



**Council**  
**4 February 2016**  
**Guidance for the PCC on Drafting Determinations**

<b>Classification</b>	Public
<b>Purpose</b>	For decision
<b>Issue</b>	This paper proposes new guidance on drafting determinations which will enhance both the quality and consistency of the Professional Conduct Committees' (PCC) decision-making. While primarily produced for the PCC, as members of the PCC also sit on the Health Committee, it is intended this guidance can also be of some assistance to the Health Committee.
<b>Recommendation</b>	To agree the draft Guidance for the Professional Conduct Committee on Drafting Determinations at Annex B.
<b>Financial and resourcing implications</b>	None identified
<b>Equality and diversity implications</b>	Equality considerations have been reflected in the review of the draft guidance post consultation. Monitoring of diversity data will form part of the Regulation Department Quality Assurance Framework.
<b>Communications implications</b>	The GOSc has undertaken a three month consultation on the draft guidance on drafting determinations. If approved, the guidance will be published on the GOSc website.
<b>Annexes</b>	A. Responses to the Consultation  B. Draft Guidance for the Professional Conduct Committee on Drafting Determinations
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## Background

1. The Professional Conduct Committee (the Committee) considers cases involving criminal convictions or allegations against an osteopath's conduct or competence. At the end of the hearing, the Committee will set out its findings and any sanctions in its determination of the case. There are 12 members of the Committee, but a case is considered by a Committee of three members. In addition to the Chair, the Committee has three other members who are able to chair hearings.
2. At the introductory meeting of all Committee chairs on 28 November 2014, the Chair of Council together with the Committee chairs discussed mechanisms for achieving good quality determinations. One of those matters discussed was developing a guidance document on drafting determinations. In line with our on-going commitment to quality improvement and to encourage consistency and improve the quality of the Committee's decision making, we have developed draft guidance for the Professional Conduct Committee on drafting determinations. The objective of this draft guidance is to provide a framework for decision making by the Committee but does not impact upon the Committee reaching independent decisions. As members of the Committee also sit on the Health Committee, it is intended this guidance will be of use to the Health Committee.

## The GOsC's policy

3. At its meeting on 12 March 2015, the Osteopathic Practice Committee (OPC) considered the draft guidance on drafting determinations. OPC members made a number of helpful drafting comments which have been incorporated into the draft produced for consultation. In particular, the OPC considered that the draft guidance should specifically refer to the Committee's determination setting out the reason why a witness was or was not believed (in whole or in part as the case may be).
4. Council considered the draft policy at its meeting on 14 May 2015, where further, minor amendments were suggested and subsequently made to the draft. Council members approved this draft of the policy for consultation at this meeting in May.

## The consultation

5. The GOsC undertook a three month consultation from 31 July 2015 to 30 October 2015, in accordance with our engagement strategy. In addition to being published on our website, an article relating to the consultation was featured in the August/September 2015 issue of *the osteopath* and the September news e-bulletin sent to osteopaths.
6. Direct correspondence in the form of an email went to targeted stakeholders, including osteopathic educational institutions, other healthcare regulators and public/patient representatives shortly after the launch of the consultation (3

August 2015) and as a 'last chance' reminder email (26 October 2015) a week before the deadline. The consultation also featured in social media postings on Twitter and Facebook.

7. The GOsC received four responses to the consultation questionnaire. One response was received from one of our external legal providers, Blake Morgan. The low response might be partly attributable to the fact that ample opportunity has been provided for the contents of the draft to be extensively discussed and commented on by Committee members and legal assessors prior to the external consultation taking place. Additionally, the draft guidance is fairly non-contentious given the nature of the document, with other healthcare regulators already having guidance of a similar nature in place.
8. A summary of the consultation responses are set out in Annex A.
9. All feedback received has been reviewed and considered when making revisions to the draft guidance on drafting determinations which can be found at Annex B.

**Recommendation:** to agree the draft guidance for the Professional Conduct Committee on Drafting Determinations at Annex B.

