Tooth Whitening: Questions Answered

**Aims:** To review the up to date legislation on tooth whitening and to discuss answers to the common questions that the dental care professional may have considered regarding bleaching and the regulations.

**Objectives:** On completion of this verifiable CPD article the participant will be able to demonstrate, through the completion of a questionnaire, the ability to:

- Identify current legislation with regard to tooth whitening products in the United Kingdom
- Identify guidance given by the General Dental Council with regard to complying with current standards for dental care professional with regard to tooth whitening

**Introduction**

Obvious discolouration of the teeth can be a physical handicap that impacts on a person’s self image, self confidence, physical attractiveness and employability. It cannot therefore be dismissed as merely of cosmetic importance.¹ Bleaching is conservative of tooth tissue and may delay the need for more invasive veneers and crowns.² Bleaching of teeth has encountered some legislative problems in recent years but since 31st October 2012 the European Union Council Directive came into force in the UK clearly defining the use of tooth whitening products.

This article will review this directive and outline the key points and discuss questions that the dental care professional may consider surrounding tooth whitening.

**The Directive**

On the 31st October 2012 the European Union council directive came into force in the UK. The changes were brought into force in the UK by the European Communities (Cosmetic Products) Regulations 2004 to 2013.

The Directive states:

- That products containing or releasing up to 6% hydrogen peroxide can be used as long as this strength is only sold to dental practitioners.
• A dentist must have examined the patient to make sure there are no risks or other concerns about their oral condition.

• The patient must be over 18 years of age.

• For each cycle of use, first use is by a dental practitioner or under their direct supervision by a dental hygienist or dental therapist.

• The exposure to the product must be limited to ensure that the products are used only as intended in terms of frequency and duration of application.

• Tooth whitening kits bought over the counter or on the internet can legally only contain up to 0.1% hydrogen peroxide. This concentration is too low to have any noticeable effect on the colour of teeth.\(^3\)

**What do the General Dental Council Say?**

The General Dental Council state that the practice of dentistry is limited to General Dental Council registrants and that in the Council’s view, applying materials and carrying out procedures designed to improve the aesthetic appearance of teeth amounts to the practice of dentistry. So too does the giving of clinical advice about such procedures. Therefore, all tooth whitening procedures are seen as the practice of dentistry by the General Dental Council (GDC).

**Ethical Considerations**

Ethical issues arise in treating patients and GDC registrants must:

- Act in the best interests of the patient in providing a high standard of care.

- Obtain fully informed consent for treatment, which they must be competent to carry out.

- Obtain a medical history of the patient before starting treatment.

- Give the patient necessary explanations about benefits and risks.

These and similar issues can arise in connection with any dental treatment proposed or carried out. They apply whether the registrant personally delivers the treatment or gives advice to patients about the use of home kits. It is open to patients to complain to the GDC about these matters as with any form of care or treatment.\(^3\)

**Which GDC registrants can carry out tooth whitening?**

In addition to dentists being allowed to carry out tooth whitening, dental hygienists, dental therapists and clinical dental technicians that have carried out the relevant additional training can carry out tooth whitening under the supervision of a dentist.
once the dentist has provided them with the relevant prescription to ensure patient safety.⁴,⁵

Dental protection advises that whilst the regulations do not define the term direct supervision there is nothing to suggest that the dentist has to be in the same room as the hygienist/therapist when undertaking the tooth whitening. They do advise that the dentist must physically be on the premises when the first use of tooth whitening product is provided to the patient by the hygienist or therapist.⁴

Can hygienists carry out tooth whitening under direct access?

As the regulations state that hydrogen peroxide products releasing more than 0.1% hydrogen peroxide can only be legally sold to dentists, hygienists and therapists cannot provide this treatment directly under direct access.⁴

Can a dental nurse carry out tooth whitening?

The scope of practice set out by the GDC for a dental nurse does not include tooth whitening, therefore a dental nurse cannot carry out tooth whitening. The dentist cannot delegate the role of explaining tooth whitening procedures to the dental nurse he/she must provide this information to the patient themselves.

