

Council
20 May 2021
Fitness to Practise report

Classification	Public
Purpose	For noting
Issue	Quarterly update to Council on the work of the Regulation department and the GOsC's Fitness to Practise committees.
Recommendation	To note the report.
Financial and resourcing implications	Financial aspects of Fitness to Practise activity are contained in the annual budgets approved by Council.
Equality and diversity implications	Ongoing monitoring of equality and diversity trends forms part of the Regulation department's future quality assurance framework.
Communications implications	None
Annex	A - Fitness to Practise Dataset
Authors	Sheleen McCormack and David Bryan

Key messages from the paper:

- We continue to list and hold meetings and hearings through the use of remote hearings and blended hearings, ensuring the safety and wellbeing of all participants.
- We have listed 6 of the 16 cases referred by the Investigating Committee (IC) to the Professional Conduct Committee (PCC).
- In this reporting period, we received 19 concerns and 13 formal concerns were opened. The latter figure is comparable to the previous year.
- On 24 February 2021, the High Court handed down its reserved judgment in the appeal case Sayer v General Osteopathic Council [2021]. The appeal was dismissed in its entirety and the Appellant was ordered to pay the costs of the GOsC in the amount of £14,210.
- On 26 March 2021, the Court of Appeal granted GOsC permission to appeal against the judgment of the High Court in the case Wray v General Osteopathic Council [2020]. The Court of Appeal hearing has been listed for one day on 14 October 2021.
- On 4 March 2021, at the City of London Magistrates Court, Mr Gareth Milner was found guilty on one count of using the osteopathic title while not registered with the GOsC, contrary to section 32 of the Osteopaths Act 1993.
- On 25 March 2021, the GOsC hosted the second in its series of live Fitness to Practise webinars with over 100 attendees joining the event.

Fitness to practise case trends

1. In this reporting period, the Regulation Department received 19 concerns and 13 formal complaints were opened. During the same period last year, the figures were 34 concerns received and 16 formal complaints opened.
2. Of the 19 concerns, one related to a registrant's caution, three related to a lack of insurance, four related to poor clinical treatment, one related to concerning conduct on social media, two related to a transgression of sexual boundaries, two related to a lack of adherence to Covid-19 rules and six related to poor conduct on social media regarding Covid-19.
3. The 13 formal concerns related variously to: a police caution, inappropriate comments towards a patient, conduct on social media in relation to Covid-19, lack of insurance, poor clinical treatment and a transgression of sexual boundaries.
4. The IC considered two interim order applications this quarter, of which one suspension was imposed and undertakings accepted in the other case. The PCC considered one case and determined that an interim suspension order should be

placed on a registrants practise. All three interim order applications related to alleged transgression of sexual boundaries.

5. During this reporting period, the Regulation Department serviced 11 remote Committee hearing and meetings remotely. This included six substantive hearings, two IC meetings, two IC ISO hearings and one PCC ISO hearing.

Fitness to practise case load and case progression

6. As at 31 March 2021, the Regulation Department's fitness to practise caseload is 40 cases (32 formal complaints and 8 concerns). This time last year, the Regulation Department's fitness to practise case load was 65 fitness to practise cases (48 formal complaints and 17 concerns).
7. Performance against the new performance targets for this reporting period, is as follows:

Case stage	Key Performance Indicator	Performance Target	Median figures
Screening	Median time from receipt of concern to the screener's decision	9 weeks	9 weeks
Investigating Committee	Median time from receipt of concern to final IC decision	26 weeks	25 weeks
Professional Conduct Committee	Median time from receipt of concern to final PCC decision	52 weeks	77 weeks

8. In this reporting period, the median figures for screening were reduced by two weeks to meet the target.
9. The IC median figure was exceeded by one week of the target.
10. The PCC median figure was twenty-five weeks outside the target. This reflects the impact of the postponement of all unheard substantive cases between 26 March and 3 July 2020 last year due to Covid-19.

Section 32 cases

11. 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.

12. The Regulation department continues to act on reports of possible breaches of section 32 and as at 31 March 2021, is currently handling 26 active section 32 cases.
13. Mr Gareth Milner appeared at City of London Magistrates' Court on 4 March 2021, and was found guilty on one count of using the osteopathic title while not registered with the GOsC. In summary, Mr Milner continued to provide information on his websites, which implied that he was still an osteopath, despite the fact that he had resigned from the GOsC's Register in 2011. Mr Milner was given warnings by GOsC that by continuing to use the osteopathic title he may be committing a criminal offence. However, despite this, he failed to make adequate amendments to his websites. Mr Milner was fined £1,300 and ordered to pay costs of £360 to the GOsC.
14. There are two outstanding prosecutions pending against Amanda Purcell and Gerard Garrote. As previously reported to Council, the Purcell case had been subject to delay because of the pandemic but has now been listed for trial on 21 June 2021. The Garrote hearing has been listed for trial on 5 May 2021.

