General Dental Council consultation on the dentist and dental care professional annual retention fee level for 2016

Response from the British Dental Association

November 2015
Introduction

1. The British Dental Association is the representative organisation for dentists throughout the UK.

2. We believe that this consultation was complex and, despite the provision of statistical materials, not transparent or easily understandable to average registrants. We have spent some time analysing the data provided and the answers to additional questions we submitted during the consultation period.

3. We append with this consultation response advice from counsel (annex 1) which was commissioned to consider the legality of both the consultation process and the legitimacy of the GDC’s approach to the use of registrants’ funds. The advice concludes that the consultation is arguably unlawful and that there are serious questions about the legality of the way in which the GDC is currently operating. We submit this response to the consultation on a “Without Prejudice” basis to any subsequent actions we may initiate to seek correction of these matters.

4. Below is our response.

Consultation questions

Q1: Based on the principle that we will only charge dentists what it costs us to regulate them, do you agree that the ARF for dentists in 2016 should be £890 to enable the GDC to raise sufficient funds to operate effectively?

No.

If you answered no, please explain why.

Please see the answer to question 3.

Q2: Based on the principle that we will only charge dental care professionals what it costs us to regulate them, do you agree that the ARF for Dental Care Professionals in 2016 should be £116 to enable the GDC to raise sufficient funds to operate effectively?

No.

If you answered no, please explain why.

Please see the answer to question 3.

Q3: If you disagree that the 2016 ARF for dentists should be £890 and/or that the ARF for Dental Care Professionals should be £116 please tell us why and indicate the level you consider appropriate.
Our analysis

In informing our response, we have carefully reviewed the information supplied in the consultation document and also sought clarification from the GDC with regard to a number of specific additional questions.

It is our view that this consultation highlights very serious issues in regard to the GDC’s role, approach and legitimacy. There is an absence on the GDC’s part of any real effort to mitigate the costs of regulation of dental professionals. There is also a mis-stated (and also in our view incorrect) requirement on the part of the GDC to collect and retain registrants money both in the form of an excessive reserve account and in the form of large cash balances in the current account.

This causes us to believe that radical and urgent action is required to bring dental regulation under control and to make it appropriate in respect of parliamentary purpose, patient protection and in respect of proportionate, right-touch regulation. This means that the response to this question demands a thorough evaluation of what currently happens and what, in our view, should happen. Only then is it possible to comment on the ARF level proposed and our alternative view.

The request in question 3 of this consultation for a suggested alternative quantum of ARF by respondents is wholly disingenuous. In order to give a meaningful response, individual registrants would need to be acquainted with complex operational details at a level that is totally unrealistic. Rather than asking such a question, the GDC should be making efforts to ensure that the ARF is as low as is absolutely necessary only to discharge its statutory functions.

This observation feeds directly into the separate consultation that the GDC has recently concluded on its corporate strategy. Our view is that instead of seeking to expand its activities, the GDC should be seeking every possible means of reducing what it does and rendering its operation more efficient. It should also be urgently returning previous overpayments to registrants by means of ARF discounts in the forthcoming year. These comments are further supported by the GDC’s conspicuous position as the most expensive and least effective UK healthcare regulator.

We have the following specific observations to make.

A. The GDC’s statutory purpose

The GDC defines its remit, as defined by Parliament, as follows:

- Administering and maintaining a register of dental professionals who meet our standards;
- Investigating complaints and taking appropriate action against dental professionals whose fitness to practise may be impaired or who may be practising illegally;
- Assuring the quality of dental education and training.
B. The GDC’s non-statutory additional chosen activity

Beyond its identified purpose the GDC also chooses to:

- Run the Dental Complaints Service which facilitates the resolution of complaints about private dentistry.

While there is legal permission for this activity, it is not a statutory requirement and could be undertaken elsewhere. We understand the historic reasons why the DCS exists and currently sits within the aegis of the GDC, but believe it is now time to fundamentally reconsider this. We provided comment on this in the GDC’s strategy consultation.

C. Professional Standards Authority (PSA) and Right-Touch Regulation

The Professional Standards Authority has said that regulators should, in the delivery of their activities, fulfil the principles of “right-touch regulation” by adopting the following approaches:

- Identify the problem before the solution
- Quantify the risks
- Get as close to the problem as possible
- Focus on the outcome
- Use regulation only when necessary
- Keep it simple
- Check for unintended consequences
- Review and respond to change.

The PSA also commented upon what it has actually found to be the case in practice. In its paper “Rethinking Regulation” it observed that:

- “Too often we have seen examples of regulatory mission creep, where regulators have sought to expand the boundaries of their activity in ways that have resulted in confusion for the public and internal conflict of interest.”
- “…it is in everybody’s interests that regulation is conducted in as efficient and cost-effective manner as possible. Over-regulation (either in the sense of regulating too many groups, or of excessively onerous regulatory practice) generates unnecessary costs without any additional benefit to the public…”
- “It goes on: “…in particular where regulation demands too much, it may in fact also expose the public to risk of harm…”.

The document advocates a risk based approach to the levels of regulation and proposes the adoption of a “Continuum of Assurance” as depicted in Figure 1 on Page 11 of its document.
● The document gives the considered view of the Professional Standards Authority that; “...in seeking to adjust their focus in the way that we have described... regulators must remember that their concern is not quality improvement, but quality control...”

D. The GDC’s approach

The GDC currently regulates seven groups of registrants. In its own analysis, the GDC has identified clear differences in the nature of the registrants. It has emphasised the different prevalence of patient complaints and of fitness to practise matters within the groups. We would add to this that there are other contextual differences between the groups; examples would be registration activity and CPD requirements.

