

Response to the General Chiropractic Council's consultation on guidance for the Investigating Committee

August 2019

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk
- 1.2 As part of our work we:
- Oversee the nine health and care professional regulators and report annually to Parliament on their performance
 - Accredit registers of healthcare practitioners working in occupations not regulated by law through the Accredited Registers programme
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice.

2. General comments

- 2.1 We welcome the opportunity to comment on the General Chiropractic Council's (GCC's) consultation on proposed guidance to the Investigating Committee (IC). It is positive that the GCC are seeking to promote transparency in the publication of guidance for the IC. It is helpful for patients and the public to be able to see clearly the purpose of the different stages of the fitness to practise (FtP) process and the guidance used by decision makers in deciding whether or not a case should move forward in the process.
- 2.2 We suggest that the GCC may want to consider the readability and clarity of this guidance to an external audience. Currently anyone unfamiliar with the process may find it hard to follow.
- 2.3 We further suggest that the GCC may want to review the language used in relation to consideration of the public interest regarding whether a case should go forward to a hearing. It may be helpful to ensure that sufficient clarity is provided about when this consideration might be taken into account and how it links with the overarching objective and three limbs of public protection.
- 2.4 We have some reservations about the draft new threshold criteria for Unacceptable Professional Conduct (UPC). Whilst we recognise the intention of the GCC to prevent inappropriate cases from progressing to a hearing, we

query some of the examples listed as they may exclude cases which do relate to fitness to practise and therefore should progress to a hearing. In its current form there is a possibility that the threshold criteria may also have the unintended effect of acting as a deterrent to members of the public in making complaints about chiropractors.

- 2.5 It would also be helpful for the GCC to be clear on the evidence base for the kinds of cases listed as 'matters that are not usually capable of amounting to Unacceptable Professional Conduct', for example any research carried out with patients or the public.
- 2.6 We have no detailed comments to make on the GCC's proposal to reference directly the relevant ASA guidance and code in the standards for chiropractors. This seems a sensible move to ensure that chiropractors comply with the relevant standards relating to advertising of their services and we are supportive of this change.

3. Detailed comments

Guidance for the IC

- 3.1 We welcome the GCC's proposal to publish the guidance used by the Investigating Committee to allow patients and members of the public to see the process that IC decision makers follow when making a decision about whether or not to refer a case to a hearing.

Clarity of presentation

- 3.2 We suggest that the GCC review the guidance for clarity to an external audience. There may be value in including a flow chart or similar of the FtP process and the IC decision making process. This would enable members of the public to see clearly how concerns are dealt with and how the IC process fits into this.
- 3.3 As we note later on in our response, it is currently unclear where the proposed new threshold criteria on UPC are intended to fit within the existing guidance and this may affect clarity to the public.

Consideration of the public interest

- 3.4 We have some concerns about the way that the section on consideration of the public interest is currently framed in the guidance for the IC (paragraphs 57-60).
- 3.5 We recognise the finding of the Law Commissions, regarding the need to avoid taking regulatory intervention for minor matters, however, to our knowledge the public interest is not commonly included as a consideration in this way by other regulators at this stage. We consider that if this is to be incorporated there should be more extensive guidance on how this will be applied and monitored for consistency.
- 3.6 We note that the GCC have specific limitations in their legislation in that they are unable to screen out cases that are out of their regulatory remit at an

- earlier stage in the process. However, there may be different interpretations of what the public interest means. Following the introduction of the overarching objective and the three limbs of public protection it is important to consider how the public interest in not referring a case to a hearing fits with the need to uphold professional standards and ensure public confidence in the profession (which is often referred to as ‘the wider public interest’).
- 3.7 It may be helpful for the GCC to consider how the current guidance is consistent with the principles arising from the case of *PSA v NMC (1) X (2)*¹ in which the High Court specifically recognised ‘the public interest in the thorough investigation of allegations of misconduct by registrants, and the need to maintain public confidence by investigating such allegations properly’.
- 3.8 In addition, the language referring to the public interest considerations is very broad (‘the IC should consider whether it is not in the public interest for the case to proceed further due to a special or sufficient reason’). In our view this does not provide a clear picture of the circumstances in which the IC may consider it is not in the public interest to refer a case to a hearing. It may be helpful for the GCC to clarify this.
- 3.9 We also query whether the IC is likely to have sufficient information available to them to take a view on issues such as risk of repetition, remediability and demonstration of insight which are more generally a judgement for a panel at the end of the FtP process. We note that in its current form the guidance does not recognise (in accordance with the principles arising from the High Court judgments in *Yeong and Grant*) that there are categories of cases in which, notwithstanding the identified risk of repetition, insight and remediation, public confidence in the profession requires a finding of impairment and consider that this principle applies equally to referral decisions.²
- 3.10 Finally, given that the IC are already required to consider whether there is a case to answer and as part of this, whether the case is capable of amounting to UPC, this already provides a mechanism to avoid taking forward minor matters where it may not be necessary to hold a hearing. This links to the view we have expressed that it is unclear where the proposed threshold criteria on UPC are intended to sit within the guidance and how they fit with what is already there.
- 3.11 We do recognise that the decision process for the IC has been made less clear by the separation of the case to answer/realistic prospect test from the decision to refer to a panel by the introduction of case examiners with the power to agree undertakings with registrants for some of the regulators. We referred to this in *Right-touch reform* where we discussed whether the realistic prospect test is still fit for purpose given ongoing developments in fitness to practise.³