Judicial Reviews and Statutory Appeals of decisions made by FtP Committees

15. The statutory appeal hearing, Sayer v General Osteopathic Council [2021] took place by way of a remote hearing on 21 January 2021, resuming on 28 January 2021 for half a day. The appeal was dismissed in its entirety, and the finding of the PCC upheld for the reasons set out in a reserved judgment of Mr Justice Morris handed down on 24 February 2021. The Appellant was ordered to pay GOsC's costs agreed as £14,200.
16. The background to the case is as follows. Around 12 November 2018, Patient A became a patient of the Registrant's. The Registrant soon developed an overly informal and flirtatious relationship with Patient A. The last occasion on which the Registrant saw Patient A to provide osteopathic care was on 29 January 2019. The Registrant entered into a personal relationship with Patient A around the end of February 2019, which later developed into a sexual relationship. After he had started seeing Patient A, she told him she still needed osteopathic treatment. He said he had made it clear he could no longer treat her.
17. On 14 March 2019, the Registrant sent a message to a practitioner at the Practice where he worked asking them to take over the care of Patient A. As a result, on 15 March 2019, Patient A had osteopathic treatment with this different practitioner at the Practice. The Professional Conduct Committee (the PCC) found that the Registrant had been pursuing a relationship with Patient A from a phone call he had made to her on 24 November 2018 onwards. The PCC concluded that the patient/practitioner relationship was persisting at the point where the Registrant entered into a non-professional personal relationship with Patient A. The PCC determined that the patient/practitioner relationship continued until 14 March 2019, which was the date of the hand over. However, the PCC was not satisfied

that the relationship with Patient A had become sexual prior to the handover with the other osteopath on 14 March 2019.

18. When determining whether the Registrant's conduct amounted to Unacceptable Professional Conduct, the PCC had regard to the 2012 edition of the Osteopathic Practice Standards, which was in force at the relevant time. The PCC considered that the facts proved, collectively demonstrated a serious departure from the standards required of an osteopath as the Registrant acted in a sexually motivated way towards Patient A whilst he was still in a practitioner/patient relationship with her. The PCC considered that this was a serious breach of appropriate professional and sexual boundaries. The PCC determined to suspend the Registrant for a period of six months with a review before the end of this period.
19. On behalf of the Registrant (now the Appellant) several grounds of appeal were advanced. These can largely be distilled into the following two grounds: that the PCC was wrong to conclude that the professional relationship with Patient A had not ended until March 2019 and secondly, the Legal Assessor had failed to give a good character direction to the PCC. During the course of the appeal hearing the Appellant sought and was allowed to argue an additional ground, which was that, in any event (i.e. even if the PCC had been correct in concluding that the professional relationship had not ended until March 2019), the sanction imposed by the PCC was wrong and disproportionate in all the circumstances.
20. In a lengthy judgment in which the court undertook a close scrutiny of the issues, Mr Justice Morris concluded that the principal purpose of the imposition of the sanction in cases involving sexual misconduct is *'the maintenance of public confidence in the profession'*. He stated that the public interest *'ultimately takes precedence over the consequences for the individual which may be unfortunate and somewhat punitive'*. Morris J determined that the PCC rightly recognised that the sexual misconduct fell at the lower end of the scale and for that reason concluded that removal would not be proportionate, which was also further reflected in the fact that the PCC chose to impose a period of suspension at the lower end of the range of possible periods of suspension (six months).
21. In the course of his judgment, Morris J drew a distinction between treatment and the professional relationship, observing that the end of a treatment or a course of treatment is not necessarily the end of the professional relationship between healthcare professional and patient: *'At the heart of the patient/practitioner relationship (as distinct from a personal or other non-professional relationship) is a need for absolute trust and confidence. Boundaries are required to maintain that trust and prevent abuse of power'*.
22. In relation to the necessity for a character direction, the judge observed, on the authorities, there is no rule or standard practice that in every case a good character direction should be given by the legal assessor. Whilst there may be cases where it is appropriate to give such a direction (for example, where dishonesty is a central issue) the question in each case is whether on the facts of the particular case such a

direction should be given. Morris J concluded there was no requirement in this case for the Legal Assessor to have given a 'good character' direction when advising the PCC prior to its consideration of the findings of fact. Moreover, it had been open to the Appellant's legal representative to ask for such a direction or to make submissions based on good character, but he did not do so.

23. The judge concluded that the PCC's reasoning and ultimately its conclusion, did not fall outside the bounds of what the PCC could properly and reasonably have decided and the appeal was dismissed. The full judgment can be accessed here: <https://www.bailii.org/ew/cases/EWHC/Admin/2021/370.html>
24. On 26 March 2021, GOsC was granted permission to appeal to the Court of Appeal against the judgment of the High Court in the appeal case Wray v General Osteopathic Council [2020]. The appeal has been listed for one day before the Court of Appeal on 14 October 2021. A briefing note has been circulated to Council providing the background and issues in this appeal.

Working with other regulators/stakeholders

25. On 25 March 2021, we hosted the second of our live FtP webinars with the Director of Fitness to Practise and Regulation Manager which was chaired by Rachel Birks a partner at Ward Hadaway Solicitors. Topics focussed on the investigation of fitness to practise cases, including screening and Investigating Committee decisions. Over 100 people attended the event which provided an opportunity for all attendees to ask questions of the panel. It was a lively and interesting session lasting from 6.30 pm - 7.35 pm. This is the second of a series of future webinars and engagement opportunities where we intend to share insights on fitness to practise and familiarising our processes for the profession and the public and 'myth busting' misconceptions.

Training for the Investigating Committee and Professional Conduct Committee

26. Following the successful appointment of four new members to the Investigating Committee and Professional Conduct Committee this year, induction training for these new Committee members took place on 16 April 2021. The final agenda included an interactive session on equality and diversity training delivered by an external consultant and fee paid judge, followed by a joint session on interim orders and separate breakout sessions on investigating committee meetings and professional conduct hearings. Leading counsel, Jonathan Whitfield QC also delivered a session on our Remote Hearings Protocol and shared insights and learning on hearings in the virtual environment.

Recommendation:

To note the report.