

**To:** Council  
**From:** Sheleen McCormack and Hannah Doherty  
**Date:** 17 July 2019  
**Paper:**

**Q4 Fitness to Practise Report (1 April 2019-30 June 2019)**

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| <b>Classification</b>                        | Public   |
| <b>Purpose</b>                               | To note  |
| <b>Issue</b>                                 | Q1 update to Council on the work of the Regulation Department and the GOSC's fitness to practise committees (1 <sup>st</sup> April 2019-30 <sup>th</sup> March 2019) |
| <b>Recommendations</b>                       | 1. To note the report.   |
| <b>Financial and resourcing implications</b> | Financial aspects of fitness to practise activity are considered in Annex B of the Chief Executive's Report.   |
| <b>Equality and diversity implications</b>   | Ongoing monitoring of equality and diversity trends will form part of the Regulation Department's future quality assurance framework.                                |
| <b>Communications implications</b>           | None   |
| <b>Annex</b>                                 | A - Fitness to Practise Q1 Data Set  |

## **Introduction**

1. This paper provides an update to Council on the work of the Regulation Department and the GOsC's fitness to practise committees for the first quarter of this reporting year, Quarter 1 (1st April 2019-30th June 2019). It provides an overview of our performance against our performance targets as well as ongoing activity to support the GOsC's fitness to practise committees.

## **Fitness to practise case trends**

2. In this Q1 reporting period, the Regulation Department received 29 concerns and 10 formal complaints. During the same period last year, the figures were 25 concerns and 14 formal complaints.
3. Of the 29 concerns: eight involved transgression of personal boundaries and/or sexual impropriety; three related to clinical concerns including an incorrect diagnosis, ineffective treatment and forceful or painful treatment; four arose from registrants' declarations about their health; four related to dishonesty, including dishonesty to the GOsC; three related to conduct outside of clinical practice; three related to misuse of patient data; two related to a failure to maintain PII; one related to advertising; and one related to a conviction.
4. Of the 10 formal complaints: three concerned dishonest conduct; three related to the misuse of patient data; one related to issues with treatment; one concerned a sexual relationship with a patient; one related to a police charge for violent conduct outside of work; and one related to a failure to maintain PII.
5. One application was made to the Investigating Committee for the imposition of an Interim Suspension Order. No applications were made to the Professional Conduct Committee or Health Committee. During the same period last year, one application was made to the Investigating Committee, and two applications were made to the Professional Conduct Committee.
6. The Interim Suspension Order (ISO) applications made during this reporting period concerned an allegation of a sexual relationship with a patient.
7. The IC considered that an interim suspension order was not necessary for public protection and decided not to grant the application.
8. During this reporting period, the Regulation Department serviced 36 Committee hearing days and training events, including substantive hearings, review hearings, a restoration hearing, IC meetings and an ISO hearing. By way of comparison, the number of hearing days and events serviced by the Department last quarter was 18.

## **Fitness to practise case load and case progression**

9. As at 30 June 2019, the Regulation Department's fitness to practise case load was 56 fitness to practise cases (39 formal complaints and 17 concerns). At the 31 March 2019, the fitness to practise case load was 48 cases (38 formal and 10 concerns).
10. The performance against targets for this reporting period is as follows:

| <b>Case stage</b>              | <b>Key Performance Indicator</b>                         | <b>Performance Target</b> | <b>Median figures achieved this</b> |
|--------------------------------|--|---------------------------|-------------------------------------|
| Screening                      | Median weeks from formal complaint to screening decision | 3 weeks                   | 1 week                              |
| Investigating Committee        | Median weeks from formal complaint to IC decision        | 17 weeks                  | 16 weeks                            |
| Professional Conduct Committee | Median weeks from formal complaint to PCC decision       | 52 weeks                  | 62 weeks                            |
| Health Committee               | Median weeks from formal complaint to HC                 | 52 weeks                  | 38 weeks                            |

11. In this reporting period, the performance targets were met for screening and Investigating Committee decisions.
12. The PCC performance target has not been met in this quarter. However, the performance data above includes one case which was on hold pending a police investigation and therefore outside our control. Excluding this case, the median performance against this target for the quarter was 52 weeks.
13. The HC performance target has been met in this quarter. This figure relates to a single HC case considered in Q1.
14. The Professional Conduct Committee heard 10 cases over 29 days during the relevant period. Three cases went part heard. In one case no UPC was found; two cases resulted in a suspension and one case resulted in a removal from the register. The PCC stayed one case concerning a registrant who was removed from the register at the conclusion of a separate fitness to practise matter.
15. During the reporting period, the Investigating Committee considered 11 cases, referred eight cases for a final hearing and closed three cases.