The consultation document implies there is a different cost to regulating the seven different groups but does not provide the information by individual groups to allow meaningful analysis, such as number of complaints to GDC and DCS by registrant group, the number of FtP hearing days by group, legal cost per group. Without this information it is a meaningless exercise to ask consultees to propose an ARF rate.

The GDC also funds the Dental Complaint Service, a non-statutory system that deals solely with complaints relating to dentistry provided under private contract. This service is funded by all registrants via the ARF.

In its recent draft strategy, the GDC stated as part of its purpose: “If the quality of care or treatment or the behaviour of a registrant is not acceptable, we will investigate a complaint from a patient or other party and take action if appropriate.”
It further stated that it would “use its powers to improve the quality of dental care in the UK,” although this wording has been modified in the latest draft, which is, however, still to be approved.

Contextually, it would appear that the GDC has either not read, or has chosen to ignore the underpinning principles as encapsulated in the will of parliament and the approach defined by the PSA. Expressly, there is no evidence that the GDC has made any consideration of the differing risk experiential profiles of different groups of registrants. There is no evidence that the GDC has made any consideration of the continuum of assurance with a view to making its activities simpler and aligned to the reality of risk.

Instead, at a time when all authorities are pointing towards simplification and narrowing of activity, the GDC is unilaterally seeking to expand its remit. And it is seeking to fund that expansion by an excessively priced annual retention fee.

**E. The GDC’s operational competence**

The adequacy and operational competence of the management of the GDC has been the subject of significant comment in many fora. It has been criticised by the Professional Standards Authority, Government and Parliament and in the High Court. There is, as yet, no evidence to demonstrate that these competency issues have been addressed. The communication methods deployed by the GDC in recent times have demonstrated a preparedness to use inadequate or flawed analyses to justify a particular direction of travel.

Its failure for a long time to acknowledge its own mistakes or failings, and its preparedness to deliberately misrepresent facts (examples being the reporting of the outcome of last year’s court case and of the comments made by the Health Committee of parliament) does not give confidence that the GDC is either a learning organisation or one whose representations on any subject can be trusted.

This background presents a major stumbling block to both the credibility of undertakings made by the regulator, and the accuracy of projections or analyses in the current exercise. Consultees have been presented with a volume of arcane spread sheets, presumptions and projections that seek to justify a budgetary requirement and the corresponding retention fees derived from that requirement.

The difficulty is that this information has been provided by the same body that, a year ago, was found to have based its projections upon dubious statistics and analyses and then to have translated them into an unlawful consultation. There has never been a public apology or recognition of necessary learning or demonstration of insight. In the circumstances, then, it is very difficult to accept that the analyses, propositions and proposals in this consultation are any more reliable than last year – not least when the anticipated projections from last year have failed to materialise. Yet, somehow, the GDC is contending that the 2015 ARF level is deemed to be exactly right also for 2016.

From all of this, the BDA’s conclusion is that there is nothing to convince us that the GDC has improved its capability or that the reasoning in the financial modelling in this document has any credibility whatsoever.
F. The GDC's attitude to reserves

Two years ago, in the initial stages of the ARF review, the GDC described its approach to the retention of large reserves as "a legal duty". In response to a request for evidence of the source of this legal duty, it has confirmed this year that there actually is none. Instead, the GDC now refers to its approach to reserves as "best practice" and "being prudent". It has also implied that its approach has been endorsed by both the National Audit Office and its own auditors.

To deal with the last point first, the sign off by auditors does not endorse an accounting approach. Instead, it merely certifies that the information the auditors have been asked to look at has been reported accurately. The citing of implied external endorsement of its approach is further evidence of the GDC's preparedness to justify its preferred direction of travel with the use of misleading information.

In view of the fact that the approach to reserves is so central to the GDC's budgeting process and its stated funding requirements, we feel obliged to comment on the references to the need for reserves.

In recent responses to questions from the BDA, the GDC has asserted that "A high performing organisation is a financially sound organisation - one that has sufficient reserves in accordance with accountancy best practice".

The retention of reserves is indeed a normal function of financial management. But there is no such thing as generic "best practice". It is the case, rather, that the quantum of reserves required in any organisation should be determined by its operating profile and the risks to which it is exposed. In a normal business, the level of reserves would also be subject to a consideration of whether such retention risked compromising the operational efficiency of the business. In the final analysis the directors would need to weigh the level of prudent reserves against the level of prudent investment in current operations. Having made that analysis, the directors (or in this case the Council members) then need to make a decision about the level of reserves they believe is required. As a result, the truth is that the level of reserves is a choice, it is not a legal duty.

It is our belief that the GDC's portrayal of its choices as either a legal duty, best practice or an unavoidable requirement at a particular level is completely misleading. This misrepresentation is compounded by the suggestion that either the auditors or the National Audit Office have approved the GDC's approach. Similarly the GDC's references to "need" and "prudence" are highly subjective, not absolute justifications.

Beyond the fact of the misrepresentation of the status of the current reserves policy, we believe that the reasoning sitting behind the current policy is also deeply flawed. Our explanation is as follows:

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1 In its call for evidence on the ARF policy review in 2013, the GDC stated the following under point C - When should fees be increased?: “In order to fulfil its statutory functions the GDC needs to ensure that it has sufficient resources. Its only source of income is that which it receives from registrants (sic) fees. As part of this, the GDC is under a legal duty to ensure that it maintains reserves with a range of four to six months of operating expenditure.”

