair of the Appointments Committee was aware of the whistleblower's concerns at the time they were first raised, and in fact had been alerted to concerns about the potential compromise to the independence of the Investigating Committee by "one or two" Investigating Committee members at the Investigating Committee members' training day shortly beforehand (on 17 July 2013). The former Chair of the Appointments Committee has told us that they informed the rest of the Appointments Committee about the whistleblowing disclosure on 5 August 2013, prior to the Committee's meeting on 12 September 2013, in relation to a query from the former Director of Regulation about the timing of joint training or other measures to improve the relationships between the Investigating Committee staff and members while the investigation into the whistleblower's disclosure was ongoing.
- 4.129 The former Chair of the Appointments Committee has told us that as the Committee had no role in the investigation, it did not consider the substance of the matter prior to the production of the Penningtons report (although it did consider related matters such as training and morale). The former Chair of the Appointments Committee was interviewed as part of the Penningtons investigation and they told us that their interview was confined to matters falling within the remit of the Appointments Committee. On 17 October 2013 the former Chair of the Appointments Committee referred to Penningtons 'an emerging concern about the 'management' action of the GDC in deploying [Investigating Committee] members to Committees' and said that the Chief Executive had agreed to ask Penningtons to consider this as part of their review. It appears from the Penningtons report that no formal request to investigate the issue was made, as the report recorded that Penningtons had not been instructed to investigate the issue, referred to the

written correspondence including the apology offered by the former Head of the Investigating Committee, and said that Penningtons understood that the matter was being considered internally by the GDC. There appears to have been no further consideration of the matter, beyond that set out in the former Director of Regulation's email to the former Chair of the Appointments Committee dated 31 October 2013 (referred to in paragraphs 4.131, 5.61 and 5.327), prior to the issue of the Penningtons report.

- 4.130 On 4 October 2013 the former Chair of the Appointments Committee sent an email to the other Committee members raising a concern that the next Investigating Committee training session had been cancelled, without reference to the Appointments Committee. The email referred to having sought an assurance about delivery of the learning and development plan, to the Chief Executive having advised the Chair of concerns about the engagement of the Investigating Committee members in the development review process, and to having asked for a report from the former Director of Regulation about learning and development at the Appointments Committee's meeting on 12 November 2013. The email also referred to concerns about not having a sufficient number of Investigating Committee members and to seeking advice on one possible solution. The email stated, 'I am conscious that this is a worrying and risky time for the GDC in relation to the [Investigating Committee]'.
- 4.131 On 16 October 2013, the former Chair of the Appointments Committee wrote to the Chief Executive (copied to the Chair of the Council) raising a 'significant concern' on behalf of the Appointments Committee about an email sent by the former Head of the Investigating Committee on 2 October 2013 stating that they had in the past stopped using Investigating Committee members for certain periods of time or had not used them at all for 'operational reasons'. The former Chair of the Appointments Committee noted that the 2 October email could 'reasonably be interpreted as GDC staff taking, or planning to take, decisions about the deployment of IC members which only the AC can and should take and of which, in the interests of natural justice, the members concerned should be told. That could be construed as the GDC seeking to influence IC decisions and so compromise the independence of IC members. This possibility is of grave concern to the AC'. The letter stated that the Appointments Committee was 'seeking an explanation of the issues raised...and assurance that the independence of IC members has not and will not be compromised in any way'. The Chief Executive responded to the former Chair of the Appointments Committee on 18 October 2013, stating that the concerns had been forwarded to Penningtons. The former Chair of the Appointments Committee told us that they therefore assumed that the concern raised would be addressed during the investigation into the whistleblowing disclosure. The former Chair of the Appointments Committee received an email from the former Director of Regulation on 31 October 2013 which attached the account of the former Head of the Investigating Committee for their actions and which said that, having discussed the matter with the former Head of the Investigating Committee and their having accepted that it was not appropriate to 'not use' Investigating Committee members unless they were suspended by the Appointments Committee under a formal process/agreement, the former Director of Regulation was satisfied that the former Head of the Investigating Committee would act in accordance with the former Director of Regulations' views in future. The email also said that that training would be provided and that the former Director of Regulation would be 'taking an even

closer interest in [the Head of the Investigating Committee's] interaction with [Investigating Committee] members and others for the time being'. The former Chair of the Appointments Committee has told us that they shared the assurance that had been provided with the rest of the Committee.

12 November 2013, Appointments Committee meeting:

- 4.132 Reference was made to the existence of the whistleblower's concerns (and the investigation into them that was ongoing) at the next Appointments Committee meeting on 12 November 2013. The minutes of that meeting record the former Director of Regulation explaining that an Investigating Committee members' training day planned for October 2013 had been cancelled because '...given the fact that the [Penningtons] investigation had been commissioned following a concern by IC members about the perceived influence of GDC officers and the impact of this on their independence, there was no point in providing training until this issue had been addressed'.
- 4.133 The former Chair of the Appointments Committee has told us that the minutes of the meeting<sup>127</sup> show that the former Head of the Investigating Committee reported to the Appointments Committee on concerns about some Investigating Committee members not engaging with the development review process. We have seen an extract from those minutes recording a discussion of various issues relating to whether the process that had been devised was focused on the development of the Investigating Committee members and was transparent and constructive, or whether it was more of a performance management mechanism. We have also seen an extract from those minutes recording a discussion of how the outcomes of the tasks set by GDC staff were to be assessed, of the information to be provided to Investigating Committee members prior to their mid-year review/consolidated review, and of the ways in which any performance or capability issues should be addressed.
- 4.134 While the version of the minutes of that meeting we have seen is redacted<sup>128</sup>, we also note a reference to 'In response to questions the Director of Regulation advised that the potential risk of low staff morale within the IC team was already being addressed' and a later reference to 'the risks associated with .... the effect on staff morale of the [Penningtons] investigation and report need to be added'.

12 February 2014 meeting:

- 4.135 The former Chair of the Appointments Committee was provided with the Executive Summary of the Penningtons report, rather than the full report. The former Chair of the Appointments Committee was not permitted to share that document with the other members of the Appointments Committee, as set out in the covering letter from the Chief Executive, although they were given permission to share the recommendations, especially in relation to training, with the other Appointments Committee members.

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<sup>127</sup> We have not seen this section of the minutes, so we have been unable to verify the accuracy of the extract provided to us by the former Chair of the Appointments Committee.

<sup>128</sup> The GDC only gave us permission to review an unredacted version of the minutes at its offices and on the basis of an undertaking to make no onward disclosure of the redacted sections, and we therefore declined to access the unredacted minutes on that basis as we would have been unable to refer to the unredacted material in this report. The GDC has told us that only irrelevant material or material that it was necessary to redact in order to comply with legislative requirements was in fact redacted.



4.136 The former Chair of the Appointments Committee, by email on 12 January 2014 to the rest of the Committee, expressed their concerns about not being permitted to share this document with them. They attached to that email the letter they had received from the Chief Executive explaining the limitations on onward disclosure of the Executive Summary. In their email to the Appointments Committee, the former Chair expressed three concerns in relation to the decision not to share the Executive Summary with the entire Committee – first about the Committee’s ability to assure the Investigating Committee training if all Appointments Committee members had not had access to the Executive Summary, second a concern about how the Appointments Committee could handle any discussion of the report that might be initiated by Investigating Committee members who had received it, and finally, a concern about the lack of transparency and the possible inference of a lack of a trust in the Appointments Committee’s maintenance of confidentiality. The former Chair of the Appointments Committee told us that when they challenged the GDC’s refusal to let them share the Executive Summary with the Committee (a refusal stated to be made on data protection grounds) it was agreed that the Chief Executive would attend the Appointments Committee’s meeting on 12 February 2014 to present a special paper that would be prepared for the purpose. The former Chair of the Appointments Committee communicated this to the rest of the Committee by a subsequent email on 15 January 2014, setting out conversations they had had with the Chief Executive in which the Chief Executive had explained that the restriction on disclosure of the Executive Summary was entirely the result of advice on protection of personal data and in which they had confirmed that they understood that the Committee needed to know the context and recommendations around training in order to perform its role, and for that purpose a special report would be provided to the Appointments Committee meeting which would particularly highlight the training needs identified. The former Chair of the Appointments Committee described that approach as “a proportionate and constructive way forward”. The former Chair of the Appointments Committee told us that one member of the Committee then raised a concern as to whether or not the Committee would have all the information it required, to which the former Chair responded that that issue could be raised at the meeting following the Chief Executive’s report. We note that the minutes do not record any concern being raised at the meeting by the Appointments Committee that it had not been provided with sufficient information.

4.137 We note that the paper that was presented to the Appointments Committee at its meeting on 12 February 2014 was largely the same as the paper presented to the Audit and Risk Committee in January 2014 and as later (amended) presented to the Council on 20 February 2014. The paper made it clear that the Appointments Committee was not being provided with the Executive Summary of the Penningtons report (for data protection reasons) and stated that ‘details of the key conclusions and recommendations ...are set out in this paper to enable the [Appointments Committee] to deliver its role in relation to the training of the [Investigating Committee]’. In response to seeing a draft of this report the GDC has said that it gave very careful consideration to the information to be shared with the Appointments Committee and concluded that it was sufficient to provide the Committee with the recommendations from the Executive Summary of the Penningtons report that related to training for Investigating Committee members (as set out in the paper presented to the Appointments Committee), having

provided the Executive Summary to the former Chair of the Appointments Committee.

- 4.138 The minutes of the meeting record the Appointments Committee as asking various questions of/making comments to the Chief Executive and the former Director of Regulation in relation to: the possibility of additional Investigating Committee members being required as a consequence of implementation of the Penningtons recommendations; the role of the Appointments Committee in implementing the action plan in relation to approving, assuring and evaluating Investigating Committee member training; the role of Appointments Committee members in attending Investigating Committee member training, particularly in light of the forthcoming recruitment process; the need to improve Investigating Committee members' 'soft skills' and remediate relationships; the process that had been put in place to allow Investigating Committee members to raise informal concerns; monitoring the impact of the implementation of the action plan and the use of Investigating Committee member feedback after each Investigating Committee meeting to inform the induction of new Investigating Committee members; the need to ensure that the Investigating Committee member profile was still fit for purpose; the forthcoming Investigating Committee members' recruitment process; and the measures taken to ensure the diversity of the Investigating Committee members at each meeting. These types of questions/comments reflected the remit of the Appointments Committee. The minutes also record that the Committee sought clarification around a number of 'AC actions' in the action plan, including that of 'ensuring working practices are properly embedded' (in response to which the former Director of Regulation said that the Committee's current policies would address these, although the monitoring of feedback would be very important). At that meeting it was also agreed that the action plan that had been prepared by the Head of Corporate Legal would be combined with the separate action plan being used by the Investigating Committee team, in order to ensure consistency (the former Director of Regulation had not previously seen the action plan tabled by the Head of Corporate Legal)<sup>129</sup> and that further clarification would be provided to the Appointments Committee about its role in implementation. The minutes record that the former Head of the Investigating Committee outlined forthcoming training, and the former Chair of the Appointments Committee advised that in order for the Committee to evaluate and provide assurance about the training, the Committee would need to agree the questions to be included on the feedback forms. It was agreed that reference to learning outcomes would be included on feedback forms. It was also agreed that the former Director of Regulation and Head of Corporate Legal would provide further clarification in relation to the Appointments Committee's role in the action plan produced by the executive.
- 4.139 The minutes of the Appointments Committee meeting held on 21 May 2014 record that the Committee received an update on implementation of the action plan, including on the successful delivery of the joint Investigating Committee members and staff training in March 2014. The minutes also record various discussions by the Appointments Committee of the Investigating Committee members' responsibility to raise issues formally and deal with the consequences, and of the importance of the Investigating Committee staff encouraging and supporting them

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<sup>129</sup> The former Chair of the Appointments Committee has told us that it was as a result of the Appointments Committee's questioning at this meeting that the extent of the inconsistencies between the action plans presented by the former Director of Regulation and the Head of Corporate Legal became apparent.

through that process. We note that while the minutes record discussion about how best to support the Investigating Committee members in giving feedback, there was no evidence of any recognition that it might prove difficult for Investigating Committee members to raise concerns about staff members with those staff members directly, particular when those staff members also have a role in providing training. In response to seeing a draft of this report the GDC has said that the reference in the minutes to supporting Investigating Committee members in giving feedback contains an implied intention to overcome any difficulties that Investigating Committee members may have experienced in raising concerns about staff members. The former Chair of the Appointments Committee has commented that although this is not referred to in the minutes, the Appointments Committee was aware of the lack of trust between many Investigating Committee members and GDC staff, following the concerns raised at the 17 July 2013 training day (as well as in the annual survey of Investigating Committee members in relation to the development review process) and the whistleblowing disclosure. However, by this time, the former Head of the Investigating Committee was no longer involved in Investigating Committee work and there was emerging evidence that the Investigating Committee members felt able to raise concerns with the seconded Head of the Investigating Committee team.

- 4.140 The former Chair of the Appointments Committee also told us that Committee members provided support for implementation of the action plan by attending Investigating Committee member training events to seek assurance that learning objectives were being met. The minutes that we have seen confirm that the Appointments Committee also received another update on implementation of the action plan at its meeting in July 2014. The Appointments Committee's annual report to the Council in March 2015 recorded that, as a result of additional measures taken during 2014 to obtain and triangulate feedback from staff, members and observers following Investigating Committee training events (over and above the observations of such events that the Appointments Committee had always undertaken), the Committee was for the first time able to assure the Council that the training and development delivered to the Investigating Committee members effectively met its immediate learning objectives.

#### Our view

- 4.141 The paper presented to the Appointments Committee at its meeting in February 2014 contained even less detail about the majority of Penningtons' findings/the background to Penningtons' conclusions and recommendations than the papers presented to the Audit and Risk Committee and to the Council at around the same time. To the extent that the paper was the same as that previously presented to the Audit and Risk Committee and the paper to be presented to the Council shortly afterwards, our concerns about the lack of detail with regard to Penningtons' findings (see paragraphs 4.93 – 4.127 above) remain, albeit that these are of less concern in relation to the Appointments Committee's scrutiny, given its more limited role.
- 4.142 We do not consider that the paper contained sufficient detail about the findings in the Penningtons reports to enable the Appointments Committee to apply meaningful scrutiny to the adequacy of the actions being taken. This is particularly the case given the Appointments Committee's remit in terms of overseeing the training/appraisal of Investigating Committee members. We note that this paper

contained even less information than the similar papers presented to the Audit and Risk Committee and the Council, and note that the Audit and Risk Committee had access to the full Penningtons reports and that Council members were provided with the Executive Summary and could request the full report, whereas the Appointments Committee was not even provided with the Executive Summary. The Appointments Committee was only invited to note (rather than approve) the relevant sections of the action plan despite its responsibility for oversight of the training and development of Investigating Committee members. We note that in fact the Committee nevertheless scrutinised the information it was given, sought clarification of various issues, and proposed future actions that it would take in relation to assuring training.

- 4.143 We note that the former Chair of the Appointments Committee was ‘very troubled’ by the GDC’s decision not to share the Executive Summary with the whole of the Committee and stated as much to the other Appointments Committee members on 12 January 2014. Subsequently it was agreed that the Chief Executive would report to the Committee at its meeting on 12 February 2014. The minutes of the 12 February 2014 Appointments Committee meeting do not contain any reference to the Committee’s view about not having been provided with the actual Penningtons reports (or the Executive Summary of the main report). The former Chair of the Appointments Committee has told us that the Committee acted in good faith on the information presented to it.
- 4.144 In response to seeing a draft of this report the GDC has asked us to note that the Appointments Committee was provided with regular updates on progress with implementing the action plan that was put in place to deliver the Penningtons’ recommendations, and to note that a member of the Appointments Committee attended each of the training days held for the Investigating Committee members during 2014.

### Scrutiny by the Council

- 4.145 The current Council met for the first time in October 2013. The Chair of the Council has told us that that meeting consisted of an induction about process and that the Council’s attention was not drawn to particular financial, operational or reputational issues because the Council was not sufficiently familiar with the landscape to assess the risks. The Chair has expressed the view in response to seeing a draft of this report that, had the Council been told about the concerns raised by the whistleblower at the October 2013 meeting, in all likelihood the Council would have asked the executive to report back once the investigation had been concluded.
- 4.146 The Chair of the Council has also told us that ‘the Council was entitled to rely on the fact that the [Audit and Risk Committee] had visibility of the issues being investigated by Penningtons and that if [the Committee] had any real concerns with the approach, it would inform the Council’. We are unclear as to how the Council could have placed such reliance upon the Audit and Risk Committee, in circumstances where the Council was not aware of the whistleblowing disclosure, or of the existence of Penningtons’ investigation at the relevant time.

### 5 December 2013, Council meeting:

- 4.147 The minutes of the closed Council meeting held on 5 December 2013 record that the Chief Executive provided a briefing about the whistleblowing disclosure and

the external investigation. The Chief Executive also noted that the matter had been reported to the Audit and Risk Committee, and it was likely that the Audit and Risk Committee would meet to consider it further once the external investigation report had been received, before a further report was made to the Council in February 2014.

*The Chair of the Council's views*

4.148 When we asked the Chair of the Council about whether any discussions took place concerning risk in relation to the ongoing investigation by Penningtons at the time they came into office (in October 2013), the Chair of the Council's view was that the situation was being managed by the executive management team. However, the Chair of the Council said that in hindsight they considered that "we should have had a bit more visibility of the issues and that a bit more time should have been spent explaining to me what this was really about and why it is important...[but] I'm inclined to think that having satisfied ourselves that [Penningtons were]... looking at the right things and using the right processes, the right thing for the Council to do was to let [Penningtons] finish [the] investigation and let the management team get on with implementing its findings". We asked the Chair of the Council about the process for deciding how the outcome of the Penningtons report would be made known to the Council. The Chair of the Council initially told us that this matter was decided by 'Management', but subsequently clarified that it was decided by the Audit and Risk Committee together with the Chief Executive, with advice as necessary from the former Director of Governance and the Head of Corporate Legal.

*20 February 2014, Council meeting:*

4.149 The paper that was presented to the Council at its meeting on 20 February 2014 was largely the same as the paper that had been presented to the Audit and Risk Committee on 22 January 2014. The paper for the Council also stated that Council members could access a copy of the full Penningtons' report by contacting the Chief Executive's assistant<sup>130</sup> (as only the Executive Summary of the Penningtons report was appended to the paper).

4.150 However, there were some small differences in the substance of the paper to Council, which were made in order to reflect the Audit and Risk Committee's discussion of the matter on 22 January 2014 - these were:

- The inclusion of an additional statement about the conclusions as to risks arising in the Penningtons report, 'It is nonetheless a significant concern that there is the potential for compromise in the current system and it is for this reason that matters must be addressed as soon as possible'.
- Additional commentary in a section focused on 'lack of communication', which set out the Audit and Risk Committee's concern about the lack of clarity for Investigating Committee members about how to raise concerns informally and the need for guidance about this; as well as noting the fact that there had been difficulties in the working relationship between Investigating Committee members and the Investigating Committee Secretariat 'for some time' before

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<sup>130</sup> The GDC has told us, in response to seeing a draft of this report, that the Chair of the Council encouraged all Council members to read the Penningtons report in full and expected them to have done so.

the whistleblowing incident, and that it was important for relationships to be healed and trust restored.

- An additional recommendation made by the Audit and Risk Committee concerning engendering 'harmonious, trusting working relationships which will allow concerns to be expressed and resolved within an informal framework' including producing guidance for raising concerns and addressing them informally.

4.151 The minutes of the Council meeting of 20 February 2014 reflect the contents of the paper presented. Notably attention was given to the role of Investigating Committee members (the minutes stated that 'whilst the investigation report only examined the role of ... staff .. the role of [Investigating Committee] members was also crucial in the current .. process') and the explanation given for the staff failings again appears to have focused on 'some tension in the relationship between IC members and staff partly arising from the changes made to the IC process over the last 2 to 3 years in particular the use of Indicative Outcomes Guidance ... there were additional factors (1) that staff handled a high caseload ... and (2) new staff recruitment which meant that not all staff were experienced'. A concern was raised that these matters had only come to light via a whistleblowing disclosure and that this might demonstrate a cultural problem – and it was stated that the Council had an important role in setting out the principles and values of work at the GDC and what is expected of Investigating Committee members and staff. The minutes record other Council members noting that the investigation had discovered a lack of procedures, compliance and understanding of roles ,and that an action plan was in place to implement the report's recommendations, including providing joint training workshops for staff and Investigating Committee members to address the issues highlighted in the report.

#### *The Chair of the Council's views*

- 4.152 We asked the Chair of the Council at interview how they felt about the Penningtons reports. The Chair said that they were disappointed not just with what the reports said but about what they revealed about management not understanding the performance of the business. The Chair said that the Council had noticed a tension between getting things right and the former Director of Regulation's insistence that they had to 'ram cases through'. The Chair said that the Council had developed a gut feeling that speed had been seen as more important than quality of process, and the Penningtons report had borne this out.
- 4.153 In response to seeing a draft of this report, the Chair of the Council has confirmed that they read the Penningtons reports in full, as well as the Executive Summary, and that they encouraged other Council members to do the same. Their view is that even if the Council members read only the Executive Summary, that would have enabled them to have a clear grasp of the content of the Penningtons report. They also told us that they have no doubt that Council members understood the key points, and treated the Penningtons report seriously and that they recall Council members asking pertinent questions. The Chair of the Council also said that in their opinion the size of staff caseloads was a relevant factor in explaining staff failings and that in any event this factor (along with staff inexperience and tensions between the Investigating Committee members and staff) was only referred to at the Council meeting as part of the contextual background.



- 4.154 When we asked the Chair at interview about the extent of the discussion about GDC staff as well as Investigating Committee members' behaviour at the Council meeting, the Chair told us that they could not remember the detail of the discussion at that meeting, but they thought that all the discussions had been focused on staff performance. To address the cultural problem that the minutes record the Council discussing, the Chair of the Council explained that they had set up a Fitness to Practise Review Group which was comprised of the Chair of the Council plus the three Chairs of the GDC's standing committees and which was focused on these issues.
- 4.155 In response to seeing a draft of this report, the Chair of the Council told us that they convened additional discussions with Council members outside of the formal Council meeting and in the absence of staff, having been advised by the Director of Human Resources about the potential employment law risks of holding such discussions during formal Council meetings when staff were present. The Chair told us that those private discussions were not minuted, but any decisions reached would have been repeated in the open or closed Council meetings and minuted. We note that there is no indication in the minutes of the Council meeting of 20 February 2014 of any such decisions having been reached by the Council outside of the formal meeting.
- [1 April, 20 May and 18 June 2014 Council meetings:](#)
- 4.156 The minutes of the subsequent Council meetings on 1 April 2014, 20 May 2014 and 18 June 2014 demonstrate that progress reports were provided to the Council on the steps that had been taken shortly after receipt of the Penningtons reports, as well as on implementation of the action plan to address Penningtons' recommendations.
- 4.157 We note that the minutes of the Council meeting held on 1 April 2014 record that the Chair of the Council had, earlier that day, had a private discussion with the Chief Executive in attendance. As we have only seen a redacted version of the relevant section of the minutes<sup>131</sup> we are unable to confirm if that discussion was one of those concerning staff which the Chair of the Council told us had taken place outside of formal Council meetings (referred to in paragraph 4.155 above) although it is clear that it concerned a matter related to the Penningtons report.
- 4.158 The progress report presented on 1 April 2014 recorded the various questions we had asked the GDC as part of our oversight of this work prior to our investigation. It also set out the GDC's responses (including an assurance that the compliance team would carry out 'regular audits to check that the drafting of [IC decisions] has been carried out in line with the [Penningtons] recommendations'<sup>132</sup>) details of the steps the GDC had taken shortly after receipt of the Penningtons reports, an assurance that the external lawyer leading on implementation of the recommendations would monitor compliance with the new processes and procedures and had been attending the majority of Investigating Committee meetings to do so since their appointment on 27 January 2014, and an assurance that 'IC members are also being encouraged to feed back to us if they see any behaviours on the part of their colleagues or staff members which appear contrary

<sup>131</sup> Please see footnote 16 above

<sup>132</sup> The seconded Head of the Investigating Committee team told us in October 2014 that, as at that date, no such audits had been conducted to their knowledge, and one scheduled audit (planned for April/May 2014) had been cancelled.

to the [Penningtons] recommendations'. It stated that Investigating Committee staff had been 'made fully aware of the issues identified in the [Penningtons] report' in advance of the start of the formal training programme and asked to comply with the recommendations. It stated in particular that the Investigating Committee staff had been initially instructed to do no pre-drafting of Investigating Committee decision documents at all (and later were only permitted to draft in advance 'formal and factual paragraphs'). It referred to the instructions given that only typographical/grammatical errors could be changed after Investigating Committee meetings and then only if they were tracked and approved by the relevant Investigating Committee Chair. It stated that compliance with the advance drafting restriction had been regularly checked.

- 4.159 The report noted that there would be a post-implementation evaluation by Penningtons of the outcomes of the GDC's actions – to check that all recommendations had been implemented and that policies and procedures were in place to ensure the changes were sustained. It also referred to work that was under way to review the whistleblowing and raising concerns policies and procedures within the GDC. It referred to the report completed by the former Director of Governance into complaints made by the whistleblower.
- 4.160 The minutes of the meeting on 1 April 2014 record the establishment of an informal steering group composed of the Chair of the Council together with the Chairs of the three standing committees and the Chief Executive, with the objective to: 'ensure that the Council understood the problems which had caused a succession of difficult issues and obtained assurance that the work underway to address these problems was well co-ordinated and effective'. The group was to consider whether cultural issues within the GDC were causing problems. At that meeting the Council also obtained an assurance that a whistleblowing policy for staff was in place, together with formal and informal mechanism for raising concerns. The GDC considers it relevant to our report that the minutes of that meeting also record the Chair of the Council having written to the Authority about our investigation '...in no way to dissuade [the Authority] from conducting the special investigation but to ask that [the Authority] take into account all the work the GDC was currently carrying out, as the investigation would require a considerable amount of GDC executive time and resources'.
- 4.161 At the Council meeting on 20 May 2014, the Chief Executive presented a paper setting out progress, and told the Council that the majority of the recommendations arising from the Penningtons' reports had been implemented, and that steps were being taken to embed the processes and monitor performance. Our decision to conduct an investigation into the whistleblower's concerns following the complaints they had made to both us and the Health Select Committee was also reported to the Council.
- 4.162 At the Council meeting on 18 June 2014 a paper was presented by the Chief Executive updating the Council on implementation of the Penningtons recommendations and on our investigation, as well as reporting that Penningtons' post-implementation review would begin in September 2014.

#### **Our view**

- 4.163 It is not clear why the GDC's Council was not informed earlier of the whistleblowing disclosure, given the potential seriousness to GDC registrants, the public interest, and to the GDC itself were the concerns raised by the whistleblower ultimately established as being well-founded. We note that the Chair

of the Council and the Chair of the Audit and Risk Committee were both made aware of the whistleblowing disclosure at a very early stage. The previous Council met on 26 September 2013 (its final meeting before it left office in October 2013) and the current Council met for the first time on 17 October 2013 and yet it was not mentioned to the Council until 5 December 2013. As noted above, the Chair of the Council has told us that the current Council was not informed about any particular financial, operational or reputational issues at the meeting on 17 October 2013, as that meeting was essentially part of its induction.

- 4.164 The paper that was presented to the Council at its meeting on 20 February 2014 was largely the same as the paper that had been presented to the Audit and Risk Committee on 22 January 2014. To that extent, the concerns highlighted above about the paper presented to the Audit and Risk Committee are also relevant to the paper presented to the Council at this meeting. It is also a matter of some concern to us that Council members were only provided with the Executive Summary of the Penningtons report, and would have had to request access to the full report. In our view, the summary of Penningtons' recommendations set out in the paper presented to Council should have included more detail about Penningtons' factual findings, on the basis that not all Council members might be expected to have requested access to and digested the full report.
- 4.165 We consider that the paper by itself did not present sufficient information to enable the Council to give due consideration to the causes of the objectionable practices or the potential effectiveness of the actions taken to address them. One possible effect (which we accept would have been unintended) might have been that Council members would not have been aware of the extent of the risks that remained, and/or of who should be held accountable for the problems that had been identified. We accept that the Chair of the Council has told us that they encouraged Council members to read the report in full, and that it may have been the expectation of the executive management team that the Council members would all request access to and then read and digest the full report prior to the Council meeting, rather than relying solely upon the paper presented to them (which appended the Executive Summary).
- 4.166 Having considered the presentation of the information to the Council and having reviewed the meeting minutes, we have concerns about the adequacy of the Council's scrutiny into the causes of the objectionable practices highlighted in the Penningtons report, and therefore the effectiveness of its oversight of the steps being taken to remedy the problems.
- 4.167 We have not been reassured about the adequacy of the information provided to the previous Council in 2013 and the level of scrutiny applied by the current Council in February 2014 by the various statements made to us by the GDC in response to seeing a draft of this report that: it is a false assumption that 'everything done in the name of the Council has to be done by the Council'; that the Council 'was confident that elsewhere in the system - through the Fitness to Practise Performance Review Group, the Finance and Performance Committee, the Audit and Risk Committee - different aspects of the problem were being interrogated in great depth'; and that individual Council members are capable of raising concerns privately with the Chair and indeed that the Chair held such private conversations with Council members.

- 4.168 The Chair of the Council told us that the information had led the Council to ask some serious questions about the level of executive oversight, and that it had also led the Chair to set up an oversight group to tackle the cultural issues that the Penningtons reports had highlighted to the Council. However we note that there is no indication in the redacted version of the minutes of the meeting of 20 February 2014 which we have seen<sup>133</sup> that the Council was told or inquired into whether the work being initiated by that oversight group (the Fitness to Practise Performance Review Group) or the Finance and Performance Committee was linked to or of direct relevance to the remedial work being implemented as a result of the Penningtons report.
- 4.169 Similarly, in our view, neither the ability of the Chair of the Council to act on behalf of the Council, nor the potential opportunities for individual Council members to raise concerns privately with the Chair are relevant to whether or not the full Council was properly sighted on both the findings and the conclusions of the Penningtons investigation and the causes of the objectionable practices identified.
- 4.170 As the GDC recognises, the whistleblower's allegations were serious and called into question the legitimacy and robustness of the decisions made by the Investigating Committee. The Penningtons report subsequently established that the whistleblower's concerns were valid, and that objectionable practices that put the GDC at risk of legal proceedings had been operated by the GDC staff, in some instances as a matter of routine. The issues raised and investigated presented a significant risk for the GDC and, in our view, neither the level of information actively provided to the Council in the paper on 20 February 2014 nor the level of scrutiny of the issues by the Council as recorded in the minutes were adequate in the circumstances.

*(c) The post-implementation review by Penningtons in 2014*

- 4.171 There is no reference in the minutes of the Audit and Risk Committee meetings on 14 May 2014 or 2 July 2014 to the post-implementation review to be conducted by Penningtons in September 2014 (we acknowledge that most members of the Audit and Risk Committee are also Council members, and therefore would have been aware of the scheduled post-implementation review). In response to seeing a draft of this report the GDC has informed us that the Audit and Risk Committee was informed about the post-implementation review prior to its commencement.
- 4.172 There is no reference in the minutes of the Appointments Committee meetings held up to and including the meeting on 21 May 2014 to indicate that the Appointments Committee was informed that Penningtons would be conducting a post-implementation review in due course.
- 4.173 The paper presented to the Council by the Chief Executive on 1 April 2014 recorded that the Chief Executive had asked Penningtons to conduct a post-implementation audit within six months 'to check that all actions have been implemented and policies and procedures are in place to ensure the changes are sustained'. The paper presented to the Council by the Chief Executive on 18 June 2014 recorded that the post-implementation review would start in September 2014.

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<sup>133</sup> See footnote 16 above

## 5. Section Three: The GDC's whistleblowing policy and its operation in practice

### Introduction

- 5.1 In this section of the report we consider the adequacy of the GDC's whistleblowing policy and the operation of this policy as evidenced by:
- Its response to a disclosure by a whistleblower; and
  - Its management of a complaint by the whistleblower of detrimental treatment because of their disclosure.
- 5.2 We also consider the adequacy of the GDC's revised whistleblowing policy which was introduced in July 2014.

### What led to our decision to investigate?

- 5.3 On 26 September 2013 we were contacted by the whistleblower who informed us about their whistleblowing disclosure regarding the management and support processes for the Investigating Committee and their concerns about the way that they were treated following their disclosure. In this section of the report we deal with the concerns the whistleblower raised about their treatment following the disclosure. The management and support processes for the Investigating Committee are dealt with in Section One of the report.
- 5.4 Following the whistleblower's contact with us, we met and corresponded with the GDC over several months, to assess whether we considered the GDC was adequately addressing the concerns that the whistleblower had raised with it. During this period the GDC investigated the allegations of detrimental treatment which the whistleblower had made (relating to a complaint being made against them following the disclosure and being offered fewer opportunities to sit as an Investigating Committee member). The conclusions of the resulting investigation report dated 26 March 2014 were that the GDC did not consider that the whistleblower had suffered detrimental treatment, but recognised that there were some improvements it could make to its processes and procedures relating to how complaints about statutory committee members are considered and to how Investigating Committee members are empanelled.
- 5.5 Throughout this time we continued to receive information and additional concerns from the whistleblower about the management of the Investigating Committee and the way that they had been treated by the GDC following their disclosure. We also received a letter from the then Chair of the Health Select Committee who asked: 'Whether the Authority proposes to monitor the implementation of the [Penningtons] recommendations, either as part of the annual performance review of the GDC or otherwise?' and 'What is the Authority's assessment of the adequacy of the GDC's policies governing the handling of concerns raised by members of the GDC and its Committees?'
- 5.6 On 4 April 2014 we carried out a further risk assessment under our published process and concluded that it was necessary to conduct an investigation into the adequacy of the GDC's whistleblowing policy and the operation of this policy.

## The basis for our investigation

- 5.7 We decided to investigate these areas of the GDC's performance for three reasons.
- 5.8 Firstly, on the basis of the evidence that we already gathered we considered that there was a question to be answered regarding whether the GDC had appropriately treated the whistleblower following their disclosure; and had appropriately responded to the whistleblower's allegation of detrimental treatment.
- 5.9 Secondly, as highlighted by the inquiry into the Mid Staffordshire NHS Foundation Trust<sup>134</sup>, dealing effectively with disclosures made by whistleblowers is a priority for all organisations focused on public protection. However, it is also important that following the disclosure the whistleblower is treated fairly, professionally and is not subject to any acts of retaliation or reprisal. An organisation's failure to protect a whistleblower can impact on others' confidence to raise concerns which may have adverse consequences for both public protection and public confidence in the organisation itself.
- 5.10 Thirdly, we identified similarities between the allegations made to us by the whistleblower and those we considered during our previous investigation of the GDC. In that previous investigation we considered allegations made by a former Chair of the Council, including allegations that there were 'signs of a pattern emerging where a challenge to executive decisions is countered by complaints directed at the challenging person'.<sup>135</sup> That former Chair alleged that the GDC's approach to handling complaints had led to the resignation of two Investigating Committee Chairs and the conclusion by another Investigating Committee member that they had not been appointed as a Chair because they had previously raised concerns about Investigating Committee processes and support. We did not conclude that this allegation made by the former Chair was substantiated. Another allegation made by the former Chair which we investigated was in relation to the timing of the second matter which was raised about them. The former Chair noted that this emerged just after they had challenged the decision reached in relation to the first matter (i.e. that the matter had been raised at that time deliberately). We considered that the second set of allegations made about the former Chair were very serious and whilst we could not comment on the validity and veracity of the allegations (as they were never fully investigated), having reviewed the partial investigation documentation we did consider that it was legitimate for the GDC to treat it seriously.
- 5.11 During our 2013 investigation we also investigated allegations regarding the quality of the investigation undertaken and reports produced by the former Director of Governance and a previous former Chair of the Appointments Committee.<sup>136</sup> Our investigation found that improvements could have been made in relation to both the investigations and the reports (for example the 2013 Investigation Report suggested that it would have been preferable for further

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<sup>134</sup> <http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/repor>

<sup>135</sup> An investigation into concerns raised by the former Chair of the General Dental Council – Advice to the Department of Health February 2013.

<sup>136</sup> The former Director of Governance has asked us to make it clear that the allegations about the quality of the investigation undertaken/report produced by them referred to in the 2013 Investigation Report do not relate to any of the allegations made by the former Chair of the Dental Council.



interviews to have been conducted, for the person who ‘whistleblew’ on that occasion to have been informed about the internal reporting arrangements, and for them to have been provided with a copy of the investigation report).

- 5.12 We were concerned about similarities between the matters raised with us by the whistleblower and some of those we had previously investigated in the 2013 Investigation Report (whether or not we found that they were substantiated or concluded that improvements could have been made). We were concerned that this indicated that lessons had not been learnt by the GDC as an organisation or by some of the senior individuals involved either in supporting the Investigating Committee or in dealing with concerns raised by or about statutory committee members.
- 5.13 We note that in commenting on our findings from this investigation the GDC has suggested that the Authority was ‘well aware of the manner in which the sex and race<sup>137</sup> discrimination complaint [the complaint about the remark made by the whistleblower] was being handled within the GDC, and at no time gave any guidance raised any objection or passed any comment on that matter’ and therefore that it is not appropriate for the Authority to examine what the GDC actually did, either in relation to the complaint made about the whistleblower, or about the whistleblower’s claim to have suffered detriment. We reject the proposition that we were aware of all aspects of the GDC’s approach to handling the complaint about the whistleblower in 2013/14 (to the extent that we were aware, that was due to the whistleblower raising concerns with us about it). We also reject the proposition that, had we been so aware, we should have intervened at the time, and that our not having intervened then means that it is not open to us to investigate and make critical findings subsequently. It is not our role to intervene directly in the operations of the regulators that we oversee.

#### How we carried out the investigation

- 5.14 To investigate these concerns we have:
- Met with the whistleblower, the Chair of the GDC’s Council, the Chair of the GDC’s Audit and Risk Committee and the former Chair of the Appointments Committee.
  - Met with various members of staff at the GDC:
    - The Chief Executive.
    - The former Director of Governance.
    - The former Director of Regulation.
    - The Head of Corporate Legal.
    - The former Head of the Investigating Committee.
    - The Investigating Committee Secretary who made a formal complaint about the whistleblower (the first Investigating Committee Secretary).
    - Two Investigating Committee Chairs.
  - Considered the documentation the whistleblower provided to us between September 2013 and February 2015, including their views on the GDC’s response to their whistleblowing disclosure and their treatment by the GDC following this disclosure.
  - Considered documentation provided by the GDC, including correspondence exchanged in relation to the concerns/formal complaint made about the

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<sup>137</sup> The remark complained of related to nationality rather than race.

whistleblower, the GDC's investigation report into the whistleblower's allegation of detriment, its whistleblowing policy (both the one in use at the time of the disclosure and complaint of detriment and the one in current use) and its disciplinary procedure for statutory committee members.

- Taken account of our previous GDC investigation report which was published in February 2013.
- Shared our draft investigation report on two occasions with key individuals whom we interviewed, and considered carefully their comments.

### **The terms of reference**

5.15 The specific concerns which we considered in the investigation are:

#### Terms of reference 2(a): The GDC's response to a disclosure by a whistleblower

- The timing of the concerns raised by members of the Investigating Committee team and the formal complaint made about the whistleblower by the first Investigating Committee Secretary.
- The decision to use the disciplinary procedure for statutory committee members without prior use of the internal complaints procedures.
- The decision to exercise discretion and accept the first Investigating Committee Secretary's complaint outside of the time limit set down in the disciplinary procedure.
- The former Chair of the Appointments Committee's breach of confidentiality when they informed the Appointments Committee of the complaint made about the whistleblower.
- The GDC's treatment of the whistleblower, specifically its failure to keep the whistleblower's identity confidential, its failure to treat them as other Investigating Committee members were treated in terms of updates and payments in relation to the Penningtons' investigation, and its failure to provide appropriate support to them following their disclosure.

#### Terms of reference 2(b): The GDC's management of a complaint by the whistleblower of detrimental treatment because of their disclosure

- The time taken to commence the investigation.
- The decision to appoint the former Director of Governance to carry out the investigation.
- The thoroughness of the investigation.
- The steps taken after the report had been provided to the Chair of the Council.

### **Summary of our findings**

5.16 We have concluded that:

- We are unable to determine whether, following the disclosure by the whistleblower, concerns and a formal complaint were deliberately raised about them by members of the Investigating Committee Secretariat in retaliation for the disclosure. We consider that it was reasonable for the whistleblower to draw this conclusion. The lack of contemporaneous documentation and confused interview evidence has made it possible to cast doubt on the motivation behind actions of the GDC and its staff but no conclusive view on this can be reached.

- The GDC's Chief Executive and the former Chair of the Appointments Committee made some decisions regarding how to handle the formal complaint made by the first Investigating Committee Secretary that we consider were not appropriate in the circumstances (albeit they both identified reasons for those decisions at the time and had access to in-house legal advice) – particularly in relation to the decision to accept the complaint out of time. We have no evidence to suggest that these decisions were made in order to prejudice the whistleblower – rather they appear to have arisen from a lack of clarity within the disciplinary procedure and/or a lack of knowledge of or misapplication or misinterpretation of the GDC's policies.
- The GDC did not treat the whistleblower in accordance with its own whistleblowing policy during the course of the Penningtons investigation. The GDC breached the whistleblower's confidence by revealing their identity to the entire Investigating Committee Secretariat and additionally to the Investigating Committee membership rather than restricting disclosure to individuals on a 'need to know' basis, despite the assurance to that effect that was given to the whistleblower before the investigation began by the Director of Human Resources. This resulted in a further loss of confidence in the GDC by the whistleblower. Similarly the former Chair of the Appointments Committee revealed both the whistleblower's identity as the subject of a complaint and the details of the complaint to the Appointments Committee, when, in our view, the extent of that disclosure was unnecessary and when the whistleblower had never been warned that such a disclosure might be made.
- The GDC did not act appropriately when it delayed investigating the complaints of detrimental treatment which the whistleblower had made. In reaching the decision to delay the investigation, in our view, the Chair of the Council took account of factors which were irrelevant, such as a perceived need to await the outcome of the Penningtons investigation.
- While we recognise that one of the GDC's concerns was to ensure its investigation into the whistleblower's complaints of detriment was conducted proportionately, in our view, the Chair of the Council made an unwise decision in appointing the former Director of Governance to undertake the investigation into the whistleblower's complaints of detriment. The former Director of Governance was placed in a difficult position as they were charged with investigating the actions of one of their team (the Head of Corporate Legal), one of their peers (the former Director of Regulation) and their line manager (the Chief Executive) and there was therefore a risk of them being perceived as someone who would not be impartial. The former Director of Governance had also, prior to their appointment as investigator, made statements about the validity of the whistleblower's complaints, and that fact also created a risk of them being perceived as being biased on the basis that they had pre-judged the validity of aspects of the whistleblower's concerns.
- The investigation carried out by the former Director of Governance was not thorough. They did not obtain or consider all the material evidence, appropriately test the evidence they did consider, interview all the relevant individuals, consider all the allegations contained within the complaint in their totality, or properly apply the test of detriment as set out in the whistleblowing policy. The failings in the investigation mean, in our view, that its conclusion

(that there had been no detriment) is one that might not have been arrived at had all the relevant evidence been gathered and fully considered. We note in particular that the former Director of Governance's finding that there had been no detriment was based, in part, on an assumption that no record would be kept on the whistleblower's file of the complaint – even though the disciplinary procedure makes it clear that such records are always kept, and even though the whistleblower was informed that such a record would be kept and would be referred to in the event of future complaints being made.

- The GDC did not take adequate steps to follow up the recommendations in the former Director of Governance's report or in the Chair of the Council's letter which accompanied the report. This appears partly to be a result of a lack of ownership/managerial oversight within the GDC. The GDC also failed to take proper account of comments made about the accuracy of the report by the former Chair of the Appointments Committee. We consider that these comments highlighted material errors in the former Director of Governance's report, and that it would have been appropriate to follow up on them, potentially amend the report, and inform those to whom it had already been sent that it had been amended. We have not been able to reach a conclusion about the extent to which consideration was given by anyone other than the former Director of Governance to the former Chair of the Appointments Committee's comments on the report. The former Director of Governance told us in response to seeing a draft of this report that they had discussed the comments with the Head of Corporate Legal (who sent the comments to the Chief Executive) and that a meeting then took place between the former Chair of the Appointments Committee, the Chair of the Council and the Chief Executive (at which the former Director of Governance was not present). However none of those individuals' accounts at interview with us or on seeing a draft of this report referred to such a meeting having taken place. We consider that the decision not to take further action in respect of the comments provided by the former Chair of the Appointments Committee, whether that was a decision taken after consultation with others or not, adds to the impression that the GDC was not committed to treating the whistleblower's complaints of detrimental treatment seriously or investigating them thoroughly.
- The revised whistleblowing policy is unsatisfactory. We have identified some clear areas for improvement particularly in relation to the clarity and accuracy of its content. We consider that the weaknesses within the revised policy may lead to problems in its application in practice in the future. We note that the Head of Corporate Legal has informed us that the statutory committee members when consulted on the revised policy provided only favourable comments about it.

5.17 We consider that there are lessons the GDC could learn from its management of the disclosure by the whistleblower and its response to the whistleblower's complaints of detrimental treatment, and make the following recommendations:

- The disciplinary procedure for statutory committee members should be amended to set out clearly: what the 'internal complaints procedures' are and how they apply; and the factors that should be considered by the Chief Executive when deciding whether a complaint should be referred to the Appointments Committee. The views of those who use this procedure should be sought when making the amendments.

- The disciplinary procedure for statutory committee members should be amended to set out the types of factors that should be considered when deciding if a complaint should be accepted out of time because of ‘exceptional circumstances’. The views of those who use this procedure should be sought when making the amendments.
- The disciplinary procedure for statutory committee members should be amended to set out the circumstances in which it is acceptable for information about a complaint to be disclosed to members of the Appointments Committee, whether in order to allow a decision to be made about the suspension or removal of the member, or otherwise.
- Any complaints about statutory committee members (either those complaints dealt with under the ‘internal complaints procedures’ or formally by the Appointments Committee) should be appropriately documented and records stored in one central and secure location (with safeguards in place to ensure that access to each record is appropriately restricted) in order to enable an audit trail of events and decisions to be kept.<sup>138</sup>
- The GDC should develop guidance for staff on how the whistleblowing policy should be operationalised. This should include matters such as the need to agree how often a whistleblower is updated on any investigation into their disclosures, the management of matters relating to maintaining a whistleblower’s confidentiality, and how any complaints of detrimental treatment should be managed, investigated and reported on internally. The GDC should also develop similar guidance for whistleblowers. The views of those who use this procedure should be sought when developing this guidance. We also recommend that the GDC should seek external advice from experts in whistleblowing management. Staff should be trained on how to use the guidance and the policy.<sup>139</sup>
- The GDC should formally apologise to the whistleblower for the inappropriate disclosure of the whistleblower’s identity to both GDC staff and former members of the GDC’s former Investigating Committee as well as the disclosure to the former members of the Appointments Committee.
- The GDC’s Council and Audit and Risk Committee should review the current whistleblowing policy in light of the concerns that we have raised about its clarity and factual accuracy and consider adopting a revised policy as necessary.
- The GDC’s Council, Audit and Risk Committee and the executive management team should consider this report in full, both individually and collectively, in order to identify all the lessons that should be learnt, as well as the actions the GDC should take to address our recommendations.

## Chronology

5.18 Below is the chronology of the key events relating to the matters considered in this section of the report.

<sup>138</sup> The GDC has told us that such records are not kept in the central system due to access issues, but are kept on the individual’s personnel file.

<sup>139</sup> In response to this recommendation the GDC has told us that guidance was provided to staff and said that ‘there is a risk in too much operationalisation [sic] and in providing too much documentation’.

- 5.19 **13 June 2013** – Before an Investigating Committee meeting, the whistleblower made a remark to the first Investigating Committee Secretary which offended them. The Investigating Committee Secretary raised it with their line manager verbally (the former Head of the Investigating Committee) but did not formally complain at the time.
- 5.20 **19 July – 2 August** – The first Investigating Committee Secretary went on leave (according to the information contained in the former Director of Governance’s report into the whistleblower’s complaint of detriment).
- 5.21 **31 July 2013** – The whistleblower made a disclosure about the Investigating Committee support and management processes in an email to the former Chair of the Appointments Committee, copied to the Chair of the Audit Committee. The Chair of the Audit Committee passed the email to the Chief Executive that same day. The former Chair of the Appointments Committee corresponded with the whistleblower about the options open to them to raise their concerns.
- 5.22 **Around the same day** – The Chief Executive informed the former Director of Regulation of the whistleblowing disclosure. (The GDC has not been able to provide the precise timing of this event, but we have seen documentary evidence that it had taken place before 2 August 2013).
- 5.23 **5 and 7 August 2013** – The former Head of the Investigating Committee raised concerns with the former Chair of the Appointments Committee about the conduct of the whistleblower and the basis for some of their decision-making.
- 5.24 **6 and 8 August 2013** – On the 6 August the whistleblower met with the Director of Human Resources and the Head of Corporate Legal. The Chief Executive attended the first part of the meeting and explained that an independent investigator would investigate their concerns under the whistleblowing policy. The Director of Human Resources explained that the purpose of the meeting was to check understanding of the scope of the whistleblower’s concerns and to establish the terms of reference for the investigation. They also explained that the GDC would keep the matter as confidential as possible, only making disclosure to staff or Investigating Committee members and Chairs on a need to know basis and said that they would keep the whistleblower updated. On the 8 August the GDC’s Chief Executive met with the whistleblower to inform them that the disclosure was being taken seriously and that an external solicitors firm (Penningtons Manches LLP) would be instructed to investigate the matters (the firm was commissioned to investigate and report on the matters on 16 August 2013).
- 5.25 **14 August 2013** – The former Chair of the Appointments Committee responded to the former Head of the Investigating Committee’s emails of 5 and 7 August 2013 setting out the two options available to resolve matters – a formal complaint had to be made or they had to deal with matters informally.
- 5.26 **15 August 2013** – The Director of Human Resources met individually with both the former Director of Regulation and the former Head of the Investigating Committee and informed them about the whistleblowing disclosure.
- 5.27 **15 and 16 August 2013** – The former Director of Regulation informed the GDC’s Investigating Committee Secretariat of the disclosure by the whistleblower – the notes of the meeting state that the former Director of Regulation named the individual and said they had made a complaint ‘in the guise of a whistleblower’, that in the circumstances there was ‘no choice’ but to appoint an external investigator and that ‘Whilst this is frustrating, bearing in mind we have already



been through this once with the [Authority] (and received a clean bill of health) it should not be viewed as anything to worry about. If anything it will be useful to see either if any of our processes aren't quite right or, more likely, that our processes are fine and we can get on with the business of running IC meetings'.

- 5.28 **19 August 2013** – The Director of Human Resources wrote to the former Director of Regulation referring to their meeting on 15 August, attaching the whistleblowing disclosure and the terms of reference for Penningtons' investigation. That letter also said that it was likely that Penningtons would be interviewing the former Director of Regulation and the former Head of the Investigating Committee (and other staff) in mid-September. It asked the former Director of Regulation not to discuss 'your evidence or the substance of the complaint with anyone else including any member of your team or any IC member'.
- 5.29 **26 August 2013** – The first Investigating Committee Secretary sent an email to the former Head of the Investigating Committee in which they formally complained about the remark made by the whistleblower on 13 June 2013.
- 5.30 **29 August 2013** – Investigating Committee members were informed by the Chief Executive that the whistleblower had raised concerns and that these were being investigated. The whistleblower was named in this correspondence.
- 5.31 **30 August 2013** – The former Head of the Investigating Committee forwarded the first Investigating Committee Secretary's complaint to the Chief Executive.
- 5.32 **3 September 2013** – Following discussion of the whistleblowing disclosure by an Investigating Committee Chair at an Investigating Committee meeting, the Head of Corporate Legal emailed all Investigating Committee Chairs and Members reminding them of the need for confidentiality.
- 5.33 **18 September 2013** - The Chief Executive forwarded the complaint by the first Investigating Committee Secretary to the former Chair of the Appointments Committee, as the Chief Executive considered the matter to be serious enough to be investigated under the disciplinary procedure. The letter emailed to the former Chair of the Appointments Committee stated that it enclosed an extract from the evaluation form completed by the first Investigating Committee Co-ordinator detailed at paragraph 5.93 below.
- 5.34 **19 September 2013** – The Secretary to the Appointments Committee wrote to the former Chair of the Appointments Committee advising on the next steps with regard to the complaint by the first Investigating Committee Secretary about the whistleblower. That letter referred to 'another complaint concerning [the whistleblower] that you are already aware of', as well as the events that had occurred at an Investigating Committee meeting held on 18 September 2013 (which did not involve the whistleblower) and suggested that advice was sought from the Head of Corporate Legal about how to proceed 'as it may be that these will not all be dealt with in isolation'.
- 5.35 **20 September 2013** – The former Chair of the Appointments Committee emailed the Secretary to the Appointments Committee (and others) saying that they were minded to exercise their discretion to accept the complaint out of time (subject to receipt of advice from the Head of Corporate Legal) and that they wished to give the whistleblower an opportunity to respond before they reached a decision about 'next steps'.