¹ *PSA v NMC (1) X (2)* [2018] EWHC 70 Admin - [para 65]

² *CHRE v NMC (1) Grant (2)* [2011] EWHC 927 (Admin) ; *Yeong v GMC* [2009] EWHC 1923 (Admin)

³ Professional Standards Authority 2017, *Right-touch reform*. Available at:

https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-reform-2017-fitness-to-practise.pdf?sfvrsn=49517320_8 p.78-79

3.12 However, if the GCC intends to leave this section in the guidance, we suggest they may wish to be clear on:

- How a decision not to refer a matter on public interest grounds in which it is decided that there is a case to answer is consistent with the overarching objective and three limbs of public protection, in particular the need to ensure public confidence in the profession,
- When the public interest test might apply – a definition of what might constitute a ‘special or sufficient reason’ not to refer to a hearing,
- How the public interest section fits with the guidance for the IC to consider whether a case meets the definition of UPC, and
- What the limitations might be in an IC taking a view on risk of repetition, remediability and demonstration of insight.

Involvement of the complainant

3.13 We note that there is very little in the guidance regarding involvement of the complainant in the process. The guidance references the registrant’s right to provide observations on the material to be considered by the IC but nothing suggesting that the complainant would then be given time to respond to this. We have previously published policy advice on the importance of sharing the registrant’s response with the complainant.⁴

Consideration of health issues

3.14 We suggest that the guidance could be clearer that the IC has the power to adjourn to wait for the registrant to attend a medical examination ahead of a decision on case to answer. At paragraph 37 it states that the IC has the power to invite the registrant to undergo such an assessment but if this invitation only occurs when the IC meet to consider the case it may be material for this to be completed ahead of a final decision on whether there is a case to answer.

New threshold policy on UPC

3.15 We recognise the GCC’s stated intention in seeking to implement the new threshold policy on UPC to outline clearly the criteria that will be used by the IC when considering whether a case is likely to meet the threshold of UPC, as arising from the Spencer judgement.⁵ In *Right-touch reform* we highlighted our criticism of the GCC for taking forward matters that should not have been the concern of the regulator. We also recognise that the GCC are constrained in that they are not permitted under their legislation from screening cases out ahead of the IC stage.

⁴ Professional Standards Authority 2009, *Handling complaints: sharing the registrant’s response with the complainant*. [Online] Available at: <http://www.professionalstandards.org.uk/publications/detail/handling-complaints-sharing-the-registrant-s-response-with-the-complainant>

⁵ Spencer v GOsC [2012] EWHC 3147 (Admin)
<https://www.bailii.org/ew/cases/EWHC/Admin/2012/3147.html>

- 3.16 However, we have some reservations about the drafting of the proposed threshold criteria and the effect it may have both on the likelihood of a member of the public raising a concern and the ability of the IC to refer on the right cases. We have drawn on the comments we made when the General Osteopathic Council consulted on very similar criteria in 2014.⁶
- 3.17 It would also be useful to understand more clearly where this policy is intended to sit within the existing guidance (i.e. is it intended to replace the current Annex?)

