

Response to the GOsC consultation on draft Restoration Guidance

June 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 voluntary 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
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice.
- 1.3 We welcome the opportunity to respond to this consultation on draft Restoration Guidance.

2. Questions

Question 2. Did you find the draft Restoration Guidance helpful and informative?

- 2.1 In part.
- 2.2 We are pleased that the GOsC is producing guidance on this process. While we appreciate that the GOsC receives only a small number of restoration applications, it is nevertheless important that there is clarity and transparency for osteopaths and patients on how the process works.
- 2.3 We found that the guidance itself could have been clearer. In particular, we felt that the description of the test to be applied at the hearing placed insufficient emphasis on the over-arching duty that the Panel *must*, under the amended Osteopaths Act 1993, take into account when making a restoration decision:

“(3A) The over-arching objective of the General Council in exercising its functions is the protection of the public.

(3B) The pursuit by the General Council of its over-arching objective involves the pursuit of the following objectives—

(a) to protect, promote and maintain the health, safety and well-being of the public;

(b) to promote and maintain public confidence in the profession of osteopathy; and

(c) to promote and maintain proper professional standards and conduct for members of that profession.”¹

- 2.4 This duty is only referred to explicitly in a footnote in paragraph 11, and is not set out in the guidance document. It is not clear as a result how these three limbs should fit in with the other considerations, particularly those in paragraphs 11, 14, and 15, which the Panel is asked to take into account. While the factors set out under paragraph 15 appear to address public protection considerations (although they do not do so explicitly), the duties to maintain public confidence and professional standards are not covered anywhere in the guidance, as far as we can see.
- 2.5 It might be helpful to consider the 2018 case of the GMC v Chandra.² This was a second appeal by the GMC, the first one having been dismissed, against a Medical Practitioners Tribunal Service decision to restore a doctor to the register 11 years after he was struck off, in a case involving sexual misconduct against a patient. The Judgment in the appeal case is clear: restoration decisions, like sanction decisions, must be guided by the over-arching objective; therefore restoration decisions must take into account not only current fitness to practise, but also the need to maintain public confidence in the profession and to uphold professional standards.³ The Judgment is critical of the GMC’s guidance for restoration applicants, for not mentioning or referring to the over-arching objective.⁴
- 2.6 In our view, the guidance needs to spell this out to ensure that restoration decisions protect the public in the widest sense, and that the GOsC is fulfilling

¹ Health and Social Care (Safety and Quality) Act 2015, Schedule, 3 (2). Available at: <http://www.legislation.gov.uk/ukpga/2015/28/schedule/enacted>.

² [2018] EWCA Civ 1898, 2018 WL 03825943

³ See paragraph 70 of GMC v Chandra: *“In my judgment, the same approach applies equally to restoration – the tribunal must consider the matters in the guidelines including the circumstances which led to the erasure. They must make findings as to what extent the applicant has shown remorse and insight and remediated him/herself and satisfy themselves that he or she is no longer a risk. The passage of time (here now twelve years) will be important. The MPT must then stand back and have proper regard to the over-arching objective. As Mrs Justice Cox put it in Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Paula Grant [2011] EWHC 927 (Admin), a sanctions case, but which applies equally to a restoration case:*

“101 The Committee should therefore have asked themselves not only whether the Registrant continued to present a risk to members of the public, but whether the need to uphold proper professional standards and public confidence in the Registrant and in the profession would be undermined if a finding of impairment of fitness to practise were not made in the circumstances of this case. In my judgment, in failing to have regard to these issues and to ask themselves the right questions, the Committee were in error.”

⁴ See paragraph 34 of GMC v Chandra: *“There is no mention of, or reference to, the over-arching objective and, essentially, the guidance sets out only those practical issues which need to be addressed evidentially by an applicant. No form of guidance is given as to how the discretion will be exercised, by reference to the over-arching objective or otherwise.”*

its statutory duty. It is worth noting that restoration only applies to former registrants whose misconduct was so serious that a panel decided they should be removed from the register. That such an application can be made after only 10 months is something of an anomaly among the regulators we oversee – for most of them it is a minimum of five years – and makes it all the more important that decision-makers consider the impact on all three limbs of public protection.