- 5.36 **23 September 2013** – The Secretary to the Appointments Committee (on the instructions of the former Chair of the Committee) contacted the whistleblower to inform them of the complaint about them and to seek their views.
- 5.37 **23 September 2013** – The former Head of the Investigating Committee sent an email to the former Chair of the Appointments Committee in which they asked for the likely timescale around the Appointments Committee dealing with the first Investigating Committee Secretary’s complaint about the whistleblower. The former Head of the Investigating Committee queried if the Appointments Committee would be considering interim suspension of the whistleblower.
- 5.38 **24 September 2013** – The whistleblower emailed the former Chair of the Appointments Committee and admitted that a conversation along the lines complained of took place and apologised for any offence caused. At this time the whistleblower raised a number of concerns about the use of the disciplinary procedure by email with the Chief Executive, concerning: the appropriate application of the disciplinary procedure, the acceptance of the first Investigating Committee Secretary’s complaint when it was outside the timeframe set out in the procedure; they also made the suggestion that the complaint by the first Investigating Committee Secretary was linked to their whistleblowing disclosure.
- 5.39 **24 September 2013** – The former Head of the Investigating Committee sent an email to the three Investigating Committee members involved in an Investigating Committee meeting held on 18 September 2013 notifying them that they were being referred to the Appointments Committee for investigation pursuant to the disciplinary procedure, and inviting them to withdraw from participating in Investigating Committee meetings until the conclusion of that investigation.
- 5.40 **25 September** – The Chief Executive wrote to the whistleblower in reply to their letter of 24 September 2015. They stated that, having taken advice from the GDC’s legal and HR departments they had decided that the complaint was not appropriate to be considered under the internal complaints procedure since it concerned an allegation of race<sup>140</sup> and sex discrimination and that it should be referred to the Appointments Committee which was independent and ‘the correct forum’ for the allegation to be considered. The letter stated the Chief Executive’s view that Chair of the Appointments Committee was in the best position to consider the possible link between the complaint and the whistleblowing disclosure.
- 5.41 **25 September 2013** – The former Chair of the Appointments Committee contacted the other members of the Appointments Committee by email, informing them that they had exercised their discretion to accept the complaint about the whistleblower, attaching a copy of the complaint, and asking for their views as to whether or not it was necessary to suspend the whistleblower (following an email about the whistleblower’s continued attendance at Investigating Committee meetings that had been sent by the former Head of the Investigating Committee, upon which the former Chair of the Appointments Committee had taken legal advice from the Head of Corporate Legal).
- 5.42 **26 September 2013** – The former Head of the Investigating Committee contacted the former Chair of the Appointments Committee and stated that an Investigating Committee member had failed an online equality and diversity course, and that they could therefore not sit again as a member of the Investigating Committee

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<sup>140</sup> The remark complained of related to nationality rather than race

until the issue was ‘remediated’. The former Chair of the Appointments Committee replied, pointing out that the former Head of the Investigating Committee had no power to suspend an Investigating Committee member, and suggesting that the member in question should be given more time to complete the equality and diversity course.

- 5.43 **26 September 2013** – The whistleblower contacted us to raise their concerns about the management and support processes for the Investigating Committee, and their belief that they had been subject to detrimental treatment as a result of their whistleblowing disclosure.
- 5.44 **27 September 2013** – The whistleblower wrote to the Chief Executive stating that they had lost confidence in the GDC to deal with the matters in an open, transparent, balanced or impartial way as a result of the events that had occurred since their whistleblowing disclosure, and stating that they had reported their concerns to the Authority, and invited the Chief Executive to suspend the operation of the disciplinary procedure pending receipt of Penningtons’ report and pending the Authority’s decision about what action it would take.
- 5.45 **1 October 2013** – The Chief Executive replied to the whistleblower’s letter of 27 September stating that they did not agree to suspend the disciplinary procedure and encouraging the whistleblower to continue to participate in it, as well as providing an assurance that they were determined to follow proper process in order to get to the bottom of the various issues.
- 5.46 **2 October 2013** – The former Head of the Investigating Committee emailed the former Chair of the Appointments Committee stating that they had in the past stopped using Investigating Committee members for certain periods of time or had not used them at all for ‘operational reasons’.
- 5.47 **2 October 2013** – The former Chair of the Appointments Committee wrote to the whistleblower to set out the reasons why they had accepted the complaint about the whistleblower.
- 5.48 **6 October 2013** – The whistleblower wrote to the former Chair of the Appointments Committee admitting they had made the remark complained of by the first Investigating Committee Secretary, denying that that remark had been intended to be derogatory or demeaning or intended to cause offence, and repeating their offer to apologise. The letter set out the whistleblower’s observations about the appropriate procedure to follow should an allegation of harassment be made, and referred to their concerns that such steps had not been taken with regard to the complaint against them, which had instead been inappropriately escalated. The letter set out the background to the whistleblowing disclosure and referred to the whistleblower’s concern that they were being punished for making the disclosure and had received no support from the executive management team or the Appointments Committee.
- 5.49 **11 October 2013** – The former Chair of the Appointments Committee replied to the whistleblower’s letter of 6 October, stating that they had passed the offer of an apology on to the first Investigating Committee Secretary. The letter also said that the former Chair had had no alternative but to deal with the complaint about the whistleblower, once it had been referred by the Chief Executive. The letter referred to Penningtons’ investigation into the concerns raised by the whistleblower about the relationship between the Investigating Committee Secretariat and the Investigating Committee, and encouraged the whistleblower to contact the Director of Human Resources, who had been briefed and was

available to listen to concerns and provide confidential support (which the Appointments Committee could not do, given its role in the disciplinary procedure).

- 5.50 **11 October 2013** – The whistleblower wrote to the Chief Executive (copied to the former Chair of the Appointments Committee) referring to the correspondence they had received from the former Chair of the Appointments Committee about the actions they had taken. The whistleblower invited the Chief Executive to reconsider their decision to refer the complaint to the Appointments Committee, on the basis that the Chief Executive had not at the time of their decision investigated the matter, listened to both sides, or sought resolution but had instead instigated the disciplinary procedure. The letter repeated the whistleblower’s offer to apologise for any perceived rudeness or insensitivity.
- 5.51 **16 October 2013** – The Chief Executive wrote to the whistleblower in response to the concerns they had raised on 11 October 2013. The letter reiterated the reasons the Chief Executive had provided previously for their decision to refer the complaint to the Appointments Committee, and said that the Chief Executive did not consider it was either necessary or required under the procedure for them to discuss the matter with the whistleblower before making that decision. The letter said that the Chief Executive would not review that decision, as it would be ‘inappropriate, a breach of the disciplinary procedure and grossly unfair to [the first Investigating Committee Secretary] to do so’ and concluded by thanking the whistleblower for offering an apology and saying that it was in everyone’s best interests to resolve the matter as quickly as possible using the procedure that was already under way.
- 5.52 **16 October 2013** - The former Chair of the Appointments Committee wrote to the Chief Executive on behalf of the Appointments Committee expressing ‘significant concern’ regarding the former Head of the Investigating Committee’s email of 2 October 2013. The GDC told us that the Chief Executive discussed the matter with the Director of Human Resources and the former Director of Regulation and it was agreed that the former Director of Regulation would ask the former Head of the Investigating Committee for an explanation in writing (see paragraph 5.55 below). The former Head of the Investigating Committee’s written response was provided by email to the Chair of the Appointments Committee.
- 5.53 **22 October 2013** – The whistleblower complained to the Chair of the Council that they had been subjected to a detriment as set out in paragraph 34 of the GDC’s whistleblowing policy.<sup>141</sup> The detriment alleged was that a complaint had been made about them by a staff member who worked in the team their whistleblowing disclosure related to, and that that complaint concerned a matter which had happened some months previously, and that it had been handled in a disproportionate manner by the GDC. The whistleblower claimed that members of the Investigating Committee Secretariat were harassing them, and had made the complaint in the knowledge of the impact a record of such a complaint would have on their career inside and outside the GDC. The letter also claimed that the Chief Executive was biased against them, as demonstrated by their referral of the complaint direct to the Appointments Committee without using the internal complaints procedures or undertaking any preliminary investigation and their refusal to review that decision in light of the concerns the whistleblower had

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<sup>141</sup> See appendix A

raised. The letter also raised concerns about breaches of the whistleblower's confidentiality, and about the GDC treating them differently to other members of the Investigating Committee in terms of providing information about Penningtons' investigation and payment for their time contributing to it.

- 5.54 **23 October 2013** – The former Chair of the Appointments Committee informed the Chief Executive and the first Investigating Committee Secretary that the complaint by the first Investigating Committee Secretary had been resolved by way of an apology.
- 5.55 **25 October 2013** – The former Head of the Investigating Committee emailed the former Director of Regulation setting out their explanation for their email of 2 October 2013 to the former Chair of the Appointments Committee, together with their reflections on it. The note attached to that email (manually dated 23 October 2013) referred to a recent discussion between the two individuals, and contained an apology for the tone and content of the email, and stated that the former Head of the Investigating Committee had been unwell and feeling under significant stress at the time the email of 2 October 2013 was drafted. The note acknowledged that the former Head of the Investigating Committee had no power to suspend members of the Investigating Committee, and confirmed that they would not act independently or without approval from either the former Director of Regulation or the former Chair of the Appointments Committee to stop an Investigating Committee member from being empanelled. The note recorded the former Head of Investigating Committee's understanding of a previous discussion between the former Head of the Investigating Committee and the former Director of Regulation about the possibility of not empanelling some Investigating Committee members in 2014, and the former Director of Regulation making it clear that they could never take action which might amount to some form of informal suspension of Investigating Committee members. The note concluded with a request for guidance about which route to use for dealing with 'issues with' Investigating Committee members, and an assurance that in future the former Head of the Investigating Committee's communications would leave no room for misinterpretation about their actions/motivations.
- 5.56 **25 October 2013** – The Chair of the Council informed the whistleblower that the GDC would investigate their complaint of detriment after Penningtons had reported on the investigation into the matters raised by their disclosure. The letter also apologised for the exclusion of the whistleblower from the update about the Penningtons' investigation that had been sent to other Investigating Committee members on 21 October 2013.
- 5.57 **26 October 2013** – The whistleblower asked the former Chair of the Appointments Committee to confirm that the other Appointments Committee members were and would continue to be unaware of the complaint about the whistleblower.
- 5.58 **28 October 2013** – The former Chair of the Appointments Committee replied to the whistleblower saying that the 'reference will be anonymous' – this referred to the notification to be made to the Appointments Committee that a complaint had been made and resolved.

- 5.59 **29 October 2013** – The former Chair of the Appointments Committee emailed the whistleblower to explain why they had shared information about the complaint against the whistleblower with the other Appointments Committee members.<sup>142</sup>
- 5.60 **30 October 2013** – The whistleblower complained to the Chair of the Council about the former Chair of the Appointments Committee breaching their confidentiality. In that letter they also said they consented to consideration of their complaint of detriment being postponed until Penningtons report had been received (in mid-November).
- 5.61 **31 October 2013** – The former Director of Regulation emailed the former Chair of the Appointments Committee attaching the email sent by the former Head of the Investigating Committee on 25 October 2013 plus the note setting out their explanation for their email of 2 October 2013. The email stated that the former Director of Regulation had made it clear that it was not appropriate to ‘not use’ Investigating Committee members unless they were formally suspended by the Appointments Committee. It also recorded the steps already taken in relation to providing development and support for the former Head of the Investigating Committee and contained an assurance that the former Head of the Investigating Committee would act in accordance with the former Director of Regulation’s views in future, and that the former Director of Regulation would be ‘taking an even closer interest in [the former Head of the Investigating Committee’s] interaction with the IC members and others for the time being’. It recorded that, after discussion, the Chief Executive had agreed with the former Director of Regulation that ‘the matter should rest there’.
- 5.62 **3 November 2013** – The whistleblower complained to the Chair of the Council that as a result of their whistleblowing disclosure they had been subjected to a detriment, in that they had not been offered a fair number of Investigating Committee sittings for the first six months of 2014.
- 5.63 **3 November 2013** – The whistleblower raised concerns with the Chair about the process that had been used to decide on the empanelment of members of the Investigating Committee.
- 5.64 **5 November 2013** – The Chair of the Council replied to the whistleblower saying they would write with regard to the whistleblower’s concerns once the Penningtons’ report had been received. The letter also said that the former Director of Regulation had been asked to explain the empanelment process to the whistleblower, in response to the concerns they had raised on 3 November 2013.
- 5.65 **6 November 2013** – The former Director of Regulation emailed the whistleblower to explain the empanelment process and the fact that, at that stage, the empanelment process had only been completed for the first half of 2014, and they expected to hold a greater number of meetings in the second half of the year. The letter explained that seven Investigating Committee members currently had been allocated the same number/fewer days in 2014 as the whistleblower, with another seven having only another one or two days more, and the remaining four members all having more days because they were dental care practitioners. It also explained the restrictions around the empanelment operation, once diversity was taken into account, estimated the likely empanelment for the whistleblower for 2014 based on previous data, and contained an assurance that the empanelment

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<sup>142</sup> The explanation provided was incomplete/inaccurate. See paragraphs 5.217-5.221 and 5.227 – 5.230.



for 2014 had not been affected by the whistleblower's 'complaint about our management of the IC'.

- 5.66 **6 – 28 November 2013** – Correspondence passed between the former Director of Regulation and the whistleblower regarding 'diversity empanelment'.<sup>143</sup> The former Director of Regulation stated that diversity empanelment was first raised with statutory committee members at a training day in November 2011. The whistleblower stated that they had no recollection of it being mentioned then<sup>144</sup> or in subsequent training sessions and noted the lack of gender diversity on a recent Investigating Committee panel.
- 5.67 **8 November 2013** – The Chief Executive sent a further update letter to the Investigating Committee members about Penningtons' investigation which identified the whistleblower by name as the source of the 'complaint' under the whistleblowing policy.
- 5.68 **22 November 2013** – The whistleblower made a second complaint to the Chair of the Council that they had been subject to a detriment as a result of their whistleblowing disclosure. The detriment alleged was that the number of Investigating Committee sittings offered to them had reduced since their whistleblowing disclosure had been made. The whistleblower objected to the Chair of the Council having delegated responding on this to the former Director of Regulation, given their involvement in the subject matter of the whistleblowing disclosure, and invited the Chair of the Council to consider the matter for themselves once the whistleblower had received responses to supplementary questions they had sent to the former Director of Regulation, following their email of 6 November.
- 5.69 **29 November 2013** – The Chair of the Council wrote to the whistleblower saying that they had asked the former Director of Governance to respond to the whistleblower's recent correspondence, and asking the whistleblower to use the former Director of Governance as their single point of contact in future, other than in relation to routine correspondence with the Investigating Committee Secretariat. The letter said that the former Director of Governance would update and refer matters to the Chair of the Council as appropriate, and said that all matters addressed to the Chair would in future be passed to the former Director of Governance without further acknowledgement.
- 5.70 **1 December 2014** – The whistleblower emailed the Chair of the Council saying that they would submit correspondence through the [former Director of Governance], provided that the Chair of the Council accepted their complaint of detriment in relation to empanelment (as they were the only person empowered to do so) in the same way that they had agreed to investigate the whistleblower's complaint of detriment in relation to the use of the disciplinary procedure. The letter queried who the whistleblower should refer that complaint to for adjudication, if the Chair of the Council was 'refusing to engage in the GDC's own processes'.
- 5.71 **2 December 2013** – The whistleblower wrote to the Chair of the Audit and Risk Committee enclosing copies of their correspondence with the Chair of the Council

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<sup>143</sup> The GDC has told us that diversity empanelment is the process that was used by the Investigating Committee Secretariat to try to ensure that each Investigating Committee panel was representative in terms of gender and race.

<sup>144</sup> The former Director of Governance subsequently told the whistleblower (on 2 December 2013) that the former Director of Regulation had not been present at the training session, and their account of this having been referred to at that training day had come from the former Head of the Investigating Committee.

and the former Director of Regulation. The letter noted that, had the whistleblower been aware that the Audit and Risk Committee were to consider the annual report on the operation of the whistleblowing policy on 21 November 2013, they would have made the Chair of the Committee aware of their experiences in advance of that meeting. The Chair of the Audit and Risk Committee replied to say that it would not be appropriate for them to be involved, as the complaint was being dealt with by the Chair of the Council, and referred to the Committee considering the Penningtons report in due course.

- 5.72 **2 December 2013** – The former Director of Governance wrote to the whistleblower explaining why the Chair of the Council had previously asked the former Director of Regulation to respond to the whistleblower’s queries about empanelment. The letter stated that the former Director of Governance was responding on the Chair’s behalf, having had regard to the correspondence between the whistleblower and the former Director of Regulation about empanelment. Their view was that the process described by the former Director of Regulation was logical and reasonable and in accordance with the principles discussed with the Appointments Committee, and they saw no reason to advise the Chair that further investigation was warranted. The former Director of Governance also addressed various specific queries the whistleblower had asked about the timing of the introduction of, and communication about, the diversity empanelment process.
- 5.73 **3 December 2013** – The former Director of Governance replied to the whistleblower saying that they did not believe the whistleblower had reasonable grounds for making a complaint of detrimental treatment in relation to empanelment, but that they would review the whistleblower’s request for an investigation once Penningtons had reported on their investigation.<sup>145</sup> The whistleblower replied on 6 December (and copied their correspondence to the Chair of the Council, noting that they did not accept the reasoning of the former Director of Governance).
- 5.74 **17 December 2013** – The former Director of Governance replied to say they would review their advice to the Chair of the Council once the Penningtons’ report had been received. The whistleblower replied the next day, pointing out that the terms of reference for the Penningtons investigation did not include considering treatment of the whistleblower, only the concerns raised by the whistleblower. They accepted that their complaint of detriment in relation to empanelment should await delivery of the report, and said that they had referred the matter to the Authority, as no one in the GDC was prepared to accept the complaint about empanelment under the whistleblowing policy.
- 5.75 **23 December 2013** – Penningtons provided their final reports on the outcome of their investigation to the GDC.
- 5.76 **9 January 2014** – The whistleblower wrote to the Chair of the Council noting the conclusions reached by Penningtons, and inviting the Chair to reconsider the matter of their complaint of detriment in relation to empanelment. They noted that neither they nor, they believed, others generally, had been canvassed about availability to sit on additional Investigating Committee dates that had been arranged subsequent to their whistleblowing disclosure. The GDC replied to the

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<sup>145</sup> The letter also requested further information in relation to certain aspects of the whistleblower’s complaints of detriment in relation to the use of the disciplinary procedure.

whistleblower the next day, informing them that the former Director of Governance had been asked by the Chair of the Council to report to them on the whistleblower's outstanding concerns.

- 5.77 **20 January 2014** – The Chair of the Council wrote to the whistleblower to confirm that they would now consider the two complaints of detriment that the whistleblower had made, and that the former Director of Governance would carry out this investigation. The same day the whistleblower raised a concern about the former Director of Governance being appointed to carry out the investigation, as they questioned the potential compromise of the Chair's role under the whistleblowing policy if someone else filtered complaints for them, and they also said they had serious reservations about the former Director of Governance's ability to retain an open mind, on the basis of 'previous experience' that the former Director of Governance was 'too ready to accept assurances from others within the GDC whom [the former Director of Governance] is unwilling to challenge, or to probe more deeply'. In that letter the whistleblower also commented on the lack of respect and courtesy they had experienced from senior staff at the GDC (with the exception of the Chief Executive) during the period since they made their whistleblowing disclosure. The Chair of the Council replied the following day providing assurances to the whistleblower about the investigation of their complaints.
- 5.78 **17 February 2014** – The former Chair of the Appointments Committee replied to a query raised by the whistleblower on 15 February 2014 about the process that had been used to appoint a new Chair of the Investigating Committee. They explained the process that had been followed in respect of the appointment of that Chair, and referred to an assurance that had been given by the former Head of the Investigating Committee at an Appointments Committee meeting in November 2013 that all Investigating Committee members had been aware of the opportunity for development as Chairs and 'had been equally encouraged and supported to undertake personal development and bespoke training could be provided for any of those seeking to become Chair'.
- 5.79 **19 February and on 21 February** – The whistleblower provided information to the former Chair of the Appointments Committee (copied to the Chief Executive) from themselves and others that the assurances referred to in paragraph 5.78 above were false.
- 5.80 **21 February 2014** – The former Chair of the Appointments Committee replied to say they were seeking assurances about this from the GDC, and had shared the information with the former Director of Governance.
- 5.81 **23 February 2014** – The whistleblower wrote to the Chair of the Council and enquired about how the review by the former Director of Governance of those assurances would affect their investigation.
- 5.82 **28 February 2014** – The former Director of Governance set out their understanding of the whistleblower's complaints, following the whistleblower's enquiry about the timeframe for the investigation and whether they would be interviewed. The letter said that the former Director of Governance had completed most of their report, and invited the whistleblower to submit any comments they wished to have taken into account in the conclusions. No response was received.
- 5.83 **6 March 2014** – The whistleblower wrote to the Chair of the Council expressing surprise that the former Director of Governance (rather than the Chair or a member of the Audit and Risk Committee) was investigating their complaint in

regards to the disciplinary procedure, as that meant they were investigating the actions of their own line manager.

- 5.84 **13 March 2014** – The former Chair of the Appointments Committee wrote to all Investigating Committee members setting out the process for recruitment in autumn 2014. The letter made it clear that applications would be anonymised, and that neither the former Chair of the Appointments Committee or any members who were involved in the development review process would play any part in the discussions, in order to ensure objectivity.
- 5.85 **26 March 2014** – The former Director of Governance reported to the Chair of the Council, the executive management team, and the whistleblower on the outcome of their investigation into the whistleblower’s complaint of detrimental treatment. The former Director of Governance concluded that the whistleblower had not suffered any detriment.
- 5.86 **4 April 2014** – The former Chair of the Appointments Committee wrote to the former Director of Governance setting out concerns about some aspects of their report (further details are set out at paragraph 5.350).
- 5.87 **July 2014** – The GDC’s new whistleblowing policy was introduced.<sup>146</sup>

### The concerns

*Concern 2(a) (i): The timing of the concerns raised by members of the Investigating Committee Secretariat and the formal complaint made about the whistleblower by the first Investigating Committee Secretary*

### The evidence

#### *The whistleblowing policy*

- 5.88 Paragraph seven of the whistleblowing policy in place in July 2013 states that, ‘If a concern is raised in good faith under this policy and the whistleblower believes it to be substantially true the whistleblower will not be subject to sanctions or less favourable treatment for raising it, regardless of the outcome of any investigation’.

#### *The whistleblower’s view*

- 5.89 The whistleblower told us that they believed that disciplinary action had been taken against them inappropriately. They said that action was taken ‘based on a half remembered conversation<sup>147</sup> that took place nine weeks prior to the making of the complaint and three weeks after I raised concerns and after [the external solicitor] had been appointed to investigate, by a member of the team which is at the heart of the external investigation. Although this matter has been resolved informally by an apology for insensitivity the matter remains on my file.<sup>148</sup> I believe the disciplinary process was improperly used and improperly applied.’

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<sup>146</sup> The revised whistleblowing policy can be accessed at: [http://www.gdc-uk.org/aboutus/thecouncil/council%20meeting%20documents%202014/11\(b\)%20annex%20%20whistleblowing%20policy.pdf](http://www.gdc-uk.org/aboutus/thecouncil/council%20meeting%20documents%202014/11(b)%20annex%20%20whistleblowing%20policy.pdf) (Accessed at 27 March 2015)

<sup>147</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us they do not accept that the conversation was “half remembered” by the First Investigating Committee Secretary as they gave a “very specific and detailed account of the incident” which the whistleblower did not dispute. The complaint made by the First Investigating Committee Secretary can be found at paragraph 5.130.

<sup>148</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that, had the matter been dealt with other than by referral to them, a record would still have been kept. We note that the views expressed to us by the Chief Executive and the former Director of Governance about whether the

5.90 The whistleblower also wrote to the Chair of the Council to convey this view. The whistleblower wrote that ‘I believe the events following my disclosure and the actions taken against me demonstrate that members of the IC Secretariat are harassing me, and the Chief Executive is biased against me. The only reason for that bias can be that I have made a whistleblowing disclosure and have referred matters to the PSA’.

5.91 Following receipt of the former Director of Governance’s report into the whistleblower’s allegation of detrimental treatment, the whistleblower wrote to us on 7 April 2014 and highlighted their concerns about the content of some of the appendices to the report – which they had not seen before (in particular the email from the former Head of the Investigating Committee to the former Chair of the Appointments Committee of 5 August 2013). The appendices referred to concerns about the conduct and decision-making of the whistleblower that had been raised by some of the Investigating Committee Secretariat and by one Investigating Committee member, of which the whistleblower had not been notified and was previously unaware. In their email to us, the whistleblower indicated that it was important to note that:

- The concerns raised and the formal complaint were all made after the incident concerning the first Investigating Committee Secretary on 13 June 2013, with the exception of one which was dealt with by way of a private and informal discussion in February 2013.
- None of the issues relating to diversity and the whistleblower’s decision-making had been brought to their attention either formally or informally by the GDC staff, or by GDC associates or by other Investigating Committee members.
- The concerns that the Investigating Committee Secretariat had identified from Investigating Committee meetings they attended alongside the whistleblower were not reflected in the team reviews completed by the Investigating Committee members/Chairs who attended those meetings.
- None of the issues brought to the attention of the former Chair of the Appointments Committee in an email dated 5 August 2013 had been brought to the whistleblower’s attention at any time.
- It was inconceivable that the Chief Executive had not informed the former Director of Regulation about the whistleblower’s concerns at the earliest opportunity after they had made their whistleblowing disclosure, or given the closeness of their working relationship, that the former Director of Regulation had not informed the former Head of the Investigating Committee about the whistleblower’s concerns around the same time.

#### The concerns raised by members of the Investigating Committee Secretariat

5.92 On 5 August 2013, six days after the whistleblower’s disclosure, the former Head of the Investigating Committee sent an email to the former Chair of the Appointments Committee. That email related to the whistleblower. It contained a number of allegations about their behaviour, including an allegation that, when making decisions on cases, the whistleblower was influenced by factors outside of the facts of the case. In the email, the former Head of the Investigating Committee

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matter was in fact dealt with “formally” or “informally” and about the impact of that on whether or not a record would be kept of it differ from the views of the former Chair of the Appointments Committee.

sought the former Chair of the Appointments Committee's view as to what action should be taken in relation to those allegations. The email stated: 'On the one hand the concerns raised would normally have been dealt with by me [sic] under the Informal Feedback process, although the number and breadth perhaps would be indicative of the need to escalate the problem. The issue here is that I do not want to dilute the concerns raised with any potential suggestion that there is any element of deliberate targeting or vindictive behaviour resulting from [their] previous complaint about me'.<sup>149</sup>

5.93 The allegations were said to arise from four sources:

- An Investigating Committee member (the first Investigating Committee member), who had allegedly raised concerns about the whistleblower not acknowledging their emails or responding to them in a timely fashion. The evidence provided to support this allegation was a peer review that the first Investigating Committee member had completed about the whistleblower, following an Investigating Committee meeting held in July 2013. The peer review was generally complimentary of the whistleblower, and only raised concerns about the whistleblower's detailed and particular approach to drafting reasons for decisions. There was no mention in the peer review form or the accompanying email of the timeliness or otherwise of the whistleblower's responses to the first Investigating Committee member.
- The second source of the allegations against the whistleblower was from a GDC staff member within the Investigating Committee Secretariat (the first Investigating Committee Co-ordinator). They had set out their concerns in a document titled 'IC evaluation'. The concerns were as follows:
  - That the whistleblower did not judge the case solely on the papers in front of them, and that they suspected that factors outside of the facts of the case played a part in the whistleblower's decision-making. The first Investigating Committee Co-ordinator said that they believed this because of comments the whistleblower made during their opening of a case – and alleged that if a registrant was from a foreign country, the whistleblower would mention that in their opening statement;
  - The whistleblower paid no regard to the first Investigating Committee member<sup>150</sup>, often talking over them;
  - The whistleblower did not engage with the first Investigating Committee Co-ordinator, and directed the answers to any questions asked by that person to the Investigating Committee Secretary.<sup>151</sup>
  - The whistleblower had made a particular remark to the first Investigating Committee Secretary.<sup>152</sup>

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<sup>149</sup> The whistleblower had complained to the former Director of Regulation in March 2013 about the former Head of the Investigating Committee's failure to respond to the whistleblower in a timely fashion and in relation to a decision the former Head of the Investigating Committee had made about the payment of fees.

<sup>150</sup> This was the same person who had submitted a generally positive peer review about the whistleblower's conduct at the meeting in question which is set out in the first bullet point.

<sup>151</sup> It is unclear why the Investigating Committee Co-ordinator would have been asking questions of Investigating Committee members during the meeting.

<sup>152</sup> This was the remark which the first Investigating Committee Secretary complained about on 26 August 2013.



- The third source of the allegations was from an Investigating Committee Secretary (the second Investigating Committee Secretary) who had been asked to comment on the peer review mentioned in the first bullet point above, as they had attended the relevant Investigating Committee meeting. The second Investigating Committee Secretary said that the whistleblower dwelt on relatively trivial details, that they appeared to have a bias against registrants of backgrounds not similar to their own ‘which may need to be monitored’, and that the whistleblower did not communicate much with the first Investigating Committee Co-ordinator, and often cut across/talked over the first Investigating Committee member when they were making points to the Committee. This had not been raised by the first Investigating Committee member in their peer review.
- The fourth source of the allegations was from a second Investigating Committee Co-ordinator – who said that they had identified that the whistleblower had not submitted any peer reviews that year or for their mid-year review.

5.94 In the email of 5 August 2013 the former Head of the Investigating Committee said that the first Investigating Committee Co-ordinator was prepared to ‘go on record’ in relation to their concerns, but that the second Investigating Committee Secretary had ‘some reticence’ about doing so. No mention was made of the first Investigating Committee member or the second Investigating Committee Co-ordinator.

5.95 The email set out the former Head of the Investigating Committee’s perception of the four options for dealing with these issues. These options were: doing nothing; raising the issues with the whistleblower by way of informal feedback, moving the issue towards the capability and disciplinary procedure, or contacting the whistleblower to ‘exercise our rights under clause 4 of [their] terms and conditions and inform [them] that we no longer wish to use [them] as a member of the IC bearing in mind the issues raised in relation to the development review process (or other concerns) and by virtue of the fact that there is no business case to provide them with sitting dates’. The email said that the former Chair of the Appointments Committee would have been aware that the former Head of the Investigating Committee had given the whistleblower informal feedback earlier in the year about contributions in Investigating Committee meetings which were more style than substance,<sup>153</sup> and that they were very demanding.

5.96 The former Head of the Investigating Committee sent a further email to the former Chair of the Appointments Committee on 7 August 2013. Attached to this email was a document that had been prepared by a third Investigating Committee Secretary, providing feedback on an Investigating Committee meeting that they had attended (as secretary) the previous week. In this document, the third Investigating Committee Secretary raised various concerns about the whistleblower, which were that they had: made unprofessional comments, behaved inappropriately, disagreed with the third Investigating Committee Secretary’s explanation of the ‘case to answer’ test to be applied, made unhelpful references to the Indicative Outcomes Guidance, and not approached cases correctly (in the third Investigating Committee Secretary’s view). The third

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<sup>153</sup> A reference to the need to avoid changes that were more style than substance appeared in the August 2013 Investigating Committee Bulletin.

Investigating Committee Secretary commented that one registrant in relation to whom the whistleblower had ‘pushed’ for a particular outcome was foreign and had a Spanish sounding name.

- 5.97 The former Chair of the Appointments Committee’s views about the emails of 5 and 7 August are set out at paragraphs 5.123-126 below. Following receipt of these emails, the former Chair of the Appointments Committee wrote on 14 August 2013 to the former Head of the Investigating Committee (copied to the former Director of Regulation and the Head of Corporate Legal) and set out the two options available for dealing with such matters. The former Chair of the Appointments Committee’s email said that either a formal complaint should be made using the disciplinary procedure, or the matters should be dealt with through informal mechanisms such as written advice, the development review process (the appraisal process) or through the recently introduced informal mechanism which formed part of the early stages of the disciplinary procedure.<sup>154</sup> The former Chair of the Appointments Committee informed the former Head of the Investigating Committee that, in future, all such concerns should be sent to the Appointments Committee Secretary.

*The former Head of the Investigating Committee’s views*

- 5.98 At interview with us the former Head of the Investigating Committee described their close working relationship with the former Director of Regulation and their approach to getting approval from the former Director of Regulation before taking action, and their assumption that such approval also meant they had the Chief Executive’s approval (the views about this the former Head of the Investigating Committee provided to us are detailed at paragraph 3.291).
- 5.99 We asked the former Head of the Investigating Committee when they had first become aware of the whistleblowing disclosure. The former Head of the Investigating Committee told us at interview that they were unaware of the whistleblowing disclosure until the former Director of Regulation briefed the Investigating Committee Secretariat about it on 15 and 16 August 2013. In response to seeing a draft of this report however, the former Head of the Investigating Committee said that they (the former Head of the Investigating Committee) may have the order of events muddled. They told us that their recollection is that they were ‘formally’ told about the whistleblowing disclosure by the Director of Human Resources on the same day as the former Director of Regulation provided briefings to the Investigating Committee staff generally (15 August 2013). The former Head of the Investigating Committee also told us in response to seeing a draft of this report that before those staff briefings took place they had already been given the ‘heads up’ by the former Director of Regulation about the matter (they did not confirm when that discussion took place but said it was shortly before their meeting with the Director of Human Resources), and that the two of them had met to discuss the approach to be taken at the staff briefings. The former Head of the Investigating Committee also implied that they were aware at an earlier date in August that ‘something was up’ due to the requests for

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<sup>154</sup> This appears to have been a reference to an informal mechanism that had been introduced into the capability procedure (rather than the disciplinary procedure) in June 2013. Although the former Chair of the Appointments Committee told us at interview that such a mechanism had been introduced into the disciplinary procedure (and none of the current or former GDC staff whom we interviewed queried that statement) the only reference to the introduction of such a procedure that we have seen in the Appointments Committee minutes or elsewhere relates to the capability procedure.

information which they were receiving from the Governance team which they realised were connected with the whistleblower (albeit they did not know that individual had made a whistleblowing disclosure at that time).

- 5.100 The former Head of the Investigating Committee said that their method of dealing with complaints changed after the whistleblowing disclosure had been made.<sup>155</sup> The former Head of the Investigating Committee said that, prior to August 2013, they would make attempts to resolve matters locally, in line with the Appointments Committee process. The former Head of the Investigating Committee said that if they needed the former Chair of the Appointments Committee's view, they would email the former Chair of the Appointments Committee directly, copying in the former Director of Regulation.<sup>156</sup> From August 2013 however, the former Head of the Investigating Committee said that they would always refer matters to the former Director of Regulation – it would have been for the former Director to decide whether or not to escalate the matter to the Chief Executive and the former Chair of the Appointments Committee.
- 5.101 The former Head of the Investigating Committee told us that they sent the email of 5 August 2013 to the former Chair of the Appointments Committee on the former Director of Regulation's instructions, having raised the issue with the former Director of Regulation at a one-to-one meeting. The former Head of the Investigating Committee said that they regularly referred concerns about Investigating Committee members to the former Chair of the Appointments Committee for their advice; the former Head of the Investigating Committee said that they had inherited that process, which had been used by the previous Appointments Committee Chair.<sup>157</sup> The former Head of the Investigating Committee said that they had sent the further email to the former Chair of the Appointments Committee on 7 August 2013 because concerns had been raised about the whistleblower which the former Head of the Investigating Committee had not been aware of prior to sending the email on 5 August 2013. We asked the former Head of the Investigating Committee why they had not included reference to the first Investigating Committee Secretary's concerns in the 5 August 2013 email. The former Head of the Investigating Committee said it was because the first Investigating Committee Secretary had not put their concerns in writing at that stage.
- 5.102 Four options were identified in the email of 5 August 2013: to do nothing, for the former Head of Investigating Committee to raise the issues with the whistleblower as informal feedback, to move towards the capability and disciplinary process, or to contact the whistleblower and exercise the GDC's rights under clause 4 of their terms and conditions and inform them that the GDC no longer wished to use the whistleblower as a member of the Investigating Committee 'bearing in mind the issues raised in relation to DRP (or other concerns) and by virtue of the fact that there is no business case to provide the whistleblower with sitting dates'. We asked the former Head of the Investigating Committee about the fourth option they

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<sup>155</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has asked us to make it clear that their approach to complaints did not change, in that the Committee continued to follow the disciplinary procedure.

<sup>156</sup> This is disputed by the former Chair of the Appointments Committee.

<sup>157</sup> This account appears to have been accepted by the former Director of Governance and included in their report (in that the report said that from the date of the whistleblower's disclosure the former Head of the Investigating Committee cannot be shown to have done anything they would not have done anyway) but is disputed by the former Chair of the Appointments Committee.

had set out in the email. The former Head of the Investigating Committee said that the Investigating Committee members' contracts do not oblige the GDC to give them any particular number of days' work, and so one option in relation to Investigating Committee members was just to cease using them 'informally, rather than going down the disciplinary process'. In the former Head of the Investigating Committee's view, the disciplinary process was not helpfully written and was designed to be used by Chairs rather than administrators. In response to seeing a draft of this report the former Head of the Investigating Committee told us that their intention in outlining all the possible options was to be completely clear.

5.103 When we asked what action the former Head of the Investigating Committee had taken following the former Chair of the Appointments Committee's response on 14 August 2013, the former Head of the Investigating Committee said that they could not recall clearly. The former Head of the Investigating Committee said that they probably would have escalated it to the former Director of Regulation for advice on what to do next. The former Head of the Investigating Committee said that every time they spoke to the Appointments Committee about feedback/a complaint about the Investigating Committee members, the Appointments Committee said it should be dealt with informally.<sup>158</sup> The former Head of the Investigating Committee said that they knew that managing matters informally had been included in the disciplinary procedure in June 2013<sup>159</sup>, but that they did not consider that the procedure was clear about what should be dealt with at this stage of the process or how it should be dealt with. The former Head of the Investigating Committee said that the response they received from the Appointments Committee was indicative of the culture of the GDC. The former Head of the Investigating Committee said generally things went up the chain of command<sup>160</sup>, and the response to any requests for advice would be generic, or if the response was specific, often there was then a change of mind and the former Head of the Investigating Committee would be considered to be at fault for acting on the initial advice given.

5.104 We asked the former Head of the Investigating Committee why the potentially very serious concerns about discrimination in decision making on the part of the whistleblower had not been pursued, whereas the first Investigating Committee Secretary's (arguably less serious) complaint had been pursued. The former Head of the Investigating Committee said that '*someone*' had made the decision that one matter should go forward and the other should not. The former Head of the Investigating Committee expressed concerns that there was a lack of clarity as to what was and was not a serious issue such as to justify invoking the new informal part of the disciplinary procedure.<sup>161</sup> The former Head of the Investigating

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<sup>158</sup> The former Chair of the Appointments Committee disputes this account. Their account is set out at paragraphs 5.123 – 5.129 below.

<sup>159</sup> This appears to be an error – as set out in footnote 154, it was the capability procedure rather than the disciplinary procedure that had been amended to include an informal procedure. What the disciplinary procedure required was for staff to use the internal complaints procedures before using the disciplinary procedure.

<sup>160</sup> We understand this to refer to the executive within the GDC and assume it cannot be a reference to the Appointments Committee, given that Committee's role and its independence from the GDC management.

<sup>161</sup> See footnote 154. Only the capability procedure included an informal resolution mechanism. The disciplinary procedure required the internal complaints procedures to be used before the disciplinary procedure was used.

Committee said that they had not considered using the informal procedure in respect of the ‘other’ matters raised about the whistleblower.<sup>162 163</sup>

*The former Director of Regulation’s views*

- 5.105 The former Director of Regulation said that they had worked with the former Head of the Investigating Committee at a previous regulator, but that they had not worked together closely at that time. However, the former Director of Regulation said that between 2011 and 2013 and, since joining the GDC, they had worked closely with the former Head of the Investigating Committee. This tailed off in 2014 after the Penningtons report had been published, when the former Director of Regulation stepped back from involvement with the Investigating Committee.
- 5.106 We asked when and how the former Director of Regulation had first heard about the whistleblower’s disclosure. The former Director of Regulation stated that they could not recall when they heard about the whistleblower’s disclosure, but that it was probably at the end of July/the beginning of August 2013. They said that they could recall a conversation with the Chief Executive about it, but they could not remember if they already knew about it at that point.<sup>164</sup>
- 5.107 The former Director of Regulation told us their views about the former Head of the Investigating Committee’s emails to the former Chair of the Appointments Committee about the whistleblower sent on 5 and 7 August 2013. The former Director of Regulation told us that they had received feedback on the whistleblower from the Investigating Committee Secretariat from time to time, and that they were aware of the first Investigating Committee Secretary’s complaint before they made it formally. However, at another point during their interview with us the former Director of Regulation also told us that no matters about the whistleblower had been raised with them prior to the whistleblowing disclosure; at another point they told us that their general perception of the whistleblower at the time from other feedback was that they were “inordinately rude, pompous...”.
- 5.108 The former Director of Regulation said that they could not recall any conversation with the former Head of the Investigating Committee about the email of 5 August 2013 (they said that they received over 120 emails a day and could not monitor all communications) but they felt that they must have authorised the former Head of the Investigating Committee to send the email, because they suspected that the former Head of the Investigating Committee would have asked whether or not to do it and they would remember if the former Head of the Investigating Committee had acted against their instructions. The former Director of Regulation did not think that the former Head of the Investigating Committee had discussed the 7 August 2013 email with them before it was sent. The former Director of Regulation said the former Head of the Investigating Committee probably saw that email as an extension of the issues that they had already contacted the former Chair of the

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<sup>162</sup> See footnote 154 above

<sup>163</sup> This account differs from the account apparently given to the former Director of Governance. An annex to the note of the former Head of the Investigating Committee’s interview with the former Director of Governance for the purposes of their investigation into the whistleblower’s complaint of detriment contains a statement that ‘There remains another set of complaints in relation to behaviour which were not referred by the [Chief Executive] to the [Appointments Committee] and determined at the time to be resolved informally. In light of the ‘whistleblowing’ complaint these were not addressed and have been discontinued as they are now too old to be dealt with fairly/appropriately’.

<sup>164</sup> We have subsequently seen documentary evidence which confirms that the Director of Regulation was aware of the whistleblowing disclosure before 2 August 2013.



Appointments Committee about, and therefore did not feel the need to raise it with the former Director of Regulation.

- 5.109 The former Director of Regulation told us that they understood that three out of the four issues raised in the email of 5 August 2013 related to the whistleblower's development and review and as such were "right up the Appointments Committee's street". The allegation of discrimination was a "left field issue" that could not have been dealt with informally. The former Director of Regulation said that they may have had a discussion with the former Head of the Investigating Committee about the development and review issues, followed by the former Head of the Investigating Committee later including the allegation of discrimination, which the former Director of Regulation did not pick up on at the time.
- 5.110 The former Director of Regulation told us that they thought that it was perfectly reasonable for the former Head of the Investigating Committee to get a steer from the Appointments Committee as to how seriously they took the development review process. When told that the former Chair of the Appointments Committee had intended their email of 14 August 2013 to give a clear steer to the former Head of the Investigating Committee that the former Head of the Investigating Committee should sort the issues out without using the formal disciplinary procedure, the former Director of Regulation maintained their view that it was appropriate for the former Head of the Investigating Committee to raise the issues with the former Chair of the Appointments Committee. The former Director of Regulation acknowledged that the inclusion of an allegation of discrimination (as opposed to issues relating to the development review process) was an 'additional complexity'.
- 5.111 When we raised our concerns about option four set out in the former Head of the Investigating Committee's 5 August 2013 email (preventing the whistleblower from sitting as an Investigating Committee member, without any formal disciplinary process being initiated) the former Director of Regulation said that they did not have any concerns about the options for action proposed by the former Head of the Investigating Committee. The former Director of Regulation said that all the options referred to by the former Head of the Investigating Committee were open to the former Chair of the Appointments Committee in relation to the development and review issues, and that the former Director of Regulation and the former Head of the Investigating Committee were wondering how far the Appointments Committee would "push it" in the context of the whistleblower having already raised concerns and the risk of any action taken being seen as a "tit for tat" response'. The former Director of Regulation said that they considered that it was perfectly reasonable to ask the Appointments Committee to give an indication as to how seriously the Committee viewed the behaviour, as the Committee were responsible for the development review process.
- 5.112 The former Director of Regulation initially said that they had discussed the concerns highlighted in the 5 and 7 August 2013 emails and/or the issue raised by the first Investigating Committee Secretary with the Chief Executive (although the former Director of Regulation could not remember the content or timing of these discussions). The former Director of Regulation said that this was a discussion about the issues rather than the fact that they had been/were going to be referred to the Appointments Committee. The former Director of Regulation told us that the Chief Executive had said that it could be a situation where raising of these



concerns would be perceived as “tit for tat” and that it would be “unwise to be drawn into a situation whereby we were having people throwing complaints around about each other in retaliation”. The former Director of Regulation said that these were “very difficult and sensitive issues” and that the Chief Executive could not personally start a formal investigation into an Investigating Committee member who had just blown the whistle on the organisation because it would look like they were “just trying to discredit or undermine” that individual. The former Director of Regulation also said that in the background the Francis report<sup>165</sup> was in regulators’ minds and that using the term “whistleblower” gives an individual “sacred status” and puts them in an “unassailable position” which makes it difficult to deal with any issues about them.

- 5.113 We asked the former Director of Regulation why the potentially very serious allegations about discrimination in decision-making on the part of the whistleblower had not been pursued, whereas the first Investigating Committee Secretary’s (arguably less serious) complaint had been pursued. The former Director of Regulation said that the distinction was that the evidence did not come forward in relation to the allegations about discrimination and other matters; whereas the first Investigating Committee Secretary had made a formal complaint. The former Director of Regulation said that if someone had been willing to provide evidence about the whistleblower’s judgments being discriminatory, that would have been serious and it would have had to have been investigated properly. Some of the other issues represented different levels of problems. The former Director of Regulation said it would not have been possible to have a conversation on that topic with the whistleblower based on what someone “feels” – specific cases would need to be identified. The former Director of Regulation said that that sort of complaint is so serious it would have to “go up the chain” and, if there was no evidence, the GDC could not do anything about it. The former Director of Regulation said that they had not considered using any other procedure in respect of the ‘other’ matters raised about the whistleblower. The former Director of Regulation said that there remained an issue about corroborating the serious allegations of discrimination.

#### *The Head of Corporate Legal’s views*

- 5.114 The Head of Corporate Legal told us that they thought that notice of the whistleblowing disclosure was confined to a limited group that did not include the former Head of the Investigating Committee. The Head of Corporate Legal said that the former Head of the Investigating Committee gave an assurance to the former Director of Governance (during the course of their investigation into the whistleblower’s allegations of detrimental treatment) that they had not known about the whistleblowing disclosure when sending the emails on 5 and 7 August 2013.
- 5.115 We asked the Head of Corporate Legal whether they were aware if the issues raised in the 5 and 7 August 2013 emails had been resolved. The Head of Corporate Legal said that they had assumed that the issues raised in those emails had been resolved informally, and observed that the type of comments made were difficult to deal with in any other way.

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<sup>165</sup> <http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/repor>

*The former Director of Governance's views*

- 5.116 The former Director of Governance told us that they were not aware of the 5 and 7 August 2013 emails at the time they were sent. They had first seen the 5 August email as part of their investigation into the whistleblower's allegations of detrimental treatment in early 2014, and they never saw the 7 August email. The former Director of Governance also told us that they did not consider these emails to be inappropriate. The former Director of Governance was not overly concerned by 'option 4' (preventing the Investigating Committee member from sitting, without the disciplinary procedure being initiated), as set out in the 5 August 2013 email, and said that in any event by that time Penningtons had been instructed and the former Head of the Investigating Committee would have been "mad" to take any such action.

*The Chief Executive's views*

- 5.117 We asked about the Chief Executive's working relationship with the former Director of Regulation. The Chief Executive said that they had one-to-one supervision meetings with the former Director of Regulation. These occurred every ten days or so, interspersed with conversations - there was constant communication. The Chief Executive noted that directors were appointed "for a reason" and that they were senior people, and therefore the Chief Executive placed a great deal of reliance on the directors' judgment on a day to day basis. The Chief Executive said that they expected the directors to bring problems to them.
- 5.118 We asked the Chief Executive at interview when they had told the former Director of Regulation and the former Head of the Investigating Committee about the whistleblowing disclosure. The Chief Executive stated that they would need to check, but they expected that they would have done so straight away. The GDC has subsequently confirmed that the Chief Executive never spoke to the former Head of the Investigating Committee about this matter.
- 5.119 The Chief Executive told us that, prior to the whistleblowing disclosure, their only knowledge of the whistleblower related to their disagreement with the former Head of the Investigating Committee in March 2013 about payment of fees and their non-engagement with their personal development and review plan. The Chief Executive told us that they were not aware of any suggestion that the whistleblower had displayed a discriminatory approach in Investigating Committee meetings.
- 5.120 When we told the Chief Executive that the former Director of Regulation had told us at interview that the Chief Executive thought that they had discussed the concerns regarding the whistleblower's approach to decision-making with the Chief Executive, they said that they did not recall this, and asked whether we had any correspondence to support what we had been told – we noted we had not. The Chief Executive said that they were not aware there was any question of the whistleblower's decision-making being discriminatory. The Chief Executive confirmed at several points during our interview that nothing "of the nature that [the whistleblower] made decisions based on a registrant's ethnicity' was made known to [them], and [the Chief Executive] would have remembered it, if it had been". The Chief Executive said that the one example of similar concerns that was raised with them concerned 'somebody else'. In relation to that matter, the Chief Executive said that they had asked the former Director of Regulation to discuss it

with the member in the first instance, and then to raise it with the former Chair of the Appointments Committee if necessary (i.e. if the member did not accept that the behaviour was inappropriate). The Chief Executive said that they had asked the former Director of Regulation to make the decision about how to action the concerns raised about “somebody else”, and that that would have been their usual approach.

5.121 Following our interview with the Chief Executive, we were provided with a copy of correspondence between the former Head of the Investigating Committee and the Chief Executive in which the first Investigating Committee Secretary’s complaint was brought to the Chief Executive’s attention. Attached to that correspondence was some of the documentation that was sent to the former Chair of the Appointments Committee on 5 and 7 August 2013, in which concerns about the whistleblower’s allegedly discriminatory approach to decision-making were made. The only comment the Chief Executive made about this when we asked them about it was that they had not taken this information into account when reaching a view about whether to take action in relation to the formal complaint made by the first Investigating Committee Secretary. The GDC has subsequently told us, in response to seeing a draft of this report, that the Chief Executive could not have taken this information into account at the time, because they did not ‘study’ the attachments to the correspondence. However we note that the letter the Chief Executive sent to the former Chair of the Appointments Committee on 18 September 2013 notifying them of the complaint about the regulator stated that it enclosed an ‘extract’ from an evaluation form which appeared to corroborate the complaint. The evaluation form in question appears to be the one referred at paragraph 5.93.

5.122 When we asked why the concerns raised in the emails of 5 and 7 August 2013 were not taken forward, whereas the first Investigating Committee Secretary’s complaint was pursued, the Chief Executive said that this was because the first Investigating Committee Secretary’s complaint was a formal complaint and referred to the fact that it had been made in writing (which is a requirement under the disciplinary policy). The GDC has told us in response to seeing a draft of this report that it was also relevant that the email sent by the first Investigating Committee Secretary was titled ‘official complaint’, as that made it clear that there was an intention on their part to escalate the matter.

*The former Chair of the Appointments Committee’s views*

5.123 The former Chair of the Appointments Committee disagrees with the former Head of the Investigating Committee’s account as set out at paragraphs 5.100 – 5.101. The former Chair of the Appointments Committee told us that, prior to receiving the former Head of the Investigating Committee’s email of 5 August 2013, they had had no previous contact with the former Head of the Investigating Committee about the whistleblower or any other named Investigating Committee member. The former Chair of the Appointments Committee said that the email of 5 August 2013 had come completely “out of the blue”. In response to seeing a draft of this report the former Chair of the Appointments Committee has told us that while the Appointments Committee had always been prepared to comment on the treatment of anonymised and generalised concerns (for example about a failure to attend mandatory training) during this period the type of concerns raised by the former Head of the Investigating Committee were materially different, in that they referred to individual members and made specific allegations. It was the view of the

former Chair of the Appointments Committee that it was inappropriate for such concerns to be raised directly with the Appointments Committee outside of a referral from the Chief Executive in accordance with the disciplinary procedure, and it could have caused a conflict in the event that such a referral under the disciplinary procedure was made.