Content and purpose of the guidance

- 3.18 We query some of the examples given in the draft threshold criteria of cases that are not usually capable of amounting to UPC and therefore should not generally be referred to a Professional Conduct Committee. Some of the examples given appear to exclude cases that may raise fitness to practise questions. For example, under a) complaints about note taking and record-keeping alone, we would suggest cases of this nature also involving dishonesty should be of relevance to the regulator. Similarly, the example given under m) of a boundary dispute between neighbours may have FtP considerations if there is dishonesty or abusive behaviour involved.
- 3.19 Whilst we recognise the GCC's intention to provide guidance to the IC when seeking to distinguish between cases which may or may not be of relevance to the regulator we suggest that presenting examples in the way that the current guidance does may be unhelpful in that it risks oversimplifying the decision when in fact it will be down to the IC to consider the specific facts of each individual case.
- 3.20 There is also a subjective element to the way that a number of the criteria are outlined. For example, under vexatious complaints the document references as examples:
- failure to identify the precise issues that they wish to complain about,
 - changes to the substance of the complaint or raising of new issues, and
 - appears to have brought the complaint solely for the purpose of causing annoyance or disruption to the registrant.
- 3.21 The first two considerations may disadvantage complainants who have difficulties in communicating or adequately expressing the substance of their complaint and there are likely to be different views on whether or not a complainant is solely attempting to cause annoyance or disruption to the registrant.
- 3.22 In addition to the risk of the wrong cases being closed at IC stage, as currently drafted the threshold criteria may discourage members of the public who may wish to make a complaint about a chiropractor as it may discourage them from

⁶ Professional Standards Authority 2014, Response to the General Osteopathic Council consultation on draft guidance on threshold criteria for unacceptable professional conduct. Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/consultation-response/others-consultations/2014/gosc-threshold-criteria-unacceptable-professional-conduct.pdf?sfvrsn=3ba57f20_9

raising concerns if they feel that their concern is excluded based on the examples given.

- 3.23 It may be helpful for the GCC to be clearer that this document is intended as guidance and not a prescriptive list of case types which shouldn't be referred on. It would also be useful to draw a clearer link between the basis for UPC in the GCC's legislation and the need to uphold the overarching objective and three limbs when considering the kinds of allegations which may be out of scope for the regulator. We also query whether having the criteria as a standalone document is helpful or whether it might be better framed within the existing guidance for the IC on establishing whether there is a case to answer.

Evidence base

- 3.24 We suggest that the GCC may wish to be clearer on the evidence base they have relied on in developing these criteria. Although there is a reference to consultation with stakeholders including public and patient representatives and previous decisions by the IC it would be useful to understand how the list of examples has been developed for example any research carried out with the public.

Consideration of the public interest

- 3.25 We have noted in our response the lack of clarity over where the proposed new threshold criteria are intended to sit. This makes it difficult to understand fully how the proposed new criteria are intended to fit with the existing guidance for the IC.
- 3.26 We have raised our concerns about interpretation of the public interest in the existing guidance, but we would also highlight the risk of overstating the public interest in not referring a case for a hearing. This currently appears to be a consideration both as an element of the threshold test about whether a case is likely to meet the definition of UPC and as a standalone consideration for the IC with regard to the existing content of paras 57-60.
- 3.27 Along with further clarity on where the new guidance will sit, a more explicit link to the GCC's overarching objective and three limbs would help to ensure that decisions on which cases to refer also take into account the need to uphold standards and maintain public confidence in the profession.

Language

- 3.28 We have noted in our recent report looking at how public confidence is taken into account in the FtP process that the variation in language and use of outdated terminology by some of the regulators is unhelpful in that it is not always aligned with the overarching objective and three limbs of public protection that are now in place for the majority of the regulators. We highlight in particular references to 'the reputation of the profession' and 'bringing the profession into disrepute'. It may give the perception of an inconsistent

approach across the regulatory bodies or appear out of step with a modern system of professional regulation.⁷

- 3.29 We note that the GCC are constrained by the specific limitations of their own legislation, in that along with the GOsC they are still required to apply the UPC test rather than the current impairment test used by the other regulators. We further note that regulators are to some extent reliant on the interpretations and language provided by the case law. However, it may still be helpful to try and 'translate' such requirements in language that is easily understood by the public and link where possible to the overarching objective and three limbs of public protection.

4. Further information

- 4.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

Professional Standards Authority for Health and Social Care
157-197 Buckingham Palace Road
London SW1W 9SP

Email: daisy.blench@professionalstandards.org.uk

Website: www.professionalstandards.org.uk

Telephone: 020 7389 8030

⁷ Professional Standards Authority 2019, *How is public confidence maintained when fitness to practise decisions are made? Advice to the Secretary of State*. Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/how-is-public-confidence-maintained-when-fitness-to-practise-decisions-are-made.pdf?sfvrsn=c8c47420_0