The scope of practice for the dental nurse does include the following if additional training has been completed in these areas:

- Taking shades
- Taking intra oral photographs
- Taking impressions
- Producing bleaching trays

Therefore, if they have undertaken additional training in these areas it would be within their scope of practice to assist the dentist to gather some preliminary information to populate the patient’s record by carrying out these skills.

Once the dentist has decided on a review cycle for the patient undergoing tooth whitening, the dental nurse may make any appropriate courtesy calls to the patient to check how they are progressing with their treatment.⁴

Questions about the Law

Doesn’t EU law say that anyone can perform tooth whitening?

EU Directive 76/768/EEC classifies products containing less than 0.1% hydrogen peroxide or releasing less than 0.1% hydrogen peroxide as being cosmetic and able
to be sold on the open market. This is often cited as justification for the claim that tooth whitening is cosmetic. This is not true. The Directive does not legislate for how products containing or releasing less that 0.1% hydrogen peroxide should be applied. The act of tooth whitening is governed by the UK’s domestic law, namely the Dentists Act 1984 as interpreted by the UK courts. Given the provisions of the Dentists Act 1984 and the High Court case of GDC v Jamous (full case report below), tooth whitening is the practice of dentistry. ⁴

Is it illegal for beauticians to offer tooth whitening?

The High Court case of GDC v Jamous confirmed that tooth whitening is the practice of dentistry and can only be legally performed by a dentist or a dental therapist, dental hygienist or a clinical dental technician working to the prescription of a dentist. ⁴

Could tooth whitening be considered a cosmetic procedure?

In the case of GDC v Jamous the High Court ruled that tooth whitening is the practice of dentistry. This means that tooth whitening is a dental treatment and not a cosmetic treatment.

The GDC are aware that the case of Optident Limited and Another v Secretary of State for Trade and Industry and Another [2001] UKHL 32 (28th June, 2001) is often quoted as authority for the proposition that tooth whitening is a cosmetic procedure and can be carried out by any person. The case is wrongly used to argue that since tooth whitening products are regulated by the European Council Directive on Cosmetic Products 76/68.EEC, a person offering tooth whitening services is carrying out a cosmetic procedure and is not practising dentistry. This is not a correct interpretation of the Optident case. This case was concerned solely with classifying substances for marketing purposes. The substances had to be defined as either dental devices or cosmetic products. The product used in tooth whitening was classified as a cosmetic product but the case did not establish that the act of using the product on the teeth amounted to a cosmetic treatment. ⁴

What about if the trays are handed to an individual for self-administration and consent forms have been signed?

The Dentists Act makes it illegal for anyone who is not a dentist to give “treatment, advice or attendance” that would usually be given by a dentist. Handing an individual a tooth whitening tray and advising them on application, amongst other things, could constitute the giving of “advice or attendance” and would be illegal. ⁴
General Dental Council v Jamous, [2013] EWHC 1428

This case had a successful outcome for the GDC. This case outline from Sarah Harris at Kingsley Napley provides an overview of the case which you may find interesting.

Case Update: General Dental Council v Jamous, [2013] EWHC 1428

5th June 2013 (Written by Sarah Harris)

Judgment date: 10 May 2013

High Court holds that teeth whitening treatment comes within the meaning of the practice of dentistry as identified in section 37 of the Dentists Act 1984.

This appeal by way of case stated from District Judge Roscoe at Westminster Magistrates Court considered the question of whether tooth whitening comes within the meaning of the practice of dentistry as identified in section 37 of the Dentists Act 1984 (the Act).

The defendant (D) was offering tooth whitening to the public, providing treatments which complied with UK and EU law. Although she was insured to carry out cosmetic tooth whitening, her only qualification was from the Fuss Beauty School, where she completed a single day course. In December 2011, D carried out tooth whitening on a patient by applying gel to the teeth and then shining a light, and was duly paid for the treatment. The patient complained about the treatment and was said to have had adverse side effects.