- 5.124 The former Chair of the Appointments Committee told us that they were equally concerned to receive the email of 7 August 2013, so soon after the email of 5 August 2013 and before they had had an opportunity to respond to that email. The former Chair of the Appointments Committee knew that there were general difficulties in the relationships between Investigating Committee members and staff, and was aware that some Investigating Committee members could be “more pedantic and picky”. The former Chair of the Appointments Committee said that the email was very detailed and that this kind of thing had not happened before. In their view it was inappropriate for the former Head of the Investigating Committee to contact them in such a way, as such matters should only be raised by the Chief Executive under the Disciplinary Procedure for Statutory Committee Members. The former Chair of the Appointments Committee had no idea why the former Head of the Investigating Committee had decided to send the email to them, and they considered that the former Head of the Investigating Committee should have known to raise the issue first with their line manager, the former Director of Regulation.
- 5.125 The former Chair of the Appointments Committee said that they did not know what the former Head of the Investigating Committee wanted them to do about the matters they had raised about the whistleblower. The former Chair of the Appointments Committee told us that the operation and delivery of the development review process is a matter for the GDC and that the issues raised should only have been escalated to the Appointments Committee if formal action was required. The former Chair of the Appointments Committee did not want to escalate the matters to the Appointments Committee at that time unless all other options had been explored. The former Chair of the Appointments Committee felt that they should not have been sent the emails. The former Chair of the Appointments Committee said that they sought advice from within the Governance team (the GDC staff team that provides support to the Appointments Committee) and from the Head of Corporate Legal as to how they should deal with the emails. The former Chair of the Appointments Committee said that the advice received was that the matters raised were matters for the Appointments Committee, but did not justify calling an emergency Committee meeting. The former Chair of the Appointments Committee told us that they responded to the former Head of the Investigating Committee by email dated 14 August 2013, setting out that either a formal complaint should be made about the whistleblower, or that the matters should be dealt with informally. The former Chair of the Appointments Committee said that they had requested that the former Head of the Investigating Committee inform them by 30 August 2013 which option they intended to pursue – however the former Chair of the Appointments Committee then heard nothing further from the former Head of the Investigating Committee in relation to the issues that had been raised.
- 5.126 The former Chair of the Appointments Committee told us that they were particularly concerned regarding option four in the email of 5 August 2013 - which suggested that it was open to the former Head of the Investigating Committee to decide to stop using a member of the Investigating Committee – as it was not for

GDC staff members to decide not to empanel Investigating Committee members. Any problems with Investigating Committee members would have to be the subject of a proper investigation under the disciplinary procedure. The former Chair of the Appointments Committee told us that in June 2013 the Appointments Committee had agreed an amendment to the disciplinary procedure to include an informal process – the intention being to try to sort out individual issues without the need to invoke a formal procedure. The former Chair of the Appointments Committee said that the former Head of the Investigating Committee had attended the Appointments Committee at which this amendment had been agreed (in June 2013) and should have been aware of it.<sup>166</sup>

- 5.127 The former Chair of the Appointments Committee told us that they did not accept the assertion made by the former Director of Regulation that it was open to the former Chair of the Appointments Committee to prevent an Investigating Committee member sitting, without any initiation of the formal disciplinary procedure. The former Chair of the Appointments Committee told us that such action could only be taken by the Appointments Committee, after referral of a complaint to the Committee, and referred to paragraph 18 of the disciplinary procedure (which provides that if the Chair considers that the suspension or removal of the member may be required, they must refer the matter to the Appointments Committee). There is documentary evidence to demonstrate that this was the former Chair of the Appointments Committee's understanding at the time (they emailed other Appointments Committee members on 25 September 2013 to seek their views about whether or not it was necessary to suspend the whistleblower, first informing them that the former Chair had exercised their discretion to accept the complaint). Having examined the relevant legislation (The GDC (Constitution of Committees) Rules Order of Council 2009) we can confirm that rules 7 and 8 only provide for the suspension (or removal) of members of statutory committees (including the Investigating Committee) by the Appointments Committee as a whole (i.e. the rules do not permit the Chair to take such action alone) and that the rules limit the relevant circumstances, as well as specifying the procedure to be followed.
- 5.128 We asked the former Chair of the Appointments Committee whether they had taken any action in relation to option four set out in the 5 August 2013 email. The former Chair of the Appointments Committee said that before they had had time to do so, the former Head of the Investigating Committee sent an email suggesting that they were not going to empanel another Investigating Committee member because that member had not undertaken some training (this was the email dated 26 September 2013 referred to in paragraphs 3.323 and 5.42 above) to which the former Chair of the Appointments Committee had replied, explaining that only the Appointments Committee could stop an Investigating Committee member from continuing to sit. The former Chair of the Appointments Committee told us that, after that exchange of emails, they were particularly surprised to receive a further email, dated 2 October 2013, on a similar topic from the former Head of the Investigating Committee which caused such concern that it formed the subject of

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<sup>166</sup> The minutes of the June 2013 Appointments Committee meeting refer to a process for the informal feeding back of performance/capability concerns raised by Committee members/chairs. We have seen no reference in the Appointments Committee minutes to a similar procedure having been introduced into the disciplinary procedure and it is therefore unclear that such an amendment was ever made. As noted at footnote 164 above, an informal procedure was introduced into the capability procedure in June 2013.



a referral from the Appointments Committee to the Chief Executive on 16 October 2013: see paragraphs 5.52, 3.41 and 4.131.

5.129 In contrast to the view expressed by the former Director of Regulation, the former Chair of the Appointments Committee told us that the three issues raised in the former Head of the Investigating Committee's email of 5 August 2013 which did not relate to discrimination were not relevant to the Appointments Committee's role in relation to the training and development of Investigating Committee members – as that role is limited to assuring training and development, rather than delivery of it.

#### The formal complaint made by the first Investigating Committee Secretary

5.130 On 26 August 2013 the first Investigating Committee Secretary sent an email to the former Head of the Investigating Committee in which they made a formal complaint about the whistleblower. This complaint related to the whistleblower's alleged conduct before an Investigating Committee meeting that had taken place on 13 June 2013. At this meeting (which was the first time the two people had met) the whistleblower was adamant that they had met before. When the Investigating Committee Secretary disputed this, the whistleblower made a remark about the Secretary's nationality and gender. The first Investigating Committee Secretary described the whistleblower saying that they 'confused all [nationality] girls because [the whistleblower] worked with many and found they all come to England to meet a husband and get pregnant, or words to that effect'. The first Investigating Committee Secretary said that they found this highly inappropriate and rude and that the whistleblower was passing a baseless and somewhat racist judgment on them. When asked why they had waited nine weeks before lodging a formal complaint, the first Investigating Committee Secretary said that they realised that they were making their complaint a substantial period of time after the event, but that they had wanted time to think carefully about the matter.

5.131 On 30 August 2013 the former Head of the Investigating Committee sent the Chief Executive and the former Director of Regulation an email which said: 'I have received this week two formal complaints about an IC member. I have sought previously input and advice from [the former Chair of the Appointments Committee<sup>167</sup>] who confirms that any formal complaint made needs to be raised with you. I spoke also with [the Head of Corporate Legal] yesterday just to ensure that I hadn't erred in my thinking having received the complaint from [the first Investigating Committee Secretary] over the bank holiday weekend. The reason I have exercised such caution is that the two complaints relate specifically to the conduct of [the whistleblower]'.

5.132 Attached to this e-mail were:

- The formal complaint from the first Investigating Committee Secretary (as noted above).
- A document entitled 'IC Evaluation' from the first Investigating Committee Co-ordinator (as noted at paragraph 5.93).

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<sup>167</sup> This appears to be a reference to the email of 14 August 2013 which the former Chair of the Appointments Committee sent to the former Head of the Investigating Committee in response to their emails of 5 and 7 August 2013 i.e. it was not a reference to any correspondence between the two of them concerning the allegation made by the first Investigating Committee Secretary about the whistleblower.



- An email entitled 'URGENT – concerns regarding comments made by [the whistleblower] in the IC on 1 August 2013' from the third Investigating Committee Secretary. This included the concerns we outlined at paragraph 5.93 and a follow up email which was sent to the former Head of the Investigating Committee by the third Investigating Committee Secretary an hour before the former Head of the Investigating Committee forwarded the complaints to the Chief Executive. This email set out that the third Investigating Committee Secretary had considered further the comments made by the whistleblower in August, and that they considered that their concerns should be dealt with formally by the GDC 'as opposed to being dealt with as part of the informal committee feedback process.' These comments related to the whistleblower's conduct in Investigating Committee meetings.

5.133 In their email the former Head of the Investigating Committee did not specify their expectations of either the Chief Executive or the former Director of Regulation in terms of the next steps to be taken.

*The first Investigating Committee Secretary's views*

5.134 The first Investigating Committee Secretary confirmed that they had mentioned to the former Head of the Investigating Committee the remark that the whistleblower had made on the day it was made, and said that the former Head of the Investigating Committee had said that the first Investigating Committee Secretary should put it in writing.<sup>168</sup> The first Investigating Committee Secretary said that the former Head of the Investigating Committee said that if it was not in writing then they would be unable to take it any further. The first Investigating Committee Secretary said that they decided to think about this over the weekend. They told us that they wanted to make it clear that they found the remark unacceptable, and wanted to put it in writing so that at least there was something on the whistleblower's file in relation to the incident.

5.135 When asked to explain the delay in making their complaint, the first Investigating Committee Secretary said that they had had a number of Investigating Committee meetings after 13 June 2013 which required significant preparation; they had also had academic work to do; they were preparing for the Investigating Committee members' training, and they were also on annual leave for two weeks. They said that they finally decided to put their complaint in writing during the August bank holiday weekend, as they were concerned that they would soon be sitting with the whistleblower again in an Investigating Committee meeting, although they did not know this for sure.

5.136 The first Investigating Committee Secretary emphasised to us that they did not make a complaint because of the whistleblowing disclosure, although they were aware of it.<sup>169</sup> They told us that their reasoning for making the complaint about the whistleblower was because of their principles.

5.137 The first Investigating Committee Secretary told us that the former Head of the Investigating Committee did not encourage or pressure them to make a complaint about the whistleblower, nor had they prompted them to make a complaint

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<sup>168</sup> The first Investigating Committee Secretary clarified on 17 September 2014 that the former Head of the Investigating Committee did not instruct nor tell them specifically to put it in writing, it was only if they felt it was an issue or was unhappy about it.

<sup>169</sup> We note that they would have been informed of it on 15/16 August at the latest – at one of two briefings the former Director of Regulation provided to the Investigating Committee team.

between the day of the Investigating Committee meeting at which the incident occurred and the date they made the complaint. The first Investigating Committee Secretary told us that they were not aware that anyone else knew that they were going to complain.

*The former Head of the Investigating Committee's views*

- 5.138 The former Head of the Investigating Committee told us that the first Investigating Committee Secretary had raised their concern with the former Head of the Investigating Committee on 13 June 2013 - the day the remark had been made to them. The former Head of the Investigating Committee said that they told the first Investigating Committee Secretary to think about whether they wished to make a formal complaint. The former Head of the Investigating Committee said that they suggested that the first Investigating Committee Secretary should put the complaint in writing if they wanted to pursue the matter.
- 5.139 The former Head of the Investigating Committee told us that their usual approach to feedback about Investigating Committee members involved considering whether the matter could be resolved by way of a “quiet word”. We asked the former Head of the Investigating Committee why they did not opt for a “quiet word” with the whistleblower about the first Investigating Committee Secretary’s concern (as the former Head of the Investigating Committee had done in March 2013 in relation to the whistleblower on another matter). The former Head of the Investigating Committee said that, whilst they and the whistleblower had had a “constructive chat” at that time, the whistleblower had then complained about the former Head of the Investigating Committee a week later in relation to another matter.<sup>170</sup> Because of that incident, the former Head of the Investigating Committee did not want to engage with the whistleblower in that way, or did not feel comfortable to do so. The former Head of the Investigating Committee also told us that they also wanted to be sure that the first Investigating Committee Secretary was not just “blowing off steam”.
- 5.140 The former Head of the Investigating Committee said they could not recall what advice they had given the first Investigating Committee Secretary about what would happen if the first Investigating Committee Secretary formalised their complaint. The former Head of the Investigating Committee also told us that they were not aware of the one month deadline for making a complaint about a statutory committee member which was contained within the disciplinary procedure (although later in the interview the former Head of the Investigating Committee said that they did know about the one month deadline, however they had not recalled it at the time). The former Head of the Investigating Committee also said that they escalated all concerns about Investigating Committee members which they received in writing – which would have been on the instruction of the former Director of Regulation.
- 5.141 The former Head of the Investigating Committee said that they could not recall what engagement they had had with the first Investigating Committee Secretary in the intervening period before they made a formal complaint – the former Head of the Investigating Committee had put the matter out of their mind, having made a note of it. The former Head of the Investigating Committee said that they were still having regular one to one meetings with all the Investigating Committee

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<sup>170</sup> In relation to the former Head of the Investigating Committee not responding to emails and in relation to the payment of fees.

Secretaries during that period, including the first Investigating Committee Secretary, and that it was likely that the former Head of the Investigating Committee had been prompted to ask the first Investigating Committee Secretary about the situation at some point during that period, because the former Head of the Investigating Committee was aware that “the further in time it got away from the incident, the harder it would be to prove and the longer it goes on, the harder it is to deal with”. The former Head of the Investigating Committee said that they were fairly certain that they would have asked the first Investigating Committee Secretary “where [they were] with their letter”. The former Head of the Investigating Committee said that at the time there were other similar issues about Investigating Committee members and inappropriateness. The former Head of the Investigating Committee said that they hoped that they would have been mindful of the issue about the first Investigating Committee Secretary’s concern being outstanding.<sup>171</sup>

5.142 We asked the former Head of the Investigating Committee how they had responded to the first Investigating Committee Secretary’s formal written complaint. The former Head of the Investigating Committee said that they could not recall whether they communicated with the Chief Executive directly or not when the complaint was sent, or what other information the Chief Executive was provided with. However, the former Head of the Investigating Committee said that, if they had forwarded the complaint to the Chief Executive, that would have been the course of action they had agreed with the former Director of Regulation. The former Head of the Investigating Committee said that they had told the first Investigating Committee Secretary not to involve them in the next stage of the complaint. The former Head of the Investigating Committee did not think that they had kept an eye on what was happening – they told us that they were really busy at the time, and in any event they did not want it to look like they were encouraging or exacerbating the situation – they wanted it to be clear that they were ‘hands off’.

5.143 However, in our second interview with the former Head of the Investigating Committee Secretary we discussed with them an email they had sent on 23 September 2013 to the former Chair of the Appointments Committee.<sup>172</sup> In that email, the former Head of the Investigating Committee asked the former Chair of the Appointments Committee for an indication of the timescale around the investigation into the first Investigating Committee Secretary’s complaint, and the former Head of the Investigating Committee asked whether consideration had been given as to whether or not the conduct of the whistleblower was such that the Appointments Committee would be considering interim suspension. The former Head of the Investigating Committee told us that they asked the former Chair of the Appointments Committee about this because they and the former Director of Regulation were reviewing the options available to them regarding the whistleblower’s forthcoming Investigating Committee meetings, and were considering whether they should ask the whistleblower to consider withdrawing.

5.144 We asked what had prompted the former Head of the Investigating Committee to send that email of 23 September 2013 to the former Chair of the Appointments Committee, given that the former Head of the Investigating Committee had said

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<sup>171</sup> The former Head of the Investigating Committee told the former Director of Governance that after the first Investigating Committee Secretary first mentioned the matter, they put it out of their mind.

<sup>172</sup> We were not aware of the email at the time of the first interview.

that they had been reluctant to become further involved with the complaint that had been made by the first Investigating Committee Secretary. The former Head of the Investigating Committee told us that they could not recall the circumstances, and suggested various possible explanations. The first explanation was that, as the operational manager for the Investigating Committee Secretariat team, the former Head of the Investigating Committee needed to manage the potential situation that both the first Investigating Committee Secretary and the whistleblower would be sitting in Investigating Committee meetings together in the near future. However, when we put it to the former Head of the Investigating Committee that the whistleblower's next sitting date was 17 October 2013, the former Head of the Investigating Committee said that, in that case, the only answer was that the Appointments Committee could take "months and months" to do something<sup>173</sup>, and if they were going to suspend the whistleblower, then the former Head of the Investigating Committee and the former Director of Regulation would have had to empanel an alternative lay member. The former Head of the Investigating Committee said that there were only a limited number of lay Investigating Committee members, and therefore that empanelling an alternative member would present a problem. The former Head of the Investigating Committee stated that that was the only logical answer, however they could not be certain. The former Head of the Investigating Committee said that they had spoken to the former Director of Regulation about the issue, and had shown a copy of the email of 23 September 2013 to the former Director of Regulation before sending it to the former Chair of the Appointments Committee. The former Head of the Investigating Committee went on to say that they could only suspect that the reason they were involved was because their team had been raising concerns about empanelment saying, "If [the whistleblower] is going to be suspended by the Appointments Committee we are going to have a problem with empanelment. Can we get some clarity about whether or not...?" We asked how the Investigating Committee Secretariat would have known about the complaint made by the first Investigating Committee Secretary, and the possibility of the whistleblower's suspension. The former Head of the Investigating Committee said that one of the Investigating Committee Co-ordinators would know. The former Head of the Investigating Committee then said that they could not say how anyone would have known. We clarified with the former Head of the Investigating Committee that no one in the Investigating Committee Secretariat (other than the first Investigating Committee Secretary and the former Head of the Investigating Committee) should have known about the first Investigating Committee Secretary's complaint.<sup>174</sup> The former Head of the Investigating Committee then suggested that it might have been not one of the team who had been worrying about the consequences for empanelment if the whistleblower were suspended,

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<sup>173</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that they do not accept this comment, and they have referred to the specific time-limits set in the disciplinary procedure.

<sup>174</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that not only did some GDC staff appear to be aware of both the whistleblower's disclosure and the complaint subsequently made about them, but that some Investigating Committee members also appeared to be aware of both issues and asked Appointments Committee members questions about them. They were unable to supply us with any further details. This raises a further concern about the extent to which confidentiality was maintained in relation to the complaint about the whistleblower.

but the former Head of the Investigating Committee – the former Head of the Investigating Committee was uncertain about this.

5.145 The former Head of the Investigating Committee told us that they had had many options in dealing with the first Investigating Committee Secretary's complaint and that they did not know what to do. The former Head of the Investigating Committee told us that they had made mistakes in their handling of the complaint and that they should have progressed it more quickly.

5.146 In relation to when the former Head of the Investigating Committee first became aware of the whistleblowing disclosure, they maintained to us at interview that they were unaware of the whistleblowing disclosure until the former Director of Regulation briefed the Investigating Committee Secretariat about it on 15 and 16 August 2013. In response to seeing a draft of this report however, the former Head of the Investigating Committee said that they may have the order of events muddled. They told us that their recollection is that they were 'formally' told about the whistleblowing disclosure by the Director of Human Resources on the same day as the briefings provided by the former Director of Regulation (i.e. 15 August 2013).<sup>175</sup> The former Head of the Investigating Committee also told us that before those staff briefings they had already been given the 'heads up' by the former Director of Regulation about the matter and that the two of them had met to discuss the approach to be taken at the staff briefings. The account provided by the former Head of the Investigating Committee also suggested that they were aware at an earlier date in August that 'something was up' due to the requests for information which they were receiving from the Governance team which they realised were connected with the whistleblower (albeit they did not know that that individual had made a whistleblowing disclosure at that time). They told us that in the week commencing 5 August 2013 they were not 'formally' aware of the complaint, or its details, or the fact that it was a whistleblowing disclosure.

*The former Director of Regulation's views*

5.147 The former Director of Regulation said that they had become aware of the complaint by the first Investigating Committee Secretary soon after 13 June 2013, as the former Head of the Investigating Committee had mentioned it. The former Director of Regulation stated that, as far as they were concerned, at the time of the whistleblower's disclosure<sup>176</sup> the first Investigating Committee Secretary was still deciding whether to make a formal complaint. However, the route for doing so, in the former Director of Regulation's view, was not particularly clear. The former Director of Regulation said that they understood that the complaint would come to them, and then they would have to decide with the Chief Executive whether the matter would be referred to the Appointments Committee.

5.148 The former Director of Regulation told us that they had spoken to the Chief Executive about the incident and about whether a formal complaint would be made. The former Director of Regulation said that once a formal complaint was made, they went to the Chief Executive and said there had been a complaint about an Investigating Committee member who is answerable to the Appointments Committee. The former Director of Regulation said that they had

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<sup>175</sup> That account was confirmed when we subsequently received from the GDC a copy of the note of that meeting, along with a letter sent to the former Head of the Investigating Committee on 16 August 2013 by the Director of Human Resources.

<sup>176</sup> Which was more than one month after the incident on 13 June 2013 that the first Investigating Committee Secretary subsequently complained about.



had no discussion with the Chief Executive about the steps that should be taken after this notification of the complaint.

#### *The Chief Executive's views*

- 5.149 The Chief Executive could not recall at interview with us who had informed them of the first Investigating Committee Secretary's complaint, or what information they had been provided with at that time. The Chief Executive later told us that this matter had been brought to their attention by the Head of Corporate Legal, and that they had been notified of other concerns about the whistleblower, including their conduct in Investigating Committee meetings and their approach to decision-making, but had not taken them into account when handling the first Investigating Committee Secretary's complaint. The Chief Executive offered no explanation as to why these matters had not been considered by them, or why any formal or informal action was not taken by the GDC. The GDC told us, in response to seeing a draft of this report, that the Chief Executive had not taken these matters into account at the time because they did not 'study' the attachments to the relevant correspondence (the emails of 5 and 7 August 2013 from the former Head of the Investigating Committee to the former Chair of the Appointments Committee) and that the Chief Executive has no recollection of the former Head of the Investigating Committee raising these issues with them.
- 5.150 The Chief Executive said at interview that they wanted to make it clear "that nothing in the way [they] handled this matter was seeking to prejudice [the whistleblower]" and that "there was no punitive element" to these incidents.

#### *Our view*

- 5.151 The timing of the concerns raised by members of the Investigating Committee Secretariat and the formal complaint made by the first Investigating Committee Secretary indicate that it is possible that they were raised/made in retaliation for the whistleblower's disclosure or as a result of encouragement from others who were motivated by a desire for retaliation. No comprehensive audit trail exists to show when key discussions were had and decisions made. For example, it is not clear when the former Director of Regulation was first informed that the whistleblower had made their disclosure (although it is clear that the former Director of Regulation knew of it before 2 August 2013) what prompted the emails of 5 and 7 August 2013, nor the reasons why the matters contained in the former Head of the Investigating Committee's 5 and 7 August 2013 emails were not progressed either formally or informally by the GDC executive, given the serious nature of them. It is also partly because some of the accounts provided to this investigation were confused and inconsistent and cast doubt on who knew about the formal complaint made by the first Investigating Committee Secretary and the disclosure by the whistleblower and when they knew. We are concerned that when dealing with either such potentially serious allegations or a formal complaint, there was no structured approach adopted to maintaining a comprehensive record of events, particularly given the additional sensitivities, as the matters involved a whistleblower. We note in particular that when the former Director of Governance came to investigate the whistleblower's complaint of detriment, they were not aware of either the email of 7 August 2013 sent by the former Head of the Investigating Committee to the former Chair of the Appointments Committee, or the response of 14 August 2013, or of the email that the former Head of the Investigating Committee sent on 23 September 2013. Those documents were, in



our view, relevant to any consideration of whether retaliation was the motivation behind any of the actions the whistleblower complained had caused them detriment. We recommend that in future the GDC should ensure that any complaints (either those managed using the internal complaints procedures or by the Appointments Committee) should be appropriately documented and records stored in one central and secure location (with safeguards in place to ensure that access to each record is appropriately restricted) to enable an audit trail of events and decisions to be kept.

- 5.152 Whilst we cannot reach a definitive view on this aspect of the investigation, given the evidence we have reviewed we can see why the whistleblower considers that the timing of the concerns raised by the members of the Investigating Committee Secretariat, as well as the formal complaint made by the first Investigating Committee Secretary, was deliberate and that these issues were raised in retaliation for their whistleblowing disclosure.
- 5.153 We note that the former Head of the Investigating Committee and the former Director of Regulation, on both their accounts, had a close working relationship and we consider that it is unlikely that the former Director of Regulation would not have shared some information about the whistleblowing disclosure with the former Head of the Investigating Committee at the time that the former Director of Regulation became aware of it (which was by 2 August 2013) given its significance. We also infer from the former Head of the Investigating Committee's comments in response to seeing a draft of this report that they were in fact aware of some information about the concerns that had been raised by the whistleblower (although not that the matter had been raised under the whistleblowing policy) before they were 'formally' notified about it on 15 August 2013, albeit they have not been able to confirm details about what they knew prior to that date. The GDC, in response to seeing a draft of this report, has said both that the former Director of Regulation has always maintained that they had not disclosed such information to the former Head of the Investigating Committee, and that the Head of Corporate Legal had advised the former Director of Regulation not to do so. We have not been provided with a copy of that advice or information about the date on which it was given. We note that at interview the Head of Corporate Legal told us that they did not know whether the former Head of the Investigating Committee was aware of the whistleblowing disclosure as at 5/7 August 2013 (when they sent emails to the former Chair of the Appointments Committee raising concerns about the whistleblower), although they understood that knowledge about it had been limited to a small group that did not include the former Head of the Investigating Committee. While we have not seen the advice the GDC has told us that the Head of Corporate Legal provided to the former Director of Regulation, we have seen the letter the Director of Human Resources sent to the former Director of Regulation on 19 August 2013 asking them not to discuss the matter with anyone. We note that letter was sent some considerable time after the former Director of Regulation became aware of the whistleblower's disclosure – which we have established was on 2 August 2013 at the latest. Further, the views expressed to us at our investigation by the former Director of Regulation and by the former Director of Governance also indicate that the identity of the whistleblower was widely known and therefore suggest that the fact that there had been a whistleblowing disclosure would also have been known.

- 5.154 We note that the former Head of the Investigating Committee sent an email to the former Chair of the Appointments Committee within three working days of the whistleblowing disclosure (i.e. on 5 August 2013) setting out detailed concerns about the whistleblower, followed by a second email raising further concerns 2 days later (on 7 August 2013). The former Head of the Investigating Committee told us that *after* the whistleblowing disclosure they changed their approach to handling complaints. The former Head of the Investigating Committee said that, prior to the disclosure, their approach was to make attempts to resolve matters locally, in line with the Appointments Committee process. They told us that if they needed the former Chair of the Appointments Committee's view, they would email the former Chair of the Appointments Committee directly, copying in the former Director of Regulation.<sup>177</sup> The former Head of the Investigating Committee told us that, from August 2013, they changed their approach and would always refer matters to the former Director of Regulation – it would then be for the former Director of Regulation to decide whether or not to escalate the matter to the Chief Executive and the former Chair of the Appointments Committee. In relation to the 5 and 7 August emails, the former Head of the Investigating Committee told us that they sought advice from the former Director of Regulation before referring the concerns to the former Chair of the Appointments Committee. This suggests that the former Head of the Investigating Committee knew of the subject matter of the whistleblowing disclosure (even if they did not know that the form in which the matter had been raised was that of a disclosure under the whistleblowing policy) at the time of the emails sent on the 5 and 7 August 2013. That contradicts both what they originally told us about their knowledge of the whistleblowing disclosure at interview, and the assurance that they provided to the former Director of Governance as part of their investigation into the whistleblower's allegations of detriment.
- 5.155 The former Head of the Investigating Committee also said that they would only forward concerns to the Appointments Committee if those concerns were received in writing - but we note that this was not the case in respect of all of the concerns raised in the 5 August 2013 email. The former Head of the Investigating Committee, forwarded a concern which had not been received in writing. That casts further doubt on the credibility of the former Head of the Investigating Committee's account at interview.
- 5.156 Further, the former Chair of the Appointments Committee told us that contact of this nature was unprecedented<sup>178</sup>, which is not consistent with the former Head of the Investigating Committee telling us that they had regularly sought the Appointments Committee's advice and that there were other matters involving Investigating Committee members and inappropriateness. This implies that there may have been a different motivation behind forwarding this matter to the Appointments Committee. Whilst we are unable to reconcile the views of the former Chair of the Appointments Committee and the former Head of the Investigating Committee, we note that the former Chair of the Appointments Committee thought that the former Head of the Investigating Committee's request for advice as set out in their emails of 5 and 7 August 2013 was inappropriate – with which we agree. Had the former Head of the Investigating Committee wanted to ascertain how seriously the Appointments Committee would deal with breaches

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<sup>177</sup> This element of their account is not accepted by the former Chair of the Appointments Committee.

<sup>178</sup> See paragraph 5.123.

of the development review process (the motivation that was suggested to us by the former Director of Regulation as possibly lying behind the former Head of the Investigating Committee's emails) they could have done so without mentioning any names. The Appointments Committee would have been involved in any subsequent disciplinary proceedings against the whistleblower (which might well have ensued, had the allegations of discrimination in decision making been pursued) and as such the contact made by the former Head of the Investigating Committee was inappropriate.

5.157 In addition, the former Director of Regulation at interview said that they had no concerns about the options that the former Head of the Investigating Committee had presented in their email of 5 August 2013 to the former Chair of the Appointments Committee. The former Director of Regulation said that all the options referred to by the former Head of the Investigating Committee were open to the Chair of the Appointments Committee in relation to the development and review issues and that they and the former Head of the Investigating Committee were wondering how far the Appointments Committee would "push it" in the context of the whistleblower having already raised concerns and the risk of any action taken being seen as a "tit for tat response". This statement implies that the former Head of the Investigating Committee was aware of the whistleblowing disclosure much earlier than they told us at interview. In addition, when we put our concerns about the options presented in the email of 5 August 2013 sent to the former Chair of the Appointments Committee to the former Director of Governance, they said that by the time this email had been sent, Penningtons had already been commissioned to investigate the matters referred to in the whistleblower's disclosure, and that the former Head of the Investigating Committee would therefore have been "mad" to take any adverse action against the whistleblower. This again implies that the former Head of the Investigating Committee knew of the disclosure considerably earlier than they recalled at interview. It suggests that, as the former Head of the Investigating Committee has implied subsequently, they were aware earlier in August that an issue had been raised in connection with the whistleblower, even if at that stage they were not aware of the details, or of the fact that it consisted of a whistleblowing disclosure.

5.158 It is not clear to us why matters relating to the whistleblower's allegedly discriminatory approach to decision-making were raised in August 2013 by the second and third Investigating Committee Secretaries and the Investigating Committee Co-ordinator. The former Head of the Investigating Committee had asked for their views on a peer review carried out by the first Investigating Committee member in which no concerns had been raised about the whistleblower, other than about their approach to the drafting of decisions being sometimes overly focused on style rather than substance. It is unclear why both staff members decided to raise wider (and similar) issues about the whistleblower at that point in time, particularly given that the whistleblower had been a member of the Investigating Committee for several years and no such concerns had been raised at any point previously. On a similar issue, it is not clear why the third Investigating Committee Secretary raised their concerns again on 30 August 2013 (having first raised them on 7 August 2013), just an hour before the former Head of the Investigating Committee submitted the complaint to the Chief Executive and asked for them to be dealt with formally. Whilst the first Investigating Committee Secretary has provided an explanation for the delay in making their complaint, there is some dispute between them and the former Head of the Investigating

Committee about whether there was any discussion between them about whether a complaint would be made, from the time the remark was first reported and the date when the formal complaint was made. We are unable to reconcile their verbal accounts, and we have not seen any notes from their one to one meetings. However, the timing of the first Investigating Committee Secretary's formal complaint (which was made after the whistleblowing disclosure) in combination with the concerns raised in the 5 and 7 August 2013 emails gives the appearance of a co-ordinated attempt within the Investigating Committee Secretariat to identify and raise concerns about the whistleblower. This is all compounded by the suggestion in the former Head of the Investigating Committee's most recent account of events that they were aware in early August (albeit 'informally') that 'something was up' in connection with the whistleblower (although they did not know that the whistleblower had made a disclosure under the whistleblowing policy at that time) and stating at interview that other Investigating Committee Secretariat members might have known of the formal complaint about the whistleblower that had been made by the first Investigating Committee Secretary. This casts doubt on whether confidentiality was maintained in relation to any of the concerns about the whistleblower that were raised.

5.159 Finally, we have been given no credible explanation as to why the arguably more serious concerns about the whistleblower's approach to decision making and those related to their lack of engagement with the personal development review process were not pursued by the GDC. The reasons given by all those whom we interviewed to explain the difference in treatment as between the potentially serious matters raised in the emails of 5 and 7 August 2013 and the first Investigating Committee Secretary's complaint was that the first Investigating Committee Secretary had framed their concern into a formal written complaint. We do not consider it appropriate that the only measurement of the seriousness of a concern and the most important indicator as to the action to be taken is whether a complaint is made in writing or not or whether the complainant describes it as 'formal'. The nature and content of the concern must be taken into account in assessing its seriousness whether it is raised in writing or otherwise. We note that the disciplinary procedure allows for complaints that are not made in writing to be accepted in 'exceptional' circumstances (in the same way that 'exceptional' circumstances may justify accepting complaints made outside of the one month time limit) – i.e. the fact that a complaint is not made in writing is not an absolute bar to its being taken forwards, although the GDC staff whom we asked about it at interview all told us that a complaint could only be taken forward if made in writing.

5.160 It is particularly troubling if the fact that the first Investigating Committee Secretary's complaint was made in writing was the distinguishing factor between that complaint and the other issues raised about the whistleblower which were not progressed, in circumstances where the first Investigating Committee Secretary was not made aware by the former Head of the Investigating Committee when they first raised their concern that the internal complaints procedures should be used first. Nor did the former Head of the Investigating Committee explain to the first Investigating Committee Secretary what the disciplinary procedure entailed, despite having been sent a copy of the procedure by the former Chair of the Appointments Committee on 14 August 2013. The fact that the first Investigating Committee Secretary made a formal written complaint cannot be relied upon as determinative of the seriousness of the underlying matter.

- 5.161 In terms of the concerns raised in the 5 and 7 August 2013 emails not being pursued, the former Director of Regulation said that a lack of corroborating evidence from the staff about the concerns that were raised prevented any action being taken. However, we have seen nothing to suggest that such evidence was ever sought from those that had raised these concerns about the whistleblower. This is despite the third Investigating Committee Secretary stating that they wanted their concerns to be treated formally by the GDC, and the Investigating Committee Co-ordinator stating that they would be happy to go 'on the record' with their concerns. Further, had the former Head of the Investigating Committee's concern related to the whistleblower's participation in the development review process (as suggested by the former Director of Regulation) there would have been corroborating evidence within the GDC's own records. The former Head of the Investigating Committee told us that they had passed the response from the former Chair of the Appointments Committee to the former Director of Regulation, and that it was for the former Director of Regulation to decide what, if any, action should be taken. Given that the former Head of the Investigating Committee considered that the concerns were serious enough to be raised with the former Chair of the Appointments Committee, it is surprising that the former Head of the Investigating Committee did not follow this up with the former Director of Regulation. We consider that it would not be defensible for a regulator to ignore concerns raised about possible discrimination by a decision maker in the fitness to practise process. Therefore, we consider that other factors must have been taken into account when reaching the view that these matters should not be pursued further.
- 5.162 Finally, in relation to the 5 and 7 August 2013 emails, we note that despite the advice from the former Chair of the Appointments Committee that these matters should either be resolved informally or formulated into a formal complaint, and no such complaint having been made in respect of those matters, they were still included with the email that the former Head of the Investigating Committee sent to the Chief Executive, along with the complaint from the first Investigating Committee Secretary. The Chief Executive and the Head of Corporate Legal have both said that these emails did not factor into their thinking about the action that should be taken in response to the first Investigating Committee Secretary's complaint about the whistleblower.<sup>179</sup> We consider that it would be reasonable to conclude that the motivation for attaching those emails was in order to influence the Chief Executive's approach to deciding what action to take in response to the complaint from the first Investigating Committee Secretary.
- 5.163 For all the reasons set out above, we can understand why the whistleblower reached the view that actions were taken by GDC staff in retaliation for their whistleblowing disclosure. In our view, the investigation that was undertaken into this aspect of their complaint was inadequate to establish whether or not that was in fact the case.

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<sup>179</sup> However, the Chief Executive apparently mentioned within their referral to the former Chair of the Appointments Committee dated 18 September 2013 an 'extract' from the evaluation form referred to at paragraphs 5.33 and 5.121. See paragraph 5.186.

*Concern 2(b) (ii): The decision to use the disciplinary procedure for statutory committee members instead of the internal complaints procedure*

**The evidence**

*The disciplinary procedure*

- 5.164 Paragraph eight of the disciplinary procedure in place at the time the first Investigating Committee Secretary made their complaint states as follows:
- ‘A complaint from any quarter will be investigated under the procedure, except that a complaint from a GDC employee will only be taken forward at the instance of, and in the name of, the Chief Executive. A member of staff of the General Dental Council who wishes to make a complaint against a member should use the Council’s Internal Complaints Procedures before following this procedure.<sup>180</sup> Where the Chief Executive decides that the case should not be taken forward under the procedure s/he should inform the Chair of the Appointments Committee (“the Chair”) of the nature of the complaint, any actions/he has taken to address the issue complained of and confirm that details have been placed on the member’s file.’
- 5.165 It is unclear what the ‘Internal Complaints Procedures’ referred to in paragraph eight of the disciplinary procedure were. The GDC has told us that they are unable to locate a copy of such procedures. When we located the GDC’s Grievance Policy and suggested that that document might be one of such procedures, the GDC initially told us that the Grievance Policy was only applicable to grievances in relation to staff, not to GDC associates such as Investigating Committee members. However in response to our recent request for a copy of the ‘internal complaints procedures’ referred to in paragraph eight of the disciplinary procedure, the GDC referred us to the Grievance Policy.
- 5.166 Paragraph 16 of the disciplinary procedure in place at the time states as follows:
- ‘Complaints should be addressed to the Secretary of the Appointments Committee (“the Secretary”), but if addressed to anyone else they should be referred to the Secretary immediately. The Secretary will acknowledge receipt of the complaint to the complainant and refer the complaint, or information, to the Chair within 3 working days of receiving it together with the member’s file. At the same time the Secretary will provide the member concerned with a copy of the complaint that has been received and which has been referred to the Chair to decide how it should be progressed. The Chair will respond, with reasons for the decision, to the Secretary within 10 working days from receipt of the complaint. The Secretary will then within 3 working days advise the complainant and the member of the Chair’s decision’.
- 5.167 Paragraph 17 of the disciplinary procedure in place at the time sets out the action that the Chair of the Appointments Committee can take once a complaint has been forwarded to them (following receipt by the Secretary of the Appointments Committee). Those actions are:

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<sup>180</sup> We were informed on 19 February 2015 that the GDC cannot locate the Council’s internal complaints procedures.



- Determining that the complaint does not fall within the scope of the procedure.
- Concluding that more details are needed.
- Summary dismissal of any complaint which is trivial or vexatious.
- Seeking resolution of the complaint by whatever means are appropriate in the circumstances (other than removal or suspension, which are decisions that can only be taken by the Appointments Committee) including:
  - Mediation.
  - The offer of apology by the member if accepted by the complainant.
  - A requirement for the member to undertake additional training/change their behaviour if implemented within the timescale specified.
  - Advice (oral or written) from the Chair to the member, provided it is accepted.
  - Inviting the complainant and the member to attend a preliminary meeting to ascertain the substance of the complaint (within 10 working days of the Chair receiving the complaint).
  - Initiating an independent investigation, prior to it being considered by the Appointments Committee.
  - Referring the complaint directly to the Appointments Committee without an independent investigation.

5.168 Paragraph 18 provides that where the Chair of the Appointments Committee considers on an initial reading of the complaint that it may result in removal or suspension of the member they must refer it to the Appointments Committee.

*Documentary evidence*

5.169 On 23 September 2013, the whistleblower was informed by email (by a GDC governance manager who was acting as the Secretary to the Appointments Committee) that they had been reported to the Appointments Committee for an alleged breach of the Code of Conduct for associate members. The email attached a copy of the complaint about the whistleblower. On 24 September 2013 the whistleblower wrote to the Chief Executive outlining their dissatisfaction with the Chief Executive's decision not to follow the steps outlined in the disciplinary procedure, namely that the internal complaints procedures should be exhausted before consideration is given to a referral to the Appointments Committee. There followed an exchange of correspondence (between 26 September and 16 October 2013) between the whistleblower and the Chief Executive in which the whistleblower requested an explanation for this decision and asked for the decision to be reconsidered. The Chief Executive said that they had taken advice from the legal and human resources departments and decided that it was not appropriate to consider the matter under the internal complaints procedures, since it concerned an allegation of discrimination by a statutory committee member. The Chief Executive went on to say that the Appointments Committee is independent, and in the Chief Executive's view was the correct forum for consideration of the allegation. The Chief Executive also recorded that they were 'also aware of the possibility of the complaint having been brought as a result of the whistleblowing complaint raised by you'. In terms of reconsidering the referral, the Chief

Executive said on 1 October 2013 that a delay would not be in the interests of the GDC.

*The whistleblower's view*

- 5.170 As a result of the Chief Executive's decision to progress the complaint through the disciplinary procedure although the internal complaints procedures had not been utilised, and that of the former Chair of the Appointments Committee to accept the complaint even though it was outside of the time limit, the whistleblower approached us with their concerns. The whistleblower told us that 'in all the circumstances, not only the ongoing external investigation but in particular the timing of the complaint, I am left with the clearest impression that the complaint has been made and disciplinary procedures have been followed as a direct result of my having made a whistleblowing disclosure'.

*The first Investigating Committee Secretary's view*

- 5.171 We asked the first Investigating Committee Secretary if they had a particular expectation of how their complaint would be handled. The first Investigating Committee Secretary said that they were "not told much" about the complaints process by the former Head of the Investigating Committee when they made their complaint in August 2013. They said that they thought that it might just go on the whistleblower's record and only be brought up again if there were future performance issues. The first Investigating Committee Secretary said that they were surprised when they received a letter from the Chief Executive - informing them that the complaint had been forwarded to the Appointments Committee - but that this had reinforced their view that the behaviour was unacceptable and they had not been overly sensitive.

*The Head of Corporate Legal's view*

- 5.172 We asked the Head of Corporate Legal about the extent of their involvement in the Chief Executive's decision to deal with this complaint under the disciplinary procedure. The Head of Corporate Legal said that they and the Director of Human Resources had given the Chief Executive advice on how the complaint should be considered. The Head of Corporate Legal said that, when advising the Chief Executive on handling the complaint, they did not consider the matters raised by the former Head of the Investigating Committee in the emails of 5 and 7 August 2013, as they were of the view that they were not relevant. The Head of Corporate Legal confirmed that the Chief Executive had taken their advice on how to handle the complaint. The Head of Corporate Legal said that the reason that the Appointments Committee deals with all reasonably serious complaints against GDC associates (such as members of the Investigating Committee) is to protect the independence of the members from the GDC executive. The Head of Corporate Legal confirmed that it was their view that the disciplinary procedure did not allow for informal resolution of the complaint nor for any preliminary contact between the parties.

*The Chief Executive's view*

- 5.173 We asked the Chief Executive when they had been notified of the first Investigating Committee Secretary's complaint, and what documentation they received about it. At interview, the Chief Executive said they had been notified of the complaint on 26 August 2013, but could not confirm who had brought it to their attention, or what documentation they had been sent. After the interview, the GDC

provided a copy of the email that the Chief Executive had received notifying them of the first Investigating Committee Secretary's formal complaint and the concerns raised by the third Investigating Committee Secretary in relation to the whistleblower. The Chief Executive received this email on 30 August 2013. The Chief Executive confirmed to us after the interview that they only took account of the formal complaint raised by the first Investigating Committee Secretary when deciding to refer the complaint to the Appointments Committee (i.e. that the other matters raised by Investigating Committee Secretariat staff did not factor into their consideration). The Chief Executive repeatedly stated at interview with us that they were unaware of any other concerns about the whistleblower outside of the dispute with the former Head of the Investigating Committee about the payment of fees and their non-engagement with the personal development review process.

- 5.174 We asked the Chief Executive to explain the reasons for their decision to refer the complaint to the Appointments Committee. The Chief Executive said that before referring the complaint to the former Chair of the Appointments Committee they had sought advice from the Head of Corporate Legal and the Director of Human Resources. The Chief Executive told us that in terms of their dealing with the complaint, they "didn't think [they] had a choice". They were "very conscious that the whistleblowing incident was already in play". The Chief Executive thought that the option of the allegation being handled by staff seemed "extremely fraught with difficulty, precisely because it would be handled by a member of staff who was heading up the very operation which was subject to questioning as part of the whistleblowing incident". The Chief Executive thought that, in all the circumstances, it was fairer to both parties to refer the matter to the former Chair of the Appointments Committee because of its independence. The Chief Executive was conscious that the complaint was out of time, but trusted the Chair of the Appointments Committee "to make a decision based on this".
- 5.175 We asked the Chief Executive whether it was the fact that there was a whistleblowing disclosure that had motivated them to refer the matter to the former Chair of the Appointments Committee. The Chief Executive said that one of the options for the Appointments Committee to suggest was that the complaint could be handled informally, and therefore they were not ruling out this possibility. However, "it was right to say that the climate around the whistleblowing incident absolutely influenced my decision" and that they were "protective of all concerned". The Chief Executive told us that the handling of the complaint could be potentially compromised by involving staff, when staff were the subject of the whistleblower's main complaint. The Chief Executive also did not think that the whistleblower would have been content with an internal, informal procedure being followed and the complaint being dealt with by the same individuals who were the subject of the whistleblower's concerns.
- 5.176 This was the Chief Executive's rationale for referring the matter to the Appointments Committee.
- 5.177 We pointed out that this was a different reason from the one which was provided to the whistleblower in the Chief Executive's correspondence with them on 26 September 2013 - which was that 'the complaint was not appropriate to be dealt with under the informal complaints procedure<sup>181</sup> since it concerned an allegation

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<sup>181</sup> We have assumed that this was meant to refer to the internal complaints procedures, as per paragraph eight of the disciplinary procedure

of race<sup>182</sup> and sex discrimination against a statutory committee member'. Further, that correspondence said that 'I am aware of the possibility of the complaint being brought as a result of the whistleblowing complaint raised by you. Again I felt that the Chair of the Appointments Committee was in the best position to consider this amongst the other matters'. The Chief Executive told us that they should have added another sentence to the letter to embellish the comment that they had made regarding being aware of the possibility of the complaint having been brought as a result of the whistleblowing disclosure, as the comments they had made about the need for an independent investigation were related to this.

5.178 When we asked the Chief Executive about their reasons for declining to defer the disciplinary investigation pending the outcome of the Penningtons report<sup>183</sup>, they said it, "was not [their] business to defer the investigation once it had been referred to [the Chair of the Appointments Committee]" – it was "out of [their] hands" once the referral to the former Chair of the Appointments Committee had been made.

5.179 We asked the Chief Executive whether, if the same complaint had been made against an Investigating Committee member who was not a whistleblower, their decisions with regard to how the complaint was handled would have been the same. The Chief Executive said that their decisions would have been the same had the complaint been a formal one. However, if there was an informal complaint in an environment without any whistleblowing, the Chief Executive said that the issue of handling "would have been a judgment call" and that they would have discussed with the former Director of Regulation whether it could be dealt with more informally. The Chief Executive said that the GDC "was not an organisation that tried to escalate things out of all proportion easily".

5.180 We questioned whether it was valid to attribute so much weight to the words 'formal complaint' when the first Investigating Committee Secretary had had no understanding of the consequences that would flow from their complaint, and did not know that it had such serious connotations. The Chief Executive expressed surprise at this, and noted that the first Investigating Committee Secretary had taken some time to consider whether they wished to raise it as a formal complaint and had then raised it formally in writing. The Chief Executive said that if the first Investigating Committee Secretary was surprised at how the matter had been handled "then there was a complete breakdown in communication between [them] and [their] line manager". The Chief Executive said that when someone does raise a formal complaint, they would have expected there to be the necessary support in place to ensure that the complainant understands every step of the procedure.

5.181 The Chief Executive told us that they did not consider making an initial approach to the whistleblower and the first Investigating Committee Secretary to see if the matter could be resolved informally. The Chief Executive was advised that, under the policy there was no facility to do that, as once a formal complaint had been received, it was to be referred to the Appointments Committee.<sup>184</sup> It was then the

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<sup>182</sup> The remark complained of related to nationality rather than race.

<sup>183</sup> The whistleblower wrote to the Chief Executive on 27 September 2013 asking them to suspend the investigation of the complaint against them (see paragraph 5.44 above). The Chief Executive declined to do so on 1 October 2013 (see paragraph 5.45).

<sup>184</sup> If that was the advice that the Chief Executive received, we consider that it was incorrect, as paragraph eight of the disciplinary procedure clearly provides for the Chief Executive to make a decision about whether or not such a referral should be made.

Appointments Committee that took the decision on the level of formality or informality to be applied.

*The former Chair of the Appointments Committee's view*

- 5.182 The former Chair of the Appointments Committee told us that they believed that this matter should have been dealt with first by the GDC, that an attempt should have been made to resolve the matter informally, and that the amended disciplinary procedure (June 2013) contained a mechanism through which this could be done.<sup>185</sup> The former Chair of the Appointments Committee also told us that once the matter had been referred to them as Chair of the Appointments Committee, it was not open to them to deal with it “informally” as the Chief Executive had suggested to us. The former Chair of the Appointments Committee said that they had told the Chief Executive and the whistleblower that, in their view, an attempt should have been made to resolve the matter informally before it was referred to them, and that they had told the Chair of the Council (in a letter dated 4 April 2014) the same thing following receipt of the former Director of Governance’s report on the whistleblower’s allegations of detrimental treatment. The former Chair of the Appointments Committee said in the letter to the Chair of the Council that they had ‘no alternative but to consider the complaint about the whistleblower when it was referred to me, but that the GDC knew that I considered that it would have been better had the Registrar<sup>186</sup> informed the whistleblower of the complaint and sought to resolve it informally first’.

*The Chair of the Council's view*

- 5.183 The Chair of the Council said to us that they thought the first Investigating Committee Secretary’s complaint had been “mishandled top to bottom” and that the matter should have been sorted out straight away. This view was reflected in their letter to the former Director of Governance dated 24 March 2014 (following submission of the former Director of Governance’s report into the allegations of detriment made by the whistleblower). In that letter the Chair said that ‘the GDC needs to import some test of proportionality into its processes for managing any future complaints of this nature...I am not persuaded that this event, taken in isolation, merited the lengthy and formal process that has been adopted. However, in the absence of a rapid mediation process, the Chief Executive appears to have had no alternative than to involve the Appointments Committee’.
- 5.184 In response to seeing a draft of this report, the GDC has told us that it was open to the former Chair of the Appointments Committee to resolve the matter informally once it had been referred to them and that, as a matter of fact, the former Chair of the Appointments Committee did deal with the complaint about the whistleblower informally, in that it was resolved by way of an apology.
- 5.185 The GDC has also told us that ‘it was agreed’ that it would not be appropriate for the Chief Executive to deal with the complaint about the whistleblower informally for two reasons: first, because it was a complaint that had been made formally about a statutory committee member in a quasi-judicial role and therefore the

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<sup>185</sup> This appears to be an error. We have only found a reference to the capability procedure being amended to include such a mechanism, rather than the disciplinary procedure.

<sup>186</sup> The Registrar is the same individual as the Chief Executive.



Chief Executive had no power to apply any form of sanction; and secondly, because it involved an allegation of race<sup>187</sup> and sex discrimination.

### Our view

- 5.186 We consider that it was reasonable for the whistleblower to assume that the Chief Executive would have read all of the email and the attachments that were sent by the former Head of the Investigating Committee. We note that the Chief Executive told us that they did not take account of the attachments to the email of 30 August 2013 when deciding what action to take in relation to the complaint made about the whistleblower by the first Investigating Committee Secretary. It appears to us that that account is not entirely consistent with the reference in their letter to the former Chair of the Appointments Committee on 18 September 2013, to enclosing an 'extract' from one of the attachments (see paragraphs 5.33 and 5.121). However we are satisfied that the Chief Executive did not refer the complaint to the Appointments Committee with the intention of causing prejudice to the whistleblower. We have not seen any evidence to suggest that the Chief Executive's decision to refer the matter to the Appointments Committee was based on anything other than a concern to ensure fairness for all the parties involved, particularly the first Investigating Committee Secretary and the whistleblower. It appears that there was a misunderstanding by the Chief Executive as to the possible avenues for the resolution of the complaint, due to the advice they were given.
- 5.187 We note that paragraph eight of the disciplinary procedure requires a member of staff to utilise the internal complaints procedures before escalating a complaint to the Chief Executive, yet no consideration was apparently given to this.<sup>188</sup> There appears to be an ongoing lack of clarity within the GDC as to what those internal complaints procedures consist of in relation to statutory committee members such as the whistleblower, and we have concluded that no proper consideration was given to the application of such procedures at the time. The Chief Executive's view was that it was inappropriate for the matter to be considered by the staff who were the subject of the whistleblowing disclosure, and the GDC appears to consider that any complaint about an Investigating Committee or fitness to practise panel member should be referred to the Appointments Committee, due to the nature of their role and the inability of the Chief Executive to apply any sanction to them.<sup>189</sup> However, we consider that the disciplinary procedure *required* the internal procedures to be used first, and that it would have been reasonable to

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<sup>187</sup> See footnote 182 above

<sup>188</sup> The GDC initially told us that the Grievance Policy that was in existence from 1 July 2013 does not apply to complaints about GDC Associates, including Investigating Committee members, although when we subsequently asked for a copy of the 'internal complaints procedures' referred to in paragraph eight of the disciplinary procedure, the GDC referred us to the Grievance Policy. The Bullying and Harassment Policy states that 'complaints about harassment by those who are not employees of the GDC differs according to the nature of the claim i.e. whether harassment because of sex or race etc. However, such complaints are covered by this Policy although it is acknowledged that the ability of the GDC to deal with such harassments [sic] allegations may be limited'. It sets out both an informal and formal procedure, neither of which were followed in relation to the complaint made by the first Investigating Committee Secretary about the whistleblower (nor has anyone we interviewed suggested that any attempt was made to treat the matter as one falling within the Bullying and Harassment Policy).

<sup>189</sup> We note that the Chief Executive's report to the Audit and Risk Committee in November 2013 implied that any complaints about statutory committee members were routinely referred to the Appointments Committee, and made no reference to use of the 'internal complaints procedures'.



identify other senior staff who could be used to apply them (as would ordinarily happen in the case of grievance type complaints). This type of process would have been more proportionate, given the nature of the complaint. If the whistleblower had shown no remorse or insight, the matter could then have been referred to the Appointments Committee for consideration in line with the disciplinary procedure. If it is never appropriate for the internal complaints procedures to be used in respect of Investigating Committee/fitness to practise panel members as the GDC has suggested, then that should be expressly stated in the disciplinary procedure.