## **Section 32 cases**

16. Under section 32 of the Osteopaths Act 1993, it is a criminal offence for anyone who is not on the GOsC's register to describe themselves (either expressly or by implication) as an osteopath.
17. The Regulation department continues to act on reports of possible breaches of section 32 and as at 30 June 2019, is currently handling 25 active section 32 cases.

## **Judicial Reviews and appeals of decisions made by FTP Committees**

18. On 14 June 2019, GOsC received a sealed notice of appeal together with grounds of appeal pertaining to a PCC decision made in May 2019 in relation to both findings of fact and the sanction imposed. This statutory appeal has been lodged at the Manchester High Court. We have engaged counsel and will be resisting the appeal. As yet, no date has been set down for the hearing.
19. The statutory appeal of Beard v General Osteopathic Council [2019], took place over two days on 10 and 11 April 2019, at the Manchester High Court before Mr Justice Kerr. The approved reserved judgment was handed down at the Royal Courts of Justice on 24 June 2019. The main ground of appeal was upheld and costs of £22,000 was awarded against the GOsC.
20. The allegations arose from a complaint dated 7 September 2016 sent to the Respondent by Patient A about the Appellant's treatment of, and communication with, him at two appointments: an initial appointment on 18 July 2016, and a follow-up appointment on 21 July 2016. They were his first and only appointments with the Appellant. It was alleged that at both appointments the Appellant did not conduct an adequate assessment of Patient A's left foot, did not provide a diagnosis, did not discuss/explain the proposed treatment and did not obtain valid consent for any treatment. Additionally, it was said that on 18 July 2016 she used excessive force when treating the foot, and that on 21 July 2016 she used unprofessional, dismissive, condescending and petulant language. The key issue for the Panel to resolve was, therefore, one of primary fact i.e. what happened at the two appointments. The PCC found the Appellant guilty of Unacceptable Professional Conduct and imposed a conditions of practice order for a period of 12 months.
21. The Appellant appealed against the determination of the PCC. In total, there was five grounds of appeal. However, Mr Justice Kerr concluded that these separate grounds would not have led to him interfering with the findings and the decision of the PCC. The third ground of appeal asserted that it was perverse of the PCC to prefer the evidence of Patient A in light of the Appellant's notes recording her two appointments with the Patient. Kerr J

observed that he would not have found fault with the PCC for preferring the evidence of the Patient to the Appellant. Ground four alleged that the PCC failed to provide adequate reasons for preferring Patient A's evidence to that of the Appellant. The judge did not accept this argument, concluding that the reasons given provided an adequate basis for rejecting the accuracy of the osteopathic notes made by the Appellant.

22. The first ground of appeal, which the judge found to have sufficient merit to justify interfering with the PCC's decision, related to the fairness of the overall hearing being compromised by the questioning of the Appellant by the lay panel member of the PCC. Throughout the judgment the lay panellist is heavily criticised by the judge.
23. The second ground, in effect an adjunct to the first, was that the lay panellist / PCC should have recused themselves when an application was made to them by the Appellant's counsel at the reconvened hearing. Mr Justice Kerr concluded that this added nothing to the first ground.
24. In reaching a decision on the first ground, the judge examined the questioning of the Appellant, he read the transcript and listened to the recording of parts of the hearing. Throughout his judgment it is clear that Justice Kerr formed an adverse view of Patient A and he expressed those views in trenchant terms referring to Patient A as 'reprehensible'. He expressed concern about the tone and content of the patient's correspondence with the Appellant which he found to be 'undoubtedly, aggressive and bullying in its tone and content'. Kerr J observed that the PCC and the lay panelist, in particular, did not seem to understand that the Appellant was being badly treated by her patient even if his account was true and hers untrue. The judge considered the protracted questioning by the lay panelist (and the Chair who came after her) to be 'surprising' but it was the content and tone of the questions that troubled him. He concluded that the lay panellist was allowed to pursue 'hostile' lines of questioning for too long, the relevance of those questions being nil or 'so tenuous' as to amount to 'vexing' the Appellant rather than illuminating the factual issues. Neither the legal assessor nor the Chair prevented the lay panelist's questions in time to preserve the integrity and fairness of the hearing, the legal assessor only belatedly suggesting a break. For these reasons the judge was satisfied that there was a procedural irregularity that was so serious as to render the decision unjust. As the credibility of the Appellant and that of the patient was the crucial issue in the case it was of the utmost importance to the overall fairness of the proceedings that this crucial issue was treated in an even handed and balanced way and not 'marred by inappropriate protracted and hostile questioning'.
25. As such, the lay panellist's 'descent into the arena' may have impaired her judgment by hampering her ability to properly evaluate and weigh the evidence. As he did not know what influence this may have had on the

other two members of the PCC and the decision the PCC made to reject the Appellant's evidence on the critical issue, Kerr J upheld the first ground of appeal.