## Annex A to 10

Consultation Question	Yes	No	Consultation response*	GOsC Response (where relevant)
Do you think the draft guidance is clear	4	0	The contents have been noted and it seems to be taking shape.	
Do you think the draft guidance will improve the consistency and transparency in different panel's decision making?	4	0		
Do you have any suggestions on how to improve the guidance?			<p>Is this to ensure consistency in decision-making, or on drafting? The title of the guidance is on drafting, but the introductory paragraph refers to decisions.</p> <p>The section on drafting the determination could be strengthened to clarify the role of the Legal Assessor in drafting early versions of the determination. The final version is ultimately the responsibility of the Chair, but responsibility for drafting initial versions is that of the Legal Assessor.</p>	<p>The guidance is intended to provide a framework for Committees in terms of their decision making to ensure that all relevant matters are addressed by it when reaching a decision. This in turn will improve the quality of the determination which captures that decision making in written form.</p> <p>This has been amended to make this clearer.</p>

		<p>The last sentence under the heading "Structure" says "Avoid internal inconsistency". We suggest that this could be expanded to explain that panels should avoid internal inconsistency both in the language used, and in their reasoning and conclusions. For instance, where a panel says at stage 2 that a registrant presents a risk of harm to patients, but then goes on to impose a sanction that does not address that risk.</p> <p>We would also suggest that some more detail in the section on findings of fact would be beneficial. Panels should be reminded that if they rely on a witness who has made inconsistent statements, they must explain why they consider it safe to rely on that witness notwithstanding the inconsistencies (<i>Casey v GMC</i> [2011] NIQB 95).</p>	<p>Amendments made.</p> <p>Noted.</p>
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\*Some responses have been shortened.



**General  
Osteopathic  
Council**

## **Draft Guidance for the Professional Conduct Committee on Drafting Determinations**

**Effective: [Date]**

### **The purpose of this guidance**

1. This guidance is addressed primarily to the Professional Conduct Committee (the Committee) but can also be of use to the Health Committee. It has been produced to improve both the quality and consistency of the Committees' decision-making and takes account of best practice within healthcare regulation. In achieving the above objectives the guidance has been designed to provide a framework for decision making by the Committee but does not impact upon the Committee reaching independent decisions.
2. The guidance is intended to be a 'living document' and will be amended from time to time, to take into account developments in the case law, and any feedback and learning points provided by the Professional Standards Authority for Health and Social Care (PSA).

### **Equality and Diversity Statement**

3. The GOsC is committed to ensuring that processes for dealing with concerns about osteopaths are just and fair. All those involved in our processes are required to be aware of and observe equality and human rights legislation. Decision making of the Committee should be consistent and impartial, and comply with the aims of the public sector equality duty.

### **The Audience for the Committee's determination**

4. When drafting its determination, the Committee should bear in mind the various persons who are likely to be interested in the outcome of a hearing and the decisions made by the Committee, and who may thus read the determination. These include:
  - a. the parties to the hearing (the Registrant and the GOsC)
  - b. the complainant
  - c. the Professional Standards Authority
  - d. Judges of the High Court
  - e. the osteopathic profession
  - f. osteopathic patients (who are potential complainants)
  - g. the general public.

## **The importance of accessibility**

5. There are obligations at common law and pursuant to Article 6 of the European Convention on Human Rights for the Professional Conduct Committee, in every case where a decision is made to impose an order, to give adequate reasons and in good time.
6. Good determinations should be accessible. This is a key part of ensuring that justice is seen to be done, and thereby maintaining confidence in the regulation of the profession of osteopathy.
7. As such, the determination should function as a stand alone document. This means that a person with no prior knowledge of the case and without experience of regulatory hearings, should be able to understand the issues, the decisions made by the Committee, and the reasons for those decisions, simply by reading the Committee's determination.
8. When drafting its determination, the Committee should ensure that the determination remains accessible even where complex clinical or financial issues are involved. This can be achieved by:
  - using simple and direct prose
  - being precise and to the point
  - using the active voice rather than the passive
  - trying not to use language that excludes.
9. The Committee should be alert to avoid the appearance of discrimination and prejudice in its use of language.
10. It should avoid the use of stereotyping and drawing assumptions (e.g. 'it is difficult to attribute sexual motivation to an apparently happily married man') and consider using gender neutral language.
11. Language in determinations should be intelligible, moderate and neutral.

## **Structure**

12. A clear structure aids the accessibility of a written determination.
13. A determination should have an introductory section setting out the background to the case and the allegations being considered. It should set out the facts that are admitted and the areas of dispute between the parties. The determination should then address the contested questions of fact and, using a process of reasoning, determine what those facts are.