- 5.188 It is a misunderstanding of the policy to say that the former Chair of the Appointments Committee could deal with the matter informally once it had been referred to them, or (as the GDC has told us) that the complaint about the whistleblower was in fact resolved informally. While paragraph 17 of the disciplinary procedure allows for a complaint to be resolved by the Chair of the Appointments Committee by way of an accepted apology without independent investigation or adjudication by the full Appointments Committee, in our view it would be incorrect to describe that as being an 'informal resolution', given that such resolved complaints are reported to the full Appointments Committee, and any documents that are created in connection with them are required to be kept on the individual's file for future reference (see paragraph 47 of the disciplinary procedure). Dealing with this complaint through the internal complaints procedures (i.e. without referring it to the former Chair of the Appointments Committee) is likely to have been accepted by all parties, given the first Investigating Committee Secretary's lack of any expectation that such a formal disciplinary procedure would be used, and given the whistleblower's immediate apology for any offence caused. Again, if this had not happened, a referral to the Appointments Committee could have been made in line with the disciplinary procedure.
- 5.189 We agree with the view expressed by the Chair of the Council that the GDC needs to import a test of proportionality into how it manages such complaints in the future. It appears that there is some confusion within the GDC about what the 'internal complaints procedures' as referred to in paragraph eight of the disciplinary procedure consist of in relation to statutory committee members. We recommend that the disciplinary procedure should be amended to clearly set out the factors that should be considered when deciding whether to deal with a complaint through the internal complaints procedures (including explaining clearly what those procedures are and where they are documented) or by referral to the Appointments Committee.

*Concern 2(a) (iii): The decision to exercise discretion and accept the first Investigating Committee Secretary's complaint outside of the time limit set down in the disciplinary procedure*

#### **The evidence**

- 5.190 The complaint the first Investigating Committee Secretary made about the whistleblower related to a conversation that occurred on 13 June 2013. The complaint was made to the GDC on 26 August 2013. This was approximately 10 weeks after the matter complained of occurred.

### *The disciplinary procedure*

- 5.191 The disciplinary procedure for Statutory Committee members sets out that:
- Paragraph 12 – Subject to paragraph 13 below, complaints about a member’s behaviour or relevant information about a member should be submitted in confidence and received by the Secretary of the Appointments Committee:
    - (a) Not later than one calendar month after the date of the alleged Code of Conduct breach or other matter(s) complained of; or
    - (b) If the complainant was not aware of the alleged Code of Conduct breach or other matters complained of at the time, not later than one calendar month after s/he did become aware of it.
  - Paragraph 13 – The Chair may dispense with the time limit in paragraph 12 or accept a complaint not in writing if s/he considers that there were exceptional reasons in the circumstances to do so.

### *The whistleblower’s view*

- 5.192 The whistleblower told us in an email of 26 September 2013 that they believed that ‘In all the circumstances, not only the ongoing external investigation but in particular the timing of the complaint, I am left with the clearest impression that the complaint has been made and disciplinary proceedings have followed as a direct result of my having made a whistleblowing disclosure’. On 24 September 2013 the whistleblower asked for an explanation from the former Chair of the Appointments Committee as to the decision made that there were exceptional reasons for accepting the complaint. The former Chair of the Appointments Committee said in their acknowledgment of receipt of that request that a response would be sent the following week. Their response was then sent on 2 October 2013. When the whistleblower received the former Chair of the Appointments Committee’s response, they then wrote to the Chair of the Council and highlighted that they did not consider ‘the reasons given belatedly to be exceptional i.e. unusual, special or out of the ordinary’.

### *The first Investigating Committee Secretary’s view*

- 5.193 The first Investigating Committee Secretary told us that the reason for their delay in making the complaint was that they were very busy both at work and in their personal life. They said that they decided to put the complaint in writing in August 2013 as they were concerned that they could be sitting with the whistleblower in an Investigating Committee meeting again at any time. The first Investigating Committee Secretary emphasised to us that they did not make a complaint because of the whistleblower’s disclosures, although they noted that they were aware of it. The first Investigating Committee Secretary said that they complained because of their principles and they did not wish for the whistleblower to believe it was acceptable to make comments based on a person’s gender and nationality.

### *The Chief Executive’s view*

- 5.194 The Chief Executive said that at the time they referred the complaint to the former Chair of the Appointments Committee, they were conscious that the complaint had been made out of time, but that they trusted the former Chair of the Appointments Committee to make a decision on this matter.

*The former Chair of the Appointments Committee's view*

- 5.195 The former Chair of the Appointments Committee said to us that the first step they took when they received the complaint (on 18 September 2013) was to review the disciplinary procedure, as they were aware that the complaint was out of time. The former Chair of the Appointments Committee said that their decision to accept the complaint was not finely balanced – they were clear that this complaint should be accepted, even though it was made outside of the time limit, and they recorded the reasons for that decision in an email sent to the Secretary to the Appointments Committee and to the Governance Manager (and copied to the former Director of Governance, the Head of Corporate Legal and the Chief Executive's Executive Assistant) on 20 September 2013, in which they said that they were 'minded to exercise [their] discretion to accept the complaint' on the basis of 'all the circumstances, that is the sensitivity of the issue, the potential for future links with the entirely separate whistleblowing complaint, the significance of the issue of process and the fact that the complainant has given a reasonable reason for the delay'. In that email the former Chair of the Appointments Committee asked for the Head of Corporate Legal's view about whether it was reasonable to decide to accept the complaint on the basis set out, and whether it was appropriate to detail their reasoning in the notification to the whistleblower about the complaint. In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that the advice provided by the Head of Corporate Legal in response was that the former Chair of the Appointments Committee needed to decide whether to accept the complaint out of time, before proceeding with it. The former Chair of the Appointments Committee also told us that the Head of Corporate Legal had strengthened the initial reasoning the former Chair had set out, by referring them to the legal position of the GDC in relation to equality and diversity issues, and that this was then reflected in the reasoning provided to the whistleblower. The former Chair of the Appointments Committee also said in that email that they did not consider it desirable to decide about 'next steps' before giving the whistleblower an opportunity to comment. It appears from the email that the former Chair of the Appointments Committee did not feel that they needed to see the whistleblower's response before reaching a decision about whether or not to accept the complaint. The inference from the email is that the former Chair of the Appointments Committee's view was that information from the whistleblower was only relevant to their decision about 'next steps'. That inference is supported by the wording of the former Chair of the Appointments Committee's email to the rest of the Appointments Committee on 25 September 2013 – in which they said that they had decided to exercise their discretion to accept the complaint, and that they had told the whistleblower that they needed the whistleblower's response before a decision was made about how the case was to be handled (rather than about accepting the complaint at all). It was clear from the account that the former Chair of the Appointments Committee gave to us at interview that the decision to accept the complaint had already been made by the time the notification to the whistleblower was sent. We have not seen any subsequent correspondence between the Secretary to the Appointments Committee/the Head of Corporate Legal and the former Chair of the Appointments Committee about these matters.
- 5.196 The former Chair of the Appointments Committee wrote to the whistleblower informing them about the complaint on 23 September 2013. On 24 September 2013 the whistleblower offered an apology, at the same time as asking the former Chair of the Appointments Committee to explain their reasoning for accepting the

complaint. The former Chair of the Appointments Committee wrote to the whistleblower on 2 October 2013, formally setting out their reasons for accepting the complaint (having previously acknowledged receipt of it, and advised that their response would be sent the following week) having first obtained comments from the Head of Corporate Legal on the content of their response. The reasons given in the letter of 20 October 2013 were, in summary:

- This was a complaint of sex and race<sup>190</sup> discrimination which are both potentially very serious matters. The complaint was made against a member of the Investigating Committee, which is a quasi-judicial role, and it could impact on the member's ability to carry out that role.
- The former Chair of the Appointments Committee considered it a common occurrence for there to be a delay between this type of incident and its being reported, and that the delay in this case was not excessive.
- The former Chair of the Appointments Committee had concluded that it was unlikely that the whistleblower's memory would have been affected by the length of time since the incident.
- The former Chair of the Appointments Committee had concluded that there was no evidence that the complaint had anything to do with the whistleblower's disclosure and therefore it was not fair to refuse to consider the complaint for that reason. The letter stated that if the whistleblower had any evidence to put to them on that point they should be grateful to receive it.
- The former Chair of the Appointments Committee had balanced the rights of the whistleblower as the person complained of against the rights of the complainant to have their complaint dealt with.

5.197 We discussed the contents of this letter with the former Chair of the Appointments Committee at interview.

5.198 The former Chair of the Appointments Committee explained that concerns about race<sup>191</sup> and sex could amount to discrimination and, if a member of the Investigating Committee were shown to hold these views, or to unfairly discriminate, they would fall below the standards required of an Investigating Committee member, as set out in the former Chair of the Appointments Committee's letter to the whistleblower of 2 October 2013. This meant that the complaint involved serious matters. The former Chair of the Appointments Committee confirmed that they had reached this view based on the complaint made by the first Investigating Committee Secretary alone, and that they had not taken account of the other unsubstantiated allegations against the whistleblower which they had been made aware of by means of the emails sent by the former Head of the Investigating Committee on 5 and 7 August 2013.

5.199 The former Chair of the Appointments Committee said that they based their view that the complainant had a reasonable reason for the delay on the information that the first Investigating Committee Secretary had given in their written complaint, which was 'I wanted time to carefully think about this while I was on leave recently'. The former Chair of the Appointments Committee did not ask the first Investigating Committee Secretary for any other information. The former Chair of the Appointments Committee referred to previous posts in which they had had a significant degree of experience of dealing with complaints, and told us that they

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<sup>190</sup> See footnote 182 above

<sup>191</sup> See footnote 182 above

appreciate that when complaints relate to discrimination they can be more difficult to bring, and hence it can take longer for an individual to decide to make them.

- 5.200 In terms of balancing the rights of the first Investigating Committee Secretary and the whistleblower<sup>192</sup>, the former Chair of the Appointments Committee said that the whistleblower had the right to know about the complaint, and not to have vexatious complaints made about them. Following on from that, the first Investigating Committee Secretary also had the right to “have their say”, for the procedure to be followed, and to have their complaint looked at and decided objectively.
- 5.201 The former Chair of the Appointments Committee told us that at the time when they made the decision to accept the complaint out of time, they saw no obvious link between the whistleblowing disclosure and the complaint that had been made about the whistleblower. The former Chair of the Appointments Committee, when the whistleblower raised the issue of a link, asked the whistleblower if there was any evidence, and told us that, had such evidence been provided, they could have taken further action to investigate the whistleblower’s concerns. The former Chair of the Appointments Committee said to us that they do not believe that they had any freedom to assess whether or not there was a link between the whistleblowing disclosure and the complaint about the whistleblower before they decided to accept the complaint (i.e. before the whistleblower had raised the possibility of there being a link). In response to seeing a draft of this report they have told us that there is no provision in the disciplinary procedure and nor would it be ‘normal practice’ for any investigation to be made of the motive behind the complaint, unless the person complained about asked for such an investigation to take place in circumstances where they say the complaint is untrue and maliciously motivated.
- 5.202 The former Chair of the Appointments Committee also told us in response to seeing a draft of this report that, as there was no guidance within the disciplinary procedure about what is to be regarded as an ‘exceptional’ reason justifying accepting a complaint outside of the one month time limit, they took into account criteria that they had had regard to in previous similar posts, such as the vulnerability of the complainant, the subject matter of the complaint, the likelihood of accurate memories and relevant documentation about the event being available, and that they also took legal advice. The former Chair of the Appointments Committee told us that they also regarded it as a relevant exceptional circumstance that no attempt had been made by the GDC to resolve the matter informally with the whistleblower, before it was referred to them as a complaint. The former Chair of the Appointments Committee has subsequently clarified that their concern was that a potentially serious and sensitive concern had not been explored – as the Appointments Committee would have been concerned if a statutory committee member had made inappropriate and rude comments to a female member of staff and had not had the insight to apologise. We note that this factor is not referred to within the reasons set out in the former

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<sup>192</sup> While we have used the term “whistleblower” throughout the report to refer to the relevant individual, the former Chair of the Appointments Committee said that at the time of considering the complaint they had regard not only to the fact that that individual was a whistleblower but also that they were an experienced member of the Investigating Committee, committed to operating respectfully and without bias, and who had had a complaint made about them, of which they were unaware.



Chair of the Appointments Committee's letter to the whistleblower explaining their reasons for accepting the complaint.

*The Chair of the Council's view*

- 5.203 The Chair of the Council wrote to the former Director of Governance on 24 March 2014 and noted that they thought that 'the GDC needs to consider the introduction of tighter timescales for some formal complaints to be made and a more precise definition of the circumstances in which a complaint may be accepted out of time.' That letter went on to say, 'I would suggest amending the process to make it less formal and to ensure that the length of time taken to make the complaint should be taken into account when considering whether to take the matter forward'.

**Our view**

- 5.204 We have concluded that the decision to accept the complaint out of time (on the basis that there were 'exceptional circumstances') was not appropriate in the circumstances, although we recognise that it was made after the former Chair of the Appointments Committee had received internal legal advice. The former Chair of the Appointments Committee decided to accept the complaint out of time without waiting for any response from the whistleblower to the notification of the complaint. We accept that the former Chair of the Appointments Committee considered at the time (and remains of the view) that they acted appropriately in accordance with the disciplinary procedure. They have told us in response to seeing a draft of this report that they consider that the disciplinary procedure did not allow them to make enquiries of the whistleblower prior to deciding whether or not to accept the complaint out of time. We acknowledge that there is no express provision within the disciplinary procedure providing for the views of the person who is the subject of the complaint to be sought before any decision is made about whether or not the complaint should be accepted, but nor is such action expressly prohibited under the procedure. We are concerned that the approach taken by the former Chair of the Appointments Committee in this case meant that they were not aware of the whistleblower's concern that there was a link between the complaint and their whistleblowing disclosure when deciding whether or not to accept the complaint. It was too late to offer the whistleblower an opportunity to present any evidence about such a link on 2 October 2013, because the decision to accept the complaint had already been made. In fact the decision to accept the complaint had been made before the whistleblower was even aware of the existence of the complaint, much less had any opportunity to raise a concern about the motivation behind it.
- 5.205 The former Chair of the Appointments Committee, in response to seeing a draft of this report, commented that they did not investigate the reasons for the first Investigating Committee Secretary's delay in making their complaint because they did not think that such action was open to them before contacting the whistleblower 'within three days as required by the procedure'. Our understanding of the disciplinary procedure is that there was no requirement that meant that the decision about acceptance of the complaint *had* to be made as quickly as the former Chair of the Appointments Committee in fact made it on this occasion. Paragraph 16 of the disciplinary procedure provides that the Secretary to the Appointments Committee will acknowledge any complaint within 3 working days of its receipt, and at the same time provide the complaint to both the Chair of the Committee and the subject of the complaint. The Chair then has ten working days



to respond to the Secretary with their decision about how the complaint should be progressed, and the reasons for that decision. The Secretary then, within three working days, advises both the complainant and the member concerned of the decision. In this case, the former Chair of the Appointments Committee decided almost immediately to accept the complaint. In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that the time limits set out in the procedure were not a material consideration.

- 5.206 Further, we consider that the former Chair of the Appointments Committee should have been alert to the possibility that the complaint might have been made in retaliation for the whistleblowing disclosure (or at least that the whistleblower might consider it to have been made for that reason). The former Chair of the Appointments Committee was aware of the whistleblowing disclosure itself, and that it concerned the behaviour of the Investigating Committee staff, one of whom, less than a month later, then made the complaint about the whistleblower. We note that the former Chair of the Appointments Committee was in fact alert to this possibility, as demonstrated in the email they sent to the Secretary to the Appointments Committee on 20 September 2013, referring to the 'potential for future links with the entirely separate whistleblowing complaint' and in the letter they sent to the whistleblower on 2 October 2013 (setting out the reasons why they accepted the complaint out of time). However, the former Chair of the Appointments Committee concluded that it was not fair to refuse to accept the complaint as there was 'no evidence' (other than a coincidence of timing) of any link between the whistleblower's disclosure and the complaint made about them. This was despite the fact that the former Chair of the Appointments Committee was also aware that other concerns about the whistleblower had been raised within 48 hours of that first complaint by Investigating Committee staff, and that the former Head of the Investigating Committee had suggested an entirely inappropriate measure (the effective suspension of the whistleblower from Investigating Committee meetings without going through the proper procedure). In these circumstances we consider that the former Chair of the Appointments Committee should have given further consideration to the possibility that the complaint about the whistleblower might have been made in retaliation for the whistleblowing disclosure, before deciding whether or not to accept the complaint, regardless of whether or not the whistleblower had themselves raised (or had an opportunity to raise) that concern at the time. We note that the former Chair of the Appointments Committee does not agree with our view that the fact that other concerns had been raised about the whistleblower within 48 hours of the first complaint was relevant to considering the possibility of retaliation.
- 5.207 While we acknowledge that the former Chair of the Appointments Committee provided reasons to the whistleblower for their decision to accept the complaint out of time, we do not consider that those reasons were adequate to justify that decision. We are particularly concerned by the suggestion that has been made to us by the former Chair of the Appointments Committee, on seeing a draft of this report, that the fact that no attempt had been made to resolve the matter informally before a referral was made to the Chair of the Appointments Committee should have been regarded as an exceptional reason capable of justifying the taking of formal disciplinary action – that seems particularly unfair to the whistleblower.
- 5.208 We have no reason to conclude that the former Chair of the Appointments Committee acted other than in good faith, and that they sincerely believed that the

reasoning for their decision was adequate, but nevertheless we have concluded that the decision they reached was not appropriate in all the circumstances.

- 5.209 We agree that the position of the former Chair of the Appointments Committee was not helped (as highlighted by the Chair of the Council) by the lack of any definition or indication within the disciplinary procedure of the circumstances in which a complaint may be accepted out of time.
- 5.210 The former Chair of the Appointments Committee was not clear at interview about why the subject matter of the complaint rendered it necessary to accept the complaint out of time. We have therefore relied upon the reasoning set out in the former Chair of the Appointments Committee's letter to the whistleblower of 2 October 2013. The former Chair of the Appointments Committee has told us that they agree that it would not be appropriate to regard any complaint of race<sup>193</sup> or sex discrimination as being so serious as to justify its acceptance outside of the one month time limit. In our view, the complaint in this case, while it involved an allegation of a discriminatory remark, was at the lower end of seriousness as regards discrimination allegations. We note that internal legal advice that the former Chair of the Appointments Committee received (the former Chair of the Appointments Committee has told us that they received that advice in advance of their decision to accept the complaint out of time - we have only seen reference to that advice within an email sent to the Appointments Committee that was sent after that decision had been taken) was to the same effect.<sup>194</sup>
- 5.211 Further, the former Chair of the Appointments Committee did not investigate the reasons for the delay by the first Investigating Committee Secretary in making their complaint. For example, the former Chair of the Appointments Committee could have inquired about how long the first Investigating Committee Secretary had been away on leave – if they had been on leave for all or most of the 10 week period, that might have made the decision to accept the complaint out of time justifiable. However, in this case there was no examination of the reason for the delay, or whether that delay was in fact reasonable. It is not clear whether or not the former Chair of the Appointments Committee was aware that the one month time limit for making a complaint would already have expired before the first Investigating Committee Secretary went on leave (according to the chronology set out in the former Director of Governance's report into the whistleblower's complaint of detriment) (we accept that even if the former Chair of the Appointments Committee been aware of that fact, it might not have altered their decision). In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that they did not seek to go behind the statement made by the first Investigating Committee Secretary about the reasons for the delay before they made their complaint, and that they took 'a decision in the round based on the available evidence which I was advised was reasonable'.
- 5.212 Whilst we consider that the decision to accept the complaint out of time was not appropriate, we have no evidence to suggest that this decision was made with the intention of prejudicing the whistleblower, or that there was any intention by the

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<sup>193</sup> See footnote 182 above

<sup>194</sup> In response to seeing a draft of this report, the former Chair of the Appointments Committee has told us that they agree that the complaint was not at the upper end of seriousness, provided that the whistleblower showed insight. We note that, as at the date the former Chair of the Appointments Committee decided to accept the complaint, they had no information as to whether or not the whistleblower did show insight, as at that time the whistleblower had not been told about the complaint.

former Chair of the Appointments Committee to cause detriment. We agree with the Chair of the Council's view that the disciplinary procedure should be amended to ensure that those dealing with complaints are clearer about what amounts to 'exceptional' circumstances. We recommend that the disciplinary procedure for statutory committee members is amended to clearly set out the factors that should be considered when deciding if a complaint should be accepted out of time because of 'exceptional' reasons in the circumstances. The views of those who will use the disciplinary procedure should be sought before any amendments are made.

*Concern 2(a) (iv): The former Chair of the Appointments Committee's alleged breach of confidentiality when they informed the Appointments Committee of the complaint made about the whistleblower*

**The evidence**

*The disciplinary procedure*

5.213 Paragraph 46 of the disciplinary procedure states:

- 'All the stages in this procedure, and the hearing, will be dealt with confidentially, and any disclosure will only be to the extent necessary to:
  - (a) Carry out the investigation, for example, by making enquiries of possible witnesses; and
  - (b) Ensure that GDC media spokespeople are sufficiently briefed to respond in case any details of the complaint do become known outside the GDC'.

5.214 Paragraph 22 of the disciplinary procedure provides that where a complaint is resolved informally, it will be reported to the next meeting of the Appointments Committee, but that the name of the member concerned will not be disclosed.

*The whistleblower's view*

5.215 On 3 November 2013 the whistleblower wrote to the Chair of the Council to register their dissatisfaction with the action taken by the former Chair of the Appointments Committee. The whistleblower noted that the disciplinary procedure sets out that the investigation of any complaint about a statutory committee member will take place confidentially. However, the former Chair of the Appointments Committee had admitted to the whistleblower (in an email of 29 October 2013) that the Appointments Committee knew of some of the details of the complaint about the whistleblower. The former Chair of the Appointments Committee went on to say that they had consulted with members of the Appointments Committee 'in order to obtain their guidance and thereby clarify the way forward' and that they 'considered that this action was essential and reasonable in light of the wider public interest issues involved'. The whistleblower complained to the Chair of the Council and said that 'if members of the Appointments Committee are aware of the complaint against me that is improper: a breach of the rules and the disciplinary process, of natural justice and confidentiality and the Appointments Committee's impartiality is prejudiced'.

*The Head of Corporate Legal's view*

5.216 The Head of Corporate Legal (who acts as an adviser to the Appointments Committee) said that they had not advised the former Chair of the Appointments Committee about the discussions that the former Chair had with the remainder of

the Appointments Committee. However, the Head of Corporate Legal said that if they had been asked to provide such advice, they would have advised the former Chair of the Appointments Committee to do whatever they felt was necessary and commensurate with their role. The Head of Corporate Legal did not think that the disclosure of the whistleblower's identity and the complaint that had been made against them had given rise to any prejudice. The whistleblower had admitted the facts alleged, such that if it had been necessary for the Appointments Committee to consider the matter, the only issue remaining for the Appointments Committee to consider would have been sanction.

*The former Chair of the Appointments Committee's views*

- 5.217 The former Chair of the Appointments Committee told us at interview that, having notified the whistleblower of the complaint and seen the whistleblower's apology for any distress caused by their remark, they were minded to seek an informal resolution of the complaint. The former Chair of the Appointments Committee also disclosed to us an extract from an email that they had sent to the Secretary to the Appointments Committee on 20 September 2013, which reveals that in fact the former Chair had decided to accept the complaint before they notified the whistleblower of it, and that they thought it appropriate to give the whistleblower an opportunity to comment on the complaint before they reached a decision about 'next steps'. At interview the former Chair of the Appointments Committee told us that, before coming to a final decision, they had discussed the matter with one or more of their fellow Appointments Committee members in order to check that their decision was correct in all the circumstances. The former Chair of the Appointments Committee has clarified that this was a reference to their consulting with the Appointments Committee about 'next steps', rather than the decision about whether or not to accept the complaint. Their account about this is supported by the email they sent to the Appointments Committee members on 25 September 2013, in which they stated that they had already exercised their discretion to entertain the complaint, and sought the Appointments Committee's view about whether the whistleblower's continued membership of the Investigating Committee in light of the complaint would be liable to undermine public confidence in the regulation of registrants – and stated 'in that case we would need to suspend [the whistleblower]'. The former Chair of the Appointments Committee was seeking the rest of the Committee's views on this, following an email received from the former Head of the Investigating Committee querying whether the whistleblower should be suspended. It appears that the action that the former Chair of the Appointments Committee took in this case was under paragraph 20 of the disciplinary procedure<sup>195</sup> (although they referred us to paragraph 18) albeit they did not call a meeting of the Appointments Committee as required, nor did they make a recommendation to the Committee in their email of 25 September.
- 5.218 The former Chair of the Appointments Committee's email of 25 September 2013 attached the complaint about the whistleblower and revealed their identity, and stated that the decision had already been made to accept the complaint. The

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<sup>195</sup> Paragraph 20 of the disciplinary procedure provides that 'If it appears to the Chair that a member has come within Rule 8 of the General Dental Council (Constitution of Committees) Rules Order of Council 2009<sup>195</sup> then the Chair should: ... (b) call a meeting of the Appointments Committee as soon as possible and recommend to the Committee (giving reasons) that the member should be suspended from sitting on Panels or Committees whilst investigation or proceedings concerning the member's fitness to practise are ongoing in accordance with paragraph 17 [of the disciplinary procedure]'.

former Chair of the Appointments Committee has told us that they knew at the time that their actions were in breach of the disciplinary procedure, and that they did not take legal advice before deciding to contact the Appointments Committee in this way (although they had taken advice about the procedure for suspending an Investigating Committee member). They have also told us that they accept that they should not have shared the whistleblower's name with the Appointments Committee. We note that the former Director of Governance's report is incorrect in the account it gives of the reasons why the Chair of the Appointments Committee consulted with other Appointments Committee members.

5.219 The former Chair of the Appointments Committee told us that they could not have made a completely anonymous reference to the Appointments Committee, as the facts would have made the identity of the Investigating Committee member concerned obvious. The former Chair of the Appointments Committee confirmed that they had not considered seeking the whistleblower's consent to the disclosure before making it, and we note that it has not been suggested that the whistleblower was ever made aware that the Appointments Committee had been asked to consider whether it was necessary to suspend them or informed of the outcome of that consideration. We note that in relation to the explanation the former Chair of the Appointments Committee provided to us at interview about the background to their disclosure of the whistleblower's identity to the Appointments Committee, they told us that they thought that they were acting in the whistleblower's best interests, and they were seeking to be fair and to act proportionately. The former Chair of the Appointments Committee said to us that they were not trying to breach the whistleblower's confidence, or to have any impact on the regard in which they were held. They have also told us that the identity of the whistleblower and the fact that a complaint had been made about the whistleblower was 'common knowledge amongst GDC staff and a large number of [Investigating Committee] members' (although the former Chair did not disclose the existence of the complaint outside of the Appointments Committee). The former Chair of the Appointments Committee has been unable to provide us with any further details about this. The former Chair expressed the view to us that, as anyone could make a similar 'mistake' to the one the whistleblower had made (i.e. the remark they made to the first Investigating Committee Secretary that prompted the complaint), there was no reason to expect anyone to think badly of the whistleblower as a result of knowing about the complaint about them, in circumstances where they had immediately apologised and the complaint had been resolved.

5.220 We asked the former Chair of the Appointments Committee whether they had considered that, if they informed the Appointments Committee members about the complaint and it then progressed, the Committee might then be prejudiced. The letter sent to the whistleblower on 29 October 2013 to explain the reasons why the former Chair of the Appointments Committee breached the whistleblower's confidentiality with regard to the rest of the Committee stated that 'because of the wider issues raised by both [the complainant's] complaint against you and indeed by you in relation to [the complaint] and because of other significant issues which the Committee were considering but which are still at this time confidential, some details of the complaint about you were shared with the Appointments Committee in order to obtain their guidance and thereby clarify the way forward ... I also want to assure you that I reflected carefully and considered that this action was essential (for example sharing that a complaint about a whistleblower had been

escalated to me, which inevitably made you identifiable) and reasonable in the light of the wider public interest issues involved...’.

- 5.221 The former Chair of the Appointments Committee has told us that the reference in that letter to ‘other significant issues’ was a reference to concerns about the actions of the former Head of the Investigating Committee, i.e. arising from the emails of 5 and 7 August 2013 and subsequently, and that the reference to the ‘wider public interest issues’ relates to the nature of the allegation against the whistleblower, as it involved discriminatory behaviour/disrespectful comments, both of which might affect public confidence in the fitness to practise process

#### Our view

- 5.222 By consulting fellow members of the Appointments Committee, the former Chair of the Appointments Committee breached the requirements of the disciplinary procedure. This was potentially prejudicial to the whistleblower and could have compromised the Appointments Committee’s ability to consider the matter fairly, had it required further consideration.
- 5.223 There was no need to attach the complaint about the whistleblower to the email sent to the Appointments Committee on 25 September 2013, nor was there any need to reveal the whistleblower’s identity in that email. The former Chair of the Appointments Committee could have simply explained the nature of the complaint that had been made about an Investigating Committee member (anonymising names or, if considered relevant, including the fact that the individual concerned had made a whistleblowing disclosure) and asked for the Committee’s views about the question of suspending them on that basis.
- 5.224 We are unable to accept the former Chair of the Appointments Committee’s analysis that there was no reason to expect anyone would think badly of the whistleblower as a result of knowing about the complaint against them, in circumstances where they had offered an immediate apology – not least because at the time the details of the complaint were shared with the Appointments Committee, they were not made aware that the whistleblower had offered an apology (which had happened the previous day) and the complaint had not been resolved. We accept the points made to us by the former Chair of the Appointments Committee in response to seeing a draft of this report that Appointments Committee members were capable of dealing fairly with statutory committee members about whom complaints had been made in the past, and that all Investigating Committee members were assured that no reference would be made to their records during the recruitment process in 2014. In our view, those points do not justify the disclosure of the whistleblower’s identity to the Appointments Committee – which the former Chair of the Appointments Committee accepts should not have occurred.
- 5.225 Aside from the impropriety of sharing any information about the complaint with the Appointments Committee at this stage, it is unfortunate that the former Chair of the Appointments Committee’s email did not inform the Appointments Committee members of the most up to date developments, i.e. that the whistleblower had, the day before, responded to the notification of the complaint (sent to them on 23 September 2013) to offer an apology – but perhaps more importantly, to highlight that the whistleblower had also queried the former Chair of the Appointments Committee’s reasons for accepting the complaint out of time. The former Chair of the Appointments Committee has told us that this occurred because they did not



have access to the whistleblower's correspondence of 23 September 2013 when they wrote their email to the Appointments Committee members that was sent on 25 September 2013. They have also told us that they informed the Appointments Committee about the updated position shortly after the Appointments Committee had reached its decision that suspension of the whistleblower was not required.<sup>196</sup>

- 5.226 In our view, the email that the former Chair of the Appointments Committee sent to the other Committee members on 25 September 2013 was in breach of the disciplinary procedure (as the former Chair accepts) and unnecessary (because the details could have been removed/anonymised without affecting the decision the Appointments Committee were being asked to make). In addition to its being a breach of confidentiality, sharing this level of detail with the Committee would have put the entire Committee in a very difficult position had the complaint progressed, e.g. if the first Investigating Committee Secretary had refused to accept the whistleblower's apology. Further, we consider that there was a real risk that the details of the complaint that were unnecessarily provided to the Appointments Committee would have had an impact on how they viewed the whistleblower in future, and that there was no corresponding justification for sharing that level of detail with the Committee at that stage. Finally, it is not clear to us that emailing the Appointments Committee in this way, and without providing recommendations, was in strict compliance with paragraph 20 of the disciplinary procedure.
- 5.227 We also note that the explanation given to the whistleblower at the time (29 October 2013) of the reasons for the disclosure did not explain that the only reason for the disclosure was to consult the Appointments Committee about whether or not it was necessary to suspend the whistleblower (which is what the former Chair of the Appointments Committee's email on 25 September 2013 to the Committee said). The letter of 29 October 2013 to the whistleblower implied that the purpose of sharing the information was to consult the Appointments Committee in some more general capacity about how the complaint against the whistleblower was to be progressed. It is not clear to us why the actual explanation for the disclosure was not made explicit in that letter, and the former Chair of the Appointments Committee has been unable to explain the reasons for this. Further, the whistleblower was not informed that the Appointments Committee had in fact been asked to consider suspending them and that that was the reason for disclosing information about the complaint— which raises an additional concern about the transparency of the process.
- 5.228 We do not understand the rationale for saying to the whistleblower that it was 'essential' (as the letter of 29 October 2013 said) to provide the entirety of the complaint about the whistleblower to the Appointments Committee at that time (while the letter referred to 'some details of the complaint' being provided, in fact the entire complaint appears to have been attached to it). The decision to accept the complaint had already been made, and the whistleblower had offered an apology, albeit the former Chair of the Appointments Committee has told us that they were not aware of that at the time, despite that offer having been made two days previously. Nor, in our view, was it essential at that time to provide the entirety of the complaint to the Appointments Committee in relation to 'any other significant issues' (i.e. the concerns about the correspondence received from the

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<sup>196</sup> We have not seen any correspondence or other documentation about this.

former Head of the Investigating Committee about the actions open to them in relation to the whistleblower and another Investigating Committee member). We accept that it might have been relevant to share the information with the Appointments Committee for that secondary purpose at a later date, once the complaint had been resolved, but even then in our view it would only have been appropriate to do so having first anonymised the details, or with the whistleblower's permission. In response to seeing a draft of this report the former Chair of the Appointments Committee has said that sharing the complaint in full was 'important' for the Appointments Committee to understand it. We remain of the view that there was no adequate justification for sharing of the entire complaint with the Appointments Committee at this stage of the process.

- 5.229 It appears to us that that the only credible explanation for the former Chair of the Appointments Committee's decision to share the complaint with the Appointments Committee (as set out in the email to them) was to consult the Committee on the question of whether or not to suspend the whistleblower, pending the resolution of the complaint against them, and that the former Chair did not foresee the potential consequences of sharing the entirety of the complaint (as opposed to some more limited information about it) with the rest of the Committee at that time.. As noted above, the former Chair of the Appointments Committee has been unable to confirm the reasons for their action.
- 5.230 We have seen no evidence to suggest that the former Chair of the Appointments Committee shared this information with other Committee members in order to discredit the whistleblower. It appears that the former Chair of the Appointments Committee did not take legal advice about what it was appropriate to disclose to the Appointments Committee in relation to their consideration of potential suspension of the whistleblower, and that was perhaps unfortunate. We are also satisfied that the result of the breach of confidentiality was limited to a loss of the whistleblower's confidence in the process, rather than resulting in a prejudicial outcome to the investigation of the complaint made about them – but that is only because the complaint was resolved once the whistleblower's apology was accepted.
- 5.231 In our view, the GDC and the Appointments Committee should consider amending the disciplinary procedure, to ensure that confidential information is only shared when it is genuinely necessary, and that where possible such information is anonymised/redacted.
- 5.232 We also consider that, in the event that the Appointments Committee is asked to consider suspending or removing a statutory committee member, as a matter of natural justice as well as in order to comply with human rights legislation, that member should be informed in advance that that matter is under consideration, so that they can have an opportunity to make any representations they see fit. The former Chair of the Appointments Committee has told us that consideration of suspension would normally arise in circumstances where the Appointments Committee is investigating a complaint, and has said that it was inappropriate for a staff member to suggest suspension or removal of a statutory committee member. If that is the former Chair of the Appointments Committee's view, it is unclear to us why they asked the Appointments Committee for their views about the matter and/or why they did so before they had received/considered the whistleblower's response to notification of the complaint.

Concern 2(a) (v): The GDC's treatment of the whistleblower, specifically its failure to keep the whistleblower's identity confidential, its failure to treat them as other Investigating Committee members were treated in terms of updates and payments in relation to the Penningtons investigation, and its failure to provide appropriate support to them following their disclosure

## **The evidence**

### *The whistleblower's views*

- 5.233 The whistleblower in their letter to the Chair of the Council dated 23 October 2013 outlined how they believed that they had been subjected to less favourable treatment. In this section of the report we address the whistleblower's concerns that:
- There had been breaches of their confidentiality, as their identity had been disclosed to the Investigating Committee members and staff, as distinct from the former Chair of the Appointments Committee's breach of confidentiality referred to above.
  - They had not been kept informed of the progress of the Penningtons investigation, whilst other Investigating Committee members had been kept so informed.
- 5.234 The whistleblower also raised with us on 15 December 2013 their concern that the GDC had not supported them following their whistleblowing disclosure.

### Breach of confidentiality

#### *The whistleblowing policy*

- 5.235 The GDC's whistleblowing policy in place at the time included the following statements about confidentiality. At paragraph six it said that 'matters accepted for investigation under this policy will be investigated thoroughly, promptly and confidentially...' and at paragraph 20 it said that 'subject to paragraph 12<sup>197</sup> you can be assured of confidentiality in the early stages of the investigation'.

#### *Documentary evidence*

- 5.236 We have seen copies of the notes of two briefings given to Investigating Committee Secretariat staff on 15 and 16 August 2013 by the former Director of Regulation about the whistleblowing disclosure and the action the GDC was taking in response – which include reference to the whistleblower by their name. We also note that the whistleblower's identity was disclosed to Investigating Committee members on 29 August 2013. Their identity was included in a letter from the Chief Executive to Investigating Committee members in which the Chief Executive informed them that the GDC had commissioned an investigation into a complaint (rather than a whistleblowing disclosure) by that person as well as in two subsequent update letters.
- 5.237 In response to seeing a draft of this report the GDC provided us with a note of a meeting that took place on 6 August 2013 between the whistleblower, the Director of Human Resources and the Head of Corporate Legal. The note records the

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<sup>197</sup> This referenced the ability of the Chief Executive or the Chair to consult or take advice in order to decide if there is a case to answer.

Director of Human Resources having explained that the GDC would keep the matter (i.e. the whistleblower's disclosure) 'as confidential as possible' only making disclosure to staff or Investigating Committee members and Chairs on a need to know basis.

*The former Director of Regulation's views*

- 5.238 When we asked the former Director of Regulation for their explanation for disclosing the whistleblower's identity to the Investigating Committee Secretariat staff, the former Director of Regulation said that they were not sure that they had made a conscious decision to name the whistleblower, but that they thought it would have been apparent who the whistleblower was to the staff once the nature of the disclosure was shared with them. The former Director of Regulation could not recall whether they considered the provisions of confidentiality in the whistleblowing policy before they named the whistleblower to staff.

*The former Director of Governance's views*

- 5.239 When we asked the former Director of Governance (the person responsible for the whistleblowing policy) for their views on the breaches of the whistleblower's confidentiality, they said that everyone knew who the whistleblower was, and that it would have been impossible for the Investigating Committee members to have been interviewed (for the purposes of the Penningtons investigation into the concerns raised by the whistleblower) without them knowing that person's identity. The former Director of Governance also said that the Head of Corporate Legal had assured them that the whistleblower had been told that their identity could not be kept confidential.

*The Chief Executive's views*

- 5.240 When we asked the Chief Executive why they had disclosed the whistleblower's identity, they said that their explanation (although it was not an excuse) was that they thought that 'it was generally known amongst the Investigating Committee who the whistleblower was'.<sup>198</sup> However, when it was pointed out by the whistleblower that they should not be named, the GDC had stopped naming them in correspondence and just referred to the matter as a 'whistleblowing incident'. The Chief Executive confirmed that they were aware of the provisions of confidentiality in the whistleblowing policy and said that the use of the whistleblower's name "would have been a complete oversight on my part".

*Failure to update the whistleblower*

*Documentary evidence*

- 5.241 In relation to the updates that the Investigating Committee members received, we note that they received an initial letter and updates on 29 August, 3 September and 21 October 2013 (at which point they were told that they would next be contacted when the Penningtons report was available). The whistleblower was not updated at all between 16 August and 23 October 2013. In response to seeing a draft of this report, the GDC has told us that the whistleblower was provided with the same information as the other Investigating Committee members during August and September (although the whistleblower was written to separately) and

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<sup>198</sup> The account that we were given by two of the whistleblower's Investigating Committee colleagues (referred to in paragraph 5.253) was that they were unaware of the whistleblower's disclosure until the Chief Executive notified Investigating Committee members about it (see paragraph 5.30).

that the failure to provide the whistleblower with the update the other Investigating Committee members received on 21 October was inadvertent and that an apology was given.

5.242 The whistleblower contacted the Chair of the Council on 23 October 2013 to complain about the lack of updates, and the difference in their treatment in relation to this matter. The Chair of the Council in a letter to the whistleblower on 25 October 2013 explained that the letter of 21 October 2013 had not been sent to the whistleblower because an incorrect circulation list had been used. The letter went on to say that the whistleblower had now confirmed that they had been sent a copy of that letter.

5.243 We can see that a further update was sent on 8 November 2013 to the whistleblower. The whistleblower asked for another update on 22 November 2013, and the Chief Executive wrote on 25 November 2013 and told them that they should be in a position to advise on the outcome of the investigation by Penningtons within three weeks. On 13 December 2013 the whistleblower sent an email to the Chief Executive and noted that two weeks had passed and no update had been provided. On 17 December 2013 the Chief Executive wrote to the whistleblower saying the report was due on 23 December 2013 and that it was likely it would be shared after the Christmas period. On 6 January 2014 the whistleblower received a copy of the Executive Summary of the report and a letter from the Chief Executive in which they said that they had accepted the Penningtons report's recommendations in full.

#### *The former Director of Governance's view*

5.244 When we asked the former Director of Governance about the frequency of the updates provided to the whistleblower, they said that the whistleblower had been updated as everyone had, apart from on one occasion, and they were given reasons for this (this was in relation to the 21 October 2013 letter).

#### *The Chief Executive's view*

5.245 When we asked the Chief Executive what steps were taken to ensure that the whistleblower was kept informed of the progress of the Penningtons investigation, they said that "hopefully successful steps" were taken and that they "did not think that the whistleblower could have been unaware of the progress of events". The Chief Executive said that they recalled correspondence "sent to people giving them the timetable for the report in the run up to late autumn and that [they were] confident that adequate steps were taken to keep the whistleblower and others informed". The Chief Executive also said that if the whistleblower had contacted the GDC requesting information about the progress of the investigation, they would have given that information to them, and that they did not recall the whistleblower doing so. The Chief Executive said they were "unaware that there was a particular problem".

#### Support provided to the whistleblower

##### *The whistleblower's view*

5.246 The last matter to be considered in this part of the report is the level of support provided to the whistleblower throughout this process. The whistleblower said that they did not feel supported, and that this was evidenced by the detrimental treatment they experienced (which we deal with in the next section of the report). They also told us during our interview with them that "[they] had been put through

hell” by the GDC and they had been put under unnecessary stress because they had made a whistleblowing disclosure.

#### *The Head of Corporate Legal’s views*

- 5.247 The Head of Corporate Legal told us that they and the Director of Human Resources had met with the whistleblower prior to agreeing the terms of reference for the Penningtons investigation, in order to discuss the investigation process.<sup>199</sup>

#### *The Chief Executive’s views*

- 5.248 In the Chief Executive’s letter to the whistleblower and the other Investigating Committee members of 21 October 2013, they said that they ‘appreciate that this is a difficult time for you and I am anxious that you should have appropriate support. With this in mind, I would encourage you to contact the Director of HR [contact details]. Alternatively, you may wish to access an independent, confidential telephone support service. The helpline telephone number is [telephone number] and it is available 24 hours a day. If you wish to access the telephone support service, you will be required to state that you work for the General Dental Council’. We also note that in a letter of 11 October 2013 the former Chair of the Appointments Committee sent to the whistleblower they encouraged the whistleblower to make contact with the GDC’s Director of HR in order to access confidential support in relation to the whistleblowing.

#### *Our view*

- 5.249 The GDC breached the confidentiality of the whistleblower, which was contrary to the whistleblowing policy. The Director of Human Resources told the whistleblower on 6 August 2013 (as recorded in the GDC’s note of the meeting that took place on that day) that the GDC gave a commitment to the whistleblower to be ‘as confidential as we can’ and warned the whistleblower that representatives of the GDC would need to discuss the whistleblower’s complaint with the former Head of the Investigating Committee, the former Director of Regulation and ‘other GDC staff IC members and Chairs’. The whistleblower explained that they had only shared their concerns with Investigating Committee Chairs, to which the Director of Human Resources replied that the GDC would only share the whistleblower’s ‘complaint’ ‘on a need to know basis’. They then asked the whistleblower to confirm that they were as comfortable as they could be with that approach (which the whistleblower confirmed). At no point during that meeting was the whistleblower told that the GDC considered it necessary to reveal not only details of their whistleblowing disclosure, but also their identity to all Investigating Committee members and Chairs, and all Investigating Committee staff.
- 5.250 In response to seeing a draft of this report, the GDC has objected to our concluding that the breaches of confidentiality that occurred appear to have been based on assumptions by both the Chief Executive and the former Director of Regulation that the identity of the whistleblower was either already known or would become obvious once the matters raised in the whistleblowing disclosure were known about. We consider that it was irrelevant whether people already knew the identity of the whistleblower – the whistleblowing policy required confidentiality, and that should have been maintained throughout, unless the

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<sup>199</sup> We have seen a note of such a meeting on 6 August 2013 – which is summarised at paragraph 5.249



whistleblower gave express permission for their identity to be referred to. The GDC has told us that every effort was made to adhere to the letter and spirit of 'the policies', while accepting that the whistleblower's identity was revealed in error 'on one occasion'.<sup>200</sup>

- 5.251 The GDC has also asserted that the whistleblower had, at the meeting on 6 August 2013 'confirmed they were comfortable with their identity being revealed'. In fact, as detailed above, the record of the meeting on 6 August 2013 shows that the whistleblower had been given an assurance that details of their whistleblowing disclosure would only be disclosed on a 'need to know' basis, and had never been expressly told that their identity would be revealed to all Investigating Committee members and staff.
- 5.252 We consider that the breaches of confidentiality were made without good reason, and that the senior management team showed a disregard for adherence to the organisation's policies and (to the extent that they were aware of the assurance that had been given to the whistleblower at the meeting on 6 August 2013) interpreted the meaning of a 'need to know' basis in a way which we consider was unreasonable, particularly as the whistleblower's disclosure had been made under the whistleblowing policy, which should have afforded the whistleblower a degree of protection.
- 5.253 Further, we note that either the assumptions made by the Chief Executive and the former Director of Regulation were incorrect, or that the disclosure was more widely known about than the information provided to the whistleblower and to us indicated. There are three factors which support an assertion that the assumptions made by the Chief Executive and former Director of Regulation were incorrect. First, the whistleblower told the Director of Human Resources on 6 August 2013 that they had only shared their concerns with the Investigating Committee Chairs (as well as the former Chair of the Appointments Committee and the Chair of the Audit Committee, to whom the disclosure was made). Second, two of the whistleblower's colleagues told us that they were unaware of the disclosure made by the whistleblower until they received the Chief Executive's letter, in which the whistleblower was named. Third, we consider that the identity of the whistleblower would not necessarily have been obvious to staff, as there was more than one person who shared the same concerns as the whistleblower, and who might have made such a disclosure. However, if the explanations provided by the Chief Executive and the former Director of Regulation are correct, that would lend greater weight to our view that a reasonable conclusion that the whistleblower could reach was that the disclosure was more widely known about prior to 15 August than the information they had been given indicated.
- 5.254 We also consider that the whistleblower's identity was disclosed without any consideration of the effect that this would have on the whistleblower. Making a whistleblowing disclosure can leave the person who makes the disclosure feeling vulnerable and isolated. In this instance, as set out above, the whistleblower had also been given a specific assurance that the GDC would only disclose details about the whistleblowing disclosure to staff/Investigating Committee members and Chairs on a 'need to know' basis, and had not been told specifically that their identity would be revealed as part of that disclosure. The GDC's evidence to this

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<sup>200</sup> The reference to 'one occasion' is factually incorrect. It was revealed more than once by the Chief Executive in correspondence to the Investigating Committee membership, as well as being revealed verbally by the former Director of Regulation to Investigating Committee staff.

investigation amounts to a concession that senior staff did not take the whistleblower's position into consideration when making decisions that would affect them. This is unfair to the whistleblower.

- 5.255 We consider that the GDC should have agreed with the whistleblower how and when updates on the progress of the investigation would be shared with them, and the extent to which they would be copied in on the information sent to other Investigating Committee members. This would have avoided the situation where the whistleblower felt the need to request information from the GDC because they were not sure if they had been forgotten about or were being ignored.
- 5.256 The GDC offered support to the whistleblower and the Investigating Committee members in October 2013. This was over two months after the whistleblowing disclosure had been made. There was no consideration given to any additional support which the whistleblower might have required, particularly after their identity had been disclosed, even though they had to continue to work with those individuals whose behaviour was the subject of the investigation as a result of their whistleblowing disclosure. This is inadequate and contrary to good practice.
- 5.257 We recommend that the GDC develops guidance for staff on how the whistleblowing policy should be operationalised. This should include matters such as the need to agree how often a whistleblower is updated on the progress of any investigation into their disclosures, and the management of matters relating to maintaining a whistleblower's confidentiality. The views of those who will use this guidance should be sought when drafting it. We also recommend that the GDC should seek external advice from experts in whistleblowing management. Staff should be trained on the developed guidance.
- 5.258 We also recommend that the GDC formally apologises to the whistleblower for the breach of their confidentiality when it disclosed their identity.

### **Terms of reference 2(b): The GDC's management of a complaint by the whistleblower of detrimental treatment because of their disclosure**

#### **Concern 2 (b) (i): The time taken to commence the investigation**

##### **The evidence**

###### *The whistleblowing policy*

- 5.259 Paragraph seven of the whistleblowing policy for members and associates that was in place in July 2013 states that, 'If a concern is raised in good faith under this policy and the whistleblower believes it to be substantially true, the whistleblower will not be subject to sanctions or less favourable treatment for raising it, regardless of the outcome of any investigation'.
- 5.260 Paragraph 34 of the whistleblowing policy for members and associates states that, 'If you feel that as a result of making a disclosure you have suffered some detriment then you can submit a formal complaint to the Chair of the Council. If it appears that you have reasonable grounds for making the complaint, the onus will be on the person(s) involved to demonstrate that their actions were not taken in retaliation for the disclosure'.

###### *The documentary evidence*

- 5.261 On 23 October 2013 the whistleblower made a complaint of detrimental treatment to the Chair of the Council under the whistleblowing policy for associates. The whistleblower said that, following their whistleblowing disclosure, they believed

that the actions taken against them (the complaint made by the first Investigating Committee Secretary and the subsequent actions taken by the Chief Executive and the former Chair of the Appointments Committee) demonstrated that the 'members of the IC secretariat are harassing me and that the Chief Executive is biased against me'. The whistleblower went on to say that 'the only reason for that bias can be that I have made a whistleblowing disclosure and have referred matters to the PSA. Accordingly please treat this letter as a complaint under paragraph 34 of the whistleblowing policy'.

- 5.262 On 25 October 2013, in response to this complaint, the Chair of the Council wrote to the whistleblower and said that 'having considered your complaint carefully, I am of the view that I should await publication of the [Penningtons] report before addressing it. This is so I can be properly informed of the full picture'. In response to this letter the whistleblower said that 'I am content to await the outcome of the [Penningtons] investigation before consideration is given to my complaint'.
- 5.263 On 30 October 2013 the whistleblower wrote to the Chair of the Council again and made another complaint with reference to paragraph 34 of the whistleblowing policy. The second complaint related to unfavourable treatment in respect of their empanelment (the number of times they had been asked sit as a member of the Investigating Committee at an Investigating Committee meeting). The whistleblower said, 'The sittings have been arranged by the department that is at the heart of my whistleblowing disclosure and the subject of external review. Is it a mere coincidence I have a reduced number of sittings and they are bundled together? I think not'.
- 5.264 In response to this, on 5 November 2013 the Chair of the Council wrote to the whistleblower and said that they had asked the former Director of Regulation to respond to the matters raised, and to explain the process used for empanelment. The former Director of Regulation did respond to the whistleblower, and set out the process that was used. The whistleblower then contacted the Chair of the Council again, reiterating that they had made a complaint about unfavourable treatment in relation to empanelment under the whistleblowing policy. They said 'you will therefore understand my surprise and concern that you delegated responsibility for dealing with this complaint to the Head of Regulation. [They] cannot be described as independent or impartial'. The whistleblower asked the Chair of the Council to investigate and adjudicate on this aspect of their complaint as the Chair was an independent, impartial and objective person.
- 5.265 The Chair did not respond to this letter from the whistleblower, so on 1 December 2013 the whistleblower wrote again to the Chair of the Council and said, 'You accepted my complaint against the Chief Executive in respect of disciplinary action. You told me in your letter of 25 October you will consider it after the [Penningtons] reports. If you are willing to do that, I do not understand your reluctance to deal with my complaint about empanelment in exactly the same way'.
- 5.266 On 2 December 2013 the former Director of Governance (on behalf of the Chair of the Council) wrote to the whistleblower and said that under paragraph five of the whistleblowing policy, the whistleblower could raise issues of malpractice with a person who is in the position to investigate the matter and take action as necessary. They went on to say that the former Director of Regulation was the appropriate person to investigate the whistleblower's complaint about unfavourable treatment in terms of empanelment, because they did not directly

carry out the empanelment exercise nor had the whistleblower, specifically or by implication, said that the outcome of the empanelment process was the fault of the former Director of Regulation. The former Director of Governance went on to say that as the Penningtons report into the matters raised by the whistleblowing disclosure was unlikely to relate to empanelment, the Chair of the Council had asked them to reply with a formal response – which was that ‘on the basis of the figures and the explanation given I see no reason to advise the Chair that further investigation is warranted’.

5.267 That same day the whistleblower wrote to the Chair of the Council and pointed out that the former Director of Governance’s letter was incorrect. They were making a complaint under paragraph 34 of the whistleblowing policy and paragraph five of the whistleblowing policy does not apply to complaints about unfavourable treatment, but instead relates to whistleblowing disclosures. In response to this, on 3 December 2013 the former Director of Governance wrote to the whistleblower (having first considered data about the allocation of Investigating Committee meetings) and said that whilst they did not believe that the whistleblower had reasonable grounds for making a complaint about unfavourable treatment in relation to empanelment, once the Penningtons report had been received, they would review their request for an investigation again.

5.268 The next day (4 December 2013) the whistleblower again asked the Chair of the Council to confirm that their complaint about empanelment would be properly investigated and adjudicated on by the Chair of the Council in accordance with the whistleblowing procedure.