2 In an answer to the BDA’s supplementary questions, the GDC states: “In addition, our statutory auditors and the National Audit Office expect us to maintain reserves at prudent levels, which we have deemed to be the equivalent of 4-6 months’ expenditure.”
a. The GDC’s annual financial cycle

Chart 1 show the GDC’s annual financial cycle in respect of cash over the last three years. It reveals the GDC holding large cash balances throughout the year. At no point within the period have GDC funds fallen anywhere near to zero. Rather, at the lowest point in the last three years (November 2014), the GDC was in possession of £13 million of cash provided by registrants. By December of that year (one month later) it was holding its highest ever cash amount of £41 million.

Like all business, the GDC must spread its income and expenditure over a whole financial year and produce an Income and Expenditure Account. Chart 2 shows the GDC’s representation of its cyclical activity over the period. It gives a misleading picture of
wildly fluctuating operating surpluses and deficits over the cycle. The management accounting principles used that create this impression fundamentally misunderstand the reality of how funds should be recognised and accounted for throughout the year. Such depiction either demonstrates financial naïveté or a manipulation of the data designed to create the impression of an organisation requiring disproportionately high levels of reserves.

Further figures received from the GDC (Table 1) reveal the funding of the building project recently completed at 37 Wimpole Street:

<table>
<thead>
<tr>
<th>Year</th>
<th>Source</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>Per Annual Report and Accounts</td>
<td>£799,000</td>
</tr>
<tr>
<td>2014</td>
<td>Per Annual Report and Accounts</td>
<td>£3,771,000</td>
</tr>
<tr>
<td>2015</td>
<td>Current forecast</td>
<td>£4,340,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>£9,000,000</td>
</tr>
</tbody>
</table>

Table 1

This table demonstrates something closer to the business reality of the GDC. What it reveals is the fact that the GDC was able to find £9 million effectively from petty cash over the period of three years. Any organisation capable of finding cash sums at this level cannot claim to be subject to any evident risk of illiquidity. An organisation that can do this and retain current cash at a level that never falls to a point below £13 million credit is clearly one that is seriously over-funded.

In light of these circumstances, the GDC’s contentions about “best practice”, “prudence” and “need” are all defeated. The organisation’s approach to the management of its current funds is highly questionable, as is its reportage of its income and expenditure. Cash reserves in the current account obviate any real need to hold monies in the reserve account as well even if there was any genuine likelihood of catastrophe (which we also dispute). In short, the approach adopted by the GDC is not prudent (see below) it is profligate with other people’s money.

The GDC must stop using misleading or partial information to justify its position. It should adopt management accounting methodologies that reflect reality rather than biased misrepresentations. It must also adopt a position on reserves that reflects its reality as a cash-rich organisation operating in a stable market with few risks and an ability to impose prices on a captive customer base.

b. The GDC’s exposure to financial risk

Working within a statutory framework and with operations that have a long lead-in and operating cycle, the GDC should be able to accurately anticipate its future workload and demands on its finances with confidence.

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3 Contained in an email received from Graham Masters, GDC Director of Finance and Corporate Services, on 21 October 2015
These levels of exposure bear no comparable relevance to the monetary amounts, neither to those currently held in cash or reserves, nor those proposed for the future.

The GDC’s reserve policy of 2014 cites a number of risks it expects to mitigate through reserves. In summary these are:

- **Business risks** £4m
- **Business continuity** £3m
- **Management failures** £8m
- **Pension fund** £2m
- **Total** £17m

Of these only the business risks can be classed as legitimate. Our concerns on the other categories are as follows:

**Business continuity.** The reserves policy cites “destruction of premises” as one reason for a £3m contingency. This is a standard risk and one that is universally managed through an insurance policy. If the GDC has not insured this risk it risks accusations of incompetence – and poor financial management as £3m reserve is poor value for money against an insurance policy. The other cited risks (IT failure, staff sickness etc. are standard risks; easily mitigated through basic organisational resilience policies and not through reserve policy). There is a further concern of excessive prudence. The prospect of the GDC facing unprecedented legal challenges while failing in its statutory duties (as cited in its “business risk” category) while its headquarters burns down appears somewhat unlikely. Any risk-based policy must consider impact and likelihood. There is a strong argument that the GDC has overestimated the financial impact of the risks it faces. It has certainly not made a realistic assessment of likelihood.

**Management failures.** At £8m this is the largest category, and one that perhaps best reflects the GDC’s own assessment of its abilities. The three risk categories are: a failure to properly budget, a failure to properly manage a capital project and a failure to properly manage an increase in the ARF (the GDC’s unlawful consultation confirmed this risk). 47% of the GDC’s reserve is attributed to these failures. All three events have now passed and with even adequate management should not recur so this contingency could be removed.

**Pension fund.** The GDC’s pension fund remains in surplus so this provision is unnecessary. Should the fund move into deficit the Pension Regulator allows a ten-year recovery period for the employer to bring the fund back to a properly funded level. This could be managed through the GDC’s I&E rather than through a contingency that may never be needed.

The policy states: “*The current approach suggests that reserves equivalent of up to 6 months operating expenditure should be provided, broadly covering the cost of an orderly winding down of the organisation*”. This policy statement does not reflect the reality of the GDC’s position. Should the GDC be wound down it is likely that its responsibilities will pass to another body, along with a transfer of its assets. It would be
reasonable to expect a managed transfer that would not require the deployment of six month’s expenditure simply to transfer staff and responsibilities. In the unlikely event of an unexpected wind up the GDC would not need to rely on reserves. It is operating from a valuable building which would be sold as part of the process.