14. It should then consider any legal issues that may arise and, after using a process of reasoning to relate the facts to the law, come to a conclusion.
15. The determination must reflect that a hearing has a number of different stages, and should make clear what issues are being determined at each stage. However, the Committee should be mindful that its reasoning throughout the different decision making stages is consistent as a whole. For example, where the Committee, in the determination on UPC identifies a particular risk but then fails to address that risk when determining what sanction to impose.
16. The use of headings and sub-headings to signpost the reader to relevant sections and to break up the text is helpful in this regard.
17. Paragraphs and pages should be numbered.

### **Preliminary matters and interlocutory applications**

18. The GOsC has produced a number of Practice Notes which relate to matters which frequently arise during the course of a hearing. These include matters such as the absence of the registrant at a hearing; applications for adjournment; service and admissibility of evidence, including expert evidence.
19. When making a decision on matters of this sort, the Committee's determination should refer to the relevant Practice Note. For example, in deciding whether or not to proceed in the absence of the registrant, a reference to the Practice Note should be set out in the Determination.

### **Findings of Fact**

20. In writing its determination, the Committee should be careful to distinguish between facts and assumptions. A fact is something that can be proved by evidence. An assumption is a statement about the unknown, based on the known.
21. The Committee should avoid making any assumptions about the motivation of a witness and should focus on the clarity and consistency of a witness's evidence. This is particularly relevant in relation to complainants in cases involving the transgression of sexual boundaries.
22. When setting out such facts, the determination should describe the facts in sufficient detail for the reader to understand the nature of the allegations.
23. The determination should refer to any legal advice received by the Committee, although where that advice is non-contentious or straightforward it is usually sufficient to state that the Committee accepted the advice of the Legal Assessor.

24. However, where the Committee disagrees with the legal advice it has received, it **must** say so and provide reasons for this within the determination.
25. The Committee must give separate consideration to each particular of the allegation.
26. It is essential that the determination sets out the evidence that the Committee relied upon when reaching its findings in relation to each particular. However, not every factor or issue which weighed with the Committee has to be set out and explained.
27. The findings must relate to the Allegation and Factual Particulars, and must explain which allegations have or have not been found proved, together with the reasons for this.
28. Any admissions made by the Registrant must be set out in the determination, and the determination must pronounce any admitted facts as having been found proved.<sup>1</sup>
29. In relation to disputed facts, the determination must refer to the burden of proof which rests on the GOsC, and to the standard of proof (the balance of probabilities).
30. If the Committee's findings turn on the credibility of a witness, the determination should explain the reason why the witness was or was not believed (in whole or in part). Equally, where the Committee relies on a witness who has made inconsistent statements or is vague and /or contradictory on certain aspects of their evidence, the Committee needs to explain why it nevertheless relied upon that witness's evidence.
31. Where there is a difference of opinion between experts '*...It is important that the tribunal should state which expert evidence (if any) it accepts and which it rejects, giving reasons... It is not enough for the tribunal simply to state that they prefer the evidence of A and B to that of C and D. they must give reasons...these may be brief, but in some cases something more elaborate is required. They must at least indicate the reasoning process by which they have decided to accept some and reject other evidence.*'<sup>2</sup>

### **Findings on Unacceptable Professional Conduct (UPC)**

32. It is well established that the issue of whether a Registrant has been guilty of UPC is a matter of judgement for the Committee, rather than an issue of proof.<sup>3</sup>

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<sup>1</sup> See rule 27(1) of the GOsC (Professional Conduct Committee) (Procedure) Rules 2000. SI 2000/241

<sup>2</sup> R (on the application of) v Ashworth Hospital Authority & Others [2002] EWCA Civ 923 per Dyson LJ at paragraph 80.]

<sup>3</sup> See CHRE v GMC and Dr Biswas [2006] EWHC 464 (Admin)

33. In determining whether or not a Registrant has been guilty of UPC, the Committee should refer to the relevant case law. Any references to case law should be up-to-date and relevant to the Committee's decision. However, quoting large portions of case law should be avoided.
34. The Committee should also have regard to the *Osteopathic Practice Standards* and the determination should refer to the relevant parts of that document.
35. The Committee must always provide reasons as to why it considers that the conduct alleged does or does not amount to UPC.