5.269 In early January 2014 and following receipt of the Penningtons report, the former Director of Governance was tasked with investigating the whistleblower’s complaints of unfavourable treatment.

#### *The Chair of the Council’s views*

5.270 We asked the Chair of the Council at interview whose decision it was to defer consideration of the whistleblower’s complaints of detrimental treatment until receipt of the Penningtons report. The Chair of the Council said that, from their recollection, they had discussed the matter with the former Director of Governance and the Chief Executive, and that the outcome was that they should await the Penningtons report to see if the deficiencies alleged by the whistleblower were borne out. The Chair of the Council did not believe that this was an illogical position. The Chair of the Council said that they did not think that dealing with the matters sequentially undermined the whistleblower’s status. The Chair of the Council said they had acted on advice from the Chief Executive and the former Director of Governance and presumably from the Head of Corporate Legal (who, the Chair of the Council said, stood behind the former Director of Governance). In response to seeing a draft of this report the GDC has said that all these individuals agreed that it was appropriate to defer the investigation into the whistleblower’s complaints of detrimental treatment until the Penningtons report had been received, and that while the Chair of the Council does not have a clear recollection about how the decision to defer the investigation was made, they accept that it was their decision.

5.271 In response to seeing a draft of this report the GDC has also reiterated that the Chair of the Council regarded the timing of the Penningtons report as a relevant factor to consider because they regarded the whistleblower’s complaint of

detriment as ‘a sub-set of the Penningtons issues’ and believed that there was a risk of the issues diverging if the investigation into the whistleblower’s complaint of detriment commenced before the Penningtons report had been received.

*The Chief Executive’s views*

- 5.272 The Chief Executive told us at interview that they were not aware of the Chair of the Council’s reasons for awaiting the Penningtons report before investigating the whistleblower’s complaints of unfavourable treatment, and that they have no recollection of being consulted about it at the time. The Chief Executive said that they thought that the Chair of the Council might have sought advice on this issue from the former Director of Governance or from the Head of Corporate Legal.

*The Head of Corporate Legal’s views*

- 5.273 The Head of Corporate Legal told us that they did not know why or how the Chair of the Council had decided to deal with the allegations of detriment as they did.

*The former Director of Governance’s views*

- 5.274 The former Director of Governance told us that their decision in early December 2013 not to investigate the whistleblower’s complaints of detriment in relation to empanelment was not connected with the timeframe within which the GDC expected to receive the Penningtons report about the allegations made in the whistleblowing disclosure.

**Our view**

- 5.275 We have heard conflicting accounts about who gave the advice to the Chair of the Council to defer the investigation into the whistleblower’s original complaint of detrimental treatment until after receipt of the Penningtons report. What is clear is that it was the Chair of the Council who decided in October 2013 to defer investigation of that original complaint, pending receipt of the Penningtons report; and that it was the former Director of Governance in December 2013 who advised the Chair of the Council not to investigate the subsequent complaint of detriment that related to empanelment at that time, but to expressly leave open the possibility of reviewing that decision once the Penningtons report was available.
- 5.276 However, the whistleblower, in line with paragraph seven of the whistleblowing policy, believed that the matters raised within their disclosure were true and the disclosure was in the public interest. As such, we consider that they were entitled to protection from detrimental treatment, and therefore that their complaints of detriment should have been investigated immediately, rather than over two months later. It was irrelevant whether the Penningtons investigation substantiated the concerns that the whistleblower had raised in their disclosure, or whether the whistleblower agreed to the delay in the start of an investigation, because the central issue to be determined was whether or not the whistleblower had been subject to detrimental treatment as a result of making their whistleblowing disclosure. An investigation into that matter could have taken place whether or not the content of their whistleblowing disclosure was substantiated by Penningtons’ investigation into the concerns they had raised.
- 5.277 We were also concerned by the GDC’s reluctance to accept the second complaint made by the whistleblower of detrimental treatment (the complaint relating to empanelment). It took the GDC over two months to accept the complaint of detriment that the whistleblower had been asked to sit on a reduced number of

occasions as an Investigating Committee member in retaliation for their whistleblowing disclosure. During this period the whistleblower had made their complaint several times to the Chair of the Council. We note that the former Director of Governance has told us that the decision not to immediately investigate the whistleblower's claim to have suffered detriment in terms of empanelment was made on the basis that it was appropriate initially to check whether the empanelment data provided any prima facie evidence of detriment, and that it was not based on any assumptions about whether or not the Penningtons investigation would address issues relating to empanelment. In our view, empanelment could have been one method of GDC staff exerting inappropriate control over the Investigating Committee (which fell within the remit of the Penningtons investigation) and it was therefore possible that consideration of the empanelment process would feature in the Penningtons report. We also note that the former Director of Governance's letter to the whistleblower of 3 December 2013 expressly referred to the possibility of their reviewing the decision not to investigate the claim of detriment in relation to empanelment once the Penningtons report was available. We have been told by the former Director of Governance, in response to seeing a draft of this report, that the reference to reviewing the decision not to investigate the complaint of detriment relating to empanelment once the Penningtons report was available was simply meant as a reference to the possibility of investigating that matter at the same time that the whistleblower's other complaint of detriment was investigated.

5.278 It was also during this period that the Chair of the Council demonstrated that they misunderstood the GDC's whistleblowing policy, and considered it appropriate for the manager responsible for the department which was the focus of the whistleblowing disclosure (the former Director of Regulation) to respond to a complaint of detrimental treatment in retaliation for that disclosure. When the Chair of the Council asked the former Director of Governance to investigate the whistleblower's ongoing concerns about empanelment, the former Director of Governance also sought a response from the former Director of Regulation. Not only was this incorrect in terms of the actual application of the policy, it was also inappropriate that a person who had an obvious conflict of interests should be asked to respond to the complaint. This misapplication of the policy is particularly concerning, given that the former Director of Governance was the person within the GDC with responsibility for the whistleblowing policy.

5.279 We recommend that, as part of the guidance to be developed for staff on how the whistleblowing policy should be operationalised, consideration is given to including advice on how to manage complaints of detrimental treatment. The views of those who will use the policy and that guidance should be sought when drafting the guidance. We also recommend that the GDC seeks external advice from experts in whistleblowing management. Staff should be trained on any guidance that is developed.

[Concern 2 \(b\) \(ii\): The decision to appoint the former Director of Governance to carry out the investigation](#)

### **The evidence**

#### *The documentary evidence*

5.280 On 13 January 2014 the whistleblower raised their concerns with us about the GDC's decision to appoint the former Director of Governance as the investigator



into their complaint of detrimental treatment. The whistleblower also raised this concern with the Chair of the Council on 20 January 2014. In their letter to the Chair of the Council, the whistleblower said that they had serious reservations about the former Director of Governance’s ‘ability to retain an open mind’ on these issues, saying that: ‘past experience suggests that [they are] too ready to accept assurances from others within the GDC whom [they are] unwilling to challenge, or to probe more deeply’. These concerns were raised in part by the whistleblower because the former Director of Governance had expressed a view in correspondence on 2 and 3 December 2013 in relation to one of the aspects of alleged detrimental treatment – empanelment. The former Director of Governance had said in correspondence that the process of empanelment described by the former Director of Regulation to the whistleblower was logical, reasonable and in accordance with principles discussed with the Appointments Committee<sup>201</sup>, and that it appeared to them that the whistleblower did not have reasonable grounds for making a complaint. The former Director of Governance has told us in response to seeing a draft of this report<sup>202</sup> that, at the time they expressed this view, they were not relying solely upon the response provided by the former Director of Regulation, but that they had also examined the Investigating Committee empanelment data – which did not reveal any obvious unfairness to the whistleblower in the allocation of sitting days (we note that it was not apparent from the former Director of Governance’s letters to the whistleblower of 2 and 3 December 2013 that they had done any analysis for themselves, other than reviewing the answers already provided by the former Director of Regulation). We have not found it necessary to conduct an analysis of that data for the purposes of considering the decision to appoint the former Director of Governance to carry out the investigation into the whistleblower’s complaint of detriment.

*The Chair of the Council’s view*

- 5.281 The Chair of the Council told us that they had been recommended to appoint the former Director of Governance as the investigator into the whistleblower’s complaint of detriment by the Chief Executive, and that the Chief Executive had probably made that recommendation because the former Director of Governance knew the background of the matter. The Chair of the Council said that they would only have made that decision on the basis of advice. When we asked the Chair of the Council if consideration had been given to an external party being instructed to investigate the allegations they said, “My inclination would be to use the team we’ve got, at least to start the investigation. It’s a question of magnitude. It’s one individual alleging one piece of detriment and I wouldn’t have seen that as something for an external investigation”.
- 5.282 In response to seeing a draft of this report, the GDC suggested that, because we were aware that the former Director of Governance had been asked to undertake the investigation at the time, we are precluded from subsequently criticising that approach, as the GDC was entitled to assume that we had no concerns about it.<sup>203</sup> The GDC has also told us that it defends the decision made to appoint the

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<sup>201</sup> The former Chair of the Appointments Committee has told us that they do not recall the Appointments Committee approving any principles in relation to empanelment. They have also told us that empanelment generally fell outside the Appointments Committee’s remit as it was primarily an operational matter.

<sup>202</sup> We did not ask them any questions specifically on this issue at interview.

<sup>203</sup> The relevant comment described it as ‘plainly unfair’ for our report to criticise the involvement of the former Director of Governance in the investigation into the whistleblower’s complaints of detriment in circumstances

former Director of Governance to carry out this role, on the basis of their legal qualification and relevant extensive previous experience. The GDC also justified its decision by saying that ‘bringing in yet another person to the organisation could easily lead to confusion and delay’. The Chair of the Council has specifically confirmed that they remain of the clear view that the decision to appoint the former Director of Governance to investigate the whistleblower’s complaints of detriment was appropriate, given the former Director of Governance’s role within the organisation and their professional background, and given the relevant consideration of the costs of appointing an external investigator. The GDC has told us that ‘it never occurred to the Chair of the Council that, at least initially, it required anything other than for the former Director of Governance to take a look’ and that it was only if the former Director of Governance had suggested to the Chair that it looked as though the Chief Executive had made a major misjudgement, or if the Chair had been advised that only an external investigation could carry any credibility, that consideration would have been given to appointing a different person (either a Council member or an external investigator) to continue the investigation.

*The Chief Executive’s view*

- 5.283 We asked the Chief Executive who had made the decision to appoint the former Director of Governance as the person to carry out the investigation. The Chief Executive told us that the decision was made by the Chair of the Council alone, and that the Chair of the Council had not discussed it with the Chief Executive. The Chief Executive said that they would have thought it was ‘odd’ if the Chair of the Council had consulted them, because they were part of the whistleblower’s complaint.

*The former Director of Governance’s view*

- 5.284 The former Director of Governance said that the decision to appoint them as the investigator had been made by the Chair of the Council, after consultation with the Chief Executive. This differs from the account given by the Chief Executive that they were not consulted about this matter.
- 5.285 In the former Director of Governance’s letter to the Chair of the Council enclosing their investigation report, they made a clear statement as to their position. In it the former Director of Governance stated that they had ‘done [their] best’ to prepare an impartial report but noted that they were a member of GDC staff who had themselves been criticised by the whistleblower, that the Chief Executive (also criticised by the whistleblower) was their line manager, that they had been involved in some aspects of handling the whistleblower’s ‘complaints’ and that the Head of Corporate Legal (who had advised the Chief Executive and the Appointments Committee) was within their directorate. When we asked about this in our interview with the former Director of Governance, they said that they would not have undertaken the investigation if they did not think they could do it impartially, and that the decision to appoint them came down to a question of proportionality in terms of money and time and the GDC’s efforts in investigating the matters raised by the whistleblower.

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where the Authority was aware of their involvement at the time and did not object to it. The comment went on to say that ‘the GDC was entitled to interpret (and did in fact interpret) the [Authority]’s silence as indicating that the [Authority] did not have concerns about [the former Director of Governance]’s involvement’.

## Our view

- 5.286 We received conflicting views about whether the Chair of the Council received advice from others in relation to their decision to appoint the former Director of Governance as the investigator into the whistleblower's complaints about detrimental treatment, and on whose advice this decision was based. While we acknowledge that the former Director of Governance had appropriate skills and experience to undertake such investigations, we consider that it was inappropriate for the former Director of Governance to be asked to undertake the investigation into the whistleblower's complaints of detriment. This was for two reasons. First, it meant that the former Director of Governance was responsible for investigating the actions of their line manager, one of the members of their directorate and one of their peers. Furthermore, the former Director of Governance had been subject to criticism by the whistleblower. It is clear that, from this position alone, the whistleblower and others were likely to believe that the investigation could not be undertaken by the former Director of Governance from an independent and objective perspective. Regardless of who the Chair of the Council received advice from in relation to this matter, we consider that they reached an inappropriate conclusion.
- 5.287 We are concerned that the GDC has told us, in response to seeing a draft of this report, (no such argument was ever made before) that it interpreted our 'silence' at the time about the appointment of the former Director of Governance to undertake the investigation as consent. We are not responsible for the decisions the GDC executive or Council takes. At the relevant time we had not even opened an investigation into the concerns raised by the whistleblower, and were certainly therefore not in a position to provide endorsement or disapproval of the actions taken by the GDC, an independent body. As a matter of principle, the Authority does not interfere in the day to day management of the regulators that we oversee.
- 5.288 Second, we consider that the decision was inappropriate because of the former Director of Governance's previous involvement in responding to some of the matters raised by and about the whistleblower – that previous involvement created a risk that the former Director of Governance might have already pre-judged those aspects of the matter.
- 5.289 Whilst we can understand the need for the GDC to be mindful of how it spends its limited resources, and the need for proportionality, we consider that it would have been more appropriate for an independent person, i.e. one with no previous involvement in matters raised in relation to the whistleblower (either within or outside of the GDC) to be appointed to investigate these complaints. This would have made it more likely that the whistleblower would have had confidence both in the investigative process used and the outcomes reached. It would also have limited the perception (whether this was fairly held or not) of the investigation being undertaken in an unfair and partial manner. We do not accept that using an external investigator would inevitably have delayed the investigation unnecessarily, or created confusion, as the GDC's comments imply (and we note that the GDC itself had already delayed the commencement of the investigation, pending receipt of the Penningtons report).
- 5.290 We recommend that as part of the guidance to be developed for staff on how the whistleblowing policy should be operationalised, consideration is given to including advice on how to manage complaints of detrimental treatment and who

should investigate them. The views of those who will use this guidance should be sought when drafting it. We also recommend that the GDC should seek external advice from experts in whistleblowing management. Staff should be trained on this guidance.

*Concern 2(b) (iii): The thoroughness of the investigation*

**The evidence**

*Our previous investigation of the GDC*

- 5.291 As part of the 2013 Investigation Report, we reviewed an investigation that had been undertaken by the former Director of Governance about a disclosure made by a (different) whistleblower. Whilst we considered that that investigation and its outcome were reasonable, we did identify areas for improvement such as:
- We considered that it would have been preferable for the former Director of Governance to have interviewed the whistleblower and other staff involved in the matter in order to ascertain their knowledge of the events – although we noted that they would not have been able to provide direct evidence about the events.
  - The whistleblower was not informed of the reporting arrangements or provided with the full investigation report. Whilst we considered it to have been preferable to do so, we did not consider it unreasonable that these things did not happen.
  - The former Director of Governance used the term ‘whistleblower’ interchangeably with other terms such as ‘complainant’ and ‘informant’, as a result of inadequate quality assurance.
- 5.292 In that investigation we also considered an allegation that a former Chair of the Council had made about the quality of the report of the investigation into their conduct. That investigation had been conducted by another former Chair of the Appointments Committee. The former Chair of the Council considered that that investigation report was flawed, because it did not include all the evidence relied upon by the investigator, make findings of fact, or reach clear and appropriate conclusions. Our view was that the quality of the investigation report could have been improved. We considered that the report should have provided greater detail about the evidence that the investigator had taken into account, which allegations they found proved, and the reasons for their findings.

*The report on the whistleblower’s complaints*

- 5.293 The report produced by the former Director of Governance (which was provided to the whistleblower on 26 March 2014) considered the following issues:
- That an allegation in respect of the whistleblower’s conduct towards a member of staff had been accepted ‘out of time’, and the way in which it was then progressed under the disciplinary procedure was not in accordance with the applicable disciplinary policy, resulting in unfairness. It was noted that the whistleblower was particularly concerned that the members of the Appointments Committee were aware of the allegation and that this could

prejudice any application that they might make for appointment as an Investigating Committee member in the forthcoming recruitment round.<sup>204</sup>

- That the whistleblower was disadvantaged in the number of Investigating Committee meetings they were scheduled to attend for the first six months of 2014, and that they were denied the opportunity to participate in additional Investigating Committee meetings in the latter part of 2013. In looking at this allegation, the former Director of Governance said that they had reviewed all Investigating Committee allocations for 2014 to check whether ‘diversity empanelment’<sup>205</sup> was being applied.

5.294 In addition, it was noted that the whistleblower had complained about a lack of transparency in the appointment of an Investigating Committee member to the role of Investigating Committee Chair – the whistleblower said that they and other Investigating Committee members had not been aware of the Chair development opportunities. While the former Director of Governance noted that the whistleblower did not claim that this was a detriment resulting from their whistleblowing disclosure (it affected all other non-Chairs as well as the whistleblower) for completeness, the former Director of Governance also dealt with this issue. The whistleblower also alleged that misleading assurances had been given to the Appointments Committee by GDC staff in relation to the appointment. This was not investigated by the former Director of Governance.

5.295 In investigating these issues, it was noted in the report that the former Director of Governance had considered paragraph 34 of the whistleblowing policy, which states that, ‘If it appears that you have reasonable grounds for making the complaint [of detriment], the onus will be on the person(s) involved to demonstrate that their actions were not taken in retaliation for the disclosure’. The report stated the former Director of Governance’s conclusion that no detriment had been suffered by the whistleblower and therefore that ‘proof of motivation’ under paragraph 34 of the whistleblowing policy was irrelevant. The report noted that ‘at first sight the coincidence of timing does raise suspicions’ and stated that ‘the GDC must satisfy itself that its staff have behaved properly’ (and take appropriate action if they had not, even if no detriment had been suffered by the whistleblower). The former Director of Governance recorded in the report the identities of those whom they had interviewed: the person who had made the complaint about the whistleblower, the former Head of the Investigating Committee, the Senior Committee Co-ordinator with responsibility for empanelment, and their manager (the Committee Support Manager). The former Director of Governance’s report stated that they had only interviewed those ‘whose actions have directly resulted in the outcomes of which [the whistleblower] complains’. The former Director of Governance said that they had not interviewed the Chief Executive or the former Chair of the Appointments Committee because ‘they have explained their actions themselves very fully to [the whistleblower]’. Having seen a draft of this report, the former Director of Governance commented that they did not consider it necessary to interview the former Chair of the Appointments Committee because that individual had taken legal advice and the reasons for their actions appeared well-documented contemporaneously, with no indication of ulterior purposes, nor did it appear that the former Chair of the

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<sup>204</sup> In fact, the whistleblower had gone further and said that the complaint had been made in the knowledge that it might affect their other quasi-judicial roles too.

<sup>205</sup> Please see footnote 143



Appointments Committee would be able to cast much light on the motivation of the former Head of the Investigating Committee. The former Director of Governance also did not interview the former Director of Regulation. Whilst the former Director of Governance did not interview the former Chair of the Appointments Committee about the handling of the complaint about the whistleblower, they did have a telephone conversation with the former Chair of the Appointments Committee (although no note of that conversation exists)<sup>206</sup> about the appointment exercise for the Investigating Committee that was to be undertaken later in 2014, and the process for developing the chairing skills of Investigating Committee members.<sup>207</sup>

5.296 The former Director of Governance concluded that the whistleblower had not suffered any detriment. The report said that, ‘My conclusions are that the GDC’s staff and the former Chair of the Appointments Committee have acted appropriately in their dealings with [the whistleblower]. The explanations given to me were reasonable, there was documentary support, and the witnesses were credible’. The report went on to say that, ‘In any event, [the whistleblower] did not suffer any detriment’ and made the following findings:

- The incident reported by the first Investigating Committee Secretary was true – the whistleblower admitted it.
- The remark complained of was inappropriate and contrary to GDC policy – the whistleblower apologised.
- The outcome was proportionate – the matter was closed with the offering and acceptance of an apology, with no record being made on the [whistleblower’s] file.<sup>208</sup>
- The suggestion that the Chief Executive and the former Chair of the Appointments Committee deliberately acted so as to ensure that there was adverse knowledge about the whistleblower on the part of the Appointments Committee when it came to the selection of Investigating Committee members for appointment in 2014 has no basis.
- The process for selection of Investigating Committee members had been carefully designed to be as independent and free of bias as is practicable and proportionate.

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<sup>206</sup> The former Chair of the Appointments Committee told us, in response to seeing a draft of this report, that they have no recollection of this conversation ever taking place. In response to that comment the former Director of Governance has told us that the same conversation included discussion (reflected at paragraphs 29 – 31 of their report) about the process for recruitment of the Investigating Committee in 2014 and the measures in place to ensure that there could be no concern about bias as a result of the Appointments Committee’s knowledge of the complaint about the whistleblower. They also told us that the same conversation included discussion of the matters referred to at paragraphs 69-77 of their report (in relation to the appointment of an Investigating Committee Chair in 2013). However we note that this section of their report expressly states that the only investigation they had undertaken was to review a resumé of information supplied to the former Director of Regulation by the former Head of the Investigating Committee, and to review one set of Appointments Committee minutes and the relevant training day agenda.

<sup>207</sup> It is not clear to us that this conversation had any relevance to the investigation undertaken by the former Director of Governance.

<sup>208</sup> As set out at paragraph 5.370 this appears to be inaccurate – under the disciplinary procedure a record should have been kept on the whistleblower’s file, and we note that the letter dated 23 October 2013 to the whistleblower said that a copy would be kept on their file, and that it would be taken into account in the event of any other complaints.



- The 2014 empanelment had not resulted in the whistleblower having fewer sitting days than they should.<sup>209</sup>

5.297 Appended to the document were a large number of documents including GDC policies, statements that the former Director of Governance had taken from staff members, a chronological list of correspondence, and other documentation such as the email of 5 August 2013.

*The whistleblower's views*

5.298 The whistleblower has been clear about their view of the quality of the former Director of Governance's report in both their correspondence with the Authority and in our interview with them. They do not believe that the former Director of Governance conducted a thorough investigation, they did not understand why they had not been interviewed, and they believed that there was a clear 'emphasis on the reasonableness of the accounts given by [GDC] staff' in the report and that the report was 'riddled with evidential and legal flaws'.

5.299 In respect of the scope of the investigation, we asked the whistleblower why they had not informed the former Director of Governance about those matters (breach of confidentiality, failure to keep them informed about the progress of the Penningtons investigation, and the payment of their fees) which were clearly referred to in their letter to the Chair of the Council but which were not included in the scope of the former Director of Governance's investigation. The whistleblower said that the letter they sent to the Chair of the Council referred to all the main points and they would have expected the former Director of Governance to deal with all of them in their investigation. The whistleblower said that they did not respond to the former Director of Governance in any event because they did not think they should respond to 'someone who writes to me in such demeaning terms as [they] had done before Christmas'.<sup>210</sup>

5.300 We asked the whistleblower for their views of the inclusion in the appendices of the email of 5 August 2013<sup>211</sup> regarding the concerns raised by the Investigating Committee Secretariat about the whistleblower's conduct and approach to decision-making (see terms of reference 2a (i)). The whistleblower said that they had been unaware that these concerns had been raised about them, but they thought it important to note in relation to this aspect of the investigation that:

- Both the concerns raised and the formal complaint were all made after the incident with the first Investigating Committee Secretary on 13 June 2013 had taken place, with the exception of one matter which was dealt with by way of a private and informal discussion in February 2013.
- It was inconceivable that the Chief Executive did not inform the former Director of Regulation at the earliest opportunity after the whistleblower had made their whistleblowing disclosure, or given the closeness of their working relationship,

<sup>209</sup> The report does not appear to have reached any overall conclusion in relation to the whistleblower's claim about the allocation of additional sitting days in 2013. The former Director of Governance found that the whistleblower was not disadvantaged in relation to four of the five dates, and made no finding about disadvantage relating to the fifth date (but stated by the staff had come to a view that a different Investigating Committee member should be appointed to sit on that date, for different reasons).

<sup>210</sup> This referred to correspondence the whistleblower and the former Director of Governance had shared about empanelment data as referred to at paragraphs 5.72-5.74 and 5.267.

<sup>211</sup> The email of 7 August 2013 was not included in the appendices. They obtained it later by way of a subject access request.

that the former Director of Regulation had not informed the former Head of Investigating Committee around the same time.<sup>212</sup>

- 5.301 When considering the thoroughness of the former Director of Governance's report, we have looked at the following areas:
- The decision to interview/not to interview key individuals.
  - The evidence and the challenge (or lack of challenge) about the evidence.
  - Empanelment.
  - The appointment of a new Investigating Committee Chair.
  - Findings of the report.

#### [The decision to interview/not interview key individuals](#)

##### *The former Director of Governance's views*

- 5.302 We asked the former Director of Governance why they did not interview a number of the key individuals as part of their investigation, given the need to explore their motivation as required by paragraph 34 of the whistleblowing policy, and how they had nonetheless felt able to make some findings about motivation without interviewing some of the individuals concerned. The former Director of Governance maintained their view that, as there had been no detriment, the question of motivation was not relevant. In response to this report the former Director of Governance has told us that their interpretation of paragraph 34 of the whistleblowing policy was based on legal advice received at the time. The former Director of Governance told us that the correspondence between the relevant parties in any event dealt "four square" with the issues raised and there was no need to go behind it. The former Director of Governance said that the Chief Executive and the former Chair of the Appointments Committee had both taken advice from the Head of Corporate Legal, and the former Director of Governance said that they could not go behind that advice. Further, the former Director of Governance said that it was obvious that the whistleblower had to be dealt with in the way that they had in fact been dealt with, and therefore the question of motivation did not arise.

- 5.303 The former Director of Governance told us that they did not interview the whistleblower because they had made their views very clear in correspondence and, in the former Director of Governance's view, it was neither necessary nor proportionate to interview them.

##### *The first Investigating Committee Secretary's views*

- 5.304 The first Investigating Committee Secretary explained that they had received an email from the former Director of Governance in relation to their investigation. This happened whilst they were abroad. They confirmed that they were then interviewed by telephone. The first Investigating Committee Secretary said that they saw the former Director of Governance's report once it was finalised.

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<sup>212</sup> We note that at interview the Chief Executive told us that they thought they would have informed the former Director of Regulation soon after the disclosure had been made. We have subsequently established from documentary evidence that the former Director of Regulation knew about the whistleblowing disclosure before 2 August 2013.

The evidence and the challenge (or lack of challenge) about the evidence

*The former Director of Governance's views*

- 5.305 We asked the former Director of Governance why they had not considered the former Head of the Investigating Committee's emails to the former Chair of the Appointments Committee of 5 and 7 August 2013 as being at least prima facie evidence of detrimental treatment – they were sent in short succession a few days after the whistleblowing disclosure had been made, they related to the whistleblower, and (we were told), were unprecedented in nature. The former Director of Governance told us that they were not aware of the 7 August 2013 email, and that they were not involved in the events occurring at that time. The former Director of Governance told us that they had asked the former Head of the Investigating Committee about their relationship with the whistleblower as part of their investigation, as the former Director of Governance did not want their report to suppress anything about the relationship between the former Head of the Investigating Committee and the whistleblower. We note that there is no reference to either the 7 August email or the email that the former Chair of the Appointments Committee sent to the former Head of the Investigating Committee on 14 August 2013 (in response to the emails of 5 and 7 August 2013) in the chronology of correspondence contained within the former Director of Governance's report, and those documents are not included within the appendices to the report. At interview the former Director of Governance told us that there was no specific reason why the emails had not been included, and that had been an oversight, but subsequently clarified that they had never seen the 7 August 2013 email, and that they had only seen a draft of the 14 August 2013 response from the former Chair of the Appointments Committee to the email of 5 August 2013 (rather than the version that was actually sent). The former Director of Governance also told us that the reference within the 14 August 2013 response to the email of 7 August 2013 was so brief that it did not prompt them to try to obtain the email of 7 August 2013.
- 5.306 Similarly, we note that it appears that the former Director of Governance was not aware of the email sent by the former Head of the Investigating Committee to the former Chair of the Appointments Committee on 23 September 2013. That email requested an indication of how long the investigation into the complaint about the whistleblower might take, and whether the whistleblower might be suspended while it was ongoing, and queried whether the former Head of the Investigating Committee should invite the whistleblower not to sit in the meantime. Similarly, it appears that the former Director of Governance was not aware of the subsequent correspondence, including the former Chair of the Appointments Committee's email to the other Appointments Committee members on 25 September 2013 in which the former Chair of the Appointments Committee disclosed details of the complaint to the Committee, and the email of 16 October 2013 that the former Chair of the Appointments Committee sent to the Chief Executive. That email of 16 October 2013 raised a concern about the former Head of the Investigating Committee's email of 2 October 2013 in which they had suggested that they could suspend an Investigating Committee member (see paragraphs 5.52, 3.41, 4.131 and 5.128).
- 5.307 We also asked how the former Director of Governance could make a finding that there was no evidence (other than a coincidence of timing) that the complaint about the whistleblower had been made because of the whistleblowing disclosure,

given the email of 5 August 2013. The former Director of Governance responded by saying that this email had “nothing to do” with the first Investigating Committee Secretary’s complaint about the whistleblower. The former Director of Governance said that the first Investigating Committee Secretary’s complaint was justified, and they had provided cogent reasons for not making it immediately. The former Director of Governance said that they could not investigate everyone just in case there was a general conspiracy against the whistleblower.

- 5.308 We asked the former Director of Governance whether it was fair to include the 5 August 2013 email and its attachments within the appendices to their report, when the whistleblower had had no opportunity to respond to the suggestion in those documents that their approach to decision-making was discriminatory’.<sup>213</sup> The former Director of Governance told us that they had wanted to include everything within the report, in order to be transparent, so that they could not be accused of failing to disclose something that might have affected their judgment. The former Director of Governance did not want anyone to think that they were suppressing information that they knew concerning complaints about the whistleblower that had been made behind the scenes. The former Director of Governance said that it was right for the whistleblower to know about it, and they would have had an opportunity to respond had the matters been taken further. The former Director of Governance told us that the former Head of the Investigating Committee’s raising of the earlier concerns in the email of 5 August 2013 and the timing of them was included at the back of the report for completeness, but those matters were not taken into account by them in reaching their decisions about the whistleblower’s complaints of detriment. The former Director of Governance told us that they believed it was necessary to provide as complete a picture as possible within the bounds of reasonableness and in so far as it was proportionate, to make it clear that there was no “whitewash”.
- 5.309 The former Director of Governance said that they had only considered the Chief Executive’s decision in terms of whether there was anything calculated to be intended to lead to detriment to the whistleblower. The former Director of Governance told us that they thought it was appropriate and proportionate for the Chief Executive and the former Chair of the Appointments Committee to have taken the decisions that they had, and commented that informal processes could result in something being swept under the carpet in circumstances “when there was no proper insight on the part of the wrongdoer”.
- 5.310 The former Head of the Investigating Committee told the former Director of Governance that they put the first Investigating Committee Secretary’s complaint out of their mind between the date when the first Investigating Committee Secretary initially told them about what had happened, and the making of their complaint. The former Director of Governance told us that they did not challenge this assertion.
- 5.311 In terms of the acceptance of the first Investigating Committee Secretary’s complaint outside of the one month time limit, the former Director of Governance told us that they could not criticise the former Head of the Investigating Committee for being unaware of the one month time limit. The former Director of Governance

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<sup>213</sup> The whistleblower only saw the 5 August 2013 email after making a subject access request to the GDC for all documents relating to them.

said that whilst policies are available to staff, they only look at them when they have reason to.<sup>214</sup>

- 5.312 On the issue of what the former Director of Governance knew about the former Chair of the Appointments Committee's discussion with other Appointments Committee colleagues in relation to the first Investigating Committee Secretary's complaint, the former Director of Governance said that they saw no reason why the former Chair of the Appointments Committee could not consult with their colleagues. The former Director of Governance said that they had not asked the former Chair of the Appointments Committee about this, but that they knew that the former Chair had taken advice on it from the Head of Corporate Legal.<sup>215</sup>

### Empanelment

#### *The former Director of Governance's views*

- 5.313 The former Director of Governance told us that they were satisfied that empanelment for Investigating Committee meetings was done mechanically, such that there was no detriment to anyone. Yet the former Head of the Investigating Committee's email of 5 August 2013 (which the former Director of Governance had seen) and the former Head of the Investigating Committee's evidence indicated that they thought that they could direct empanelment in relation to particular Investigating Committee members. In their evidence the former Head of the Investigating Committee told the former Director of Governance that, if they had wanted to be vindictive to the whistleblower, it would have been at the time of the dispute between them, and that they could have taken any grievance out on the whistleblower by way of empanelment. When we questioned the former Director of Governance about this, they said that by the time of the empanelment issue being raised by the whistleblower, Penningtons had been instructed and, as such, it would have been "mad" for the former Head of the Investigating Committee to do anything to disadvantage the whistleblower in terms of their empanelment for Investigating Committee meetings at that time.
- 5.314 We asked for the former Director of Governance's views in relation to option four set out in the former Head of the Investigating Committee's email of 5 August 2013.<sup>216</sup> The former Director of Governance said that option four did not seem particularly surprising or sinister, and that it was not unusual for 'non-lawyers' (or non-practising lawyers) to look for alternative ways to deal with problematic panel members because they (i.e. non-lawyers) may fail to appreciate all the legal implications/obstacles. The former Director of Governance said that as a result of their interviewing the staff they were absolutely confident that empanelment for Investigating Committee meetings was done mechanically, and therefore any motivation on the part of the former Head of the Investigating Committee was

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<sup>214</sup> The former Chair of the Appointments Committee's view is that the former Head of the Investigating Committee should have been familiar with the disciplinary procedure because the former Chair of the Appointments Committee had sent a copy of the disciplinary procedure to them on 14 August 2013.

<sup>215</sup> In fact, the former Chair of the Appointments Committee had not taken legal advice on the substance of the email they sent to their Appointments Committee colleagues on 25 September 2013 concerning the complaint about the whistleblower – they had however taken advice about the process of considering suspension pending the outcome of the investigation.

<sup>216</sup> Option four was contacting the whistleblower to 'exercise our rights under clause 4 of [their] terms and conditions and inform [them] that we no longer wish to use [them] as a member of the IC bearing in mind the issues raised in relation to the development review process (or other concerns) and by virtue of the fact that there is no business case to provide them with sitting dates'.



irrelevant. The former Director of Governance has said to us subsequently that it is ‘inconceivable’ that any member of the executive management team would have taken option four seriously. However we note that when we spoke to the former Director of Regulation about option four, they did not express such a view and in fact said that they did not have any concerns about it (see paragraph 5.111).

- 5.315 The former Director of Governance found that “diversity empanelment” was not a policy that had been invented in order to disadvantage the whistleblower. The former Director of Governance told us that this finding was based on: three different witnesses giving consistent accounts of having used “diversity empanelment” at the GDC under the direction of the former Head of the Investigating Committee, and in a similar manner to their previous experience when working for another regulator; two emails sent by the former Head of the Investigating Committee in March and April 2012; and an email of 30 October 2013 that referred to diversity as a factor to be taken into account when empanelling. We note that the 2012 emails may refer to diversity, but do not explain what this is a reference to. The 30 October 2013 email (which was sent after the whistleblowing disclosure had been made) refers to diversity in terms of ethnicity and gender, with a recognition that this could mean a ‘slight disproportion’ in terms of sitting days for some Investigating Committee members. The former Director of Governance said that diversity empanelment was not “something that was just dreamt up in 2014”.
- 5.316 Given their acceptance that diversity empanelment was happening in 2012, we asked the former Director of Governance if they had considered information about Investigating Committee members’ empanelment for 2012. The former Director of Governance said that they had not needed to do so, and that in any event such information would be difficult to compare with the information for 2013/14, as between those years a change was made from using five Investigating Committee members on each panel to using only three members.<sup>217</sup>
- 5.317 The whistleblower had also raised concerns about the lack of a written policy in relation to diversity empanelment, and the lack of consultation/communication about any such policy. We asked why this did not specifically form part of the former Director of Governance’s investigation.<sup>218</sup> We were told that the former Director of Governance did not consider it necessary to look at these matters in order to reach a view on the whistleblower’s claim of detriment. However, the former Director of Governance told us that they had dealt with these matters in the report’s recommendations – when they recommended that the diversity empanelment policy should be documented. The former Director of Governance also stated that they had asked the former Head of the Investigating Committee why this had not been done previously, and that their response was that, as the former Head of the Investigating Committee had been operating a small team initially, they did not feel the need to write the policy down. The former Director of Governance told us that they also asked the former Head of the Investigating Committee why the policy was introduced without consultation, and that their response was that this was done because introducing diversity empanelment was

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<sup>217</sup> We note from information that we received from the whistleblower on 19 February 2015 that over 60% of the Investigating Committee sittings between July & December 2012 (12 of 19) were non-diverse.

<sup>218</sup> In response to seeing a draft of this report, the GDC has noted that the whistleblower did not object to the terms of reference of the former Director of Governance’s investigation.



‘the natural thing to do’ given their experience working for a previous regulator where (they told the former Director of Governance) a similar criterion was used.

5.318 We asked the former Director of Governance why they had accepted the explanations provided by the former Head of the Investigating Committee and their team in relation to the failure to offer additional Investigating Committee dates to the whistleblower, even though their explanations stated that they had considered factors outside of the list of empanelment criteria produced by the former Head of the Investigating Committee in October 2013. The former Director of Governance said that, whilst they acknowledged that the reasons given were not on the list of criteria, this in itself did not make them unreasonable in the circumstances. The former Director of Governance said that they did not believe that the additional factors relied upon by the Investigating Committee Secretariat to justify the decision not to offer the whistleblower any additional Investigating Committee dates were designed to exclude the whistleblower because of their whistleblowing disclosure, and the former Director of Governance recognised that they were “one off” reasons. The former Director of Governance pointed out to us that the list of criteria was not intended to be exhaustive, i.e. it had to allow for some additions/exceptions in relevant circumstances. In their investigation report the former Director of Governance concluded that the empanelment for 2014 had been done fairly, in accordance with proper criteria, and that the allocation of sitting days to the whistleblower had been done logically, consistently and properly.<sup>219</sup> The report, while it set out the reasons given by the Investigating Committee Secretariat staff for selecting members other than the whistleblower to sit on each of the additional dates, and commented on the reasonableness of those reasons, did not expressly examine the fact that the reasons given did not fall within the list of criteria that the Investigating Committee Secretariat apparently used (which were first documented in October 2013).

*The former Head of the Investigating Committee’s views*

5.319 We asked the former Head of the Investigating Committee about a comment they had made to the former Director of Governance during their investigation. The former Head of the Investigating Committee had made a statement about using/not using Investigating Committee members, and said that they could have found reasons for not using the whistleblower. The former Head of the Investigating Committee said that this comment should not be taken out of context, and that what they had meant by it was that if they had wished to be vindictive towards the whistleblower in terms of empanelment, that would have been following the whistleblower’s complaint about the former Head of the Investigating Committee in March 2013, not after they had made the whistleblowing complaint. We asked what the former Head of the Investigating Committee meant by saying that if they had wanted to find reasons, they could have done so. The former Head of the Investigating Committee said that no one else has access to the information the Investigating Committee members provide

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<sup>219</sup> This conclusion appears to have been based on the findings made by the former Director of Governance in their report that two of the criteria that were used by the Investigating Committee Secretariat in deciding the composition of each panel were legitimate – that (racial) diversity should be prioritised, and that a dental care practitioner member should sit on each Investigating Committee panel. In fact, the latter was not necessary (it was just convenient, because it meant that the panel could then deal with cases about dental care practitioners as well as dentists) and it was subsequently established that the use of the diversity criterion was not ‘proper’ as the former Director of Governance’s report had found.

about their availability for the purposes of the empanelment exercise, and therefore, if they had wished to do so, they could have “screwed [them] over” during the final empanelment process. The former Head of the Investigating Committee clarified to us the statement that they had made to the former Director of Governance - the former Head of the Investigating Committee said that they thought that they had meant to refer to the means rather than the reasons – and noted that, as they had already said, they would not have been challenged had they taken such action.

- 5.320 As a result of a disclosure of documents made by the GDC to the whistleblower in response to their subject access request, we have seen an email sent by the former Head of the Investigating Committee to the former Chair of the Appointments Committee dated 23 September 2013. In that email, the former Head of the Investigating Committee referred to the first Investigating Committee Secretary’s complaint, and asked for an indication of the timing of the investigation and information about whether or not the whistleblower was to be suspended. The former Head of the Investigating Committee said in the email that they were asking the question because they had been considering the whistleblower’s next scheduled date to attend an Investigating Committee meeting. The former Head of the Investigating Committee enquired whether they should invite the whistleblower not to sit, ‘given the proximity and the sensitivity of the issues’.<sup>220</sup> The former Chair of the Appointments Committee told us that they were unaware at the time that such an email had been sent by the former Head of the Investigating Committee. The former Chair of the Appointments Committee replied to the 23 September 2013 email on 2 October 2013 saying that they had only recently sent the complaint to the whistleblower and did not know whether they would be suspended or how long the investigation would take to conclude.
- 5.321 We asked the former Head of the Investigating Committee why they had sent the email of 23 September 2013. The former Head of the Investigating Committee gave a number of possible explanations. One of those explanations was that ‘the team’ knew about the complaint about the whistleblower and wanted to check whether the whistleblower was due to attend an Investigating Committee meeting at which the first Investigating Committee Secretary would be acting as Committee Secretary. When we raised queries about that explanation, the former Head of the Investigating Committee then said that they did not know whether ‘the team’ had in fact known about the complaint about the whistleblower.
- 5.322 In relation to a similar matter, we also asked the former Head of the Investigating Committee about an email that they sent following the events that took place during the 18 September 2013 Investigating Committee meeting. The former Head of the Investigating Committee had initially told us that they were not involved in any of the matters following the 18 September 2013 Investigating Committee meeting. In addition to the email of 18 September 2013, we subsequently saw an email that the former Head of the Investigating Committee had sent to the Investigating Committee members on 24 September 2013 asking them to stand down whilst the disciplinary investigation progressed (in fact no disciplinary investigation was launched against any of these Investigating Committee members, and the contents of the former Head of the Investigating

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<sup>220</sup> The following day the former Head of the Investigating Committee sent an email to those members who attended the 18 September 2013 meeting saying that they were being investigated pursuant to the disciplinary procedure and inviting them to refrain from sitting (see paragraphs 5.39, 5.322 and 3.171).

Committee's email were later resiled from by the Chief Executive). When we asked the former Head of the Investigating Committee about that email, they told us that the email was sent on instructions either from the former Director of Regulation or from the Chief Executive.<sup>221</sup> The former Head of the Investigating Committee said that when they referred to instructions from the Chief Executive, those instructions would have "come down from" the former Director of Governance or from the former Director of Regulation. The former Head of the Investigating Committee said that they had sent the email to the Governance department (Corporate Legal) seeking legal input – and that the email had been "tweaked" by someone in Governance, and that the former Head of the Investigating Committee had then sent it out.

- 5.323 In relation to an email that the former Head of the Investigating Committee sent on 2 October 2013 (in which they said that they could stop using Investigating Committee members for operational reasons) the former Head of the Investigating Committee said that the GDC had made it clear that the former Head of the Investigating Committee's view about this was not justified.<sup>222 223</sup>

*The former Director of Regulation's views*

- 5.324 We asked the former Director of Regulation if the former Head of the Investigating Committee had ever said that they would like to stop empanelling an Investigating Committee member. The former Director of Regulation said that the former Head of the Investigating Committee had never discussed doing that, and that they had never stopped an Investigating Committee member from sitting – the former Director of Regulation said there is "no gap in the records" that would suggest that anyone was stopped from sitting. However, the former Director of Regulation said that it was possible to obtain approval from the Appointments Committee not to use an Investigating Committee member, and that this had happened previously in relation to a fitness to practise committee panellist.<sup>224</sup>
- 5.325 We referred the former Director of Regulation to an email of 2 October 2013 sent by the former Head of the Investigating Committee suggesting that they could in effect suspend Investigating Committee members. That email had caused consternation on the part of the Appointments Committee, such that they had referred it to the Chief Executive. The Chief Executive in turn referred it to the former Director of Regulation, who then addressed the matter with the former Head of the Investigating Committee.
- 5.326 The former Director of Regulation told us that they recalled a conversation with the former Head of the Investigating Committee in which the former Head of the Investigating Committee had said that they had an opportunity not to empanel someone. The former Director of Regulation said that they could not recall if this had happened "before or after the whistleblower issues". However, the former Director of Regulation said that they had told the former Head of the Investigating

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<sup>221</sup> The GDC has told us that the Chief Executive did not sign off that email.

<sup>222</sup> The former Head of the Investigating Committee added on 23 October 2014: 'In any event [they] would not have not used members without discussing it with [the Director of Regulation] first.'

<sup>223</sup> It was the email of 2 October 2013 that led to the Appointments Committee raising a concern about the former Head of the Investigating Committee with the Chief Executive (on 16 October 2013).

<sup>224</sup> The former Chair of the Appointments Committee has confirmed that the only available mechanism is via a referral to the Appointments Committee which results in a suspension or removal under the disciplinary procedure. It is therefore not possible to obtain the Appointments Committee's approval "not to use" a member in the way suggested.

Committee “not to be so silly” and that if they wanted to stop someone from sitting they had to remove them through a formal process on the grounds of incompetence or poor behaviour.

- 5.327 In response to the concerns raised by the former Chair of the Appointments Committee, the former Director of Regulation wrote to the former Chair of the Appointments Committee on 31 October 2013 and told them that the former Head of the Investigating Committee was fully aware of the former Director of Regulation’s views, and that the former Director of Regulation was satisfied that the former Head of the Investigating Committee would act appropriately in the future, but that the former Director of Regulation was now taking an even closer interest in the former Head of the Investigating Committee’s interaction with Investigating Committee members.<sup>225</sup> When we asked how the former Director of Regulation in fact achieved that, they said that what they were trying to say was that, for the time being, they were keeping a close eye on whether the former Head of the Investigating Committee was “pulling the strings” on empanelment or anything else. The former Director of Regulation said that they were in daily contact with the former Head of the Investigating Committee, asking them searching questions about how they were dealing with things. However, the former Director of Regulation said that they had no mechanism, given the time available, for checking that what they were being told was true, but that, unless the former Head of the Investigating Committee “had a death wish”, they would not have tried to deceive the former Director of Regulation about their conduct with regard to Investigating Committee members at that time.
- 5.328 In terms of the email sent to the Investigating Committee members involved in the meeting on 18 September 2013, the former Director of Regulation confirmed that they and the former Head of the Investigating Committee had taken legal advice from the Head of Corporate Legal on whether it was appropriate to invite those Investigating Committee members not to participate in future Investigating Committee meetings.
- 5.329 In our interview, we asked a question about an incident that had occurred in autumn 2013. This related to a situation where the whistleblower was not offered additional sitting days, and the criteria used for empanelment were not those normally used. The former Director of Regulation explained that the fact that the whistleblower had provided a negative peer review of another Investigating Committee member was relevant when considering their suitability to sit on an Investigating Committee on one of the additional dates in autumn 2013 (although this was not part of the standard criteria). This was because the person the negative peer review was provided about was to be assessed for appointment as an Investigating Committee Chair during one of the Investigating Committee meetings in the autumn. In terms of the other additional Investigating Committee meeting day for which members’ availability was canvassed, the former Director of Regulation told us that the relevant staff member accepted after the event that they could appropriately have offered that date to all Investigating Committee members. However, they had not done so because the process of canvassing

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<sup>225</sup> We have seen the email from the former Director of Regulation to the former Chair of the Appointments Committee dated 31 October 2013, as well as the email from the former Head of the Investigating Committee to the former Director of Regulation dated 25 October 2013, attaching their note explaining the content of the former Head of the Investigating Committee’s email to the former Chair of the Appointments Committee dated 2 October 2013, and the former Head of the Investigating Committee’s reflections on that email. That correspondence is summarised in the chronology.

availability was disorganised. The staff member had taken the approach of emailing those Investigating Committee members whom they thought most likely to be available to attend, given their recent and upcoming meeting dates.

#### *The Chair of the Council's views*

- 5.330 The Chair of the Council said that they had no involvement in the empanelment of the Investigating Committee, but that they had read the analysis contained within the former Director of Governance's report. The Chair of the Council stated: "It did seem to me to be a fair and convincing analysis. I had no way of establishing if the data relied on from the team was accurate. You've got to assume that data is correct. I don't think the data has ever been challenged seriously.<sup>226</sup> The thing that I was unhappy about was that the introduction of diversity as a criterion for the panel, although absolutely correct, was not actually ever formulated as a clear policy. It just kind of drifted into the system at some point around 2011 – 2012. That didn't seem to be a good practice". In response to seeing a draft of this report, the GDC has told us that the Chair of the Council saw more than one draft of the former Director of Governance's report, and that their view at the time and currently is that it was a very thorough job.
- 5.331 In response to seeing a draft of this report, the GDC has told us that a meeting was held between the Chief Executive, the former Director of Regulation, the Director of Human Resources and the Head of Corporate Legal<sup>227</sup> to discuss the content of the email received from the former Chair of the Appointments Committee on 16 October 2013 raising concerns about the email from the former Head of the Investigating Committee on 2 October 2013. The GDC told us that it was agreed at that meeting that the former Director of Regulation would write to the former Head of the Investigating Committee asking for an explanation, and that the result of the former Director of Regulation doing so<sup>228</sup> was that the former Head of the Investigating Committee replied with a detailed explanation.<sup>229</sup> The GDC told us that it was then agreed by the Chief Executive, the Director of Human Resources and the former Director of Regulation<sup>230</sup> that the explanation was adequate and that no further action should be taken, and that this was reported to the former Chair of the Appointments Committee.

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<sup>226</sup> The whistleblower has pointed out that as the relevant data was not disclosed alongside the former Director of Governance's report (or indeed upon request by the whistleblower) it was not possible for any challenge to be made to it (the whistleblower was only provided with a copy of the data during the course of legal proceedings, which occurred after the date on which the Chair of the Council made this statement to us).

<sup>227</sup> At interview, the former Director of Regulation also referred to such a meeting, but did not indicate that the Head of Corporate Legal attended it.

<sup>228</sup> We have not seen a copy of any written request from the former Director of Regulation to the former Head of the Investigating Committee. We note that the former Director of Regulation referred at interview with us to having made such a request in writing. The former Director of Regulation's email to the former Chair of the Appointments Committee dated 31 October 2013 and the former Head of the Investigating Committee's note dated 23 October 2013 refer to 'discussions' about the matter.

<sup>229</sup> This appears to refer to the email sent by the former Head of the Investigating Committee to the former Director of Regulation on 25 October 2013, attaching their note dated 23 October 2013 explaining and reflecting on the content of their email to the former Chair of the Appointments Committee dated 2 October 2013.

<sup>230</sup> The former Director of Regulation's email to the former Chair of the Appointments Committee on 31 October 2013 states that this agreement was between the former Director of Regulation and the Chief Executive and does not refer to the Director of Human Resources as being directly involved in this decision.



### *The former Chair of the Appointments Committee's views*

- 5.332 We noted that, in the 2 October 2013 email and subsequent communications, the former Head of the Investigating Committee had expressed a belief that there are circumstances where not using Investigating Committee members could be justified, without undertaking any formal procedure. The former Chair of the Appointments Committee confirmed to us that such a decision was not one which the former Head of the Investigating Committee was authorised to take. If it was the case, for example, that an Investigating Committee member failed to attend required mandatory training, it was for the Appointments Committee to consider what action to take. Similarly, there might be occasions when a repeated failure to engage with the development review process would warrant action being taken. However, the former Chair of the Appointments Committee was clear that such decisions were for the Appointments Committee rather than GDC staff to take, and told us that they reject the account provided by the former Director of Regulation that it is possible to obtain the Appointments Committee's approval "not to use" an Investigating Committee member. The former Chair of the Appointments Committee also made it clear that this had previously been said to the former Head of the Investigating Committee, for example in the former Chair of the Appointments Committee's replies to the former Head of the Investigating Committee's emails of 5 and 7 August and 26 September 2013.
- 5.333 We pointed out that the former Head of the Investigating Committee had said in their note to the former Director of Regulation about their email of 2 October 2013 that they could seek clearance for not using a member of the Investigating Committee from the former Director of Regulation or from the former Chair of the Appointments Committee. The former Chair of the Appointments Committee stated that doing so would not be the correct procedure, and told us that the former Head of the Investigating Committee had never approached them for clearance of such a nature (and that the former Head of the Investigating Committee should not do so, because the formal procedure would need to be followed). The former Chair of the Appointments Committee emphasised that there would need to be a reference to the Appointments Committee before any action was taken, and that empanelment needs to be done in a fair and open way.
- 5.334 The former Chair of the Appointments Committee also told us of their disagreement with the view expressed to us by the former Director of Regulation that provision of a negative peer review of another Investigating Committee member was a relevant matter when considering the whistleblower's suitability to sit on an additional investigating Committee meeting in autumn 2013. The former Chair of the Appointments Committee's view is that provision of a negative peer review is irrelevant – Investigating Committee members are expected to be able to handle constructive criticism in feedback.

### *The Appointment of a new Investigating Committee Chair in 2013*

#### *The former Director of Governance's views*

- 5.335 The former Director of Governance said that they were aware of the whistleblower's complaint about the former Head of the Investigating Committee giving a false assurance to the Appointments Committee in relation to the appointment of a new Investigating Committee Chair in 2014. The former Director of Governance referred to the fact that the whistleblower had not claimed that this had caused detriment to them, and that the parameters of the investigation had



been sent to the whistleblower and that they had not raised any concerns about them. The former Director of Governance said that the investigation report had addressed the issue, to the extent it was relevant to the claim of detriment. The former Director of Governance also told us that the Appointments Committee had not requested a separate report about the issue.