The GDC alleged that D had unlawfully practised dentistry, namely tooth whitening, on 27 December 2011 contrary to sections 38 (1) and (2) of the Dentists Act 1984 and further that she had carried on the business of dentistry on or before 27 December 2011 contrary to sections 41 (1) and (1B) of the Act. The Act 1984 makes it a criminal offence for anyone other than a registered dental professional to carry out dentistry.

Section 37(1) of the Dentists Act 1984 (the Act)

Section 37(1) states that;

‘s subject to subsection 1A for the purposes of this Act, the practise of dentistry shall be deemed to include the performance of any such operation and the giving of any such treatment, advice or attendance as is usually performed or given by dentists; and any person who performs any operation or gives any treatment, advice or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting of dentures, artificial teeth or other dental appliances shall be deemed to have practised dentistry within the meaning of this Act.’

It was not in dispute as between the parties that tooth whitening was a treatment, therefore the key issue was whether it was a treatment usually performed by dentists.
In the lower court, the General Dental Council (GDC) had adduced two strands of evidence to prove that this was such a treatment; firstly from an expert who spoke to the potential dangers of tooth whitening and secondly the GDC Guidance ‘Scope of Practice’ (the guidance), dated April 2009.

The expert had not given evidence as to whether dentists usually gave or performed that treatment or not, merely on the potential dangers. The District Judge had concluded that the mere fact that risks were associated with the treatment did not establish that it was the practise of dentistry; all it did was tell her was why that treatment should be considered the practise of dentistry. Whilst agreeing with that proposition, the High Court considered that the evidence went further than that;

‘If the treatment on the evidence does create a risk, such as to require training for it to be administered, it is at least more likely that it falls within the scope of the section. After all, to include it within the scope of the section fulfils essential purposes of the Act: education, control and regulation of treatment for the protection of the public.’

The Court accepted however, that this evidence was ‘by no means dispositive’.

With reference to the Guidance (published pursuant to section 26B of the 1984 Act), it states that;

‘the scope of your practice is a way of describing what you are trained and competence to do. It describes the areas in which you have the knowledge, skills and experience to practise safely and effectively in the best interests of patients.’

Reliance was more particularly placed on the scope of practice relating to dental hygienists which specifically lists that ‘tooth whitening to the prescription of a dentist’ as an additional skill they might develop during their career.

The District Judge held that the main purpose of the guidance was to regulate the profession rather than to list and identify the work that a dentist undertakes. The High Court held that whilst this was true, it is also ‘of significance as tending to show what dentists usually do and is some evidence of that practice’. It was held that the District Judge should not have so readily dismissed the force of the Guidance, however it was again accepted that the evidence was not determinative.

It was held that whilst mention in the guidance was not sufficient in and of itself to bring an activity into the scope of practice within the meaning of section 37, it may well assist, along with other factors;

Whether a particular treatment will fall within the scope of the practice of dentistry turns on whether it is usually given by dentists. The definition depends on the circumstances viewed as a whole in which the treatment in question was given’.

It was concluded that a combination in this case of the evidence of the expert and the Guidance, with the undisputed evidence as to the circumstances in which the treatment was carried out, did prove that the teeth whitening given by the defendant as the practise of dentistry and was therefore proscribed by section 38 and 40, prohibiting the practice of
dentistry by laymen. It was said that the lower Court would have been assisted by the calling of evidence to say what it was that dentists usually do.

The argument made on behalf of D that tooth whitening is an activity frequently performed by those who are not dentists, was rejected. A further argument that the circularity of the test in section 37 offends Article 7 of the ECHR because it was unclear what was proscribed or not, was also rejected.

Accordingly, the appeal was allowed and the matter was remitted to the Magistrates Court for sentence.

This result is no doubt a welcome one for the GDC who have for several years been calling for tougher controls on who is allowed to carry out teeth whitening in the UK. The High Court has helpfully provided further guidance on the application of the test at section 37 and the evidence required to prove that a treatment falls within its scope.

Portfolio tip

New non verifiable CPD has been added to the non verifiable section of the website.

Don't forget to update your non verifiable CPD Logs.

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References