This overfunding is compounded by the GDC’s decision and ability to spend current resources on the building works to the value of £9 million. Although the reserves are cited as a prudent provision against unexpected events, the Council felt any threat to be so unlikely that it could withdraw £9m from reserves. Had this activity been funded (in our view more wisely) via a mortgage, this £9 million would have remained in the reserve, removing any need to generate the proposed surplus in order to rebuild reserves.

It is our contention that none of the risks discussed were, or would be, unpredictable or unknowable. If any of them came as a surprise to the GDC then that is rather a matter of poor anticipatory management. Indeed the expenditure of the £9 million, even though it did include some unexpected costs, was actually a matter of management choice rather than one of external influence. All of the matters described here could have been managed either by careful housekeeping or by advance financial planning.

With regard to complaints it is clear that there is only a two per cent rise in projected complaints for 2016. This figure is unexplained. The “unexpected” nature of the increase in complaints in 2012 (44%) and 2013 (31%) has never been satisfactorily explained and due diligence and prudence would demand an analysis and explanation to allow the management or prevent unexpected increases in the future. The numbers of cases that are filtered by the various steps in the fitness to practise process are an indication of how consistently and rigorously caseworkers apply their criteria. That may well be an explanation for the rise in the two consecutive years.

The failure of these normal management functions cannot be used as a justification for the retention of large reserves funded from the pockets of registrants. In the absence of any other types of risk identified by the GDC there is no justification for reserves on this scale.

There is one final significant concern. The GDC’s excessive approach to reserves sits alongside its determination to exceed its statutory responsibilities and continually expand its activities. Each unnecessary expansion exposes the GDC to increased risk and necessitates an increase in its reserve both as a consequence of the risk and in line with its desire for 4-6 months expenditure. Registrants are therefore being charged twice for the GDC’s ambitions; for the development of unnecessary functions and for the reserves to underwrite them.

c. **The GDC’s ability to restore financial viability**

In light of the shape of the GDC’s financial profile, it is inconceivable that it will ever run out of cash. If, remarkably, that ever did happen, the Management Team should have projected its financial performance, considered its future needs and consulted on new ARF levels. The GDC begins drawing down dentists’ ARF payments towards the end of November and completes the process before the end of December (to permit no break in the continuity of dentists’ registration). The GDC has always been a very long way from suffering illiquidity but were such circumstances to present, it would last only a matter of weeks and would be unlikely to rise to a significant level before cash influx neutralised it.
Indeed its own paper accompanying its review of the reserves policy last year stated: “During 2014, cash balances plus investments realisable within seven days, will range from around £43m in January 2013 (sic) to an expected low of £11m in November, before increasing rapidly again in December. This trend is repeated annually and would only be affected by large one off costs, such as the re-development of 37 Wimpole Street.”

d. The reality of necessary reserve levels

From the analysis above, it is clear that the true level of financial exposure to the GDC in any given period never extends into cash illiquidity. Similarly, if the GDC were to more accurately represent its income and expenditure over the course of a year, it would reveal that there is never a real threat of significant I&E deficit. Beyond this, the GDC has also been able to dissipate large amounts of “available resources” on a management whim.

It is our contention that the GDC has presented no credible justification for anything but the smallest of reserves. On objective review of its own risk analysis shows that only £4m of its reserve is justified. This equates to approximately 10% of its turnover – a more appropriate reserve for a stable, monopoly organisation of this type.

e. The GDC’s definition of reserves

The GDC calculates its reserve as £8.6m. This does not include any increase in value of its investments on the specious grounds that this increase has not been realised (these investments form part of the general reserve so must be considered “near cash”. In this case it seems perverse not to assess their actual value when calculating reserves). The GDC also does not include the surplus on its pension fund in its reserve calculations. Its own statutory accounts concede that this surplus is not restricted as the GDC can obtain the full economic benefit from it (Statutory accounts 2014 Note 19 page 64). This sum therefore can and should form part of the GDC’s reserve calculation. This brings the GDC’s reserve to nearly £13m.

f. The significance of this analysis

On the basis of this analysis, the GDC’s reserve account is already substantially over-funded to the extent of nearly £9 million and its aspiration to add another £2.2 million in the next financial year is unjustified. Beyond these identified reserves, there is also a de facto cash reserve sitting in the GDC’s current account – an amount that has never been lower than £13 million. It is our view that these collected cash and reserve assets currently represent massive over-funding of the GDC.

G. The GDC’s strategy

The recent consultation on the draft GDC Strategy for 2016-19 revealed an ambition on the part of the GDC to extend its remit and activity well beyond the statutory framework in which it operates. This ambition is at odds with the Professional Standards Authority assessment of the current regulatory landscape which it considers costly, intrusive and
ineffective. The PSA further observes that regulators should be dissuaded from inappropriate expansion and should instead stick within the framework described by parliament. Its recommendations are that, if anything, current regulatory frameworks should be simplified and made smaller.

In addition, the UK government is participating in the European Union’s transparency exercise, looking at the proportionality of regulation of professions, and the government is likely to have its own strategy for the future in this regard.

We quote the government document ‘Enabling Excellence’ from 2011, which stated: “Given the need for pay restraint amongst the health and social care professions, the Government would not expect registration fees to increase beyond their current levels, unless there is a clear and robust business case that any increase is essential to ensure the exercise of statutory duties.”

This clearly underlines the fact that registration fees are paid only for the exercise of statutory duty by the regulators, and nothing more.