- 5.336 The former Director of Governance originally told us that they had made no note of the telephone conversation that they had had with the former Chair of the Appointments Committee about this aspect of the investigation into the whistleblower's complaint of detriment. The former Director of Governance told us that during that telephone call they also discussed with the former Chair of the Appointments Committee all the issues raised by the whistleblower that the former Director of Governance considered it necessary to ask the former Chair of the Appointments Committee about. They subsequently said that they had in fact made such a note, but had then destroyed that note once the investigation report was finalised. They told us that whereas other witnesses' evidence had been formalised within statements, the former Director of Governance had not considered it necessary to produce a formal statement for the former Chair of the Appointments Committee, as their input was factual and uncontroversial.<sup>231</sup>

*The former Head of the Investigating Committee's views*

- 5.337 We asked the former Head of the Investigating Committee about the accuracy of the assurance that the former Head of the Investigating Committee had given to the Appointments Committee in November 2013 in relation to the proposed appointment of the new Investigating Committee Chair in February 2014. The former Head of the Investigating Committee confirmed that they had given assurances to the Appointments Committee that all Investigating Committee members had been encouraged to take part in training and development activities to enable them to become Investigating Committee chairs. The former Head of the Investigating Committee said that they always encouraged Investigating Committee members at training days and as part of the development review process, and that the member who became a Chair in February 2014 had raised the question of becoming a Chair as part of that process. The former Head of the Investigating Committee said that all Investigating Committee members were equally encouraged. If any of them wanted any training and development, they were encouraged to do that, and the former Head of the Investigating Committee would have spoken to them directly telling them this when the former Head of the Investigating Committee participated in Investigating Committee meetings as Secretary during 2012, and at a training day in September 2012.

*The former Director of Regulation's views*

- 5.338 The former Director of Regulation told us that they were probably aware of the allegation that the whistleblower had made about the Appointments Committee receiving false assurances that all Investigating Committee members had been equally encouraged and supported to undertake development that could lead to their being appointed as Investigating Committee Chairs. The former Director of Regulation told us that what the former Head of the Investigating Committee was saying was that all Investigating Committee members were aware that if they wanted to develop or needed support to develop, then they should let the GDC

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<sup>231</sup> The former Chair of the Appointments Committee told us that they had no recollection of the former Director of Governance discussing this aspect of the whistleblower's complaint of detriment with them.

know. The former Director of Regulation told us that the former Head of the Investigating Committee had never said that all Investigating Committee members had been offered the opportunity to become Investigating Committee Chairs, and what the former Head of the Investigating Committee had said was that it was clear to all Investigating Committee members that the GDC was open to any suggestion about how they wished to develop. The former Director of Regulation said that all people got the same offer regarding assistance. Some people said they would like to develop into Chairs. Others stated they wanted to develop in other areas.

5.339 We asked the former Director of Regulation if they had attended the Appointments Committee meeting at which this assurance had been given. In fact it appears from the minutes of the November 2013 Appointments Committee meeting that the former Director of Regulation was present for the same parts of the agenda as the former Head of the Investigating Committee (albeit, as we have only seen a redacted version of those minutes, we have not been able to check for ourselves when the assurance was given).<sup>232</sup> The former Director of Regulation said that they had spoken to the former Head of the Investigating Committee after the allegation about this had been made by the whistleblower, and asked for a documented assurance about the extent of the offer of training and development that had been made to all Investigating Committee members. While the former Head of the Investigating Committee could not provide such a documented assurance, the former Director of Regulation said that the former Head of Investigating Committee had provided sufficient evidence from the training day agendas/plans to convince the former Director of Regulation that the former Head of the Investigating Committee had told the Investigating Committee members that “if they wanted to develop in any particular way all they had to do was to ask”. The former Director of Regulation told us that if you look at the documents for the training day, it is difficult to see what else was discussed.

5.340 We also put it to the former Director of Regulation that the former Chair of the Appointments Committee had told us that they could not recall the former Head of the Investigating Committee making any such training and development offer to the Investigating Committee members at the relevant training day. The former Director of Regulation suggested that the former Chair of the Appointments Committee may only have attended part of the training day (the inference being that this was covered while they were not present) or alternatively that the former Chair of the Appointments Committee might not be recalling the relevant training day. The former Director of Regulation also reiterated that there was other evidence to corroborate the former Head of the Investigating Committee’s account i.e. the fact that two other Investigating Committee members had independently come forward and asked for opportunities, as a result of the training and development offer made to them by the GDC.

*The former Chair of the Appointments Committee’s views*

5.341 The former Chair of the Appointments Committee told us that they had no recollection of the possibility of training/development leading to opportunities to develop into Investigating Committee Chairs being discussed at the training day. They told us that they had attended the whole of the training day held in September 2012 and that although reference may have been made, they had no

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<sup>232</sup> See footnote 16 above

recollection of anything being said about the process for developing people into Investigating Committee Chairs. The former Chair of the Appointments Committee said that they therefore had sympathy with anyone who said that they had no recollection of any information about this being shared at that meeting.

- 5.342 They told us that in response to the concerns raised by the Appointments Committee, the former Head of the Investigating Committee had told the Appointments Committee that all the Investigating Committee members had been equally encouraged and supported to undertake personal development, and that they had been told that bespoke training could be provided for any individuals seeking to become a Chair. The Appointments Committee had agreed the proposal about the particular Investigating Committee member on the basis of this assurance that all members were aware of the opportunity. The Appointments Committee had asked how the other Investigating Committee members had been made aware of the development process, and had been assured that they were aware of the requirement to develop a portfolio of evidence, similar to the process used for fitness to practise hearing Chairs. The former Chair of the Appointments Committee said that the Appointments Committee would expect all assurances from GDC staff, such as those provided above, to be true and evidence-based, and that it was important that they were recorded for reasons of transparency and equality. The former Chair of the Appointments Committee has made it clear that their recollection of the assurance that was given by the former Head of the Investigating Committee to the Appointments Committee on this topic at the November 2013 meeting is that it was different in type to the description given to us by either the former Director of Regulation or the former Head of the Investigating Committee.

#### [Findings of the report](#)

##### *The former Director of Governance's views*

- 5.343 We asked the former Director of Governance on what basis they had concluded that the delay by the first Investigating Committee Secretary in making their complaint was not excessive. The former Director of Governance said that the realities of the complaint had to be factored in – it was difficult to make a complaint about someone you have to work with regularly and to “rock the boat”. The former Director of Governance also believed that the one month time limit had been “made too much of”, and that if the first Investigating Committee Secretary had eventually decided to say something about a matter which had disturbed them, they could not be faulted for their actions.
- 5.344 On the issue of whether there were exceptional reasons that justified accepting the complaint out of time, the former Director of Governance's report stated that it is ‘difficult to imagine circumstances more exceptional than a situation with a whistleblower, which led here to the adoption of an extremely difficult and careful approach’. We asked the former Director of Governance whether it was the fact that the person complained about was a whistleblower that meant the complaint should, exceptionally, have been accepted out of time. The former Director of Governance told us that this simply explained the former Chair of the Appointments Committee's reasoning, and that someone referring to themselves as a whistleblower was “exceptional and could not be ignored”. The former Director of Governance said that the only way for justice to be done for both sides

was for the complaint to be considered by the Appointments Committee impartially.

- 5.345 The former Director of Governance told us that their finding that there was no intention to disadvantage the whistleblower in the forthcoming appointment process, had been reached because it was clear from the correspondence with and about the whistleblower that there had been no intention to disadvantage the whistleblower. The former Director of Governance confirmed that they had not made any enquiries about this. The former Director of Governance said that the whole allegation about the whistleblower being disadvantaged in the appointment process run in 2014 “had no basis”. In response to seeing a draft of this report, the former Director of Governance has told us that another reason for making no enquiries was that their staff kept them up to date about the development of the appointments process in any event, and they were well aware that any personal knowledge of an Investigating Committee member that the Appointments Committee had could not affect the outcome. The former Director of Governance said that when faced with the complaint that the whistleblower had made an offensive remark, the suggestion that the former Chair of the Appointments Committee had deliberately spoken to other members of the Appointments Committee, knowing that they would then have an adverse reaction to the whistleblower’s application for appointment to the Investigating Committee in 2014 was fanciful.
- 5.346 The former Director of Governance’s report stated that its findings in relation to the allegation about the appointment of a Chair of the Investigating Committee 2013 were based on a resumé of information that the former Head of the Investigating Committee had provided to the former Director of Regulation, as well as a review of the minutes of the Appointments Committee meeting held in June 2011, and that they had seen the agenda for the training day for Investigating Committee members held in September 2012.
- 5.347 The report concluded that the Chair who was appointed in 2013 had achieved this by satisfying the Appointments Committee that they were suitable, having proactively sought relevant opportunities as part of their individual learning and development. The former Director of Governance’s report also concluded that any other Investigating Committee member could have followed the same approach, as the opportunity was there for them to do so, but recommended that, in future, all Investigating Committee members should be reminded about the opportunity for promotion. The report did not expressly address the concern that the Appointments Committee had been given false assurances in relation to the equality of opportunity provided to Investigating Committee members to become Chairs.

*The former Chair of the Appointments Committee’s views*

- 5.348 We directed the former Chair of the Appointments Committee to paragraph 21 of the former Director of Governance’s report, which suggested that the former Chair of the Appointments Committee had not decided whether to accept the complaint at the time when they notified the whistleblower about it. The former Chair of the Appointments Committee said that the account set out in the former Director of Governance’s report was incorrect. The former Chair of the Appointments Committee told us that they had in fact already made the decision to accept the first Investigating Committee Secretary’s complaint about the whistleblower for consideration under the disciplinary procedure before making contact with the

whistleblower, as referred to in paragraphs 5.195 and 5.217. They told us that they felt they had no alternative but to consider the complaint once it was referred to them (for the reasons they set out both on 20 September 2013 and subsequently on 2 October 2013 to the whistleblower), and that the GDC were aware of that.<sup>233</sup>

- 5.349 The former Chair of the Appointments Committee told us that they were concerned that paragraph 76 of the former Director of Governance's report did not accurately represent the views of the Appointments Committee.<sup>234</sup> They told us that the Appointments Committee only decided to set up an appointment process for the member who was promoted to the position of Investigating Committee Chair in February 2014 following the receipt of (minuted) assurances from the former Head of the Investigating Committee that all Investigating Committee members had been equally encouraged and made aware of the opportunity for development as Chairs. That is the information which the former Chair of the Appointments Committee gave to the whistleblower. The whistleblower then went on to say that the Appointments Committee had been misled by the GDC (referring to other members of the Investigating Committee who, in addition to the whistleblower, had been unaware of the opportunity to be promoted to a Chair role) and that the former Director of Governance's report does not adequately address the concerns around this. The former Chair of the Appointments Committee told us that, subsequent to their passing the whistleblower's concern about the Appointments Committee being misled on to the former Director of Governance, the former Chair of the Appointments Committee had received an email from the former Director of Governance dated 21 February 2014 which said that the former Director of Regulation was gathering relevant information about this, and that the former Director of Governance would then be in a position to brief the Appointments Committee. The former Chair of the Appointments Committee told us that they understood this to mean that the former Director of Governance would address this issue in their report into the whistleblower's claim of detriment, but in fact the report did not address this issue.
- 5.350 The former Chair of the Appointments Committee also directed us to an email they had sent to the former Director of Governance (copied to the Chief Executive and to the Chair of the Council) on 4 April 2014. In that email they set out all of their concerns about the various aspects of the former Director of Governance's report which related to the actions of the former Chair of the Appointments Committee (which the former Chair of the Appointments Committee had not been asked to comment on prior to the report being finalised). These concerns were:

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<sup>233</sup> In response to seeing a draft of this report the former Director of Governance has noted that the notification sent to the whistleblower by the Secretary to the Appointments Committee at the time did not say that the complaint had already been accepted. They have also said that in their view 'nothing turns on whether [the former Chair of the Appointments Committee] had or had not accepted the complaint and had or had not got a choice in the matter'. They have suggested that if the whistleblower's response had revealed a mistaken factual basis for the complaint, it would have been open to the former Chair of the Appointments Committee to "reject" the complaint at that stage.

<sup>234</sup> We note that the former Director of Governance maintains that paragraph 76 of the report is accurate and that it reflects what the former Chair of the Appointments Committee told the former Director of Governance at the time of their investigation. The former Director of Governance also said to us that the issue was not of primary importance to their investigation because it did not form part of the whistleblower's complaint of detriment.



- There was no reference in the report to documentation which demonstrated that the former Chair of the Appointments Committee had not been keen to escalate the matters raised about the whistleblower in the August 2013 emails, without there first being an attempt at informal resolution made either by the former Director of Regulation or by the Chief Executive. The former Chair of the Appointments Committee also drew attention to the new informal element of the disciplinary procedure that had been introduced in June 2013.<sup>235</sup>
- There was no reference to the fact that the former Chair of the Appointments Committee had had no alternative but to consider the complaint once the referral was made, nor to the fact that the GDC knew that the former Chair of the Appointments Committee considered that it would have been better if the Chief Executive had informed the whistleblower of the complaint and sought to resolve it informally first.
- The former Head of the Investigating Committee should have been aware of the time limit for making complaints, and it is a matter of concern that they apparently were not. The evidence suggested that the former Head of the Investigating Committee was generally unfamiliar with the disciplinary procedure – for example as a result of their asking the former Chair of the Appointments Committee rather than their line manager for advice, as well as appearing not to appreciate the gravity of the issues they were raising with the former Chair of the Appointments Committee.
- The former Chair of the Appointments Committee was not sure what inferences readers were supposed to draw from the reference to the former Head of the Investigating Committee’s email of 26 September 2013, and took issue with the suggestion that the former Head of the Investigating Committee had acted appropriately in sending that email.<sup>236</sup>
- The suggestion that any fault in relation to the handling of the first Investigating Committee Secretary’s complaint about the whistleblower lay in the GDC’s processes was not accurate, as the procedure did allow for informal resolution.
- The account contained within the report as to whether or not the former Chair of the Appointments Committee should have entertained the complaint about the whistleblower outside of the normal time limit and any earlier knowledge of it did not reflect the former Chair of the Appointments Committee’s position or their immediate actions.
- Issues of empanelment are not for the Appointments Committee, save that all Investigating Committee members should be treated equally and without bias.
- In relation to the appointment of a particular Investigating Committee member as a Chair, there was a suggestion that references that had been made at an Appointments Committee meeting and at an Investigating Committee training

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<sup>235</sup> Having checked the relevant Appointments Committee minutes, it is our understanding that the amendment that was introduced at that time was to the capability rather than the disciplinary procedure.

<sup>236</sup> This refers to an email that the former Head of the Investigating Committee had sent to the former Chair of the Appointments Committee, stating that an Investigating Committee member had failed an online equality and diversity course and that they could therefore not sit on Investigating Committee panels until the issue was ‘remediated’. The former Chair of the Appointments Committee replied pointing out that the former Head of the Investigating Committee had no power to suspend a member and suggesting that the member be given more time to complete the module.



day in 2012 were sufficient to demonstrate that the Investigating Committee members had been told of the opportunity to develop into Chairs. The former Chair of the Appointments Committee had no recollection of any such statement being made at the Investigating Committee training day in September 2012, and could find no reference to the issue in the Appointments Committee meeting minutes. The former Chair of the Appointments Committee asked the former Director of Governance to provide evidence of the statements made.

- The statement in the report that, in the former Chair of the Appointments Committee's view, the Appointments Committee's only concern was to ensure that everyone knew of their opportunities, misrepresented what the former Chair had said, as well as the Appointments Committee. The possibility of appointing a particular Investigating Committee member to become an Investigating Committee Chair had come as a surprise to the Appointments Committee when the former Head of the Investigating Committee had raised it in November 2013, and a number of Appointments Committee members had expressed concerns about transparency and about other Investigating Committee members not being given the same opportunity to develop. They also questioned the timing, given the forthcoming Investigating Committee appointment exercise. The former Chair of the Appointments Committee said that they were not persuaded that the whistleblower's allegation that false assurances had been given to the Appointments Committee about this had been adequately addressed in the former Director of Governance's report.

#### *The GDC's comments*

- 5.351 In response to seeing a draft of this report, the GDC told us that the former Director of Governance only agreed to report to the Appointments Committee on the issue of whether false assurances had been given by GDC staff – not to include it within their investigation.<sup>237</sup> The GDC has said that it would not have been appropriate for the terms of reference for the investigation to be amended without consent from the whistleblower, and that the whistleblower had not asked the former Director of Governance to include this matter within the investigation.

#### **Our view**

##### *Scope of the investigation*

- 5.352 The investigation that was undertaken did not deal with all of the allegations of detriment that had been raised. Whilst it is true that the whistleblower did not raise an objection to the proposed scope of the investigation when they had the opportunity, we consider that the former Director of Governance should have identified all the relevant issues for themselves, and not relied on the whistleblower to do so.
- 5.353 The former Chair of the Appointments Committee had an expectation that the investigation undertaken by the former Director of Governance would include an assessment of whether or not the Appointments Committee had been given false assurances by the former Head of the Investigating Committee in relation to the process for appointment of Investigating Committee Chairs. Having reviewed the correspondence, we do not think it is clear that the whistleblower expected this

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<sup>237</sup> As far as we are aware, no such report was ever made.

aspect of their concerns to be dealt with as part of their complaint of detriment, and we therefore conclude that the former Director of Governance acted reasonably in not identifying that this should have been included within the scope of their investigation into the whistleblower's complaint of detriment. Had the former Director of Governance identified for themselves that this matter should be included within their investigation, we do not agree with the inference from the GDC's comments to us (referred to in paragraph 5.351) that the whistleblower's lack of specific consent should have been regarded as a barrier to their doing so, and we note that, if it was considered necessary, the GDC could have consulted the whistleblower about expanding the investigation's terms of reference in order to include that matter. It is also clear that while the former Director of Governance told us that the Appointments Committee did not ask them to provide a report, the former Director of Governance had, in their email of 21 February 2014, said that they would provide a briefing to the Appointments Committee about whether or not such false assurances had been given, and it appears that such a briefing never took place. We consider this to be unfortunate, given the potential seriousness of the allegation.

5.354 In our view, on the basis of the accounts we have been given by the former Chair of the Appointments Committee, the former Director of Regulation and the former Head of the Investigating Committee (none of which are entirely consistent with each other), there was prima facie evidence to suggest that the Appointments Committee had either been given a false assurance or alternatively that there had been a misunderstanding about the extent of/limitations to the assurance given by the former Head of the Investigating Committee about the nature of the information/encouragement that Investigating Committee members as a group had been given in terms of developing into Chairs. As noted above, an allegation that a staff member had provided a false assurance to the Appointments Committee is a serious matter, and in our view it is a matter that should have been investigated by the GDC, whether or not it fell within the remit of the whistleblower's complaint of detriment. We note that the former Director of Governance's report indicated that they had not reviewed the relevant Appointments Committee minutes (November 2013 and January 2014) when considering the concern about the appointment of this particular Chair. Their report did not indicate that they had discussed this matter with the former Chair of the Appointments Committee – in fact the report stated that the only actions the former Director of Governance had taken that were relevant to this matter were to review one set of Appointments Committee minutes, the agenda for the relevant Investigating Committee training day and a resumé of information that had been provided by the former Head of the Investigating Committee to the former Director of Regulation. It is not possible to reach a conclusion about whether or not a false assurance had actually been given, without investigating the matter further (including obtaining all of the relevant Appointments Committee meeting minutes and interviewing the relevant individuals) – that is not necessary for the purposes of our investigation.

5.355 The former Director of Governance's report did not explore the differing accounts about the assurance that was in fact given to the Appointments Committee in November 2013, nor did it address whether it was an accurate assurance, or one that was either unintentionally or intentionally misleading. Had the former Director of Governance asked the former Chair of the Appointments Committee relevant

questions about this matter during their investigation<sup>238</sup>, this might have facilitated their understanding of the extent of the former Chair of the Appointments Committee's concern about this issue.

### *Evidence*

- 5.356 We do not consider that it was reasonable for the former Director of Governance to decide not to interview the Chief Executive, the former Chair of the Appointments Committee, or the former Director of Regulation. It is apparent that the former Director of Governance's report was incomplete/inaccurate in various respects, and that these issues might have been resolved had the former Director of Governance interviewed additional people – and in particular had they interviewed the former Chair of the Appointments Committee.
- 5.357 Further, a proper application of paragraph 34 of the whistleblowing policy would have required an exploration of the motivation of the individuals concerned, and we do not accept the view expressed to us by the former Director of Governance that it is possible properly to assess individuals' motivation from documentary evidence alone, particularly in circumstances such as these where it is clear that not all the relevant evidence had been provided (for example, the emails of 7 and 14 August 2013). We accept however that the former Director of Governance acted in good faith and on the basis of the legal advice they had received.
- 5.358 We note that the former Director of Governance's view remains that because they concluded that there were no reasonable grounds to show that the whistleblower had suffered detriment, it was not necessary to go on to consider motivation (although the former Director of Governance did so to some extent in their report anyway). However, contrary to the former Director of Governance's report's findings, the disciplinary procedure provided explicitly that a record would be kept on the whistleblower's file (and the letter that the whistleblower was sent on 23 October 2013 expressly said that such a record would be kept and referred to in the event of any further complaints). There is no reason to think that such a record would not have been kept in this case, and the former Chair of the Appointments Committee confirmed to us that their understanding is that such a record would have been kept, in accordance with the disciplinary procedure. If there was in fact such a record kept, we consider that that was something capable of amounting to a detriment.
- 5.359 Whilst the correspondence that was taken into consideration by the former Director of Governance provided some of the reasoning for the various decisions that were made, that reasoning and the motivation behind those decisions generally could only be investigated by way of interviewing the relevant individuals. By way of example, the former Director of Governance's report referred to the letter sent to the whistleblower on 23 September 2013 notifying the whistleblower of the complaint as demonstrating that the former Chair of the Appointments Committee was seeking the whistleblower's comments before reaching a decision about whether or not to accept the complaint. In fact, the former Chair of the Appointments Committee had already decided to accept the complaint before sending that notification. Similarly the report assumed that the former Chair of the Appointments Committee had consulted the rest of the

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<sup>238</sup> While the former Director of Governance maintains that this matter was discussed by telephone with the former Chair of the Appointments Committee, that account is denied by the former Chair of the Appointments Committee.

Appointments Committee about the next steps in relation to the complaint in general, whereas the email of 25 September 2013 demonstrates that the reason for sharing information with the Committee was in order to reach a decision about potential suspension of the whistleblower, pending the conclusion of the investigation.

- 5.360 The explanation given by the former Director of Governance for their decisions not to interview the individuals referred to above is inadequate. The failure to interview relevant individuals meant that the former Director of Governance did not find out about the existence of all the relevant documentary evidence (such as the emails of 7 and 14 August 2013) and that the former Director of Governance risked misinterpreting some of the documentary evidence that they had obtained. It also meant that the former Director of Governance could not properly consider the issue of motivation as they were required to do by paragraph 34 of the whistleblowing policy. It also casts doubt on how the former Director of Governance was able to conclude that the explanations given by those persons who were not interviewed were reasonable.
- 5.361 Whilst we consider that it would have been courteous to interview the whistleblower, such an interview was not mandated by the relevant procedure, and in any event their account was set out in full in their correspondence. We consider that the decision not to interview the whistleblower was not unreasonable.
- 5.362 We consider that the former Head of the Investigating Committee's email of 5 August 2013 constituted prima facie evidence of detrimental treatment, and should have been investigated further by the former Director of Governance. We note that the former Director of Governance said that they did not know of the existence of the 7 August 2013 email, and referred to the fact that they were reliant upon individuals to provide them with all the relevant correspondence, as the GDC's record keeping systems were inadequate at the time. Had the former Director of Governance obtained a copy of the former Chair of the Appointments Committee's reply of 14 August 2013 (we note that the former Director of Governance had seen an earlier draft of it, so they knew of its existence) they would have seen that there had been a further email on 7 August 2013. The timing and nature of these communications were such that they were highly relevant to the issue of detriment and motivation. The whistleblower could not have been expected to raise these issues, as they were unaware of these emails at the time. We consider that the former Director of Governance's failure to investigate these emails and to include all relevant documentation as part of the appendices to their report undermines the reliability of the overall conclusions of that report. It is also troubling that the GDC's recordkeeping/retrieval systems at the time were inadequate to ensure that the former Director of Governance had access at least to the emails sent between the former Head of the Investigating Committee and the former Chair of the Appointments Committee during the relevant period.
- 5.363 The inclusion of the email of 5 August 2013 in the appendices to the report was unfair. Whilst the former Director of Governance said they wanted to include it so that they provided a complete picture in order to be transparent, so that they could not be accused of failing to disclose something that might have affected their judgment, these concerns had not been investigated by the GDC, they had not been considered as part of the former Director of Governance's investigation into

allegations of detrimental treatment, and therefore they should not have been appended to the report. We consider that it would be reasonable for the whistleblower to take the view that this information was prejudicial and was only included in order to unduly influence the reader of the report. We note that the former Director of Governance disagrees with our view, on the basis that this email “formed part of the background”. We accept that the former Director of Governance did not act in bad faith in including the email of 5 August 2013 within the appendices to their report.

- 5.364 The former Director of Governance did not, as part of their investigation, obtain a copy of the email of 23 September 2013 sent by the former Head of the Investigating Committee (the email in which they asked for an update in relation to the former Chair of the Appointments Committee’s investigation of the complaint made against the whistleblower). The former Director of Governance was therefore unable to explore with the former Head of the Investigating Committee their motivation for sending it, and take account of that in the report. In our interview with the former Head of the Investigating Committee we identified a potential concern about their motivation for sending the email of 23 September 2013. The former Head of the Investigating Committee gave various explanations to us of their motivation for sending that email. One of those explanations was that “the team” might have known about the complaint about the whistleblower and wanted to check whether the whistleblower was due to participate in an Investigating Committee meeting at which the first Investigating Committee Secretary was also due to act as Committee Secretary. When we queried how ‘the team’ could properly have known about the complaint against the whistleblower made by the first Investigating Committee Secretary, the former Head of the Investigating Committee said that they did not know whether ‘the team’ had in fact known about it or not. It seems to us that if ‘the team’ did know about the complaint, then a clear (further) breach of the whistleblower’s right to confidentiality had occurred. In any event, the email of 23 September and the reasons for sending it were relevant to the former Director of Governance’s investigation and that email was in the GDC’s possession.

### *Findings*

- 5.365 Paragraph 34 of the whistleblowing policy clearly requires an examination of the motivation of the persons responsible for the matters said to constitute the detriment, in circumstances where it appears that there are reasonable grounds for the allegation of detriment. It is not possible to reach a view as to whether actions were taken in retaliation for a whistleblowing disclosure without asking why those actions were undertaken. The former Director of Governance’s report adopted a confused and contradictory approach to considering the issue of the relevant individuals’ motivation. While it stated that as there was no detriment there was no need to consider motivation, nevertheless it went on to make some findings about motivation. For example, the report included a finding that there was no intention on the part of the Chief Executive or the former Chair of the Appointments Committee to disadvantage the whistleblower in the forthcoming appointment exercise, and that various actions alleged to have been motivated by the whistleblowing disclosure were ‘proper’. The former Director of Governance has said that this was to show that even if detriment had occurred (which the former Director of Governance found it had not) the motivation behind individuals’ actions was not retaliatory.

- 5.366 We consider that the former Director of Governance's report was inaccurate in its description of how paragraph 34 of the whistleblowing policy should be applied. Paragraph 34 requires issues of motivation to be considered in relation to any allegation of detriment that appears to be based on reasonable grounds – this is a low threshold and notably, the detriment does not have to be proven to exist for paragraph 34 to be engaged. Once engaged, paragraph 34 operates to shift the onus from the person alleging the detriment to the person responsible for the actions concerned, and requires that person to demonstrate that those actions were not undertaken in retaliation for the whistleblowing disclosure. In contrast, paragraph 94 of the former Director of Governance's report stated: 'I do not think that the whistleblower's complaints fall into the category that means their suspicions must be accepted as true until disproved' – which was a misreading of paragraph 34 of the whistleblowing policy. We note that the former Director of Governance has told us that both their interpretation of paragraph 34 of the whistleblowing policy and the investigation report were approved by the Head of Corporate Legal. Our concerns about both remain.
- 5.367 We consider that the former Director of Governance's failure to properly apply paragraph 34 permeated their report and influenced both the way in which they conducted the investigation and their findings. For example, the former Director of Governance's report included a comment that the Penningtons report had found faults in the Investigating Committee's support and processes, but that it had not found that any actions had been taken 'maliciously' by the former Head of the Investigating Committee and their staff. It was irrelevant whether the practices investigated by Penningtons were or were not motivated by malice. The question that needed to be answered was whether the actions that followed the whistleblower's disclosure were undertaken as a consequence of that disclosure. Detriment would occur where actions had been undertaken in retaliation for the whistleblowing disclosure. The making of the complaint did not have to be malicious for it to constitute a detriment.
- 5.368 Further, the former Director of Governance did not consider the issue that the former Chair of the Appointments Committee had not, when deciding whether or not to accept the complaint against the whistleblower out of time, considered all relevant matters of which they had knowledge in concluding that there was unlikely to be a link between the first Investigating Committee Secretary's complaint against the whistleblower and their whistleblowing disclosure. It is hard to see how the former Director of Governance could come to a well evidenced conclusion on the issue of detriment when a key aspect of the allegation had not been explored. The former Director of Governance, in commenting on our findings, has said that they based their decision on the fact that the former Chair of the Appointments Committee had followed legal advice when deciding to accept the complaint out of time, as that indicated an absence of any link between the whistleblowing disclosure and the alleged detriment. We accept that the former Chair of the Appointments Committee only reached their decision after taking legal advice from the Head of Corporate Legal about their reasoning, and that they had no improper motive. However that does not mean that the former Chair of the Appointments Committee's decision was appropriate in the circumstances. In our view it was still necessary to consider what the motivation was for the complaint that was made and which the Chair had to decide whether or not to accept as it had been made out of time. Our view is that the former



Director of Governance should have considered all the relevant matters before reaching their conclusion.

- 5.369 The former Director of Governance found that it was proper ‘and indeed wise’ for the former Chair of the Appointments Committee to have consulted with their colleagues on the Appointments Committee. This consultation was described by the former Director of Governance as having been undertaken to enable the former Chair of the Appointments Committee to ‘form a balanced view of the appropriate way forward’. The former Director of Governance had not interviewed the former Chair of the Appointments Committee about the consultation, and there was no note available of that consultation. As such, the only information available to the former Director of Governance about the nature, content and purpose of that consultation was that which had been provided by the former Chair of the Appointments Committee to the whistleblower. The former Director of Governance took that explanation at face value, and told us at interview that it was reasonable for the Chair of the Appointments Committee to consult their colleagues, and referred to the fact that in any event the former Chair of the Appointments Committee had acted on advice from the Head of Corporate Legal. During the course of our investigation, the former Chair of the Appointments Committee provided an email dated 25 September 2013 which set out the basis of their consultation with the other Appointments Committee members. It is clear from that email that the most likely purpose of the former Chair of the Appointments Committee’s consultation with the rest of the Committee was in order to reach a decision as to whether or not the whistleblower should be suspended pending the outcome of the investigation. This is an entirely different purpose from the one referred to in the former Director of Governance’s report (and we accept it is also a different purpose from the one the former Chair of the Appointments Committee told us about at interview). As the former Director of Governance did not obtain that email, nor interview the former Chair of the Appointments Committee, they did not establish the extent of the consultation of the rest of the Appointments Committee, and they were therefore also unaware (and unable to consider its relevance to the investigation) the fact that the former Chair of the Appointments Committee had attached to that email (it appears) the entirety of the information about the complaint, rather than providing ‘some details’ of it. It follows that the former Director of Governance was similarly unaware of any apparent inconsistency between the actual disclosure made to the Appointments Committee in that email, and the description of it given to the whistleblower by the former Chair of the Appointments Committee subsequently (in their email of 29 October 2013). We consider that the former Director of Governance should have explored with the former Chair of the Appointments Committee their reasons for consulting with their Appointments Committee colleagues, rather than relying on the account the former Chair of the Appointments Committee had given to the whistleblower. We do not suggest that the former Chair of the Appointments Committee did act out of any improper motive – the issue is that the failure to investigate the matter fully meant that the former Director of Governance’s conclusion did not take all the relevant evidence into consideration.
- 5.370 The former Director of Governance, in concluding that no detriment had occurred, relied on an assumption that no record of the referral to the former Chair of the Appointments Committee had been kept on the whistleblower’s file. However that assumption appears to be incorrect. The former Chair of the Appointments Committee told us that the disciplinary procedure provides that a record would be

kept. In fact paragraph 47 of the procedure states, 'All documents created under this procedure shall be kept on the member's file and may be referred to in the event of a further complaint being received, and/or if the member applies for a further term of office on a statutory committee or for membership of the Council'. While it is possible that for some reason no record was in fact kept on the whistleblower's file in this case (it is not clear from the former Director of Governance's report whether they actually checked the file) such a record should have been kept and the whistleblower was told that a record would be kept.

5.371

The former Director of Governance also gave inadequate consideration to the issue of the whistleblower's rights to have their confidentiality protected, as set out in the disciplinary procedure. The former Director of Governance told us that the whistleblowing policy did not guarantee anonymity, and that the Head of Corporate Legal had assured them that the whistleblower had been informed that their confidentiality could not be maintained. This is confused. The discussions that the Head of Corporate Legal (and the Director of Human Resources) had with the whistleblower about confidentiality on 6 August 2013 related to confidentiality about their whistleblowing disclosure, and did not encompass the complaint that was subsequently made about them. The former Chair of the Appointments Committee disclosed the complaint about the whistleblower, as well as referring to their identity, to the rest of the Appointments Committee in their email of 25 September 2013. We concluded that it was unnecessary for all the information about the complaint to be provided to the Appointments Committee, as they were only being asked to consider whether or not the whistleblower should be suspended pending conclusion of the investigation. In our view, the relevant information could have been extracted and the whistleblower's identity anonymised. At interview we note that the former Director of Governance questioned what advantage the whistleblower might have gained from the former Chair of the Appointments Committee being prohibited from speaking to the Appointments Committee about the complaint. Whether or not any actual harm was caused to the whistleblower by the former Chair of the Appointments Committee revealing information about the complaint against the whistleblower to Appointments Committee colleagues, under the terms of the disciplinary procedure, the subject of the complaint (the whistleblower) was entitled to confidentiality (that entitlement had nothing to do with their status as a whistleblower). If that confidentiality had to be breached to some extent in order to consider whether or not the whistleblower should be suspended pending conclusion of the matter, then appropriate consideration should have been given to the extent of the disclosure it was necessary to make to the Appointments Committee, given the limited role they were being asked to play. Instead, the entire Committee was sent (it appears) all the information that the former Chair had about the complaint, which was an unnecessary processing of sensitive personal data. There is of course a separate issue about the extent to which the information that was disclosed meant that the Appointments Committee members would all have been put into a difficult situation had the complaint not been resolved at an early stage - it may be that the disciplinary procedure could usefully be expanded/operational guidance developed to assist any future decision-making about interim suspension.

5.372

The former Director of Governance's report stated that when the former Chair of the Appointments Committee emailed the whistleblower on 23 September 2013 they had not yet made up their mind whether or not to accept the first Investigating

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Committee Secretary's complaint out of time. However, from the evidence we have reviewed, that does not appear to be correct. By that time the former Chair of the Appointments Committee had decided to accept the complaint, as they told us at interview, they had set this out and their reasons for it in the email they sent to the Secretary to the Appointments Committee on 20 September 2013 (they referred in that email to their being 'minded to exercise their discretion' and asked for confirmation from the Head of Corporate Legal, which we understand they received shortly afterwards). Our interview with the former Chair of the Appointments Committee established that the decision had been taken before the whistleblower was notified about the complaint on 23 September 2013. We note that, in response to seeing a draft of this report, the former Chair of the Appointments Committee has confirmed this is correct and has also commented that had they not decided to accept the complaint, they would not have told the whistleblower about its existence. This is one example of an issue that could have been identified if the former Chair of the Appointments Committee had been interviewed by the former Director of Governance.

5.373 The former Director of Governance found that the decision of the Chief Executive to refer the first Investigating Committee Secretary's complaint to the former Chair of the Appointments Committee was appropriate and proportionate. The former Director of Governance had been copied into the legal advice that had led to the former Chair of the Appointments Committee's email to the former Head of the Investigating Committee of 14 August 2013, in which the former Chair of the Appointments Committee explained the correct channels for dealing with concerns about Investigating Committee members and the former Director of Governance had also seen a draft of that email. The former Director of Governance did not, however, consider as we have done whether attempts should have been made to resolve the matter informally and/or whether the internal complaints procedures had been used, as required under the disciplinary procedure. Yet the former Director of Governance found that the decision to refer was appropriate and proportionate. No alternatives were considered. We consider that the former Director of Governance should have expressly considered whether an informal resolution should have been sought.

5.374 We also consider that the Director of Governance should have questioned the former Head of the Investigating Committee further about their interaction with the first Investigating Committee Secretary about the incident, prior to the formal complaint being made. Whilst the former Head of the Investigating Committee told the former Director of Governance that they had put the first Investigating Committee Secretary's complaint out of their mind between the date when the first Investigating Committee Secretary initially notified the former Head of the Investigating Committee about what had happened and the date when they made the complaint, the former Head of the Investigating Committee told us that they mentioned the matter to the first Investigating Committee Secretary during the intervening period. The fact and frequency of those communications was relevant to the question of whether the complaint was ultimately made in retaliation for the whistleblowing disclosure, and the former Director of Governance should have examined the former Head of the Investigating Committee's evidence in more detail before reaching a conclusion about this, including by looking more closely at other evidence that was available (such as the email of 2 October 2013, which indicated that the former Head of the Investigating Committee had considered themselves entitled to take action in relation to Investigating Committee members

– by deciding to stop using them – in the past). Further, in relation to the former Head of the Investigating Committee’s management of the situation, had the former Director of Governance read the Chair of the Appointments Committee’s email of 14 August 2013 (the former Director of Governance had seen an earlier draft of it) they would have seen that the former Head of the Investigating Committee had been provided with a copy of the disciplinary procedure at that time, a matter of days before the first Investigating Committee Secretary made their complaint, and that the former Head of the Investigating Committee should therefore have been in a position to appropriately advise the first Investigating Committee Secretary about the timeframe in which a complaint had to be made. In any event we consider that the former Director of Governance should have considered (before asserting that a manager cannot be criticised for failing to advise a staff member appropriately about the time limit for making a complaint) whether a manager should reasonably be expected to consult the relevant policy/procedure in circumstances where a staff member approaches them about a potential complaint. Either way, we do not consider the finding made by the former Director of Governance to be reasonable on this point.

- 5.375 The former Director of Governance found that there was no intention on the part of the Chief Executive or the former Chair of the Appointments Committee to disadvantage the whistleblower in the forthcoming appointment exercise for Investigating Committee members. As noted above, we asked the former Director of Governance how they could have reached a view on individuals’ motivation without having interviewed them. Without prejudice to our general view that the former Director of Governance should have interviewed the Chief Executive and the former Chair of the Appointments Committee, we accept that paragraph 34 of the whistleblowing policy only applies where there are reasonable grounds to support the allegation of detriment, and that there was no evidence to suggest that the Chief Executive and Chair of the Appointments Committee had intended to prejudice the whistleblower in the forthcoming appointment exercise.
- 5.376 That was not however the totality of the allegation of detriment that was made. Nor was it part of the scope of the former Director of Governance’s investigation, as set out in their letter of 28 February 2014. The allegation actually made by the whistleblower was that the first Investigating Committee Secretary’s complaint had been referred to the Chief Executive in the knowledge that any referral, whatever the outcome, would prejudice the whistleblower not only in relation to any forthcoming appointment exercise but also in relation to their other quasi-judicial roles. Those matters were not considered by the former Director of Governance.
- 5.377 On the issue of whether there were exceptional reasons which justified accepting the complaint against the whistleblower out of time, the former Director of Governance’s report stated that it is ‘difficult to imagine circumstances more exceptional than a situation with a whistle-blower, which led here to the adoption of an extremely difficult and careful approach’. We asked the former Director of Governance whether in their view the fact that the person complained about was a whistleblower meant that the complaint should, exceptionally, have been accepted out of time. The former Director of Governance told us that this simply explained the former Chair of the Appointments Committee’s reasoning<sup>239</sup>, and that

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<sup>239</sup> The former Chair of the Appointments Committee has told us that they object to the former Director of Governance commenting on their reasoning without checking with them.

someone referring to themselves as a whistleblower was ‘exceptional and could not be ignored’. We do not understand this explanation. The clear implication from the wording in the report is that the fact that the subject of the complaint was a whistleblower of itself constituted an ‘exceptional’ justification for accepting the complaint against them, even though the relevant time limit had passed. This is not reasonable. In our view the exceptional reasons should relate to the circumstances surrounding the delay in the making of the complaint, rather than to the status of the people involved.<sup>240</sup>

- 5.378 The former Director of Governance’s report also found that the whistleblower had suffered no detriment as a result of the acceptance out of time of the complaint. The report stated: ‘For the avoidance of doubt, I find that the whistleblower suffered no detriment in the former Chair of the Appointments Committee accepting the complaint even if there were no ‘exceptional reasons in the circumstances’ for the former Chair of the Appointments Committee to do under the rules’. This misses the point. Had the former Chair of the Appointments Committee not decided that there were exceptional reasons that justified the acceptance of the complaint out of time, the matter would have been closed without any further action being taken. By definition therefore, the whistleblower was, as a result of the decision to accept the complaint, subjected to actions that would not otherwise have taken place (including, unfortunately, the breaches of confidentiality and the creation of a perception of a risk of prejudice in the forthcoming appointments process, as referred to above).
- 5.379 The former Director of Governance told us that they had only considered the Chief Executive’s decision in terms of whether there was anything calculated to be intended to lead to detriment to the whistleblower. The former Director of Governance expressed the view to us that it was appropriate and proportionate for the Chief Executive and the former Chair of the Appointments Committee to have taken the decisions they had in fact taken, and the former Director of Governance commented to us that informal processes could result in something being “swept under the carpet when there was no proper insight on the part of the wrongdoer”. We do not understand how this is relevant to the circumstances of this case – the whistleblower immediately apologised and expressed remorse for any offence they had caused. Nor do we understand how the former Director of Governance’s comment can be reconciled with the requirement for the internal complaints procedures to be utilised in the first instance.
- 5.380 Paragraph eight of the disciplinary procedure states that any complaint from a GDC employee about a statutory committee member will only be taken forwards at the instance of, and in the name of, the Chief Executive, and states that a member of staff should first use the internal complaints procedures. It then goes on to say, ‘Where the Chief Executive decides that the case should not be taken forwards under the procedure s/he should inform the Chair of the Appointments Committee of the nature of the complaint, any action s/he has taken to address the issue complained of and confirm that details have been placed on the member’s file’. In our view this clearly provides the Chief Executive with a discretion to decide to take action other than referral to the Appointments Committee. We note that the GDC in its comments on a draft of this report

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<sup>240</sup> We note that in any event, the account given to us by the former Chair of the Appointments Committee of their consideration of exceptional reasons goes further than considering solely the whistleblower’s status, as set out at paragraphs 5.195-5.202.

acknowledged that it is for the Chief Executive to decide, having received a complaint about a statutory committee member from a staff member, whether that complaint is to be treated as 'formal' or 'informal'. We have interpreted the GDC's comment about this as being a reference to the Chief Executive's decision as to whether such a complaint should be referred to the Appointments Committee.

5.381 The former Director of Governance found that any fault that occurred in relation to the first Investigating Committee Secretary's complaint lay in the GDC's processes, and suggested that the GDC should consider whether mediated resolution should be the usual process in appropriate cases. The former Director of Governance described a member of staff wishing to complain about an Investigating Committee member as having two options: a completely informal approach to the member or their manager, or the use of the formal disciplinary procedure. We disagree with the former Director of Governance's view that the fault only lay in the GDC's processes, we consider that they lay also in the operation of them.

#### *Empanelment*

5.382 The former Director of Governance found that the desirability of maximising the diversity of Investigating Committee panels was a proper criterion to be used when scheduling (or 'empanelling') Investigating Committee meetings, that it had been properly applied in the 2014 empanelment exercise, and that it had not resulted in the whistleblower being disadvantaged. The former Director of Governance told us that they were convinced by the explanations provided by the relevant GDC staff - namely that the application of the criteria was "just what they did" and that it had not been done in order to cause detriment to the whistleblower. Paragraph 34 of the whistleblowing policy required those individuals to demonstrate that they had not acted in retaliation for the whistleblowing disclosure, and the former Director of Governance, having interviewed them, found that they had not. That was a proper application of paragraph 34. However, we consider that their finding did not take due account of other evidence that was available to the former Director of Governance - which indicated that the former Head of the Investigating Committee thought that they could use the empanelment process to exert control over Investigating Committee members - specifically their acknowledgment that they could, with impunity, have influenced the number of days of Investigating Committee meetings that individual members were scheduled to attend had they wished to be vindictive. In our view it was necessary to consider in more depth whether the former Head of the Investigating Committee had used the empanelment process to exert control over the whistleblower, given their acknowledgment that it was possible for them to do so.

5.383 That was however not the totality of the allegation that had been made. The whistleblower had referred to the lack of consultation/formalisation of the empanelment policy, and the possibility that that policy breached the Equality Act 2010. The former Director of Governance told us that they did not think it was necessary to consider the question of the lack of documentation of the policy, but that their conclusion on the issue was implicit in their recommendation that the policy should be documented. However, in our view, the lack of a written policy was relevant to the question of detriment. It gave rise to a risk that practices were being followed and not being properly monitored. In October 2013 the Appointments Committee had raised significant concerns that the former Head of



the Investigating Committee was choosing not to empanel some Investigating Committee members for operational reasons. The lack of any written empanelment policy meant that it was difficult for the Investigating Committee Secretariat to provide evidence that they had acted fairly with regard to empanelment and gave rise to a perception of detriment on the part of the whistleblower.

- 5.384 The whistleblower had also referred to a lack of consultation on the use of diversity as a criterion relevant to the empanelment process. The former Director of Governance's report stated that the former Head of the Investigating Committee had introduced that criterion without consulting anyone 'because for [them] and [their] team it was the natural thing to do'. This is not an adequate explanation.<sup>241</sup> No regard was had to the whistleblower's concerns that the use of the criterion might lead to unlawful discrimination. Instead, the former Director of Governance found that diversity was a proper criterion to be used in empanelment, and went as far as to say that it was not reasonable to suggest that it was wrong for a regulator to use this criterion. It was the subject of a positive recommendation in relation to the empanelment of a variety of committees. We consider that it was inappropriate to make a finding that the adoption of a practice of 'diversity empanelment' was in principle proper, without having first examined whether it was a practice adopted by other equivalent bodies, whether the practice that had been adopted within the Investigating Committee Secretariat was in fact capable of maximising the diversity of each Investigating Committee panel (whether in relation to racial diversity – which it appears was the principal diversity criterion used, and/or also in relation to other diversity characteristics) and without considering any potential negative impact. We note that in response to seeing a draft of this report the GDC has commented that there is no requirement to consult on a standard operating procedure, and has said that that is what the empanelment policy is.
- 5.385 The former Director of Governance made a finding that the use of diversity empanelment had not been invented in order to disadvantage the whistleblower. This finding was based on an apparent reference to the practice that had been made at a September 2012 training event, two emails sent by the former Head of the Investigating Committee in March and April 2012, and an email of 30 October 2013 that referred to diversity as a factor to be taken into account in the empanelment process. The former Chair of the Appointments Committee told us that they had no recollection of ever being informed about diversity empanelment being used during this period. The 2012 emails refer to diversity, but do not explain what this is a reference to. The 30 October 2013 email (which was sent after the whistleblowing disclosure had been made) refers to diversity in terms of ethnicity and gender, with a recognition that this could mean a 'slight disproportion' in terms of sitting days for some members.
- 5.386 Given the former Director of Governance's acceptance that 'diversity empanelment' was taking place in 2012, as noted above, we asked the former Director of Governance whether they had considered the data about which

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<sup>241</sup> A new empanelment policy was introduced in 2014 without any prior consultation having been undertaken. This does not refer to diversity criteria, as such criteria were considered by the Equality and Human Rights Commission to be potentially discriminatory. The policy was revised in August 2014 prior to the beginning of the process of empanelment for the period from 1 November 2014 – 1 May 2015 and then further revised in February 2015.

Investigating Committee members were empanelled for particular Investigating Committee meetings during 2012. The former Director of Governance said that they had not needed to do so, and that in any event that information would be difficult to compare with the information for 2013/14, as between those years a change was made from five member Investigating Committee panels to three member panels. Given the sparse evidence in support of the former Head of the Investigating Committee's assertion that diversity was a factor used in the empanelment process either in 2013/14 or earlier, the other evidence available as to the former Head of the Investigating Committee's apparent use of empanelment as a management tool, and the fact that there was no written policy or procedure in place and that the criteria being applied were limited to those of ethnicity and gender (rather than all the relevant diversity criteria), we consider that the former Director of Governance should have probed the issue of diversity empanelment further. The former Director of Governance could have done this by looking at the data relating to 2012 and undertaking an analysis of Investigating Committee members' scheduled meeting dates by ethnicity and gender. The former Director of Governance did not undertake such an analysis, and instead focussed solely on the data relating to 2013 and 2014, as provided by members of the former Head of the Investigating Committee's team.

5.387 In relation to the whistleblower's claim that they were unfairly not offered additional Investigating Committee meeting dates in 2013 (while other Investigating Committee members were approached about those dates), the former Director of Governance apparently accepted the explanations provided by the former Head of the Investigating Committee and their team, even though those explanations suggested that their decisions about empanelment for these additional Investigating Committee meeting dates had factored in matters that were not included on the list of empanelment criteria that had been produced by the former Head of the Investigating Committee in October 2013. We consider that these explanations are credible, albeit they demonstrate that the empanelment process was less than transparent, and potentially gave inadequate weight to the need to ensure that all Investigating Committee members were treated fairly in terms of opportunities to participate in Investigating Committee meetings. However, in our view, the former Director of Governance failed to reach a reasonable conclusion about whether or not the whistleblower had been disadvantaged in relation to the first and fifth of the dates referred to – in relation to the first date, the former Director of Governance's report did not consider the fairness of the allocation of dates over the year (or a reasonable period); and in relation to the fifth date, the report set out the different explanations provided by the Secretariat staff, but did not reach an express conclusion as to whether or not the whistleblower had been disadvantaged.

5.388 The former Director of Governance's report referred to another referral that had been made to the former Chair of the Appointments Committee by the former Head of the Investigating Committee on 26 September 2013, expressing concerns about another Investigating Committee member. This matter was relied upon as evidence to support the assertion that, in sending their email of 5 August 2013 about the whistleblower, the former Head of the Investigating Committee was simply doing their job (from their perspective). The report further stated that 'from the time that the whistleblower made [their] whistleblowing disclosure the former Head of the Investigating Committee cannot be shown to have done anything which [they] would not have done anyway'. The email which was sent on 26

September 2013 suggested that the former Head of the Investigating Committee intended to cease empanelling Investigating Committee members who had not completed certain training courses. The former Chair of the Appointments Committee responded to that email by informing the former Head of the Investigating Committee that they did not have the authority to (in effect) suspend Investigating Committee members, without the proper procedures having been gone through. The former Head of the Investigating Committee said in their response that there were a number of occasions when they had in fact stopped using Investigating Committee members by way of operational control/decision making. That email caused the Appointments Committee to raise significant concerns with the Chief Executive (on 16 October 2013) about the former Head of the Investigating Committee's practice in relation to empanelment. The former Chair of the Appointments Committee told us that the email of 5 August 2013 was unprecedented and, in their view, inappropriate. In our view, that email cannot be relied upon as evidence that the 5 August 2013 email represented the former Head of the Investigating Committee 'just doing [their] job'. A conclusion that the former Head of the Investigating Committee did not do anything that they would not have done anyway is a) not consistent with the former Chair of the Appointments Committee's evidence to us and b) irrelevant, if in fact the former Head of the Investigating Committee acted outside of the proper parameters of their authority, whether or not that was also the way in which they had acted previously and c) supports a claim of detriment in circumstances where doing what the former Head of the Investigating Committee would have done anyway included practices that involved empanelment decisions based on inappropriate considerations and/or specifically directed at controlling particular Investigating Committee members (which, until October 2013 and the intervention of the Appointments Committee, the former Head of the Investigating Committee appeared to consider they were entitled to do).

- 5.389 We consider that adopting an approach of 'diversity empanelment' in the way the GDC apparently did created the risk that the GDC was acting unlawfully and in breach of the Equalities Act 2010. The problems caused by the GDC's 'diversity empanelment' practice were later highlighted in advice the GDC received from the Equality and Human Rights Commission, which recommended that the GDC reconsider its approach.<sup>242</sup> We consider that it is a matter of concern that this issue was not apparently properly considered at the time the 'diversity empanelment' practice was developed, nor was it identified as problematic either by the former Director of Governance when carrying out their investigation into the whistleblower's complaint of detriment, or by any of the other senior GDC staff we spoke to during the course of our investigation. The lack of documentation of the approach adopted (or any consultation before it was initiated, given its ramifications for both Investigating Committee members and those with an interest in the decisions they reach) is a further cause for concern.

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<sup>242</sup> The Equality and Human Rights Commission wrote to the GDC on 21 July 2014 (after the former Director of Governance's report had been written, but before their interview with us) and informed the GDC that diversity empanelment was potentially unlawful and potentially in breach of the Equality Act 2010, because selection purely on the basis of ethnicity or gender (or any other protected characteristic) amounts to unlawful direct discrimination.