### **Working with other regulators/feedback loops**

26. On 20 June 2019 the inaugural meeting of the Healthcare Regulators Complaint Forum took place, set up by the NMC and Nockolds solicitors and attended by representatives from a number of healthcare regulators. The purpose of the forum is to provide a platform for sharing good practice in complaint management and the discussion and development of new initiatives to improve process, quality and service delivery. Meetings will be held on a quarterly basis with the next one taking place in September.

### **Rule 8 review**

27. The GOsC's practice note for cases suitable for disposal by consent under Rule 8 came into effect on 1 February 2018.
28. Since that date, the practice note has been applied in four cases. In three of the four cases, the application for Rule 8 consideration was made by the registrant. The other application was made by the GOsC. By comparison, just one Rule 8 case was considered in 2017 following an application made by the GOsC.
29. Of the registrant applications received, one made reference to the practice note, but the others did not do so.
30. In all four cases the PCC chair considered the application in accordance with the Practice Note and decided to allow the application. In all four cases, the PCC determined that the cases were suitable for disposal by Rule 8 and admonished the registrant.
31. In conclusion, the introduction of the practice note has coincided with an increase in registrant applications for consensual disposal. The overall number of cases is small however, making it difficult to ascertain the impact of the practice note on registrants' engagement with the Rule 8 process.
32. The findings made by the PCC in each case indicate that the information provided under the process set out in the practice note is sufficient to enable a decision to be reached. Again, the small number of cases considered under this process should be taken into account before drawing definite conclusions. We plan to keep this under review.

### **Initial Stages External Audit**

33. The GOsC Business Plan for 2018/19 states that we will 'continue to monitor and further develop, the Quality Assurance Framework, including internal/external audits and peer review of decision making'. In 2018, the PSA conducted a targeted review of our initial stages processes within fitness to practise. However, the PSA determined not to conduct a targeted review of our processes over 2018/19. Notwithstanding this, we continue to seek assurance about the quality of our processes alongside our on-going programme of continuous improvement.
34. An independent audit, conducted by a legally qualified auditor, will take place over July/August 2019. The audit will focus on the decisions of Screeners and the Investigating Committee in relation to concerns/cases that are closed under the initial closure procedure/threshold criteria/no case to answer. The review will also encompass the quality of the investigation undertaken including whether sufficient information/evidence was acquired as part of the investigation process and the allegations were adequately particularised.
35. We intend to report back the findings of the audit to Council in November 2019.

### **Draft Restoration Guidance**

36. We ran a public consultation on draft restoration guidance from 23 April – 20 June 2019. In this consultation, we proposed the introduction of guidance on the arrangements for, and procedure at, a hearing where an application for restoration to the Register is made after an osteopath has been removed from the Register following a fitness to practise hearing.
37. An osteopath who is removed from the GOsC's Register for fitness to practise reasons may apply to the Registrar for readmission to the Register after a period of ten months has elapsed. In such cases, the application for registration must be referred by the Registrar to the Professional Conduct Committee (PCC). The draft guidance is divided into separate paragraphs: what happens before the hearing and during the hearing. The procedure before the hearing mirrors the process laid down within the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 followed for fitness to practise hearings, including the notice of hearing required and disclosure of materials in advance of the hearing.
38. We have decided to delay reporting to Council on the final draft restoration guidance until November 2019. This is so we can reflect upon and incorporate the feedback we received on the draft guidance from a recent meeting of the Determination Review Group as well as taking account of some external research on patient engagement we understand is currently being undertaken.

## **Listing of cases**

39. At its meeting on 8 May 2019, the Chair of Council requested that a review of the listings protocol be undertaken, benchmarking how other regulators approach empanelment of Committee members and list hearings.
40. At the May council meeting the listings protocol was also explained including the fact that we have made substantial improvements to streamline the process and minimise cancellations, with the result that last year we only cancelled one hearing. Given our smaller caseload and the fact that our targets requires we complete a case end to end within 52 weeks, we aim to list panellists against cases approximately 3-5 months in advance and in line with the performance target for the case. This is a dynamic process and while we make every effort to prevent hearings being cancelled, sometimes this is unavoidable. While listing cases is more an art than science, we have made substantial improvements to streamline the process and minimised cancellations, with the result that last year we only cancelled one hearing.
41. Once a concern is received by the Regulation Department, it is triaged and allocated to a caseworker to investigate the matter. At present we aim to refer cases to the IC within four months from when they are screened. Where the IC decides that there is a case to answer, the case will then be referred to the Professional Conduct Committee (PCC) or Health Committee (HC) depending on the type of case. Currently, we aim to refer cases to the PCC/HC by no later than 8 months (52 weeks).
42. Once it has been established that the case should be referred, the caseworker will then send a listing questionnaire to the registrant under investigation requesting information relevant to the listing of the case, this includes dates to avoid for the hearing, the number of witnesses required, including expert witnesses and whether the registrant is making any admissions. At the same time, if there are any witnesses in the case, they too will be asked for any dates to avoid. The Regulation Assistant uses the information from the questionnaires to list the case and where possible in line with the performance target for the case. We then use this information when contacting Committee members for their availability.
43. The process below has been taken from the internal regulation manual:

### **PCC listings**

In order to list cases, we have a listing schedule which lists the panel members and cases for the coming year. Once a case is referred by the IC to the PCC, we will need to list the case as per the availability of the witnesses and the Registrant. Once a case is provisionally listed, an email is then sent to **all** [my emphasis] the Panel members (unless they have previously considered the case) to seek their availability. It is the Regulation Assistant's responsibility to manage the listing schedule. The panel consists of the Chair, lay member, osteopathic member and the Legal Assessor who plays no part in the decision making process. We aim to have a mixed panel with at least one man or one woman on the Panel, especially for cases that relate to



sexual motivation. If the hearing is a health case, we will also need a Medical Assessor to sit on the Panel. They will also play no part in the decision making process and are only there to advise the Panel on matters of health.'

44. As per the above process, panel members are given a deadline to respond with their availability. After that deadline, the panel is chosen from those who have confirmed they are available, taking into account various factors including: the number of days each panellist has already been listed for that year; any conflicts of interest; and the gender balance on the panel.
45. It is **only** with interim order hearings where committee members and legal assessors are usually appointed on a first come, first served basis given the urgency of the matter. In all other cases, we allocate hearings fairly and try to give committee members an equal spread of hearings by actively engaging with those who have had fewer hearing days allocated to them. If we need to cancel a hearing, we will endeavour to list another in its place to avoid cancelling the Panel. In order to minimise the need to cancel Panels, we offer provisional hearing dates instead of listing members for weeks at a time.
46. An email is then sent to the caseworker to advise them of the date the hearing will take place. They will then notify the registrant and inform the representatives and the witnesses to advise them of the hearing date. Once notice has been sent to the Registrant, the caseworker will then prepare 'the notice of hearing' document. This document is then forwarded to the Regulation Assistant who will in turn upload this to the website.
47. The Regulation Assistant will email the representatives of both the Registrant and the Council with deadlines for the case documents to be received. The bundles and documents to be put before the Committee will then be sent to the Regulation Assistant as per the deadline. The hearing documents will be uploaded to the online secure portal at least one week before the hearing date, for the Committee to read and consider the papers.
48. As part of our review we liaised with the General Optical Council (GOC) and the General Chiropractic Council (GCC), two of the smaller healthcare regulators. GOC have approximately 60 final hearings a year. GCC do not have a formal listings procedure. The GOC approach is broadly similar to that of the GOsC albeit they have longer end to end performance targets for their fitness to practise cases. The GOC told us that following a conflict check, they prioritise members who have sat on fewer days within that financial year until they make a panel of five. They set a date for responses to be received so all members have the opportunity to reply. If it is an urgent listing then it would be first come first served. They do advance availability and then slot in members. GOC aim to list between 4-7 months for substantive hearings due to being restricted by their statutory times.
49. The GCC only have approximately 9 final hearings a year and therefore no useful learning could be drawn from this.

50. Additionally, we reviewed the PCC members current sittings for 2019 and this is set out below as follows:

| <b>Total days scheduled 2019</b> |                   |
|----------------------------------|-------------------|
| PCC/HC Chairs                    | 29                |
|                                  | 12                |
|                                  | 15                |
|                                  | 17                |
|                                  | 13                |
| PCC/HC Lay Members               | 11                |
|                                  | 9                 |
|                                  | 18                |
|                                  | 9                 |
|                                  | 23                |
| PCC/HC Osteopath Members         | 21                |
|                                  | 26                |
|                                  | 18                |
|                                  | 15                |
|                                  | 0                 |
|                                  | 12                |
|                                  | 4 (from 1/4/2019) |

51. We are satisfied that the listings protocol is working smoothly and we do not propose at this stage to instigate changes. Rather, we intend to continue to proactively engage with individual panellists to ensure hearings are allocated as fairly as possible given the current statutory ceiling on the numbers of panelists we are able to appoint and our caseload.

### **Training for the Investigating Committee and Professional Conduct Committee**

52. The Investigating Committee all members training day is due to take place on 25 July 2019. The agenda includes: a talk by a PCC Chair on hearings, a session with Jonathan Whitfield QC, a legal assessor with GOsC, with the focus on 'what is a case to answer'. We will also have an interactive session with case studies on screening decisions and drafting allegations which will feed into our development of guidance on drafting allegations for fitness to practise investigations and hearings which is part of the GOsC Business Plan for 2019/20.
53. The Professional Conduct Committee all members training day has been scheduled for 18 November 2019. The training event will focus on questioning and managing witnesses at hearings.

**Recommendation:** to note the report.