Hence, it must be noted that the ambitions expressed by the GDC are in diametric opposition to wider public policy developments. As a result they must be seen as organisationally motivated rather than driven to assist the public or to augment the will of wider policy makers. The fact that these moves are to be funded by unreasonably expensive annual retention fees from registrants makes the propositions even more indefensible.

Were the GDC to be funded through governmental bodies, it is our contention that these contra-public-policy proposals would be rejected and would not receive funding. If that contention is true then neither should they be funded by registrants.

H. The validity of intent behind this consultation

This consultation was launched on 6th October and has been given a four-week window – closing on the 3rd November. In response to a question of the GDC we have been advised that the GDC has no intention to commence collection of ARFs until the Council have had a chance to consider the responses. The Council is scheduled to meet on the 4th November (the day after the consultation closes). There is no other scheduled date for the Council to meet and a five-minute ‘oral update’ has been set aside in the section of items for noting. From last year’s court case we are aware that for the GDC’s ARF collection mechanism to be implemented in time to draw down the ARFs, the quantum must be agreed 56 days before the deadline for payments (i.e. 31 December). Also from last year’s submissions in the High Court, we are aware that the GDC considers that any attempt to retrospectively correct overpayments will result in administrative chaos (a direct quote from the submissions made in court on the GDC’s behalf) and would expose the GDC to potential financial ruin. In light of what is now visible, the GDC should be put to proof of how, in court, it was able to put forward such a risk.

Such a tight timeframe and the inability on the part of the GDC to correct the payments leads us to believe that this whole consultation is disingenuous. Counsel’s opinion, attached herewith at annex 1, confirms this view.
It is our belief that the GDC will either proceed with what it has already announced or will make modest adjustments (that it may have already pre-determined). In light of the many flaws identified here will merely compound the misbehaviour of the GDC; more evidence of the disconnect between the regulator and those whom it seeks to regulate.

I. What the GDC should do

1. Immediately revisit the GDC’s Reserves Policy and apply realistic thresholds in light of the real business dynamic of the organisation.

2. Reduce the GDC’s determined Reserve Policy to 10% of turnover.

3. Redeploy all other reserve funds currently held in reserve to subsidise current operations, thereby releasing £9 million to fund next year’s operations.

4. Remove the budget requirement from next year’s budget to add a further £2.2 million to the reserves.

5. In light of points three and four, deduct £11.2 million from the funding requirement in 2016.

5. Put in place more transparent management accounting methods that give a clearer view to directors in the assessment of the organisation’s true needs. Accounting policies that reflect distributed cost and income throughout the year would give a far more accurate depiction of reality.

7. Scale down the size and pace of investments in Registration and Quality Assurance processes anticipated in the budget requirement, making further savings. If there are elements of the activity that can be capitalised, capitalise them and fund them via a commercial mortgage.

8. Understand that the GDC is a regulator and not a complaints body nor a quality improver, by:

   a. Ceasing the use of the expression “Fitness to Practise Complaints” for all complaints received – this term demonstrates a fundamental misunderstanding of the GDC’s function

   b. Not moving forward with the expansion of the DCS while the ongoing discussion and debate continues about how complaints processes should work for the benefit of all concerned.

10. Undertake a fundamental review of the GDC’s approach to regulation in line with the PSA’s model of the continuum of assurance. In doing so, the GDC should consider whether its current dependency upon full statutory regulation for all registrant groups is necessary and proportionate.

11. Undertake a full and independent review of the GDC’s management competencies and report the findings to the registrant base. Only when those spending the money have been validated to those who are paying it will there be any chance of restoring belief in the competency of the regulator.
12. Put in place transparent service procurement systems in order to demonstrate to registrants that all procurement decisions can be independently interrogated to check best price and value for money. This will allow genuine appraisal in the future of proposed service investments by those who will fund them, that is, the registrants.

H. The proposed ARF levels

At the head of this response, the BDA has indicated the difficulty that any registrant will have in making a meaningful suggestion of an alternative level for ARF. Within this document we have demonstrated straightforward and immediate ways that the GDC can reduce the cost and complexity of its operations while focusing on its core functions. These proposals would make significant savings within 2016 and 2017. In recognition of these changes we would propose that the ARF for dentists be reduced in 2016 by a figure of around £400. It is our belief that a reduction on this scale is achievable immediately by simply returning monies that have been inappropriately taken from registrants, by rescheduling developments at the GDC in line with more reasonable business practice and by adopting a more realistic approach to business cash-flows. The breakdown of these figures is summarised below.

Funds available

<table>
<thead>
<tr>
<th>Source of funds to permit reduction of ARF 2016</th>
<th>Total of funds available</th>
</tr>
</thead>
<tbody>
<tr>
<td>Repayment of amassed reserves to end 2015</td>
<td>£9 million</td>
</tr>
<tr>
<td>Removal of budgeted reserves contribution in 2016 budget</td>
<td>£2.2 million</td>
</tr>
<tr>
<td>Rescheduling developments works in Registration and QA</td>
<td>£1 million</td>
</tr>
<tr>
<td>Capitalisation of major works and funding via commercial mortgage</td>
<td>£1 million</td>
</tr>
<tr>
<td>Acceptance of residual operating cash balances to fall to £5-10 million per month</td>
<td>£2.5 million</td>
</tr>
<tr>
<td>(highly prudent estimate)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>£15.7 million</td>
</tr>
</tbody>
</table>

Table 2

Redistribution of Funds

We do not have confidence in the way the differential ARFs are currently apportioned between dentists and DCPs and we believe that the GDC has significantly more work to do in examining how it calculates its fees in light of risk and proportionality. Accordingly we do not feel able to offer a substitute figure with regard to the ARF for DCPs. We do however believe that with ready and straightforward savings to be made on this scale very quickly, it would be reasonable as a first step to reduce the ARF for dentists by approximately £400. This would bring the ARF for dentists to a figure of not more than £500. As charts 3 and 4 below demonstrate this would bring the ARF for dentists to a level that is still higher than all but the relatively high risk groups of professionals. We
believe that there is still work to be done by the GDC in moderating its expenditure and reviewing its activities and would therefore expect substantial further reductions to be made in 2017 which would bring the cost of regulation in dentistry to a level that is more commensurate with other comparable healthcare professions.