### *Appointment of a new Investigating Committee Chair*

- 5.390 The former Director of Governance found that there was nothing improper in the appointment of a particular Investigating Committee member as an Investigating Committee Chair in February 2014. That was not however the allegation that was made by the whistleblower. The allegation was that false assurances had been given to the Appointments Committee as to the equality of opportunity provided to all Investigating Committee members to develop into Chairs. That allegation was not referred to in the former Director of Governance's report, but appears to have been considered by them: appended to their report is an email from the former Head of the Investigating Committee (apparently sent in response to an email from the former Director of Governance) which says that no false assurances were given to the Appointments Committee.
- 5.391 The former Director of Governance's report did refer to a discussion of whether the Chair development process used for fitness to practise panellists could be adapted for the Investigating Committee which took place at an Appointments Committee meeting in 2012, and made reference to opportunities for development having been explained at an Investigating Committee training day in September 2012. These matters are disputed by the former Chair of the Appointments Committee, and we therefore asked the former Director of Governance what evidence they had considered. The former Director of Governance said that they thought they had seen a training agenda from September 2012, and stated that if they had looked at the Appointments Committee minutes, they would be appended to their report. Neither a training agenda nor any minutes were in fact appended to the former Director of Governance's report, despite their evidence that all the matters that were considered by them were appended to that report. It appears therefore that the assertions made by the former Head of the Investigating Committee were accepted at face value. This is of concern, given the whistleblower's allegation that false assurances had been given to the Appointments Committee about these matters.

### *Overall conclusion*

- 5.392 We note that, in response to seeing a draft of this report, the GDC has told us that the Chair of the Council's view is that the former Director of Governance's report 'achieved all that it was intended to achieve'.
- 5.393 However, we have significant concerns about the quality of the former Director of Governance's investigation. Key individuals were not interviewed, material evidence was not sought and/or considered, and the credibility of some of the evidence was not sufficiently challenged by reference to the other evidence available – instead the views of some of the GDC staff were taken at face value, all the allegations were not considered in their totality, and the test of detriment as set down in paragraph 34 of the whistleblowing policy was not properly applied.
- 5.394 We recommend that as part of the guidance to be developed for staff on how the whistleblowing policy should be operationalised, consideration is given to including advice on how to investigate complaints of detrimental treatment. The views of those who will use this guidance should be sought when drafting it. We also recommend that the GDC should seek external advice from experts in whistleblowing management.

Concern 2 (b) (iv): The steps taken by the GDC after the report into the whistleblower's complaint of detriment was provided to the Chair of the Council

**The evidence**

*The documentary evidence*

- 5.395 On 12 March 2014 the Chair of the Council wrote to the former Director of Governance and thanked them for the near complete investigation report. The Chair of the Council said that there was no further work on the report that they wished the former Director of Governance to undertake, and that the Chair of the Council accepted the findings. The Chair of the Council went on to say that the recommendations in the report required serious consideration by the Council and executive management team, and that at some point the Chair of the Council expected the executive management team to consider the lessons to be learned and the changes that might be required to procedures etc. The Chair of the Council set out that they wanted the executive management team to see their letter, as well as the final version of the report. The Chair of the Council said that they thought that thereafter the former Director of Governance should report to the Audit and Risk Committee and to the Council seeking their agreement of an action plan setting out the recommendations arising and the proposed changes to be made.
- 5.396 In addition the Chair of the Council made four observations which they noted could lead to further recommendations:
- First, the Chair of the Council said that the GDC needed to import some test of proportionality into its processes for managing any future complaints of this nature. The Chair of the Council noted that the whistleblower's reported remark was ill-considered, but by any reasonable standards it was on the lower end of the scale of seriousness – they had not commented in an offensive way on the first Investigating Committee Secretary's appearance, temperament or personal characteristics, and there had been no attempt at unacceptable physical conduct or any bad language. Nor was the exchange prolonged or repeated. The Chair of the Council noted that they were not persuaded that this event, taken in isolation, merited the lengthy and formal process that had been adopted. However, the Chair of the Council said that in the absence of a rapid mediation process, the Chief Executive appeared to have had no alternative other than to involve the Appointments Committee.
  - Second, the Chair of the Council said that the GDC needed to consider the introduction of tighter timescales for some formal complaints to be made and a more precise definition of the circumstances in which a complaint may be accepted out of time. The Chair of the Council said that they accepted the former Director of Governance's judgement that the delay in this case was neither inexplicable nor excessive. However, the Chair of the Council would suggest amending the process to make it less formal and to ensure that the length of time taken to make a complaint should be taken into account when considering whether the matter should be taken forward. The Chair of the Council went on to say that they felt that once a complaint has been made, the matter should be dealt with as soon as possible, in order to create the best possible climate to resolve the complaint by informal means if possible. Therefore they thought that the GDC needed to overhaul its processes to distinguish between different gradations of offensive behaviour, to ensure

formal complaints are lodged more quickly, to require the parties to consider mediation in an attempt to secure rapid resolution of all but the most serious cases, to define the circumstances when complaints can be accepted out of time and to reserve formal and therefore lengthy processes for the most serious complaints. Finally, the Chair of the Council said that the GDC also needed to review the role of the Appointments Committee in managing disciplinary matters, and their capacity and capability to do so efficiently and effectively.

- Third, the Chair of the Council said that the GDC needed to develop better mechanisms for the informal airing of grievances on the part of members of the statutory committees, and for the resolution of disputes between members of these committees and of the executive management team. The Chair of the Council said that, other than in the most serious cases, they were not convinced that whistleblowing is the right approach.
- Fourth, the Chair of the Council said that the GDC needed to define more precisely the communication of the status of chairs and members of all its statutory committees, what rights they have (if any), what their obligations are to the GDC and its executive staff, and what the GDC's obligations are to them.

5.397 On 26 March 2014 the former Director of Governance provided their report to the Chief Executive, the executive management team and the Head of Corporate Legal. In the covering email the former Director of Governance said 'The Chair has read and accepted my report into [the whistleblower's] allegations of detriment as a result of [their] whistle-blowing disclosures. I attach the report and my recommendations. I also attach the letter which [the Chair] has sent me and which is for consideration by [the executive management team] and the Appointments Committee. You will note that [the Chair] wants an action plan, to be monitored by the ARC (Audit and Risk Committee). I will put this on the [executive management team] agenda.'

5.398 The report included the following recommendations:

- That the GDC should review the disciplinary procedure to decide whether the one month time limit was appropriate in all circumstances, and whether mediated resolution should be the preferred process for resolving issues between staff and associates where appropriate;
- That managers should make clear to members of staff making complaints in respect of members that the time limit for a complaint is one month, so they must make their minds up promptly whether or not to complain;
- Empanelment criteria for the Investigating Committee, Fitness to Practise Committee, Interim Orders Committee and Registration Appeals panels should be documented and should include the criterion to maximise, where practicable, the diversity of panels<sup>243</sup>;
- When extra sitting days become available, all panellists should be offered them

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<sup>243</sup> We note that this recommendation was made before the EHRC shared their views on the use of diversity empanelment with the GDC.



- Investigating Committee panel members should be reminded that they can ask for assistance in developing the necessary skills to become Chairs.

[Reporting of the outcome of the former Director of Governance’s investigation into the whistleblower’s complaint of detriment](#)

*The whistleblower’s views*

5.399 The whistleblower confirmed that they were not kept updated on the progress of the implementation of the recommendations from the former Director of Governance’s report.

*The Head of Corporate Legal’s views*

5.400 The Head of Corporate Legal said that they did not know what was reported to the Council or committees, but they were aware that the former Director of Governance’s report had been reported to the executive management team. When asked what they would have advised about the appropriate reporting mechanisms had the Chair asked them for advice, the Head of Corporate Legal said that they would have told the Chair of the Council to talk to the Chairs of the Appointments Committee and the Audit and Risk Committee, and to let them decide whether it was a matter for their committees to consider.

5.401 The Head of Corporate Legal said that the former Director of Governance was responsible for the implementation of the recommendations generally, but that neither they nor the former Director of Governance had reported back to the Chair of the Council on the implementation of the recommendations. In terms of the implementation of the recommendations, the Head of Corporate Legal said that changes to the disciplinary procedure had been “put on hold” until the new Appointments Committee was in post (in January 2015), that the seconded Head of the Investigating Committee team and the Head of Hearings had both been reminded of the one month timeframe for making a complaint about an associate, that a new empanelment policy was in the process of being produced, that extra Investigating Committee meeting dates were being offered to all members, and that the last recommendation had been overtaken by events, as a whole new Investigating Committee had been appointed.

*The former Director of Governance’s views*

5.402 The former Director of Governance told us that the executive management team and the Audit and Risk Committee would have received their investigation report sometime in March 2014. The former Director of Governance also referred to the report’s inclusion in item six of the Chief Executive’s report to the Audit and Risk Committee at the meeting held on 14 May 2014. Whilst we have seen this report, we have only seen it in a heavily redacted format, which has not enabled us to use it to confirm the account given to us by the former Director of Governance. However, the former Director of Governance went on to say that, whilst the Chair of the Audit and Risk Committee had seen the report, they did not have any evidence of when the Chair of the Audit and Risk Committee had informed the Audit and Risk Committee about it. The former Director of Governance also said that the report was the sort of thing that would have been circulated, and that it was inconceivable that the Audit and Risk Committee would not have seen it. The former Director of Governance said that the report had been provided to the former Chair of the Appointments Committee and they were sure that it had been

circulated to the Appointments Committee as a whole.<sup>244</sup> The former Director of Governance said that they were also sure that the Council would have been given the opportunity to read the report.

- 5.403 The former Director of Governance said that, as the report contained a limited number of recommendations, they and the Head of Corporate Legal decided that there was no need for an action plan to be drawn up, despite the Chair of the Council's recommendation. In terms of the progress that had been made in implementing the recommendations, the former Director of Governance told us that the GDC was going to send around a note about the time limits involved in the complaints procedure (and that managers were making the new procedure known to staff – who may be the first point of contact from associate members); the empanelment policy was being reviewed; all Investigating Committee members were being offered extra sittings; and that the Investigating Committee members had been reminded about development opportunities but this had been overtaken by events since first, the new Investigating Committee appointment process had been completed and, second, a new process for developing into an Investigating Committee Chair had been agreed in any event.

*The Chief Executive's views*

- 5.404 The Chief Executive said that they would have expected the former Director of Governance's report to have been provided to the Audit and Risk Committee and to the Council as part of the general reporting on the implementation of the Penningtons' recommendations. However, the Chief Executive was not sure whether this had in fact happened. The Chief Executive said that they believed that the former Director of Governance was responsible for implementing the recommendations, and understood that some work had been carried out.

*The Chair of the Council's views*

- 5.405 When we asked the Chair of the Council if the Council had been informed about the outcome of the former Director of Governance's investigation, they said that the Council may have been told about it, but went on to say that they believed that this was an issue for management, and that if the Chair had been asked to put this to the Council, they would "have probably pushed back" on it. We note that the letter that the Chair of the Council sent to the former Chair of the Appointments Committee on 26 March 2014 (referred to in paragraph 5.410 – 5.413) stated that 'The members of the Council will, of course, have access to the full report'.
- 5.406 When asked, the Chair of the Council told us that they did not believe that they should have played a role in implementing the recommendations from the report, although they said that if they were the Chief Executive, they would have written to the Chair and set out what had been done in response to the observations the Chair had recorded in the letter of 12 March 2014.
- 5.407 In response to seeing a draft to this report, the GDC has told us that, as far as the Chair of the Council was aware, their letter dated 24 March 2014 to the former Director of Governance was being followed up (although the GDC has not explained who the Chair of the Council understood at the time was taking that action). The GDC has also told us that 'everything that was necessary and could

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<sup>244</sup> The former Chair of the Appointments Committee told us that they did not consider they were permitted to share the report with the Appointments Committee for the reasons set out in paragraph 5.411.

happen did happen', and has said that the non-implementation of some recommendations is due to either the impact of organisational change, or because such recommendations were subsumed within a review of the governance manual (which the GDC says was delayed due the demands on its resources caused by our investigation)

*The Chair of the Audit and Risk Committee's views*

5.408 The Chair of the Audit and Risk Committee told us that the Chair of the Council had sent them a letter on 26 March 2014 stating that the former Director of Governance had concluded their report into the whistleblower's allegations of detriment, and that the Chair of the Council had accepted its conclusions. The letter also said that the Council would have full access to the report, but the Chair had not taken any steps to circulate it, as they wanted to speak to the Chair of the Audit and Risk Committee first. When we asked if the report and the recommendations had been reported to the Audit and Risk Committee, the Chair of the Audit and Risk Committee stated that they had not, as in terms of the whistleblowing policy, the Audit and Risk Committee had no role, and the Chair of the Council considered that the former Director of Governance's report had resolved the matter. In response to seeing a draft of this report, the GDC has commented that the Audit and Risk Committee is not involved in the operation of the whistleblowing procedure.

5.409 We asked the Chair of the Audit and Risk Committee whether that Committee should have had a role in monitoring the implementation of the recommendations contained within the report. The Chair of the Audit and Risk Committee said that they believed the matter had been settled, and that the other independent members would have been aware of the report's findings, as they understood the Chair of the Council had circulated the report. The Chair of the Audit and Risk Committee told us that they did not see that the Audit and Risk Committee had any further role, but did say that they were confident that the issues relating to whistleblowing had been picked up in the new whistleblowing policy.

*The former Chair of the Appointments Committee's views*

5.410 The former Chair of the Appointments Committee was sent a copy of the former Director of Governance's report (without the appendices) by the Chair of the Council on 26 March 2014, alongside the Chair of the Council's letter accepting the report's conclusions and recommendations and referring to there being issues in the report for consideration by the executive and the Appointments Committee.

5.411 That letter asked the former Chair of the Appointments Committee to treat the report as confidential, and said that the report was password-protected with an individual password. The letter asked the former Chair of the Appointments Committee not to share it with anyone else.

5.412 The letter also referred to the Chair of the Council's wish to 'talk through the implications of the report and recommendations' with the former Chair of the Appointments Committee.

5.413 The former Chair of the Appointments Committee told us that they interpreted the wording of that letter as preventing them from sharing the report with the rest of the Appointments Committee. Our understanding is that no discussion of the implications of the report was ever scheduled.

### Responding to comments on the quality of the investigation report

- 5.414 On 4 April 2014 the former Chair of the Appointments Committee sent detailed comments on the accuracy of some aspects of the report to the former Director of Governance which we refer to above at paragraph 5.350.
- 5.415 The former Chair of the Appointments Committee stated that it might be of value for the former Director of Governance to revisit their conclusions that it was appropriate for the Chief Executive to have accepted the complaint and to have forwarded it to the Appointments Committee to consider, and that there was nothing improper in the appointment of the particular member of the Investigating Committee as Chair. The former Chair of the Appointments Committee also invited the former Director of Governance to revisit their recommendations in relation to the disciplinary procedure, and said that there was a need to remind all staff of the disciplinary procedure, with training and support to achieve early and local resolution of issues. The former Chair of the Appointments Committee did not receive a response to this correspondence.

#### *The Head of Corporate Legal's views*

- 5.416 The Head of Corporate Legal said that they were not sure if the former Director of Governance had responded to the Chair of the Appointments Committee's correspondence, but they understood that the former Director of Governance had reviewed the comments, and reached a view that no further action was necessary. The Head of Corporate Legal gave the opinion that they would have 'more or less' decided the same thing if they had had to.

#### *The former Director of Governance's views*

- 5.417 The former Director of Governance told us that they read the former Chair of the Appointments Committee's comments, but decided they did not need to change the report in light of them. In response to seeing a draft of this report, the former Director of Governance also told us that they had discussed this matter with the Head of Corporate Legal on 8 April 2014, and that they had agreed that the criticisms that had been made did not undermine their report's reasoning or recommendations, and that the only action that needed to be taken was to pass the criticisms to the Director of Human Resources for onward provision to the new Appointments Committee. The former Director of Governance also told us that their views were passed on to the Chief Executive, and that the criticisms were then discussed at a meeting held on 24 April 2014 involving the Chief Executive, the Chair of the Council and the former Chair of the Appointments Committee.<sup>245</sup>

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<sup>245</sup> We did not have an opportunity at interview to ask the Chief Executive, the Head of Corporate Legal, the Chair of the Council or the former Chair of the Appointments Committee for their recollection of the meetings that the former Director of Governance told us about in response to seeing the draft of this report.

<sup>246</sup> The former Chair of the Appointments Committee has told us in response to seeing a draft of this report that while they met with the Chair of the Council on 24 April 2014, and with the Chief Executive and the former Director of Governance on the same date, the former Chair of the Appointments Committee has no recollection of the report being discussed.

### *The Chief Executive's views*

- 5.418 The Chief Executive said they were aware that the former Chair of the Appointments Committee had made comments on the report<sup>247</sup>, but that they did not think they had been aware of the detail of those comments, other than the former Chair of the Appointments Committee's view that the Chief Executive should have handled the first Investigating Committee Secretary's complaint differently. The Chief Executive said that they considered that their involvement in the handling or discussion of these comments could compromise the investigation, and therefore they stood back and left it to others to deal with. The GDC has told us in response to seeing a draft of this report that the Chief Executive's diary does not record any meeting on 24 April 2014 as referred to by the former Director of Governance (see paragraph 5.417 above).
- 5.419 We note that the Chief Executive's account does not appear wholly consistent with the account given to us by the former Director of Governance in response to seeing a draft of this report.

### *The Chair of the Council's views*

- 5.420 We asked the Chair of the Council if they were aware that the former Chair of the Appointments Committee had written to the former Director of Governance on 4 April 2014 to raise concerns that their report contained a number of inaccuracies and that it misrepresented the position of the Appointments Committee. The Chair of the Council said that they had a "dim" recollection of being told about this by the Chief Executive, but that they had been advised that these comments did not change the substance of the report.
- 5.421 We note that, in response to seeing a draft of this report, the GDC has asserted that the comments did not show 'material' errors in the former Director of Governance's report, has referred to discussion of those comments with both the Head of Corporate Legal and the Chief Executive<sup>248</sup>, has said that the comments were treated for the purpose for which they were sent ( i.e. to extract the relevant learning) and has commented that it was 'too late for the former Director of Governance to change [their] report which had been disseminated several weeks before'.

### **Our view**

- 5.422 We consider that there has been a muddled response by the GDC to the report produced by the former Director of Governance.<sup>249</sup> Whilst the Chair of the Council was initially clear about the actions they expected the former Director of Governance and others to take, it appears that this was not robustly followed up by the Chair, and the actions and points they identified (as well as those highlighted in the report itself) do not appear to have been fully actioned. The apparent lack of oversight of implementation of the recommendations also led to uncertainty about the extent of any reporting to the Council, the Audit and Risk Committee, and the Appointments Committee. Given the significance of the fact

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<sup>247</sup> We note that the former Chair of the Appointments Committee told us that they had copied the Chief Executive in on the comments on the report that they sent to the former Director of Governance

<sup>248</sup> As noted above, the Chief Executive's evidence is that they were not involved in any such discussion of the detail of the comments.

<sup>249</sup> In response to seeing a draft of this report the GDC has told us that the Chair of the Council does not agree with our analysis.



that a whistleblower had made a complaint of detrimental treatment to the GDC and to us and to the Chair of the Health Committee, particularly given the current climate following the Francis Report, we are surprised that there was no structured formal mechanism in place for reporting the outcome of the former Director of Governance's investigation and its outcomes to the Council and the two committees. The matters raised were ones which should have been of concern to the Council and both committees.

- 5.423 Alongside this, the former Chair of the Appointments Committee brought to the attention of the former Director of Governance what we consider were material errors with their report – in response to which no changes were made to the report. We consider that these errors called into question the robustness of the report. The extent to which the matters raised by the former Chair of the Appointments Committee were considered by the Chief Executive, the Chair of the Council and the former Chair of the Appointments Committee is unclear. What is clear is that the report was not amended or re-circulated following receipt of the former Chair of the Appointments Committee's comments. It is not clear that there has been an impartial objective view taken about the comments made by the former Chair of the Appointments Committee and what they mean about the quality of the report. This is a serious concern. We also disagree with the GDC's view, expressed in response to seeing a draft of this report, that the fact that the report had already been disseminated is relevant to deciding whether the report should be amended once errors in it were identified.
- 5.424 Our concerns about the quality of the former Director of Governance's investigation and report, the lack of effective oversight of implementation of the recommendations, and the failure to carefully consider comments about key aspects of the report that had been made by a key individual, has added to our view that the GDC was not sufficiently committed to investigating the whistleblower's complaints thoroughly, and to dealing appropriately with the consequences.
- 5.425 We recommend that, as part of the guidance to be developed for staff on how the whistleblowing policy should be operationalised, consideration is given to including advice on how the outcomes of investigations into complaints of detrimental treatment are reported internally. The views of those who will use this guidance should be sought when drafting it.
- [Quality of the GDC's current whistleblowing policy](#)
- 5.426 On 24 July 2014, a revised Whistleblowing Policy for Council Members and Associates (the 2014 whistleblowing policy) was adopted at an open session of Council. The GDC has told us that it had previously been sent to the Audit and Risk Committee for comment on 2 May 2014 and to Investigating Committee members on 6 May 2014 and that the revised policy and the comments that had been made about it was discussed at the Audit and Risk Committee's meeting on 14 May 2014. We have not seen the relevant paper or section of the minutes of that meeting.
- 5.427 In the report presented to the Council by the former Director of Governance, it was stated that the revised policy had been reviewed against the National Audit Office assessment criteria for whistleblowing policies (the 'NAO Criteria').<sup>250</sup> Against

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<sup>250</sup> National Audit Office, Supplementary Report by the National Audit Office, Assessment criteria for whistleblowing policies, January 2014. The criteria are: commitment, clarity and tone from the top, structure,



these assessment criteria, the 2014 whistleblowing policy was deemed to be 'satisfactory' with some 'excellent' features.

5.428 We have analysed the 2014 whistleblowing policy, taking into consideration the legal framework for whistleblowing, the NAO Criteria, and other relevant guidance. We have also considered the findings of the Francis Inquiry and the importance of having an effective whistleblowing policy together with a culture of openness, transparency and candour.

5.429 We have concluded that whilst the 2014 whistleblowing policy is satisfactory in some respects, it is poor in others. Despite attempts to encourage reporting of serious concerns through the management line, there is still a lack of clarity over how and to whom Council members and associates should raise concerns. There are also factual inaccuracies and a number of areas where the language used could be improved in order to make the 2014 whistleblowing policy more effective and to minimise the risk of discouraging potential whistleblowers.<sup>251</sup>

*What is good about the policy?*

5.430 The 2014 whistleblowing policy, to some extent, encourages whistleblowers to make disclosures. In the introduction to the 2014 whistleblowing policy it is noted that the GDC is committed to being an 'open and transparent' organisation and at paragraph seven it is indicated that whistleblowing disclosures will be taken seriously.

5.431 The 2014 whistleblowing policy sets out in a logical manner who can use the policy and how a whistleblowing disclosure will be investigated. It is written in language that is easy to follow and to understand.

5.432 The 2014 whistleblowing policy addresses the issues of confidentiality, openness and anonymity when making a disclosure. Paragraph 20 of the policy states that the whistleblower will be assured of confidentiality in the early stages of the investigation and as far as possible thereafter. It also gives a commitment that the GDC will comply with privacy legislation, as well as referring to the possibility that the course of the investigation may reveal the whistleblower's identity. Paragraph six deals with anonymity. In line with the NAO Criteria and the BSi Code of Practice<sup>252</sup> it states that disclosures can be made anonymously, but that this might have drawbacks, i.e. the allegations could be seen as less credible and be more difficult to investigate. The 2014 whistleblowing policy encourages disclosures to be made openly, if possible.

5.433 The 2014 whistleblowing policy sets out the avenues the potential whistleblower can use to seek independent advice. At paragraph 12 it states that if a person is considering raising a concern under the policy, they can talk to Public Concern at Work. It also provides the relevant contact details for this organisation.

5.434 The 2014 whistleblowing policy sets out clearly that if the whistleblower considers that the GDC has failed to follow the policy, or they are unhappy with the outcome,

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offering an alternative to line management, reassuring the whistleblower, addressing concerns and providing feedback, openness, confidentiality and anonymity, access to independent advice and options for whistleblowers to approach external bodies.

<sup>251</sup> It should be noted that the backdrop to the introduction of the whistleblowing policy was a concern (expressed by the Council and the Audit and Risk Committee) about the fact that whistleblower had raised their concerns by way of the previous whistleblowing procedure rather than through the management line.

<sup>252</sup> British Standards Institution Code of Practice, pp. 13-14.

they can approach the Authority. Our contact details are provided. The policy also clearly indicates the need for a whistleblower to seek advice before approaching the Authority, to assure themselves that this is appropriate action and that their protections under the Public Interest Disclosures Act will still apply.

*The areas where improvements are required*

- 5.435 Our main concern about the 2014 whistleblowing policy is the inclusion of a new section – ‘How to raise a concern with the GDC’. This section of the 2014 whistleblowing policy is separate to the provisions within the policy itself and appears to be an adjoining policy. This section appears to have been introduced for two reasons. First, because there appeared to be a lack of clarity about how concerns (whether serious or not) could be raised within the GDC and second, because there was a feeling (expressed at interview with us by the former Director of Regulation, amongst others) that the whistleblower who raised their concerns in July 2013 should not have used the whistleblowing policy that was in place at the time as the means of raising their concerns.
- 5.436 In our view, however, this section of the 2014 whistleblowing policy does not provide the clarity sought by the GDC, for the following reasons:
- The introductory section encourages concerns to be raised through the management line of the GDC. However, our view is that the language used is confusing as it refers to raising ‘any concerns’ and ‘any issues’ as opposed to ‘serious concerns’ which are referred to within the 2014 whistleblowing policy. We consider it would be preferable to either separate out the GDC’s policy on how to report low level concerns to the GDC from the 2014 whistleblowing policy, or to define within these documents what the GDC would expect to be raised under the ‘how to raise a concern’ section of the policy compared with the 2014 whistleblowing policy.
  - Whilst it is right that the 2014 whistleblowing policy should seek to encourage members to raise concerns within the management line, by separating this provision from the remainder of the 2014 whistleblowing policy, it is not clear when this part of the policy should be used compared to the remainder of the policy. For example, at paragraph 10 of the 2014 whistleblowing policy it is noted that concerns should preferably be raised with the Chief Executive. However, the introductory section states that ‘any issues’ should be raised using ‘normal’ reporting lines. We consider that it would be preferable to set out either more clearly after the heading ‘GDC whistle-blowing policy for members and associates’ the provisions which firstly encourage reporting of whistleblowing concerns through the management line or to separate out the policy on how to raise lower level concerns with the GDC from the 2014 whistleblowing policy.
  - We also consider that the process outlined under the heading ‘How should you raise a concern with the GDC’ in the introductory section is also lacking some necessary detail. Some of the recent issues at the GDC have arisen through concerns being raised at a lower management level and not being adequately dealt with. This section states that, after approaching their ‘GDC contact person’ a member can refer a concern up the management line ‘if your concern relates to your contact person, or you feel unable to approach that individual.’ We consider that it should also contain a statement which allows a member to escalate a concern up the management line if they feel that they

have already raised the issue on previous occasions and it still remains unaddressed (as recommended by the BSi Code of Conduct).

- The introductory section also states: ‘Please note that if the person you approach feels that it would be more appropriate and in the best interests of the GDC for the matter to be considered by someone who is closer to the issue, they will explain to you why they are doing so’. In our view, including a statement that the GDC might refer an issue back down the management line ‘to someone who is close to the issue’ after it has been escalated higher in the organisation could create the perception that the GDC may not treat some concerns with the seriousness they deserve (and may have the effect of pushing the matter back to the person who the whistleblower chose not to contact, for good reason). In addition, we consider that the reference to acting ‘in the best interests of the GDC’ could be unhelpful and potentially discouraging, as the focus when a member raises a concern should be the public interest (in terms of whistleblowing concerns) or the best interest of the complainant (in terms of any grievance or other concern) and not solely the best interest of the GDC.
- We acknowledge that the 2014 whistleblowing policy does state at the end of the introductory section that ‘If your concern is covered by the Code of Conduct Complaints Procedure or, in the case of Statutory Committee members, the Disciplinary procedure for Statutory Committee members, you should use that process’ and ‘If you feel unable to use any of these routes and you have a serious concern which comes within the whistleblowing policy you should raise a concern under that policy’. Whilst this does indicate that the grievance procedure and the whistleblowing policy should be used by the member if they ‘apply’ to their situation, it does not clearly explain in the introductory section in what circumstances they would each apply. Neither does it explain what the disciplinary process is for associates who are not covered by the procedure for statutory committee members.

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Aside from our concerns about the new introductory section ‘How to raise a concern with the GDC’, we also have other concerns about aspects of the rest of the 2014 whistleblowing policy. These are:

- Whilst the 2014 whistleblowing policy to some extent encourages members to make disclosures, there are statements within it which could be seen to discourage, e.g. ‘The whistleblowing policy is designed for drawing attention to the serious matters set out in paragraph four [those concerns which fall under PIDA] when other channels are not suitable’. This statement could be read as the GDC encouraging members to whistleblow only as a last resort - which may not be appropriate in all circumstances. Furthermore paragraph nine of the 2014 whistleblowing policy states: ‘Concerns must not be raised under this policy maliciously and must not be raised for personal gain. The GDC may still investigate such concerns but raising knowingly false, malicious, frivolous or vexatious allegations will result in a disciplinary investigation’. Both the NAO Criteria and the BSi Code of Practice clearly refer to the need to deter those who potentially seek to misuse the policy. However, in recommending provisions for a whistleblowing policy, both just state that it should be made clear that providing information that the whistleblower ‘knows to be untrue’ is serious misconduct. They do not include the words ‘malicious, frivolous or vexatious allegations’. Whilst the 2014 whistleblowing policy is right to warn

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against the provision of knowingly false information by members, we feel that the words used in paragraph nine go too far and could act to discourage a potential whistleblower.

- There is a lack of clarity around who a member should whistleblow to. In paragraph five, it is noted that where a member has a concern that they wish to raise under the policy, it is important that they raise it 'at the appropriate level.' It then states that 'if you are not satisfied with the action taken you can raise it at a higher level.' However, at paragraph 10 it states that concerns should preferably be raised with the Chief Executive in the first instance. This is contradictory. Whilst encouraging concerns to be raised with the Chief Executive, but also at 'the appropriate level' which can then be escalated, it is not clear how and to whom members should raise concerns. This, combined with the introductory section which includes further guidance as to who a member can raise concerns with, leads to a confusing position for the reader. We note that it is a sign of a 'poor' whistleblowing policy under the NAO Criteria for it to contain contradictions or leave the reader confused.
- There is no clear explanation within the 2014 whistleblowing policy of the difference between whistleblowing concerns and personal grievances and how, if at all, this might impact on how a member raises a concern. We consider that the difference between whistleblowing concerns and grievances should be made clear. Whistleblowing is where a member has a concern about a danger or an illegality that has a public interest aspect to it: usually because it threatens others (e.g. stakeholders or the public). A grievance or private complaint is, by contrast, a dispute about the member's personal position and has no additional public interest dimension. Unless the GDC makes this distinction clear, we consider that it cannot assume or expect that its members will understand the difference and act accordingly.
- At paragraph eight of the 2014 whistleblowing policy, the requirements of a 'protected disclosure' are incorrectly set out – this is misleading and could act to deter potential whistleblowers. The 2014 whistleblowing policy states at paragraph eight that if a member raises a concern, they will not be subject to sanctions or less favourable treatment for raising it, regardless of the outcome of any investigation. However, it also states that the concern must be raised in 'good faith' and that the member must believe it to be 'substantially true' and have a 'reasonable belief' that disclosure is in the 'public interest'. This is not the legal requirement for a whistleblower making an internal disclosure. Similarly the requirement for good faith, whilst a feature of the original PIDA provisions, was removed with effect from 25 June 2013.<sup>253</sup> Under PIDA a whistleblower will gain protection from dismissal or detrimental treatment if they 'reasonably believe' that the disclosure is in the public interest and if it relates to six headings set out in PIDA. They do not have to believe the allegations are 'substantially true.' A whistleblower only has to believe that the allegations are 'substantially true' when making an external disclosure to a prescribed person or other external person. As such and insofar as the 2014 whistleblowing policy introduces a requirement for good faith and a belief in substantial truth, it is inconsistent with the statutory scheme.

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<sup>253</sup> It was removed by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013).

- Some of the wording in paragraph 22 of the 2014 whistleblowing policy is also unhelpful. Paragraph 22 states that where a disclosure leads to an investigation which involves one or more employees, Council members or associates, those individuals will be informed about the allegations and given a chance to respond. It then continues: ‘As being the subject of an investigation will be very stressful for the person(s) under investigation, all parties should strive to resolve the issue without unnecessary delay.’ This does not directly relate to the rest of the paragraph and does nothing to encourage or reassure potential whistleblowers. It places an emphasis on speed of resolution rather than on the fairness and thoroughness of the investigation.

5.438 We are concerned about the number of areas where we consider improvements need to be made to the 2014 whistleblowing policy, given the importance of such a document and the relatively recent review of the document by the GDC itself. We therefore recommend that the Council and the Audit and Risk Committee review the 2014 whistleblowing policy in light of our comments. In doing this, they should pay particular attention to the section ‘How to raise a concern’ and changes should be made so that it is clearer to the reader what concerns should be raised using this part of the policy, how they should be raised and who they should be raised with. In response to seeing a draft of this report the GDC has told us that our criticisms of the 2014 whistleblowing policy are unfair and that the Audit and Risk Committee’s scrutiny of it was reasonable and appropriate, in light of the fact that the 2014 whistleblowing policy had been approved by the executive management team (the 2014 whistleblowing policy and the comments received on it were circulated to the Chief Executive, the former Director of Governance and the Head of Corporate Legal on 14 May 2014, i.e. on the same date as the Audit and Risk Committee meeting) and that the comments made about it by statutory committee members were overwhelmingly positive and in light of an assurance given to the Audit and Risk Committee that the 2014 whistleblowing policy had been benchmarked against the National Audit Office (NAO) guidelines.<sup>254</sup>

5.439 In our view the GDC should also consider having the 2014 whistleblowing policy reviewed by a third party such as the NAO to ensure the changes made address the areas for improvement we have identified, as well as considering any other issues.

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<sup>254</sup> We have not been provided with any information about who carried out that benchmarking exercise.



## 6. Overall conclusions

### *What was the outcome of the failings in the Investigating Committee processes and support during 2013?*

- 6.1 The outcome was that the independence (and perceptions about the independence) of the GDC's Investigating Committee were jeopardised by various practices that were designed to improve the quality and consistency of the Investigating Committee's decision making, but which at the same time sought to restrict the Committee's autonomy to an extent that infringed upon the appropriate separation of powers within a regulator. This could have had very serious implications for the GDC in terms of the robustness of decision making, potential judicial review actions and the consequent reputational damage. Those practices also had serious implications for the culture that developed in the Investigating Committee Secretariat, which in turn affected the working relationships between some Investigating Committee members and the Secretariat team.

### *Was adequate mitigation undertaken once the risks were identified?*

- 6.2 We do not consider that the mitigation put in place by the GDC was adequate. We are concerned that, once the Penningtons report had established that, in the small set of Investigating Committee decision documents Penningtons had reviewed, changes had been made to the reasoning of Investigating Committee decision documents after the event and without appropriate authorisation, the GDC decided not to conduct any review of the other Investigating Committee decisions that had been issued during 2013, given that the same practices appear to have operated from early 2013 onwards. In particular we note that while the Investigating Committee decisions which Penningtons reviewed did not involve the alteration of case outcomes (the only changes were to the reasoning), it was not safe to assume that no amendments to actual disposals had ever been made in any cases. While the Investigating Committee Secretaries interviewed by Penningtons were insistent that they had never changed the outcome of a case but only amended the Committee's reasoning, the Penningtons investigation had already established that their statements that substantive amendments were always drawn to the attention of the Investigating Committee Chair were not reliable. It appears to us that the GDC failed to take due account of those circumstances as well as the fact that Penningtons had only reviewed a subset of Investigating Committee decision documents and could not advise about the risk of judicial review attached to any Investigating Committee decision document they had not had access to. In response to seeing a draft of this report, the GDC has told us that in deciding not to undertake any further review of decision documents it relied on the fact that Penningtons did not advise that any further reviews of decision documents should be undertaken, and that it obtained internal and external legal advice to the effect that a wider review was unnecessary because Penningtons had not identified that any case outcomes had been changed (as opposed to reasoning being changed). We remain of the view that the decision to undertake no wider review of decision documents was unwise, given the seriousness of the issues identified during the Penningtons investigation and the potential impact on both the Investigating Committee and the GDC in the event



that there had been any changes to case outcomes during the lengthy period for which the objectionable practices had been operating.

***What was the primary cause of the problems?***

- 6.3 It is a matter of serious concern that the GDC allowed an individual who had no previous experience of Investigating Committee work to design the processes to be used for interaction by the Investigating Committee Secretaries with the Investigating Committee and to train others on use of those processes.<sup>255</sup> In addition, this took place without effective and detailed oversight by someone with a greater degree of more relevant experience and without ensuring that effective feedback mechanisms were in place so that any concerns would emerge promptly. It appears that practices that were unacceptable were developed by the former Head of the Investigating Committee and embedded within the Investigating Committee Secretariat's working practices without anyone within the GDC staff realising that they were problematic until the whistleblower made their disclosure and the matter was investigated by Penningtons. The primary blame for this lies with the GDC's senior management, not with the staff involved.
- 6.4 These matters occurred despite the findings made in the 2013 Investigation Report and their similarity to many of the issues highlighted by the whistleblower. We have concluded that this was the result of a combination of complacency by the former Director of Regulation that all the previous problems had been fully addressed, and the degree of confidence placed in their judgments and assurances by the Chief Executive (as their line manager) and by a failure by some of the various governance mechanisms within the GDC to which the former Director of Regulation regularly reported to undertake adequate scrutiny of the information they were given.

***What role did the former Director of Regulation and the Chief Executive play?***

- 6.5 At interview the former Director of Regulation told us that as at June 2013, their level of knowledge about the Investigating Committee Secretaries' preparation for Committee meetings and behaviour was via feedback from the former Head of the Investigating Committee. The former Head of the Investigating Committee knew what was happening "on the ground" and the former Director of Regulation left them to manage the relevant individuals.
- 6.6 We note that the former Director of Regulation acknowledged to us that they were responsible for approving the Bulletin (published in August 2013) which included a detailed description of the inappropriate process for advance drafting and subsequent amendment of Investigating Committee decision documents. It appears that the risks associated with these practices were either not properly understood at the time by the former Director of Regulation or the former Head of the Investigating Committee, or they were not regarded as problematic. The

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<sup>255</sup> We note that in response to seeing a draft of this report the GDC referred to the former Head of the Investigating Committee having 'directly relevant experience of the fitness to practise process' having worked at another health professions regulator. The GDC has also suggested that there was a shortage of people with Investigating Committee experience due to regulators "moving away from Investigating Committees as a regulatory model'. We note that as at 2012 when the former Head of the Investigating Committee was appointed, the vast majority of health professions regulators operated an investigating committee model.

former Director of Regulation has made clear to us their views about whether or not each of those practices are in fact objectionable.

- 6.7 It is a matter of concern that the message that was given by the former Director of Regulation to the Investigating Committee Secretariat staff at the time the Penningtons investigation was commissioned in August 2013 was to the effect that the investigation was just a process they had to go through, and that (similarly to the 2013 Investigation Report) it was unlikely that the investigation would result in a discovery that they had done anything wrong. This suggests that the former Director of Regulation did not appreciate at that time the potential seriousness of the issues raised by the whistleblower – it should have been apparent to them that, were the whistleblower’s allegations to be found proved, there could be very serious implications for the GDC in terms of challenges being made to the final decision documents issued following Investigating Committee meetings.
- 6.8 We consider that the Investigating Committee Secretaries should have been provided with the 2013 Investigation Report’s findings, in so far as they concerned Investigating Committee processes. In our view, providing them with that information might have meant that one or more of them would have realised that the practices being operated by the Investigating Committee Secretaries following publication of the 2013 Investigation Report were problematic, given the similarity of some of the issues.
- 6.9 We noted that several of the comments the former Director of Regulation made to us during the course of this investigation suggested that they regarded it as the Investigating Committee members/Chairs’ main responsibility to challenge (and to raise alerts about) any improper behaviour by the Committee Secretariat. While we agree that the Investigating Committee members/Chairs were in some respects better placed than the former Director of Regulation or the Chief Executive to be aware of what was happening before, during and (to some extent) after Committee meetings, this does not absolve the management of the GDC from the responsibility to put supervision arrangements in place to ensure that staff performance and behaviour is properly monitored. In any event, we note that on occasion Investigating Committee members did try to raise concerns in the team review forms, but that these were either ignored or not understood. We note that, according to the former Head of the Investigating Committee, they had stopped attending Investigating Committee meetings in early 2013, shortly after the new Investigating Committee Secretaries came into post. The former Head of the Investigating Committee therefore did not put themselves in a position where they could observe the Secretaries’ behaviour during Investigating Committee meetings at a time when they were inexperienced in the role.
- 6.10 Separately some of the former Director of Regulation’s statements to us also suggested that their view is that if a number of the Investigating Committee members were not concerned about a particular practice, then by definition that practice was not a problem. In our view, whether or not the Investigating Committee Chairs/members appreciated that individual practices being operated by the Investigating Committee Secretariat were objectionable is irrelevant to assessing whether or not those actions were in fact objectionable. We also note that the Investigating Committee processes and support are part of a framework to ensure that the GDC operates its fitness to practise jurisdiction in the public interest – those processes and support are not there simply to fulfil the

preferences of the individual Investigating Committee members, but because they serve an important role in maintaining the independence of the Committee's decision-making. Whether or not the Investigating Committee members/Chairs observe that there is some form of problem, the management of the GDC has a separate responsibility to ensure that those processes are operating effectively and in the public interest.

- 6.11 To the extent that any information provided to the Audit and Risk Committee (or the previous Audit Committee), the Appointments Committee or the (previous and current) Council about the operation of the Investigating Committee processes and support before, during and after 2013 was inaccurate or incomplete, that information would usually have been supplied either to the former Director of Governance or the Chief Executive by the former Director of Regulation or by the former Head of the Investigating Committee. Our impression was that the narrative provided around the Investigating Committee process from 2011 onwards was to the effect that the problems were due to a sizeable increase in caseload, combined with an outdated legislative framework. The minutes of the relevant meetings indicate that the central issue of staff behaviour was not fully considered<sup>256</sup> and that if any individuals were singled out as being responsible for the problems, it was the Investigating Committee members/Chairs. This was unfair – the Penningtons reports clearly demonstrated that the Chairs/members were not at fault, and that the issues that arose happened due to the practices being operated by the Investigating Committee Secretaries under the instruction and supervision of the former Head of the Investigating Committee.
- 6.12 It appears that neither the former Head of the Investigating Committee nor the former Director of Regulation appreciated that as a result of their drive to improve the quality and consistency of the Investigating Committee's decision documents, they were jeopardising the legitimacy of the decisions themselves. Even when concerns were raised with them about specific parts of the process by individuals, there was apparently no recognition of the scale or seriousness of the problems – until receipt of the Penningtons reports at the end of 2013 (and even then we note that the former Director of Regulation told us that they did not agree with the Chief Executive's decision to accept all the recommendations that had been made).
- 6.13 The Chief Executive's general approach was to rely on the former Director of Regulation to effectively oversee the activities of the former Head of the Investigating Committee and the Investigating Committee Secretariat, and to escalate any serious concerns to them. The Chief Executive told us that they expected any director to ensure that they received the necessary reports and to ask the right questions.
- 6.14 The Chief Executive had a reasonable expectation that they could rely on the former Director of Regulation to take appropriate steps and to escalate any concerns to them. However the reliance the Chief Executive placed upon the information provided by the former Director of Regulation about the processes in operation and their propriety was subsequently established to be ill-founded. The Chief Executive is ultimately accountable for the decisions taken about the level of information disclosed to the GDC's committees and the Council, staff and GDC

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<sup>256</sup> We have assumed that the minutes fairly represent the discussions at the relevant meetings, albeit we accept the comments made to us by the GDC that they would not necessarily have captured every detail of all matters discussed.

associates. The Chief Executive also had several opportunities to identify the seriousness of the problems emerging, even if they were not properly brought to their attention.

- 6.15 We identified serious concerns about the presentation of information to the Appointments, Audit, and Audit and Risk Committees and the Council, as well as staff and GDC Associates, both about the 2013 Investigation Report and the actions the GDC needed to take in response to it, as well as the findings of the Penningtons investigation. Our concerns about the presentation of that information are set out above. The impact of either providing incomplete or inaccurate information to the Appointments Committee, the Audit/Audit and Risk Committee and/or the Council, or failing to highlight important aspects of that information in the presentation of it, could have been to mislead those bodies about the extent of the risks that remained and/or who should be held accountable for the problems that had been identified.<sup>257</sup>

***Was there effective oversight by the GDC's Audit/Audit and Risk Committee and the previous and current Council?***

- 6.16 We consider that oversight was inadequate. In our paper *Fit and Proper? Governance in the Public Interest*, we note that Councils need to have confidence that the information that they are receiving is sufficient to perform their oversight function. Having reviewed the various documents in detail, we do not consider that the presentation by the executive management team to the GDC's Appointments and Audit/Audit and Risk Committees or the Council (previous and current) was always helpful, in terms of ensuring that all the relevant issues from the 2013 Investigation Report and the Penningtons reports were properly highlighted, so that there could be a full evaluation of the likely effectiveness of the actions the GDC was taking to address them. We note that the Audit/Audit and Risk Committee was provided with the full 2013 Investigation Report and the full Penningtons reports, and that similarly that the Council was given access to the full reports.<sup>258</sup>
- 6.17 We also noted in *Fit and Proper?* that Councils should provide effective scrutiny by challenging the information provided. We have not seen any evidence to suggest that the GDC's Council or its Audit/Audit and Risk Committee recognised any gaps in the information presented by the executive management team or took the opportunity to challenge that information. This raised the risk of the Council and its committees failing to develop a full understanding about the risks that the Investigating Committee's processes and the behaviour of the Secretariat staff

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<sup>257</sup> We note that the Chief Executive has responded to our conclusion by stating that they believe that they acted appropriately and quickly in response to each risk as soon as it became apparent, and that they reported fairly and fully to the Audit/Audit and Risk Committee and the Council. The Chief Executive has stated to us that their view is that they have responded to each of the "shocks" that have occurred to the GDC with honesty and transparency and by taking appropriate action. In response to seeing a draft of this report the GDC has said that the Chief Executive's reliance upon the former Director of Regulation was reasonable, has noted that the Authority's 2012/13 performance review of the GDC did not identify problems relating to the Investigating Committee, and has referred to the fact that no complaints had been made by the Investigating Committee members, and has drawn the conclusion that the Chief Executive could not have had visibility of the problems emerging in these circumstances. We do not agree

<sup>258</sup> The Chair of the Audit and Risk Committee has said (in response to seeing a draft of this report) that every person they spoke to (it is not clear to us if that means all the Audit and Risk Committee members and/or all Council members) had read the Penningtons report

posed, both at the time of the reports' publication and subsequently. In particular, we highlight the lack of scrutiny by the Audit/Audit and Risk Committee, which has a specific role on behalf of the Council to ensure that risks are identified and mitigated. In our view, the Audit/Audit and Risk Committee failed in its performance of that role in relation to its scrutiny of the Investigating Committee's processes and support during 2013.<sup>259</sup> We note in particular that even when concerns were raised (in a letter to the Chair of the Audit and Risk Committee from the former Chair of the Appointments Committee on 11 March 2013) about the accuracy of the description of the Investigating Committee Secretariat's processes as set out in a paper that had been presented to the Audit Committee in February 2013 and which was subsequently to be presented to the Council in March 2013, we have seen no evidence that any steps were taken to check/amend the relevant text.

### ***The handling of the whistleblowing disclosure and subsequent complaints of detriment***

- 6.18 We have serious concerns about how the GDC managed the disclosure by the whistleblower and their subsequent complaints of detrimental treatment.
- 6.19 We consider that often the GDC's response was muddled and ill thought through. We have noted above several examples where the GDC's staff/associates told us that they are not clear about why they took the steps that they did, or where their accounts were inconsistent. Given the importance to public confidence and protection of treating whistleblowers appropriately, it is not clear to us why the GDC did not give each part of this process more thought before dealing with it.
- 6.20 Alongside this, we were concerned at the lack of a comprehensive recorded audit trail in relation to the events that occurred and the decisions that were made.
- 6.21 We consider that the concerns raised about and by the whistleblower were not always managed appropriately by the GDC. In our view the investigation into the whistleblower's complaints of detriment was flawed in various ways and, as a result, the conclusion that the former Director of Governance reached in that report was not based on all the relevant evidence and may therefore have been wrong. Further, when the former Chair of the Appointments Committee raised some material concerns about the accuracy of the report, these comments were not followed up effectively, with the result that those who had already received a copy of the report were not made aware of the potential inaccuracies within it.

### ***The context at the time, and the remedial action taken by the GDC since 2014***

- 6.22 The GDC has asked us to record that the events examined in this investigation took place towards the end of a unique and highly challenging period for the GDC, at a time when the GDC's fitness to practise caseload had increased dramatically and while it was operating under 'antiquated' legislation. We do not regard the nature of the challenges that the GDC has referred to during this period as being directly relevant to the concerns we have investigated.

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<sup>259</sup> In response to seeing a draft of this report the GDC has said that this is an unfair criticism, and has referred specifically to the Audit/Audit and Risk Committee's role being to escalate issues to the Council, and the fact that there has been no criticism of the Audit/Audit and Risk Committee by the Council.

- 6.23 In relation to the first aspect of the terms of reference of our investigation, we note that a number of significant changes have been made by the GDC in its fitness to practise function since the events described in this report as having taken place in 2013.
- 6.24 Of greatest significance to this report, and as set out in detail in paragraphs 3.113-3.116, 3.132-3.135, 3.149-3.155, 3.173-3.180, 3.206-3.210 above, in early 2014 the GDC took remedial action in relation to each of the objectionable practices that were in operation during 2013 following receipt of the Penningtons reports (in December 2013). The remediation activities consisted of delivery of a programme of training/re-training for both staff and Investigating Committee members, and revision of existing guidance documents that detail the processes to be followed by both Investigating Committee members and Secretariat staff. When Penningtons conducted a post-implementation review in autumn 2014 (including interviewing various Investigating Committee members, as well as Secretariat staff) they were satisfied that the GDC had implemented the recommendations successfully and, while the post-implementation review report identified a small number of matters for further consideration by the GDC, Penningtons' conclusion was that the objectionable practices had ceased and that the revised guidance was comprehensive, appropriate and helpful and no further action was required. In December 2014 the GDC published an amended version of the Investigating Committee Guidance Manual that had previously been revised in August 2014 (incorporating the amendments prompted by Penningtons' recommendations). The December 2014 revisions addressed the matters Penningtons' post-implementation review had suggested that the GDC should consider further. In autumn 2014 the GDC appointed a tranche of new members to the Investigating Committee following a recruitment campaign that was overseen by the outgoing Appointments Committee.
- 6.25 The GDC has asked us to record that it has also been focused on improving its fitness to practise function more generally. In November 2014 the GDC separated the Regulation Directorate into two new Directorates – Fitness to Practise and Registration. A new Director of Fitness to Practise was appointed in December 2014. An end to end process review of the fitness to practise process remains ongoing as part of the GDC's Organisational Change Programme and progress reports are regularly made to the GDC's Council. The GDC is also awaiting the introduction of legislative changes which will mean that most of the cases currently considered by the Investigating Committee will in future be considered by senior GDC staff instead using the type of 'case examiner' model introduced by the GMC (and which has since been adopted by the GOC and NMC).
- 6.26 The GDC has asked us to record that it increased the level of Council oversight of the fitness to practise function during 2014. A Fitness to Practise Steering Group ("FTPSG") (consisting of both Council and executive members – including the Chair of the Council and the Chair of the Audit and Risk Committee, the Chief Executive and the Director of Fitness to Practise) was convened three times during 2014 at the instigation of the Chair of the Council. The FTPSG was set up in direct response to the Authority's 2013/2014 performance review of the GDC and its stated purpose was to ensure that the issues identified in the Authority's performance review report in relation to fitness to practise performance were addressed as a matter of urgency and to provide additional scrutiny of the performance of the fitness to practise function. At each of the FTPSG's three



meetings it considered current caseloads and productivity at each of the key stages of the fitness to practise process in order to ensure timely progression of cases as well as considering internal audit outcomes and was provided with updates from the Fitness to Practise Oversight Group (a group which consisted of members of the executive management team and which met on a weekly basis). The projects initiated by the Fitness to Practise Oversight Group in order to improve fitness to practise performance were focused on casework, the case management system, management information, and induction of new starters. The FTPSG disbanded in December 2014, after being satisfied that fitness to practise performance was improving and that the enhancements that had been made to performance reporting would continue to allow the Council and Committees to scrutinise fitness to practise performance effectively. The FTPSG reported to that effect to the Council in March 2015. In January 2015 a new Appointments Committee took up office.