## **Sanction**

36. The Committee's determination should refer to the public interest and the purpose of imposing sanctions which is not to punish the Registrant but includes: the protection of the public, maintaining public confidence in the profession; and declaring and upholding proper standards.
37. The Committee's determination should also explain how the Committee has taken the principle of proportionality into account, so as to ensure that any sanction is proportionate to the legitimate aim pursued and that it imposes no greater restriction than is absolutely necessary to achieve this purpose.
38. In doing so, the determination should set out the balancing exercise it has taken in relation to the risk identified, the public interest and the effect of the sanction on the Registrant.
39. The Committee's approach to sanction must be stated in the determination. The Committee is required to consider the full range of sanctions available and in ascending order of seriousness. The Committee should consider the sanction immediately above the one it has decided to impose and give reasons why this sanction is not required.
40. If the Registrant has submitted evidence in mitigation and testimonials, the determination should refer to these and should state what weight the Committee has given to this material.
41. The Professional Standards Authority's (PSA) view is that limited weight should be given by the Committee to testimonials submitted by the registrant which:
  - a. are not addressed to the Committee; and
  - b. do not clearly state/indicate that the writer is aware of the nature or the full extent of the allegations (including any admissions made by the registrant).
42. The determination should refer to any submissions made by the Registrant or by the Council on sanction.

43. The determination should set out clearly any mitigating or aggravating factors identified by the Committee and must refer to the Indicative Sanctions Guidance produced by the GOsC.
44. Where the Committee has determined to impose conditions or a suspension for a specified period, it must also indicate within the determination that the case will be reviewed at a review hearing before the end of that period. The determination must also set out what information the Committee at the review hearing requires.<sup>4</sup>

### **Conditions of Practice Orders**

45. Where the Committee decides to make a Conditions of Practice Order, the determination must clearly identify and expressly state the risk posed by the registrant.
46. The determination should then go on to explain how the conditions will address the particular risks identified, and how the public will be adequately protected by those conditions.
47. This is particularly important where the conditions imposed do not actually restrict the ability of a practitioner to treat patients.
48. The determination must specify the period for which the order is to have effect<sup>5</sup>, and explain why that period has been chosen.
49. Where lack of insight is an issue in the case, the PSA's view is that a determination should:
  - a. set out activities designed to demonstrate the development of appropriate insight;
  - b. make it clear that the Registrant will be expected to demonstrate an adequate level of insight at a review hearing;
  - c. impose a requirement upon the Registrant to demonstrate at the review hearing a development in his level of insight e.g. through reflective learning or other methods; and
  - d. indicate what information should be presented by the Registrant at the review hearing, e.g. "arrange for a sample of patient records to be audited by a fellow professional in relation to areas of practice requiring remediation, once he has completed the necessary training courses, or provide for some other measure of objective assessment of the impact of

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<sup>4</sup> Rule 37 of the *General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000*

<sup>5</sup> Section 22(4A) of the *Osteopaths Act 1993*

the training on both the Registrant's understanding of the issues, and his actual interactions with patients.

50. As stated above, the determination should specifically refer to all three limbs of the public interest (the need to protect the public; declaring and upholding proper standards; maintaining public confidence in the regulation of the profession) and to the principle of proportionality.
51. It is important that the terms of a Condition of Practice Order addresses all the issues that have been identified by the Committee. Both the Registrant and the Committee reviewing the order need to understand the original failures and how the conditions are intended to remedy them.
52. The determination should set out clearly what the Registrant is expected to do and in what timescales. In particular, the determination must set out how the registrant is required to demonstrate that he has addressed the risks identified and the evidence that is required for the Committee to be satisfied of this.
53. The determination should also set out mechanisms for monitoring and independently verifying that the conditions have or are being complied with.
54. Any conditions imposed must be SMART (Specific, Measurable, Achievable, Realistic and Relevant; Time based).
55. The Committee must ensure that any obligations rest on the Registrant and not a third party, and the determination should avoid naming specific individuals in case circumstances change.
56. When drafting its determination in relation to conditions, the Committee should use the standard bank of conditions and should have regard to the Indicative Sanctions Policy.

## **Suspension**

57. The Committee should take account of the Indicative Sanctions Guidance. The Committee's determination must state the period of suspension<sup>6</sup> and explain why that period has been chosen.
58. As stated above, the Committee's determination should explain why a lesser or more severe sanction has not been imposed, and should make reference to the principle of proportionality.

## **Immediate Orders**

59. Where UPC has been found and a sanction of suspension or removal has been imposed, the Committee should make it clear in its determination that it has considered whether or not to make an order for immediate suspension, and

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<sup>6</sup> S22(4)(c) of the *Osteopaths Act 1993*

should give reasons for its decision on this issue even where it has decided not to impose an immediate suspension.