**Summary answer to Question 3**

The GDC should set the ARF for dentists in 2016 at a figure not greater than £500. It should then set about immediate work to make further substantial reductions in 2017.

British Dental Association
November 2015
IN THE MATTER OF A PROPOSED CLAIM FOR JUDICIAL REVIEW

BETWEEN

Rota BRITISH DENTAL ASSOCIATION

-and-

GENERAL DENTAL COUNCIL

ADVICE

1. I am asked to advise the British Dental Association (“BDA”) on the instructions of Hempsons Solicitors with respect to the lawfulness of the General Dental Council (“GDC”)’s “exceptional” consultation in respect of the Annual Retention Fee (“ARF”) for 2016. That consultation was launched by the GDC on 6th October 2015 and runs for four weeks until 3rd November 2015.

Context of consultation

2. The current consultation: “Consultation on the dentist and dental care professional annual retention fee level for 2016”, proposes that the ARF for dentists and DCPs be held at the same level as 2015 viz. £890 for dentists and £116 for DCPs. The Executive Summary on page 1/33 sets out the GDC’s stated commitments as:-
   (i) a commitment to transparency in the determining of the ARF;
   (ii) a commitment to setting the ARF at a level that is “no higher than is needed to do our work” effectively.

1 £945 had been proposed in the 2015 ARF consultation. On 30 October 2014 the GDC decided that the retention fee for dentists for 2015 should be £890 and for dental care professionals, £116. As recorded at paragraph 30 of the High Court judgment, one reason that the amounts were lower than those proposed in the consultation document was that the GDC had by then reduced its estimates of the number of complaints received in 2016 and 2017. The GDC restated that the primary driver for the increase in operational expenditure was the increase in complaints about the fitness to practise of dental professionals, mainly dentists.

2 There is a subtle but importance difference between “our work” and the statutory obligations on the GDC in respect of regulation. The GDC’s stated approach in its policy document Report on the Outcome of the
3. The consultation also sets out the key basis of the maintenance of the current fee level viz.: to rebuild reserves to former levels (4-6 months worth of operating income) while tackling an increased number of complaints.

4. At page 5/33 of the Consultation documents a table is produced of past actual and future predicted complaint numbers. No reference is made to the similar table in the 2015 ARF Consultation, which received so much criticism in the former litigation (R(BDA) –v- GDC [2014] EWHC 4311 (Admin) (see below), and which over-predicted complaints for 2015 (by reference to the current figures produced in the 2016 consultation) by 12% and 21.3% respectively.

5. At 8/33 the Consultation document states that “The GDC can reduce the gap between its income and expenditure by using financial reserves that have been built up over time in accordance with our Reserves policy. We have used these financial reserves to reduce the gap between our income and expenditure at certain points over the past three years”. The Reserves policy is not attached to the Consultation but one dated 4th December 2014 is available on the GDC website. If there is an updated policy, I have not been able to locate it.

6. It is further stated that these reserves are “below prudent levels” and that “we need to re-build them to move to within the range stated in our reserves policy”. It is then stated:-

“Our projected budget suggests that the level of expenditure needed to operate effectively for the year ahead, the current level of reserves and the uncertain nature of the other assets on the GDC balance sheet indicates that the GDC is not able to propose a reduced ARF for 2016”

7. An ordinary interpretation of this statement tells consultees that there really is no option other than maintaining current levels. Consultees are consultation on the Annual Retention Fee Policy (2014) is that the ARF policy is premised on the principle that the ARF “should be calculated according to the cost to us of regulating dental professionals” (Qu6, p13). The GDC is the statutory regulator of dental professionals, but its work in relation to the DCS (the dental complaints services) is not part of its core obligation and is discretionary. The DCS is funded by, but independent of the GDC and was established in 2006. An amendment to the Dentists Act 1984 - the Dentists Act Amendment Order 2005 resulted in the current s.2D(1) which provides that “(1) The Council may incur expenditure for the purposes of investigating and resolving dental complaints.” Since 2006 therefore, at least part of the ARF which is prescribed every year under s.19 of the Dentists Act, is not for regulating the profession but for funding the DCS. This is not reflected in the ARF policy statement of 2014 in relation to the ARF which focuses on the narrower remit of regulating dental professionals. The distinction between its core statutory functions and the discretionary DCS functions is set out at p.3/33 of the Consultation document. According to p.4/33 of the Consultation document the sum in respect of the DCS for 2016, is £800,000 set against an overall budget of £44.3m – just under 2%.