- 6.27 In relation to the second aspect of the terms of reference of our investigation, we note that the GDC adopted a revised whistleblowing policy on 24 July 2014. We have made various specific recommendations about further work that we consider should be done in relation to this in this report.
- 6.28 While the GDC has taken various remedial measures as set out above, given the seriousness of the concerns we identified during our investigation about: the quality of some of the GDC's decision-making; its record-keeping; the thoroughness of its internal investigations; its approach to learning from errors and listening to feedback; its previous inadequate scrutiny of the scope and effectiveness of remediation measures; and its presentation of information to its committees and the Council, we consider that it is for the GDC to demonstrate that it has considered this report fully and has taken effective steps to ensure that the remedial measures it has taken are adequate to ensure no future repetition. We consider that it is important that the GDC's Council, its new Appointments Committee, its Audit and Risk Committee and the executive management team consider this report individually and as a whole, and identify comprehensively all the lessons that should be learnt, as well as identifying any further action that the GDC should take to address the recommendations we have made. We will want to receive a written assurance from the GDC that it has undertaken such a review of the report. Nevertheless we recognise that the concerns we have investigated relate to its fitness to practise function, its internal investigations, and its reporting to its internal committees – they do not relate to its other functions, nor would it be fair to conclude that they demonstrate that the organisation as a whole is failing. We report to Parliament on each regulator's overall performance of its regulatory functions every year. We will take account of this report and the GDC's response to it in our next performance review of the GDC.
- 6.29 We also consider that the other eight health and care professional regulators could learn from the outcome of this investigation. We will ensure that we signpost the regulators to the learning arising from this investigation.

## 7. Appendix A: The GDC's previous whistleblowing policy

### **GDC WHISTLE-BLOWING POLICY FOR MEMBERS AND ASSOCIATES**

#### **Who is covered by this policy?**

1. This policy applies to Council Members (members); and associates (which includes any non-Council Members who are serving on Council Committees or Task and Finish Groups, members of the Statutory Committees, assessors and inspectors (visitors) and others to whom the Code of Conduct applies by agreement). Where the policy refers to members and associates, this should be read as all those referred to in this paragraph except where otherwise indicated.
2. Although Council members and some associates are not covered by the Public Interest Disclosure Act (more commonly known as the Whistle-blowing Act) Council has decided that protection should be offered under this policy to Council members and associates who raise matters which would be covered by the Act.

#### **What is Whistle-blowing?**

3. The term 'whistle-blowing' is used to describe incidents where a worker discloses some alleged wrongdoing within an organisation, either internally or externally, but bypassing normal reporting lines. The Public Interest Disclosure Act (PIDA, more commonly known as the Whistle-blowing Act) provides protection for workers who raise legitimate concerns about specified matters. These matters should be issues that are in the public interest, for example:
  - a criminal offence that has been committed, is being committed, or is likely to be committed;
  - suspected fraud or misuse of funds;
  - failure to comply with a legal obligation;
  - a miscarriage of justice;
  - an act causing damage to the environment
  - a risk to the health and safety of any individual;
  - an attempt to suppress or hide information relating to any of the above.
4. 'Whistle-blowing' does not include complaints which do not come under Paragraph 3 above about the conduct of Council Members or others engaged on the Council's business, which are covered by the Code of Conduct Complaints Procedure or, in the case of Statutory Committee members, the Disciplinary Procedure for Statutory Committee members.

#### **Principles**

5. This whistle-blowing policy allows you, as a Council member/associate to raise issues of malpractice with a person who is in the position to investigate the matter and take action as necessary.

6. You should note that you cannot raise serious issues about wrongdoing in confidence; once your concern is known to the GDC, it is duty bound to act on it.
7. Matters accepted for investigation under this policy will be investigated thoroughly, promptly and confidentially, and the outcome of the investigation will, as far as possible, be reported back to you unless to do so would prejudice criminal investigations.
8. If a concern is raised under this policy and you believe it to be substantially true and have a reasonable belief that disclosure is in the public interest, you will not be subject to sanctions or less favourable treatment for raising it, regardless of the outcome of any investigation.
9. Concerns must not be raised under this policy maliciously and must not be raised for personal gain. Raising knowingly false, malicious, frivolous or vexatious allegations will be regarded as a disciplinary matter.

### **Who can I talk to if I have a concern?**

10. If your concern is about a member of staff:
  - a. Talk to the Chief Executive except when the Chief Executive is implicated in the wrongdoing or fails to take satisfactory steps to remedy situation then;
  - b. Talk to the Chair of Council except when the Chair of Council is implicated in the wrongdoing or fails to take satisfactory steps to remedy situation then;
  - c. Talk to the Chair of the Audit Committee except when the Chair of the Audit Committee is implicated in wrongdoing or fails to take satisfactory steps to remedy situation then;
  - d. Talk to the PSA (see paragraph 33 for contact details).
11. If your concern is about a Council member or associate:
  - a. Talk to the Chair of Council except when the Chair of Council is implicated in the wrongdoing or fails to take satisfactory steps to remedy situation then;
  - b. Talk to the Chair of the Audit Committee except when the Chair of the Audit Committee is implicated in the wrongdoing or fails to take satisfactory steps to remedy situation then;
  - c. Talk to the Chief Executive except when the Chief Executive is implicated in the wrongdoing or fails to take satisfactory steps to remedy situation then;
  - d. Talk to the PSA (see paragraph 33 for contact details).

12. If you are considering raising a concern within this policy, you may also want to talk to Public Concern at Work, an independent charity which offers support and advice to whistle-blowers:

Public Concern at Work,  
3rd Floor, Bank Chambers  
6 - 10 Borough High Street  
London SE1 9QQ  
Whistleblowing Advice Line: 020 7404 6609  
General enquiries: 020 3117 2520  
Website: [www.pcaaw.co.uk](http://www.pcaaw.co.uk)

### **Action after you have reported a concern**

13. The Chief Executive or the Chair of Council or the Chair of the Audit Committee will consult or take advice as s/he in his/her absolute discretion considers necessary in order to decide whether there is a case to answer; and agree the correct action to take.
14. S/he will also consider, at all appropriate stages in this process, whether it is necessary for a report to be made to insurers and if necessary arrange for such a report to be made as soon as possible.
15. S/he will then take one of three actions within five working days of the concern being raised:
- a. write to the complainant, explaining in writing the reasons for believing that there are insufficient grounds to warrant an investigation; or
  - b. set up an investigation, taking on the role of 'investigating officer' if s/he is the best placed person to explore the concern in more detail; or
  - c. if s/he is not taking on that role, appoint an appropriate person to do so and provide that person with all the information associated with the case.
16. You should note that in the most serious cases, where it is likely that a crime has been committed, the matter may be referred immediately to the police or another external agency. If a referral is made, then external advice must be followed as to the disclosure of information.
17. The investigation may involve you and/or colleagues providing a written statement. The investigating officer will report to the Chief Executive and/or Chair of Council (or the Chair of the Audit Committee) who will take any action necessary. This might include raising the matter with a relevant external agency.
18. If disciplinary action is required, this will be initiated by the Chair of Council or the relevant manager if an employee of the GDC is involved.
19. You will be informed of the outcome of the investigation and what has been done about it. If no action has been taken, the reasons for this will be explained.

### **Can I be assured of confidentiality?**

20. Subject to paragraph 13 above, you can be assured of confidentiality in the early stages of investigation. If a crime may have been committed, it may be necessary to involve the police and, subsequently, the criminal justice system. If necessary under the GDC's insurance policy, the Chair of Council may consider it necessary to report the concern to insurers. If you provide a written statement, this may be required to be disclosed under any disciplinary procedures arising out of the investigation.
21. The investigation officer (or a person nominated by the investigating officer) will work with all parties as appropriate to maintain a written record of each stage in the policy. The complete report will be retained for five years.

### **What if I disagree with the decision of the investigating officer?**

22. If your concern is not taken forward to the investigation stage and you feel that you still have a serious concern, you may take your disclosure to the next level of accountability as set out at paragraphs 10 or 11 above.

### **How will an investigation be carried out?**

23. Unless the matter has been referred to the police or another external agency, if the disclosure leads to an investigation which involves one or more employees/Council members/associates, the person(s) under investigation will be informed of the allegation within 10 working days of the initial disclosure. There will be a period of 10 working days for them to respond. As being the subject of an investigation will be very stressful for the person(s) under investigation, all parties should strive to resolve the issue without unnecessary delay.
24. Where the presence of the person(s) under investigation might make it difficult to complete a thorough investigation, there may be a need for those person(s) to be temporarily suspended until the investigation has been completed by the Appointments Committee under its powers under s8(1)(d) and/or (e). The person(s) under investigation would still have the right to respond within the appropriate timeframe under paragraph 23 above and should be given access to all documents necessary to allow them to do so.
25. If the alleged wrongdoing involves a 'third party' to the GDC, for example a contract or agency worker or supplier, the investigating officer will need to report the matter to the relevant person within that organisation and work with that person under the organisation's procedures to conduct their investigation. They will request a response within 10 working days.
26. If the organisation refuses to co-operate the investigating officer will report to the Chair of the Council or other relevant person and will agree the way forward.
27. On receiving the response of the implicated person(s), the investigating officer will decide if there is still sufficient evidence to pursue a full investigation.

28. If there is insufficient evidence, the reasons will be supplied in writing to both the whistleblower and any person(s) implicated. The investigating officer, the Chair of Council and the Chief Executive will review the case to determine whether any training and development issues need to be addressed. This stage of the procedure should normally be completed within 30 working days of receiving the initial disclosure.
29. If there is sufficient evidence of wrongdoing, the investigator will recommend that the Chair of Council either inform the external authorities (for example, the police or another regulatory body); or set up an investigation panel consisting of the investigating officer plus two Council members.
30. If an investigation panel is established, the person(s) implicated will be informed by the investigating officer within 2 working days.
31. The investigation panel will conduct an in-depth enquiry and make a report to the Chair of Council within 20 working days of being formed. The report shall recommend whether there is a need to:
  - inform external authorities with the possibility of criminal proceedings; or
  - invoke disciplinary procedures against a member of Council/associate
32. After receiving the report, the Chief Executive (or Chair) will present a decision in writing to all parties concerned and place the report on file.

### **What if I am unhappy with the outcome of an internal investigation?**

33. While the internal procedures and investigation are taking place you should not contact the media or any external organisation. However, if you are still unhappy with the outcome after following this internal policy, you may contact the appropriate prescribed regulator. For the GDC, this is the Professional Standards Authority For Health and Social Care (PSA).

You may contact the PSA at:

Professional Standards Authority,  
157 -197 Buckingham Palace Road,  
London SW1W 9SP  
Telephone: 020 7389 8030  
Email: [info@professionalstandards.org.uk](mailto:info@professionalstandards.org.uk)

### **What if I receive unfair treatment as a result of disclosure?**

34. If you feel that as a result of making a disclosure, you have suffered some detriment, then you can submit a formal complaint to the Chair of Council. If it appears that you have reasonable grounds for making the complaint, the onus will be on the person(s) involved to demonstrate that their actions were not taken in retaliation for the disclosure.

Reviewed and amended by the Council of the GDC on 8 August 2013.



## 8. Appendix B: The GDC's Disciplinary Procedure for Statutory Committee members

### **General Dental Council Disciplinary Procedure for Statutory Committee Members**

#### **Part 1: Purpose**

1. The General Dental Council's core purpose is to protect the public by regulating dental professionals in the United Kingdom. Statutory Committee members have a responsibility to ensure that the functions of the Council are effectively discharged in the interests of the public. Guidance on carrying out these functions is contained in the Code of Conduct for Members and Key Standards for Statutory Committee members.
2. This document sets out the procedure to be followed in dealing with a complaint against a member of a Statutory Committee ("a member"), where it is alleged that the conduct of the member has fallen below the standards expected and could be liable to undermine public confidence in the regulation of registrants.
3. The General Dental Council have delegated to the Appointments Committee the power:
  - a. To deal with issues relating to the conduct and performance of statutory committee members in accordance with the Disciplinary Procedure.
  - b. To suspend or remove statutory committee members from office in accordance with the General Dental Council (Constitution of Committees) Rules Order of Council 2009 ( see Annex 6.1).
4. This procedure is in conformity with the Dentists Act 1984 and the General Dental Council (Constitution of Committees) Rules Order of Council 2009.

#### **Part 2: Complaints about Committee members**

##### **Who is covered?**

5. This procedure applies to all members of the Investigating Committee, the Health Committee, the Interim Orders Committee, the Professional Conduct Committee, the Professional Performance Committee, and the Registration Appeals Committee.

##### **Treatment of performance issues**

6. Poor performance on the part of a member would not normally be dealt with initially through this procedure, but consistently poor performance which has not been remedied through the capability procedure may be a matter where the possible removal of the member from office is contemplated, and therefore becomes an appropriate matter to be dealt with under the procedure in this document.

## **General Principles**

7. The procedures in this document shall be adhered to as far as possible in the interests of achieving a fair, consistent and proportionate procedure complying with the principles of natural justice, but non-compliance with any particular requirement shall not invalidate the overall outcome, unless it can reasonably be shown that the member has been significantly prejudiced thereby. All stages of the procedure should be documented and retained on the member's file. For example, the operation of the procedure will:
  - a. Ensure that disciplinary action is not taken until the facts have been properly established.
  - b. Inform the member in writing of the nature of the complaint against them and give them the opportunity to state their case.
  - c. Ensure that the member has access to relevant information used as the basis upon which decisions are made during the disciplinary process.
  - d. Allow the member to be accompanied at any meetings in the disciplinary process by a friend other than a Council member or an employee of the GDC. The friend may take notes in the meeting but may not speak.
  - e. Give sufficient time for the member to prepare for and attend any meetings in the disciplinary process.
  - f. Deal with issues thoroughly and promptly.
  - g. Be fair and consistent and ensure appropriate independence.
  - h. Respect confidentiality at all times.
  - i. Ensure the complainant is kept aware of both progress in considering their complaint and the outcome.

## **Who can bring a complaint?**

8. Complaints can be brought by members of the public, other statutory committee members, members of Council or GDC employees. A complaint from any quarter will be investigated under the procedure, except that a complaint from a GDC employee will only be taken forward at the instance of, and in the name of, the Chief Executive. A member of staff of the General Dental Council who wishes to make a complaint against a member should use the Council's Internal Complaints Procedures before following this procedure. Where the Chief Executive decides that the case should not be taken forward under the procedure s/he should inform the Chair of the Appointments Committee ("the Chair") of the nature of the complaint, any action s/he has taken to address the issue complained of and confirm that details have been placed on the member's file.

## **Examples of misconduct?**

9. In addition to action which breaches the Code of Conduct for members and the Key Standards for Statutory Committee members, examples of misconduct which would fall to be investigated under this procedure include:
  - a. Unacceptable behaviour, such as verbal or physical abusiveness

- b. Discrimination, harassment or victimisation
  - c. Misuse of GDC facilities, such as e-mail and internet
  - d. Bringing the GDC into disrepute
  - e. Breach of confidentiality
  - f. Breach of trust
10. Within Annex 1 are reasons why a member shall be removed from office by the Appointments Committee. These reasons include (rule 6(d)) removal “from office of any public body on the grounds, in terms, that it was not in the interests of, or conducive to the good management of, that body that the person should continue to hold that office.” For the avoidance of doubt removal from membership of the Statutory Committees of any other regulatory body or from judicial office by the Lord Chancellor will be deemed by the Appointments Committee as warranting removal from office under rule 7(l).

### **Part 3: The Disciplinary Process**

#### **Role of the Appointments Committee Chair**

11. The Chair has important duties under these procedures, which s/he may delegate to another member of the Committee. References to “the Chair” in this document include references to an acting Chair, in the event of there being a vacancy in the office or the temporary incapacity of the regular Chair, and a member of the Committee acting under the delegated authority of the Chair. It also covers the situation where the Appointments Committee is chaired by a member of the Committee in the absence of the Chair.

#### **Time limit for complaints**

12. Subject to paragraph 13 below complaints about a member’s behaviour or relevant information about a member, should be submitted in confidence and received by the Secretary of the Appointments Committee:
  - a. Not later than one calendar month after the date of the alleged Code of Conduct breach or other matter(s) complained of; or
  - b. If the complainant was not aware of the alleged Code of Conduct breach or other matters complained of at the time, not later than one calendar month after s/he did become aware of it
13. The Chair may dispense with the time limit in paragraph 12 or accept a complaint not in writing if s/he considers that there were exceptional reasons in the circumstances to do so.

#### **Initial receipt and sifting of complaints**

14. If a member wishes to talk through the issues before raising a formal complaint about another member, they are encouraged to speak to the Head of Hearings or the Secretary of the Investigating Committee (as appropriate). This facility does not extend to other complainants.
15. Complaints which will be treated in confidence at all stages in this procedure, must be in writing or emailed, setting out full details of the matters being raised. Anonymous complaints will not be accepted unless the information is available in the public domain and the complainant is simply drawing it to the attention of the Appointments Committee.
16. Complaints should be addressed to the Secretary of the Appointments Committee (“the Secretary”), but if addressed to anyone else they should be referred to the Secretary immediately. The Secretary will acknowledge receipt of the complaint to the complainant and refer the complaint, or information, to the Chair within 3 working days of receiving it together with the member’s file. At the same time the Secretary will provide the member concerned with a copy of the complaint that has been received and which has been referred to the Chair to decide how it should be progressed. The Chair will respond, with reasons for the decision, to the Secretary within 10 working days from receipt of the complaint. The Secretary will then within 3 working days advise the complainant and the member of the Chair’s decision.

#### **Available actions open to the Chair**

17. When a complaint is forwarded to the Chair in accordance with paragraph 16 above the Chair can:
  - a. Determine that the complaint does not fall within the scope of this procedure; in which case, the complainant and the member will be informed accordingly. The Chair’s decision will be final.
  - b. Conclude that more details of the complaint are needed for it to be dealt with, and in that event, the complainant will be contacted as soon as practicable and asked to give further information.

- c. Dismiss summarily any complaint which is, in the Chair's opinion, trivial or vexatious, and a record to that effect will be signed by the Chair. Any such summary dismissal of a complaint will be final and the complainant and the member will be notified accordingly.
  - d. Seek resolution of the complaint by whatever means are appropriate in the circumstances (other than removal or suspension of the member which are decisions that can only be taken by the Appointments Committee), including (without limitation):
    - (i) Mediation providing both the member and the complainant agree.
    - (ii) The offer of apology by the member if accepted by the complainant.
    - (iii) A requirement that the member should undertake additional training or change his or her behaviour, providing this is accepted and implemented by the member within the timescale specified by the Chair.
    - (iv) Words of advice from the Chair to the member, either orally or in writing, so long as this is accepted by the member. Oral advice will subsequently be confirmed in writing.
  - e. Invite the complainant and the member to attend a preliminary meeting to ascertain the substance of the complaint. This meeting may be held separately or jointly and should be held within 10 working days of the Chair receiving the complaint (subject to the interested parties' availability).
  - f. Initiate an independent investigation into the complaint prior to it being considered by a meeting of the Appointments Committee.
  - g. Refer the complaint directly to the Appointments Committee without the need for an independent investigation.
18. Where the Chair considers on initial reading of the complaint that it may result in removal or suspension of the member s/he must refer the matter to the Appointments Committee. The Chair will decide whether the complaint requires independent investigation in accordance with 17f above or should be referred under the provisions of 17g.
19. In addition to deciding how the complaint will be progressed, if the Chair receives information that leads them to believe that the fitness to practise of a member who is also a registered dentist or registered dental care professional may be impaired then the Chair: -
- (a) must refer that complaint or information to the Registrar for consideration under the General Dental Council (Fitness to Practise) Rules Order of Council 2006; and
  - (b) must not consider that complaint or information under this procedure until it has been considered under the General Dental Council (Fitness to Practise) Rules Order of Council 2006 (including where the Registrar has decided under rule 3 of those Rules that the complaint or information does not amount to an allegation).
20. If it appears to the Chair that a member has come within Rule 8 of the General Dental Council (Constitution of Committees) Rules Order of Council 2009 (a copy of which is at Annex 1) then the Chair should:
- (a) advise the Head of Hearings and/or Secretary of the Investigating Committee; and
  - (b) call a meeting of the Appointments Committee as soon as possible and recommend to the Committee (giving reasons) that the member should be suspended from sitting on Panels or Committees whilst investigation or proceedings concerning the member's fitness to practise are ongoing in accordance with paragraph 17 above.
21. If any mediation or other resolution process adopted under paragraph 17d fails to reach a satisfactory outcome, any admissions or statements made during the course of that

process will not be admissible in any independent investigation or hearing into the complaint.

22. Where mediation or other resolution process adopted under paragraph 17d disposes of a complaint the Chair will report accordingly to the next ordinary meeting of the Appointments Committee. The name of the member will not be disclosed to the Appointments Committee.

#### **Copy of complaint to the member**

23. As part of the communication to the member set out in paragraph 16 above, unless the Chair has dismissed the complaint in accordance with paragraph 17a or c above or requests further information from the complainant, then within 3 working days of a response from the Chair on how the complaint should be progressed, the Secretary will send a copy of it, together with any supporting documentation, to the member, who will be invited to submit a written response within 10 working days. The member will at the same time be sent a copy of this procedure. It is not the role of the member to contact witnesses at this point.

#### **Copy of response to complainant**

24. When the member has provided a response to the complaint under paragraph 23, the Secretary will send a copy of it to the complainant within 3 working days.

#### **Action other than an independent investigation**

25. Where the Chair has initiated the resolution of the complaint without the need for an independent investigation s/he can at any stage halt that process, refer the matter to the Appointments Committee and in that situation will decide whether an independent investigation should be commenced. Such reference will happen automatically if the member does not comply with the requirements of paragraph 17d(iii) and (iv) above. Where such a reference takes place the Chair will take no part in the Appointments Committee's consideration of the case.

#### **Independent Investigation**

26. The Chair has explicit authority to decide who should undertake an independent investigation (the "investigator") and may decide to undertake the investigation personally. If so s/he will take no part in the Appointments Committee's consideration of the case following their investigation of it and will not Chair that meeting. Where the Chair appoints someone else to conduct the investigation the Chair will have no further contact with the complainant or the member so as not to compromise their independence in chairing the Appointments Committee meeting to consider the outcome of the investigation. Where the investigator is a member of the Appointments Committee, as would normally be the case, that person will take no part in the Appointments Committee's consideration of the case following their investigation of it.
27. An independent investigation should normally be held if the Chair believes on initial reading of the complaint that, if established, it may lead to the removal of the member.
28. The purpose of the independent investigation is to assist the Appointments Committee in considering the complaint and to:
  - a. Establish the facts on any matter suspected to be misconduct through speaking to the complainant and the member.
  - b. Enable the alleged misconduct that will be considered by the Appointments Committee to be specified.
  - c. Identify appropriate documentation that should be presented to the Appointments Committee to assist their consideration of the complaint.
  - d. Contact any witnesses who can assist with a. above.
  - e. Make such further enquiries as appear to be necessary in the particular circumstances.



29. When collecting evidence the investigator will make it clear to those involved that s/he is undertaking a fact finding investigation not a disciplinary hearing. It is not the role of the investigator to decide on, or recommend, any action that should be taken as a result of the investigation. At all times the investigator must investigate the matter in accordance with the rules of natural justice.
30. The investigator's report will be forwarded in draft to the member and the complainant for comments which should be returned within 5 working days. The investigator is under no obligation to accept any amendments proposed by the member or the complainant but any comments received will be passed to the Appointments Committee when they consider the investigator's report.
31. The investigator will be free to decide how to conduct the investigation and to call for any information that will help establish the facts of the complaint. If appropriate the investigator can take legal advice, and the Secretary will normally act as secretary for the investigation under the directions of the investigator for the purpose of contacting participants and any other administrative functions.
32. The independent investigation of the complaint will be complete when the Secretary receives the investigator's report and the allegations, based on the investigator's findings, have been referred to the Appointments Committee for consideration. For the avoidance of doubt the independent investigator's report should specify the standards which the conduct of the member is alleged to have breached.

#### **Part 4: Consideration by the Appointments Committee**

33. The role of the Appointments Committee is to consider allegations made against a member, take into account any documentary evidence, hear any representations made by the member or the complainant, decide whether some or all of the allegations are proven on the balance of probability and if so, decide the sanction to be imposed. At all times the underpinning concern of the Appointments Committee will be to ensure that public confidence in the regulation of the dental profession is maintained.
34. Cases will reach the Appointments Committee via:
  - a. the Chair in accordance with paragraph 17f above in which case there will have been a prior independent investigation.
  - b. the Chair in accordance with paragraph 17g above in which case there will not have been a prior independent investigation.
  - c. the operation of the capability procedure where consistently poor performance has not been remedied by the member.
35. The Secretary will, within 3 working days of receiving the information in paragraph 32 above, or as soon as practicable in the case of complaints to the Appointments Committee which have not been subject to independent investigation, write to the member who is the subject of the complaint to the Appointments Committee:
  - (a) setting out the details of the complaint, the allegations to be considered by the Appointments Committee and including all relevant documents including the independent investigator's report (where one has been commissioned by the Chair) and those documents which will be referred to by the Appointments Committee when considering the complaint;
  - (b) telling the member that, if the complaint is found to be true, s/he could be removed from office;
  - (c) telling the member that the Appointments Committee will be considering the complaint, and that the member has a right to be heard before the Appointments Committee or to put his/her case in writing; and

- (d) giving the member 5 working days in which to tell the Secretary that s/he wants to take up the right to a meeting or put his/her case in writing.
36. The Secretary will at the same time as they write to the member write to the person who initiated the complaint telling them that–
- (a) the Committee is considering the complaint; and
  - (b) if there is a meeting, the person who made the complaint may be asked to give evidence before the Appointments Committee.
37. If, following receipt of a letter under paragraph 35, the member requests a meeting with the Appointments Committee, the Secretary will, within 3 working days, establish the date for a meeting of the Appointments Committee.
38. If, following receipt of a letter under paragraph 35, the member does not request a meeting with the Appointments Committee, the Committee may of its own volition invite the member to a meeting or decide to deal with the complaint at an ordinary meeting, taking into account the circumstances of the case.
39. The Secretary will write to the member and the person who made the complaint about any meeting arranged under paragraph 37 or 38 notifying them of the date and providing all the necessary information.
40. If a meeting of the Appointments Committee is held pursuant to paragraphs 37 and 38 above:
- (a) The member shall be given an opportunity to address the Appointments Committee on all points s/he considers to be relevant.
  - (b) The member may be accompanied by a friend who may not be a Council member or an employee of the GDC. The friend may take notes in the meeting but may not speak.
  - (c) The Appointments Committee may proceed to hear the case even if the member is not present.
  - (d) the Appointments Committee shall consider all spoken, written or other evidence, including any independent investigator's report (if available) before reaching its decision.
41. The Appointments Committee must decide whether disciplinary action is justified. If it is decided that the complaint should not be upheld and no formal disciplinary action is justified, then the member will be informed and the matter ends there. If disciplinary action is justified, then the Appointments Committee will need to consider what form this should take. Before taking that decision, the Appointments Committee will take into account:
- a. The member's disciplinary and general record.
  - b. Sanctions awarded in similar circumstances.
  - c. Any mitigation offered by the member.
  - d. Whether the intended disciplinary action is appropriate and proportionate.
  - e. The impact of the decision on the public's confidence in the process for regulating dentists.
42. The Appointments Committee will consider its decision in private and the Secretary will notify the member and the complainant in writing (by email) as soon as possible after the meeting confirming the decision and giving reasons.
43. Where the Appointments Committee decide disciplinary action is justified they may impose one or more of the following penalties:
- (a) hold the complaint to be upheld but decide that no further action is necessary;
  - (b) issue a written warning to the member about their future conduct;
  - (c) require the member to have further training;
  - (d) issue a final written warning to the member about their future conduct;

- (e) in the case of a Chair, remove s/he from that role;
  - (f) if, and only if, it is satisfied that any of the conditions set out in Rule 8(1)(a) - (e) or 8(2) of the General Dental Council (Constitution of Committees) Rules 2009 are fulfilled, suspend the Committee member from office.
  - (g) if, and only if, it is satisfied that any of the conditions set out in Rule 7(1)(a) – (l) inclusive of the General Dental Council (Constitution of Committee Rules) 2009 are fulfilled, remove the Committee member from office;
44. In accordance with the GDC (Constitution of Committees) Rule Order of Council 2009 the decision of the Appointments Committee is final.

## **Part 5: Miscellaneous**

### **Resignation of a member after a complaint has been received**

45. Where a member resigns after a complaint has been received the paperwork relating to the complaint will be placed on the member's file and the case will remain open but all proceedings relating to the complaint shall be terminated with effect from the date the resignation takes effect. The complainant will be advised accordingly.

### **Confidentiality**

46. All the stages in this procedure, and the hearing, will be dealt with confidentially, and any disclosure will only be to the extent necessary to:
- (a) Carry out the investigation, for example, by making enquiries of possible witnesses; and
  - (b) Ensure that GDC media spokespeople are sufficiently briefed to respond in case any details of the complaint do become known outside the GDC.

### **Retention of Documents**

47. All documents created under this procedure shall be kept on the member's file and may be referred to in the event of a further complaint being received, and/or if the member applies for a further term of office on a statutory committee or for membership of Council.

### **Follow up action**

48. Where the Appointments Committee imposes a penalty which has a time limit on it, for example, further training by a certain date, the Secretary will be responsible for ensuring a follow up action is logged and the outcome reported to the Committee.

### **Flowchart**

49. The key elements of the process described in this document are depicted in the flowchart attached as Annex 2.

Approved by the Appointments Committee of the GDC on 1 September 2011

## ANNEX 1: EXTRACT FROM THE GENERAL DENTAL COUNCIL (CONSTITUTION OF COMMITTEES) RULES ORDER OF COUNCIL 2009

### Removal of members from office

- 7.—(1) A member shall be removed from office by the Appointments Committee, if—
- (a) the member resigns, which a member may do at any time by a notice in writing to the chair of the Appointments Committee;
  - (b) in the case of—
    - (i) a member appointed in part because they were a registrant, that member's registration lapses, or
    - (ii) a member appointed in part because they were a lay person, that member ceases to be a lay person;
  - (c) the member becomes a person of the type mentioned in rule 6(a), (b) or (e) to (h)<sup>260</sup> (irrespective of whether or not they subsequently cease to be a person of the type mentioned in those provisions);
  - (d) the member becomes a person of the type mentioned in rule 6(c) or (d)<sup>261</sup>;
  - (e) in the case of a registrant member, the member has become the subject of any investigation or proceedings concerning the member's fitness to practise by the Council, as a result of which--

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<sup>260</sup> 6. (a) has at any time been convicted of an offence involving dishonesty or deception in the United Kingdom and the conviction is not a spent conviction

(b) has at any time been convicted of an offence in the United Kingdom, and—

(i) the final outcome of the proceedings was a sentence of imprisonment or detention, and

(ii) the conviction is not a spent conviction;

(e) at any time has been adjudged bankrupt or sequestration of the person's estate has been awarded, and—

(i) the person has not been discharged, or

(ii) the person is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order under Schedule 4A to the Insolvency Act 1986( ) or Schedule 2A of the Insolvency (Northern Ireland) Order 1989( ) (which relate to bankruptcy restrictions orders and undertakings)

(h) has been included by—

(i) the Independent Barring Board in a barred list (within the meaning of the Safeguarding Vulnerable Groups Act 2006( ) or the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007( )), or

(ii) the Scottish Ministers in the children's list or the adults' list (within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007(k));

<sup>261</sup> 6. (c) has at any time been removed—

(i) from the office of charity trustee or trustee for a charity by an order made by the Charity Commissioners, the Charity Commission, the Charity Commission for Northern Ireland or the High Court on the grounds of any misconduct or mismanagement in the administration of the charity—

(aa) for which the person was responsible or to which the person was privy, or

(bb) which the person by their conduct contributed to or facilitated, or

(ii) under—

(aa) section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990((powers of Court of Session to deal with management of charities), or

(bb) section 34(5)(e) of the Charities and Trustee Investment (Scotland) Act 2005( ) (powers of the Court of Session),

from being concerned with the management or control of any body

(d) has at any time been removed from office as the chair, member, convenor or director of any public body on the grounds, in terms, that it was not in the interests of, or conducive to the good management of, that body that the person should continue to hold that office;

- (i) the member's registration in the register is suspended,
- (ii) the member's name is erased from the register, or
- (iii) the member's registration in the register is made conditional upon the member's compliance with any requirement,

and the proceedings relating to that particular sanction have reached their final outcome;

- (f) in the case of a registrant member, the member has become the subject of any investigation or proceedings relating to an allegation that the person's entry in the register was fraudulently procured or incorrectly made, the final outcome of which is the removal of the person's entry in the register;
- (g) the Appointments Committee is satisfied that the member's level of attendance at meetings of the Committee falls below a minimum level of attendance acceptable to the Appointments Committee, having regard to--
- (h) any recommended minimum levels of attendance that the Council have set in their standing orders, and
- (i) whether or not there were reasonable causes for the member's absences;
- (j) the Appointments Committee is satisfied that the member has failed, without reasonable cause, to undertake satisfactorily the requirements with regard to education and training for members that apply to that member and which the Council have included in their standing orders;
- (k) the Appointments Committee is satisfied that the member is no longer able to perform their duties as a member of the Committee because of adverse physical or mental health;
- (l) the Appointments Committee is satisfied that the member's continued membership of the Committee would be liable to undermine public confidence in the regulation of registrants.

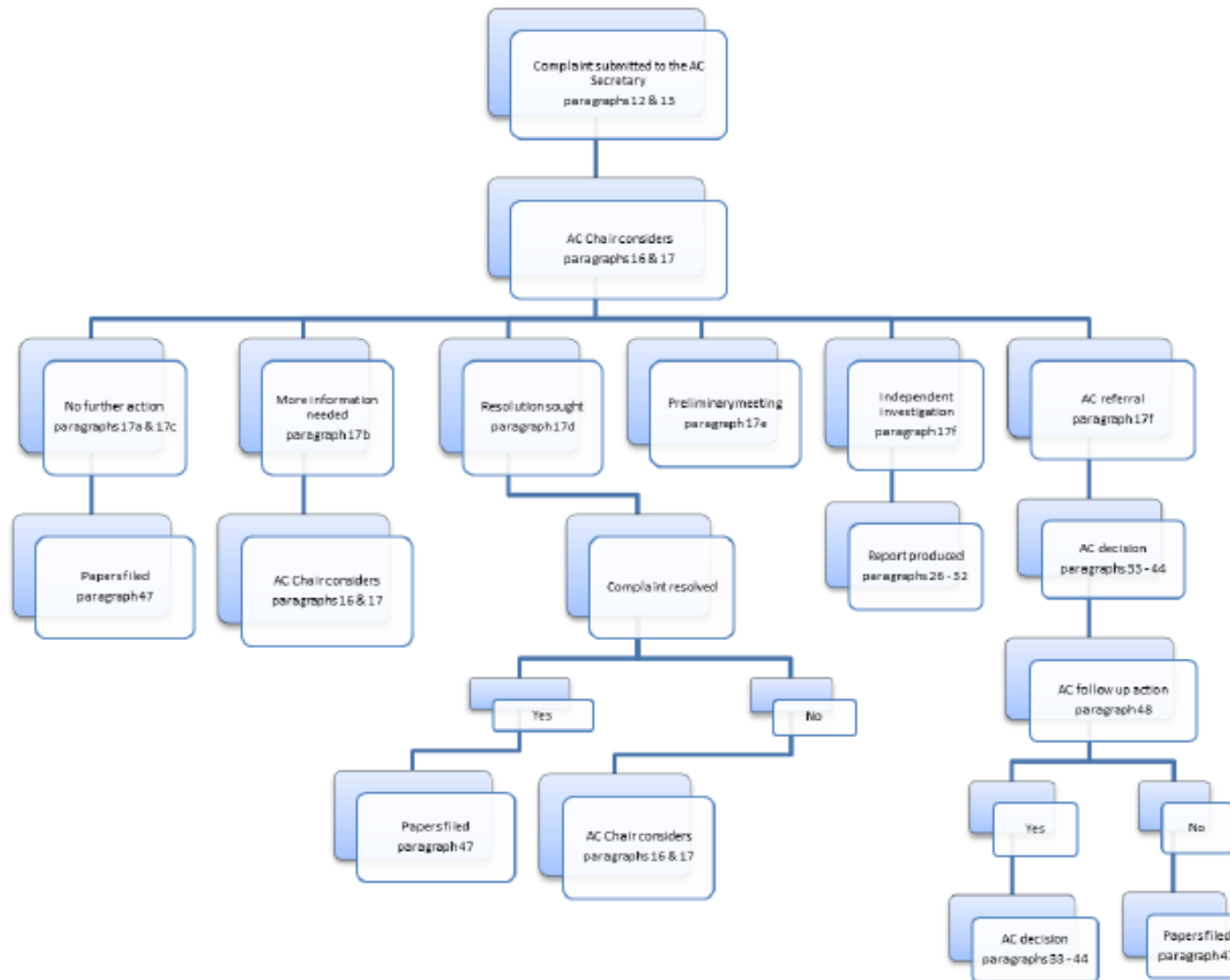
### **Suspension of members from office**

- 8 - (1) The Appointments Committee may suspend a member from office by a notice in writing served on the member--
- (a) if the Appointments Committee has reasonable grounds for suspecting that the member has become a person to whom rule 7(1)(b)(ii) to (d) applies, for the purposes of determining whether or not the member has become such a person;
  - (b) while the Appointments Committee is considering whether or not it is satisfied as to the matters set out in rule 7(1)(g) to (j);
  - (c) if the member is subject to any investigation or proceedings concerning the member's fitness to practise by--
    - (i) any licensing body, or
    - (ii) the Council,and the Appointments Committee is satisfied that it would not be appropriate for the member to continue to participate in proceedings of the Committee while the investigation or proceedings concerning the member's fitness to practise is or are ongoing;
  - (d) if the member is subject to any investigation or proceedings concerning whether the member's entry in the register was fraudulently procured or incorrectly made and the Appointments Committee is satisfied that it would not be appropriate for the member to continue to participate in proceedings of the Committee while the investigation or proceedings is or are ongoing; or
  - (e) if the member is subject to any investigation or proceedings in the United Kingdom relating to a criminal offence, or elsewhere than in the United Kingdom relating to an offence which, if committed in any part of the United Kingdom, would constitute a criminal offence, and--
    - (i) either--
      - (aa) the investigation or proceedings relate to an offence involving dishonesty or deception, or
      - (bb) the final outcome of the investigation or proceedings may be that the person is sentenced to a term of imprisonment (whether suspended or not), and
    - (ii) the Appointments Committee is satisfied that it would not be appropriate for the member to continue to participate in proceedings of the Committee while the investigation or proceedings is or are ongoing.
- (2) The Appointments Committee shall suspend a registrant member from office by a notice in writing served on the member if the member is the subject of an interim suspension order or an order for interim conditional registration.
- (3) The notice in writing under paragraph (1) or (2) shall set out the reasons for the suspension and the duration of the period of suspension, which shall (in the first instance) not be for more than 6 months.
- (4) The Appointments Committee--
- (a) may at any time review a suspension of a member by it; and



- (b) shall review any suspension of a member by it after 3 months from the start of the period of suspension, if requested to do so by the suspended member.
- (5) Following a review, the Appointments Committee may--
    - (a) terminate the suspension;
    - (b) if that review is within 3 months of the end of a period of suspension, extend the suspension for a further period of up to 6 months from the date on which the suspension would otherwise come to an end.
  - (6) The Appointments Committee shall notify the suspended member in writing of the outcome of any review and that notice shall include the reasons for any decision taken.

## Annex 2



## 9. Appendix C: GDC Grievance Policy

### Grievance policy

#### Policy Statement

The GDC recognises that effective working relationships must be based on mutual respect and confidence. Most matters of concern or complaint to employees arise from misunderstandings usually resolvable by clearly communicating decisions and their rationale. However, it is necessary to have procedures to enable more serious grievances to be addressed quickly and fairly.

#### Scope and Purpose

The scope and purpose of the policy is:-

All employees of the GDC have the right to seek redress of any grievance relating to their colleagues, conditions of work or any other aspect of their working life or environment. A grievance is a problem or concern about work, working conditions or relationships with colleagues or with the organisation in general.

Grievances may be caused, for example, by:

- Terms and conditions of employment
- Health & Safety
- Work relations
- Bullying, harassment or victimisation
- Organisational change
- Discrimination

#### Responsibility for Implementation

The responsibility for Implementation of the Policy lies with:

- Human Resources for implementation throughout the GDC;
- Line Managers for implementation within their teams;
- Individual employees in respect of compliance with the procedures described.

#### Policy

The following principles should be adhered to throughout the course of employment:

- staff have the right to be treated with respect, dignity and, in relation to their personal affairs, confidentiality;
- staff are to be treated fairly at all times and in all circumstances;
- procedures and other arrangements relating to employment are to be equitably and properly applied.

It should be noted that where an employee submits allegations which are found to be vexatious, scandalous or malicious, disciplinary action against the employee may be taken.

Where an allegation relates to bullying or harassment this policy and procedure does not apply and the employee is advised to consult the GDC Bullying and Harassment policy which contains specific procedures in relation to the informal resolution of such complaints.

The GDC recognises three separate stages in the grievance process:

- Informal complaint
- Formal grievance
- Appeals process

A flowchart is provided at Annex 1 showing the process in summary form.

At any stage in the process, mediation should be considered. If voluntary mediation is agreed, the normal grievance process can be suspended meantime.

## Procedure

### Informal Grievance Procedure

Employees are encouraged to attempt resolution of grievances informally where possible and to discuss their concerns as soon as they arise with their line manager or in exceptional circumstances with a more senior manager. In many cases discussion can resolve a grievance swiftly and without recourse to a formal grievance process. However, some grievances may be too serious for informal resolution and in such cases the employee should immediately raise the matter as a formal grievance. Consideration of the grievance at the informal stage is not a prerequisite for a formal complaint.

Where the grievance concerns the employee's line manager, every effort should be made first to resolve it with the individual concerned. If this has failed to achieve a resolution the matter should be raised with a more senior manager.

In an informal process the manager with whom the grievance is raised should arrange a meeting at the earliest possible time where the grievance can be discussed fully and confidentially with the aim of reaching amicable resolution.

In the majority of cases individuals will feel confident enough to discuss their concerns on a one-to-one basis with the manager. There may, however, be some situations where the employee may wish to be accompanied by a relevant trade union official or representative or a work colleague. Whilst there is no strict entitlement to accompaniment at an informal meeting the GDC will give serious consideration to this upon request.

The following general principles apply to the meeting:

- The employee will be given the opportunity to fully discuss their concerns and set out how they feel they may be resolved;
- The manager will give full and serious consideration to the concerns raised;
- Where possible the employee and the manager should agree how to resolve any differences, but no agreement may be reached that breaches GDC policy.

The manager should make a note of the meeting and provide a copy to the employee and the Human Resources department. It should include:

- Details of the employee's grievance;
- The manager's response to these concerns;
- Where the grievance is upheld, any action necessary to redress the situation;
- Any further concerns that the employee may have.

## Formal Grievance Procedure

The formal process should be adopted where:

- the grievance cannot be resolved at the informal meeting; or
- the employee wishes the grievance to be considered through the formal process, or;
- the manager considers the grievance too complex or serious for an informal approach, or;
- actions agreed to remedy a grievance at the informal stage have not been taken, or;
- there are unresolved issues following an informal grievance meeting

The employee should record the grievance in writing, using the GDC 'Grievance Form', (see Annex 2) and send this to Human Resources. Supplementary or more detailed information can be included with the form if necessary.

The Human Resources department will acknowledge the grievance, normally within five working days of receipt and arrange a grievance hearing as provided below.

## The Grievance Hearing

The meeting will be chaired, where appropriate, by the employee's line manager, or by another manager nominated by the Human Resources department. A member of the Human Resources department will keep minutes of the hearing. A copy of the minutes will be provided to the employee as soon as possible after the hearing.

The employee will be invited in writing, by letter or email, to attend the grievance hearing. This will:

- a) confirm that the purpose of the hearing is to consider the employee's grievance;
- b) give the employee a minimum of five working days' notice of the hearing;
- c) specify the time date and place of the hearing;
- d) specify who will attend and who will chair the hearing;
- e) explain the employee's right to be accompanied at the hearing (see Role of Companion below)
- f) identify any reasonable adjustments that may be helpful at the hearing and whether any interpreter is needed.

Where the employee or companion is unable to attend a grievance hearing it will be rescheduled to a suitable date, normally within five days of the original date. Where the employee fails to attend the hearing without good reason it may be conducted in the employee's absence.

The hearing will normally proceed as follows:

- The Chair of the hearing shall confirm the purpose of the meeting, explain how it will proceed and identify all those present;
- The employee will be invited to explain the grievance, elaborate on the information provided in the Grievance Form and to put forward any proposals for how the matter should be resolved;
- Relevant documentation will be introduced;
- If witnesses are called they shall only be present whilst giving their evidence;
- Witnesses may be questioned by the employee, employee's companion or the Chair;

- The Chair will summarise each key point relating to the grievance lodged, and test the allegations made by questioning the employee;
- The hearing will be adjourned whilst the Chair, assisted by Human Resources reaches a decision. If time is required in order to reach a decision the employee will be notified accordingly. If a hearing is adjourned to allow for an investigation, then the results of the investigation will be disclosed to the employee and the employee will be given the opportunity to respond to them with, if necessary, supporting documentation and witnesses once the hearing is resumed.
- The decision will be given verbally to both parties when the hearing is reconvened.
- If it seems likely that time will be needed to carefully consider the matter before a decision is reached, the hearing should be suspended and the employee informed. This should then be confirmed in writing within four working days of the end of the hearing;
- Whether or not the decision is advised verbally at the end of the hearing it must be confirmed in writing, normally within five working days of the decision being reached.

The hearing may be adjourned if necessary for the purpose of further investigation as set out below. The results of the investigation will be disclosed to the employee prior to the hearing reconvening so as to allow opportunity for studying the findings. It is the Chair's responsibility to ensure that hearings are fairly conducted. It is also essential that matters are considered with precision and that time is not wasted. The Chair has a critical role in creating an appropriate environment.

Once all the relevant information has been collected the hearing will be adjourned while a decision is reached. A decision will be made as quickly as reasonably practicable and communicated in writing to the employee. A decision on the grievance should normally also set out the action intended to be taken if the grievance is upheld in whole or in part (including any general steps by the GDC e.g. reviewing part of a Policy or Procedure). It should also notify the employee of the right of appeal and the right to be accompanied at an appeal.

### **Investigation**

Where prior to or during the course of a grievance hearing it is considered that further information is required to give proper consideration to the matter, an investigation will be arranged.

Where possible the investigation should be conducted by someone other than the manager who is hearing the grievance in order to ensure independence. The investigation may take the form of a review of relevant documents and records and/or interviews with other managers and potential witnesses. It should be noted that the investigator is not required to "prove" the case but merely to gather and record all evidence relating to the matter.

Where the grievance relates to the actions, conduct, performance or decisions of other employees these employees will be notified of the allegations concerning them and they will be interviewed by the investigator. Where an investigation indicates that there may be a case for disciplinary action the investigating officer should report those indications to a member of the Human Resources team who will consider what action to take. Consideration of the grievance will be made separately from any disciplinary action.

### **Appeal**

An employee who is unhappy with the findings after the grievance hearing or the proposed remedy may submit an appeal. Notice of appeal must be submitted:



- within 5 working days of the receipt of the grievance decision,
- to the person indicated in the decision letter.

When lodging an appeal, the employee should:

- state the grounds of appeal
- identify any alleged procedural failings
- identify any new substantial evidence which has come to light since the hearing

The appeal may comprise a review of the decision made or involve a re-hearing depending on the grounds of the appeal.

There will be an appeal hearing which will normally take place within 14 days of receipt of the employee's written notice of appeal. The employee will be notified in advance of the time and place of the hearing. The employee must attend the meeting if reasonably possible. As at the grievance hearing, the employee has the right to be accompanied (see Annex 3) and to have the hearing postponed.

Wherever reasonably practicable the appeal meeting will be conducted by someone senior to the person who made the decision appealed against.

In attendance at the Appeal will be:-

- A Manager considering it (Chair)
- A representative from the Human Resources team
- The employee together with a companion (see Role of Companion below)

The outcome of the appeal should be notified to the individual concerned and the employee told that there are no further stages in the process.

### **Potential outcomes from a grievance claim**

#### **The grievance is upheld**

In the event that the grievance is upheld it is up to the manager conducting the hearing or appeal to decide upon the action to be taken to remedy the grievance.

#### **Inconclusive Outcome**

Evidence in grievance complaints can sometimes rely purely on one person's word against another's. In these circumstances, it is imperative that all parties are clear about the standards of behaviour expected by the GDC, and where appropriate, action will be taken to ensure that the professional relationship of the parties is addressed.

In some instances, it may be appropriate for the parties to undergo training to help restore sound professional relationships. Such action should not be considered a detriment or sanction against either party, but a proactive step to prevent a recurrence of difficulties.

An inconclusive outcome is possible which may include a finding that there was some fault on the part of both the complainant and those against whom the complaint was made. In this context, any proposed remedies can reflect that finding.

#### **Vexatious or malicious allegations**

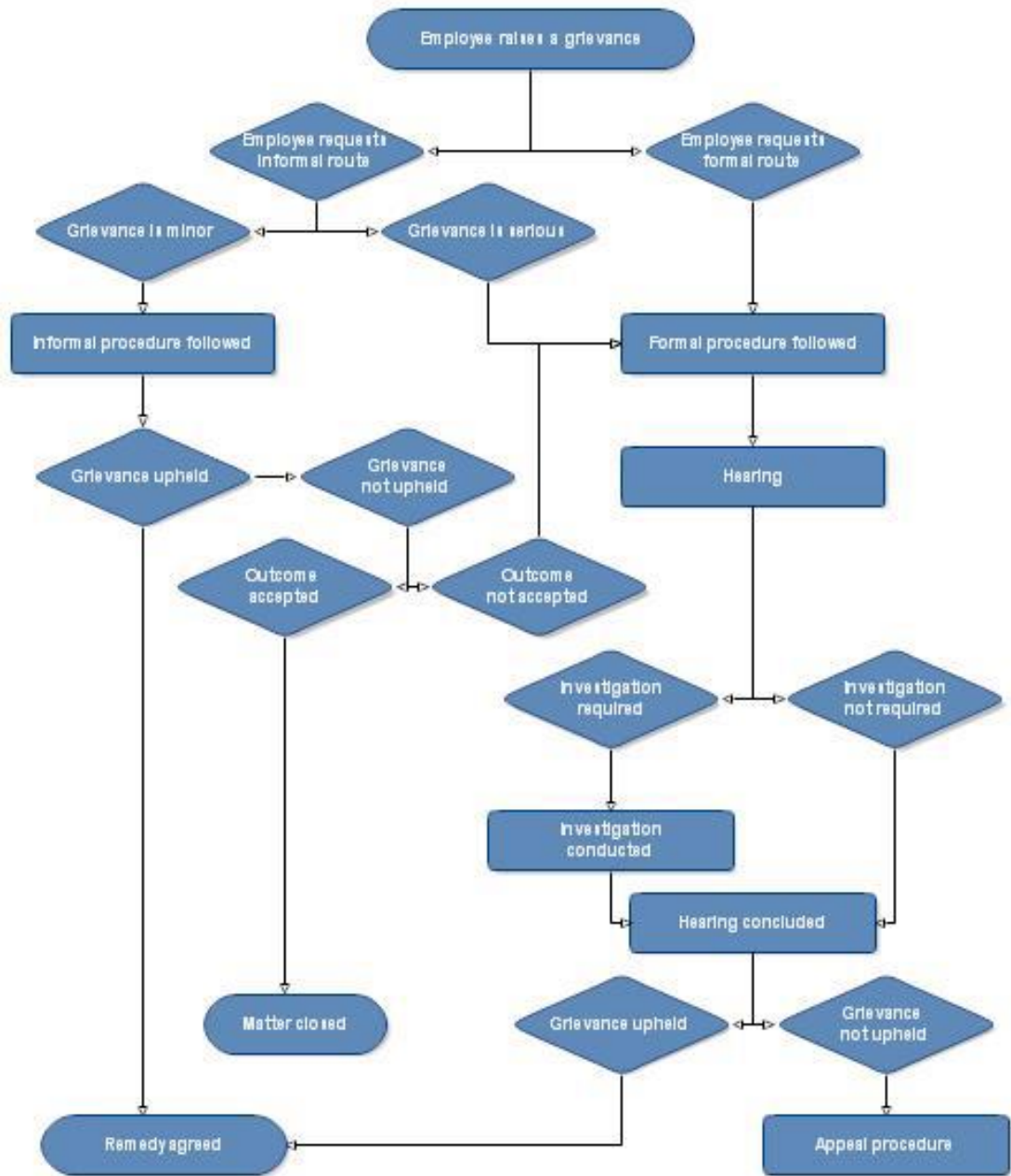
Evidence may be uncovered that suggests that a complaint has been made maliciously. In circumstances, where there is evidence of any false allegation against another employee, disciplinary action will be considered.

**Disciplinary proceedings**

Disciplinary Proceedings under the Disciplinary Procedures are to be kept separate from any proceedings implemented under the Grievance Procedures.

**Confidentiality**

To preserve confidentiality and ensure that there is a totally independent approach to proceedings, the employee involved in any Grievance implemented under these Procedures should not discuss the proceedings or any issues relating thereto with any other employee or Committee member unless they are directly involved in the case.



## Grievance Form

This form is designed to help GDC clearly understand the nature of your complaint. This form should be used in conjunction with either the GDC's '**Grievance Procedure.**' You should complete and return the form to the Human Resources. All cases will be dealt with sympathetically and in confidence.

**[Please note the form has not been included]**

## Role of companion

The employee has the right to be accompanied at a hearing by a fellow worker, Staff Forum representative or trade union official or trade union representative certified as being trained to perform this role (the "companion"). The employee's companion has the right to address the hearing; to put the employee's case; to sum up the case and to respond on the employee's behalf to any view expressed at the hearing. The companion may also confer with the employee during the hearing. However, there is no requirement for the employer to permit the companion to answer questions on behalf of the employee, or to address the hearing where the employee indicates that he/she does not wish this.

If the chosen companion cannot attend on a proposed date the employee can offer an alternative time and date so long as it is reasonable.

The chosen companion has a statutory right to speak at a hearing, **but not to answer questions for the employee.** The companion will be permitted reasonable time to speak privately with the employee.

The employee's right to be accompanied also depends upon the employee making a reasonable request (e.g. not for a companion who has been abusive or threatening to others involved).