- 2.7 We have two further comments to make on the clarity of the guidance.
- 2.8 First, it was not explained in the consultation document who this guidance would be for. If, as seems likely, it is intended to be read primarily by Professional Conduct Committee members, it might be helpful to set out more clearly and in more detail the tests that they must apply in order to reach a decision – including on ‘exceptional circumstances’, assuming the GOsC goes ahead with this proposal.⁵ If it is intended for applicants or patients, the GOsC might consider presenting the information in a more accessible format. In addition, applicants might need to be informed of which matters to address in their applications, both in relation to remediation and to the wider public interest.
- 2.9 Second, in paragraph 13, the final sentence states that “the Committee shall give its reasons for the decision.” This is an essential part of the process – for reasons of transparency, accountability, and fairness, the decision, and most importantly the reasons underpinning it, must be clearly set out in writing. This is not least so that the Authority can scrutinise the decision to determine if it is sufficient to protect the public. We therefore suggest that this should be made clear in the guidance, and that this stage of the process is given greater prominence.

Question 3. After reading the draft Restoration Guidance, did you get a clear understanding of how the restoration procedure will work in practice?

- 2.10 No. See our response to question 2.

Question 4. Should the complainant’s views (where there was a complainant during the PCC hearing) on the former registrant’s application be sought and placed before the PCC.

- 2.11 Sometimes.
- 2.12 We agree that the complainant’s views need not be sought as a matter of course for restoration hearings. However, the statements on page 5 suggest that there may be times when they would be: “where a review hearing has been directed [...] a complainant is not *usually*⁶ approached to provide their comments to the committee.” It might therefore have been more congruent with the GOsC’s stated person-centred approach if the guidance had made clear that the complainant’s views *can* be sought and put before the Panel,

⁵ See our answer to question 5 for our view on the ‘exceptional circumstances’ policy.

⁶ Our emphasis.

assuming that is the case, and identified when and why that would be appropriate.

Question 5. Should the draft guidance require the PCC to find exceptional circumstances before a former registrant is permitted to be restored to the Register if s/he makes an application before five years has elapsed since their removal from the Register?

- 2.13 No. We support the policy objective but not the means by which the GOsC is attempting to introduce the reform.
- 2.14 It is our view that registrants should only be allowed to apply for restoration five years after removal by a fitness to practise or conduct committee, for reasons of public protection.⁷ Sub-paragraph 8(2) of *The Osteopaths Act 1993* allows former registrants to apply for restoration after just ten months. We would, therefore, be supportive of any attempts by the GOsC to amend its legislation to increase this minimum to five years.
- 2.15 We do not, however, feel that we can support the current proposal by the GOsC to introduce a non-statutory ‘exceptional circumstances’ test that would limit the Panel’s discretion, without any change to the supporting legislation or backing in case law. We see no part of Section 8 of the Act that would allow for such a limitation, and worry that the GOsC would be opening itself up to legal challenge in introducing this policy. Indeed, as is clear from the Chandra Judgment, the over-arching objective gives the panel a broad discretion, and perhaps the guidance needs to explain this.⁸
- 2.16 This Judgment also specifically rejected the need for ‘exceptional circumstances’ to apply before a restoration application should be granted following sexual or other serious misconduct.⁹ The grounds for this rejection focus largely on the fact that the MPTS, like the GOsC, and unlike the Solicitors Disciplinary Tribunal, must take into account the over-arching objective when deciding whether or not to restore an applicant. Further we note the Court took into account that in the solicitors regime there is no minimum period before a solicitor can make such an application (unlike the GOsC). The reference to the regulation of solicitors on page 6 suggests that the GOsC is aware of this case law, but it is not clear to us that it has applied it correctly in its thinking about the exceptional circumstances test.
- 2.17 As stated in our response to question 2, if the GOsC does proceed with introducing this policy, we would expect the guidance to set out what might constitute exceptional circumstances. The current draft neither explains nor defines this term and it is hard to see how Panels would apply this test with any consistency.

⁷ In our research on harmonising sanctions, we found that a period of five years was considered sufficiently fair to the registrant whilst not undermining the ‘permanency’ intended by a striking off order. CHRE, Sept 2008. *Harmonising Sanctions, Analysis of consultation responses*.

⁸ [2017] EWHC 2556 (Admin)

⁹ [2017] EWHC 2556 (Admin). Although the GMC went on to win its appeal against this High Court decision, it did not further argue that the high bar of ‘exceptional circumstances’ should be applied to restoration decisions ([2018] EWCA Civ 1898, 2018 WL 03825943)

3. Further information

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

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