3 See Table 2, p.9 2015 consultation,
4 3500 in last year’s consultation (based on what was stated to be current trends) is now predicted at 3079 a 12 % reduction and 4000 in last year’s consultation paper is predicted at 3148 a 21.3% reduction.
thus told that the decision is effectively pre-determined by the Reserves policy. Nonetheless, the Consultation document, by way of a nod to principles of fair consultation (viz. that a consultation should be undertaken at a formative stage), asks the following question at 11/33 of the Consultation:

“3. If you disagree that the 2016 ARF for dentists should be £890 and/or that the ARF for Dental Care Professionals should be £116 please tell us why and indicate the level you consider appropriate”.

8. It is quite difficult to understand, based on the information contained in the consultation document and published alongside it, how an intelligent member of the profession is supposed to argue for a level different from that set out in the consultation document, unless armed with some detailed additional financial information not presented in the consultation, or unless the Reserves policy, which pre-determines the outcome is open for discussion. No arguable, yet rejected alternatives, are set out for the consultee to consider.

Principles of Lawful consultation

9. As was held by Cranston J. in R(BDA) v. GDC, [2014] EWHC 4311 (Admin) once consultation is embarked upon (as here) it must be conducted fairly. The principles of fair consultation are now helpfully summarized in the case of R(Moseley) v. Haringey Borough Council [2014] 1 WLR 3947:-

(i) Consultation must be at a time when proposals are still at a formative stage;

(ii) The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;

(iii) Adequate time must be given for consideration and response;

(iv) The product of consultation must be conscientiously considered.

10. That case also underlined that (see per Lord Wilson at 28):-

“even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options.”

Background and R(BDA) v. GDC [2014] EWHC 4311 (Admin)

11. The context of the present consultation must be seen in the light of the successful legal challenge to the 2015 ARF consultation brought by the BDA. In that decision (which was not appealed by the GDC) the Court held that:-

5 The so-called Gunning or Sedley principles, now endorsed by the Supreme Court at paragraph 25 of the judgment of Lord Wilson.
(i) although there was no statutory duty to consult, the GDC had committed themselves to a consultation process.
(ii) Once embarked upon, that consultation was required by law to be a fair one.
(iii) The consultation carried out by the GDC was unfair because it was not transparent, in particular, there was a failure to provide sufficient information about what the projected increase in fitness to practise hearings was based on and a failure to explain the position to consultees in clear and accessible terms.

12. As a result the consultation was declared unlawful.

13. Despite the unlawfulness of the consultation, the GDC avoided the usual consequence of having to collect only that sum which had been lawfully consulted upon, viz. the £576 figure, by arguing before the Court that
   (a) Although it had said it would consult on any increase to the ARF, it would be “quite impossible to consult on any new level in time to make new regulations and giving notice of a different fee, and therefore the GDC would be precluded from increasing the ARF level”;
   (b) That the GDC’s assessment was that “if it charges dentists at the 2010 ARF level, after divesting itself of all investments, the Defendant will have exhausted its reserves and have no funds at all to continue its work by August 2015”, and this would be “unjust and cause real harm to the public interest.”

14. The GDC’s “assessment” that if an ARF of only £576 as opposed to £890 was collected in November-December 2015, then the GDC would have exhausted its reserves by August 2015 was never disclosed. It is a surprising one. On the figures now disclosed in the 2016 consultation a fee to dentists of £576 and DCPs of £120 would have brought in an income of £31.6m (i.e the same as the 2014 income) which would be in addition to the £2.2m from exam fees and investments: a total of £33.8m. General reserves for 2014 stood at £8.7m with an additional £1.4m of unrealised value of investments that would form part of the general reserve if the equities were sold. This brings the total reserve to £10.1m, making a total sum of £43.9m against a predicted expenditure in the Q2 projection for 2015 of £44.9m. On my calculation, the result is only a £1m deficit by the year end and that deficit only occurring in December. But in fact it is very unlikely that the balance would ever have fallen into deficit because from each November, income in respect of ARF for the next financial year starts to be credited to the GDC’s account by direct debit at the ARF level set by the GDC in the fee regulations which are historically laid in November.

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6 Back in 2010
7 GDC’s submissions to the Court on relief paragraph 9(3).
8 See Annex 1 of the 2016 Consultation, p.12-25/33, Draft Budget for 2016
9 Q2 Forecast figures, p.14/33 of the 2016 Consultation
15. Whatever the validity of the assessment above, the upshot of last year’s court proceedings is that:

(i) despite a commitment to transparent consultation in respect of any ARF rise as recognised by the Court, the GDC failed to carry out a fair consultation in 2015 in respect of the increase from £576 to £890. In short, there has been no lawful consultation with respect to that very substantial fee rise.

(ii) The commitment to transparent consultation about that substantial fee rise has still not been discharged, unless it can be said by the GDC that the present consultation discharges that obligation.

Does the present consultation make good the deficiency of the former consultation? Is it a lawful consultation in its own right?

16. For reasons set out shortly below I do not consider that the current 4 week consultation (apparently scheduled for consideration by the GDC within days of the closure of the consultation) either (i) remedies the earlier defective consultation in respect of the ARF rise from £576 to £890; or (ii) is lawful in its own right.

Reasons

17. First, one might have thought the GDC having had the earlier consultation declared unlawful by the High Court would have:

(i) acknowledged the fact in the present consultation;

(ii) carried out the necessary full and fair consultation which should be the precursor of a substantial fee rise.

18. Neither is the case. There is no mention whatever in the 2016 consultation of the fact that the ARF rise from £576 to £890 was based on a consultation which the Court declared unlawful. Instead the consultation simply says:

“Although no changes are proposed to the level of the fees in 2016 we are nonetheless conducting an exceptional consultation this year to:

- Set out the financial and other information on which the proposal is based; and
- Seek your views on the proposed level of the fees.”

19. Second, it is striking that the figures now presented at 5/33 are significantly different (and lower) than the figures used to justify the ARF increase in the 2015 consultation which was declared unlawful. There is no attempt (other than the reference to Annex 2 using the FTP caseload predictive model see pp.26/33 onwards) to explain why these figures have been reduced, or why the previous projections on which the £945 figure in last

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10 p.1/33 of Consultation document
year’s consultation was based were so inaccurate (over 20% out in respect of predicted complaints for 2016).

20. Third, the four week consultation which commenced on 6th October and runs till 3rd November, comes very late in the year (given that regulations will need to be made for the collection of the ARF within a very short timeframe from the close of the consultation). By contrast, the 2015 consultation was 10 weeks and ran from 30th June to 4th September. Coming so late in the year, it is difficult not to view the consultation proposal contained in the consultation as other than a fait accompli. Put another way, it has the appearance of a consultation with a closed mind.

21. Fourth, the information presented in the 2016 consultation presents only one option – maintaining the current level. It does not provide consultees with any rejected arguable alternatives, such as, for example, reducing the ARF to £600, and altering the reserves policy so that reserves are kept at an equivalent of 1-2 months of operating expenditure, rather than 4-6 months. Indeed the Reserves Policy is simply presented as a “given” that predetermines the outcome. This point is underlined by a passage at 1/33 of the Consultation where it is stated:

“We have considered carefully whether it would be possible to reduce the figure payable as ARF in 2016 from the fee charged in 2015. If we are to operate effectively for 2016 and meet our regulatory objections [sic], this does not appear to be possible. We believe any reduction would expose the GDC to unacceptable financial risk if the ARF were to be reduced for next year.”

Potential grounds of challenge.

22. In the light of the above I consider that the consultation in respect of the 2016 ARF is open to challenge on the following grounds:

(i) **Closed mind/predetermination.** This is not a consultation which is being conducted at a formative stage. On the contrary, the consultation outcome is presented as an inevitability because of the requirement of the Reserves policy. It is not immediately apparent why having a Reserves policy requiring 4-6 months of operating spend to be kept in reserve is a precondition to the GDC discharging its statutory obligations as a regulator effectively. The timing of the consultation, the shortness of the consultation, and the fact that no alternatives are offered reinforce this impression. Given that the GDC committed itself to transparent

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11 The obligation is that set out in the ARF policy, namely “that the Annual Retention Fee should be calculated according to the cost to us of regulating dental professionals” – see Report on the outcome of the consultation on the Annual Retention Fee Policy June 2014
consultation in respect of any fee rise and that no such proper and fair consultation was carried out last year, the GDC ought to have conducted a full and fair consultation explaining the fee rise, explaining why it had to be maintained, and including arguable alternatives which had been considered and rejected. I do not consider that this has been done.

(ii) **No sufficient time for fair consultation.** While it is a matter for the GDC how to go about the consultation exercise, given the unlawful consultation last year, it was incumbent on the GDC to ensure that any consultation this year both explained the initial fee rise and the continued maintenance of that level. The consultation document does not do this, and 4 weeks is an insufficient period of time for consultees to respond. This is particularly because some of the underlying financial information is difficult to follow (such as the radical change in the predicted complaints figures, the relationship between complaints and fitness to practise hearings, and the justification for a reserves policy which keeps reserves at 4-6 months of operating income in the context of a regulator who annually prescribes a fee with different start dates for DCPs and dentists).

(iii) **Irrelevant considerations and/or no rational connection between Reserves policy and GDC’s statutory obligations.** There is no obvious connection between the need to build up reserves to a level equivalent to 4-6 months operating expenditure and the efficient regulation of dentists and DCPs. It is not immediately clear how having a Reserves policy which requires 4-6 months of operating expenditure is necessary for the efficient discharge of the GDC’s regulatory functions. It must be remembered that the GDC collects ARFs annually from two sources (dentists and DCPs) on different dates, (July 31st and December 31st being the due dates). No example is cited or information given which explains what the major event(s) would be that would trigger the GDC having to draw down such a large reserve properly to discharge its regulatory functions.

(iv) **Irrelevant consideration/no rational connection** between the component of the fee which is charged for the DCS and determining the ARF in accordance with the June 2014 ARF policy. The policy is concerned with determining the ARF by reference to the costs of regulating the profession. The DCS is not part of the GDC’s statutory function as a regulator.

23. For reasons set out above, my conclusion is that this very short consultation so late in the year is not a fair one, and breaches the fundamental rules of consultation in the following respects:

(a) **Consultation must be at a time when proposals are still at a formative stage.** This consultation is being conducted at a
stage when the outcome has all the appearance of being pre-
determined.

(b) **The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response.** No proper arguable alternatives are set out in the consultation nor is there any cogent rationale for the 4-6 month Reserve policy which is the GDC’s claimed reason for maintaining the level at £890 notwithstanding that the predicted level of complaints has fallen sharply from those estimated in the 2015 consultation.

(c) **Adequate time must be given for consideration and response.** I do not consider that the 4 weeks consultation is sufficient time for consultees to respond to the complex financial information in the Consultation document which is significantly different (in terms of predictions and financial modelling) from the information disclosed last year. It is notable that 10 weeks was allowed last year.

(d) **The product of consultation must be conscientiously considered.** Given that the GDC appears to be intending to lay regulations for the new fee imminently, there is once again a strong appearance of pre-determination.

JEREMY HYAM
1 Crown Office Row
Temple EC4Y 7HH

1st November 2015