60. The determination should also refer to the submissions of the parties on whether an immediate suspension order is required.

### **Review Hearings**

61. In keeping with the principle of the determination functioning as a stand alone document, the Committee's determination on a review hearing should include:
  - a. the initial allegation against the Registrant
  - b. a summary of the findings made by the previous Committee(s)
  - c. the action taken by the Registrant since the last hearing, including any action to keep his or her knowledge and skills up to date
  - d. the decisions taken by the Committee at the review hearing.
62. If Registrant has provided information or evidence, the determination should refer to it and explain what relevance and/or weight the Committee has given to such material.
63. The Committee is required to decide whether or not the Registrant has complied with conditions. If the Committee finds that the registrant has failed to comply, it must explain which conditions have not been complied with and the evidence upon which the findings are based.
64. If a further review is required, the determination should set out clearly the type of evidence or information that the registrant should provide at the next review hearing.
65. If no further review is necessary, the determination must explain why.
66. If the Committee decides to vary an order or to reduce a suspension order to conditions or vice versa, the determination should set out its reasons for doing so.
67. In particular, the determination should address any risk to the public, and explain how the public will be protected by the decision taken.

### **Reasons**

68. The Committee needs to ask itself the following questions:
  - Is what we have decided clear?

- Have we explained our decision and how we reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?
69. It is important that the reasons show that the parties have been listened to, that the evidence has been understood, the submissions comprehended and a decision reached in the light of the evidence and submissions. This is particularly important in the case of an unrepresented Registrant.
70. In writing its determination, the Committee should bear in mind:
- reasons must be proper, adequate and intelligible and should enable the person affected to know why they have won or lost;<sup>7</sup>
  - reasons must be given for every decision;
  - the exact wording from the Act or Rules should be used – do not paraphrase;
  - conversely, avoid incantations/'parroting the formula'.<sup>8</sup>
- For example, if the Committee determines that an interim suspension order should be imposed, it is not sufficient to state simply that it was necessary to make the order for the protection of the public. The reasons must go on to explain why it was considered necessary, and what the identified risks to the public were.*
- reasons 'need not be elaborate or lengthy but they should be such as to tell the parties in broad terms why the decision was reached';<sup>9</sup>
  - all Committee members must be involved in producing the Committee's decision and reasons;
  - the Committee's decision stands or falls on its own – it is not usually possible to give evidence about the reasoning given or to supplement it later if the decision is challenged.

### **Interim Orders**

71. Where the Committee is considering an application for an Interim Suspension Order, the determination must refer to the statutory test, and explain why the Committee considers that an order is (or is not) necessary for the protection of the public.

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<sup>7</sup> R v Brent LBC, ex parte Baruwa [1997] 29 HLR 915

<sup>8</sup> R (Paterson) v GMC [2006] EWHC 891

<sup>9</sup> Stefan v GMC [1999] 1 WLR 1293

72. In explaining the reasoning of the Committee, the determination should:
- identify clearly any concerns about the registrant;
  - identify clearly any risks to the public;
  - address the seriousness of the allegation; the likelihood of the alleged conduct being repeated; the severity of harm likely to result if the alleged conduct is repeated; the osteopath's previous character and employment;
  - take the effects of any order on the osteopath into account, and state that the Committee has done so;
  - explain why the Committee considers that an Order is (or is not) proportionate to the risks identified;
  - provide a recommendation to the GOsC on the length of the suspension order.<sup>10</sup>

### **Responsibility for drafting the determination**

73. While the production of the initial draft determination rests with the legal assessor, responsibility for producing the Committee's final determination ultimately rests with the Chair of the Committee hearing the case.
74. However, all members of the Committee hearing a case bear a collective responsibility for the decisions made by the Committee and the reasons for those decisions.
75. The legal assessor's guidance can be sought on questions of structure and the presentation of the reasons but not on the reasons themselves.<sup>11</sup>

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<sup>10</sup> See section 24(3)(a) of the *Osteopaths Act 1993* which provides that an ISO imposed by the PCC/HC will remain in place until the case is substantively disposed of. However, the Committee should have regard to paragraph 35 of the *Guidance for the Fitness to Practise Committees on Imposing Interim Suspension Orders, November 2015*.

<sup>11</sup> *Needham v Nursing and Midwifery Council* [2003] EWHC 1141 per Newman J at para.13



## **Annex: Template for PCC Decisions**

### **General Osteopathic Council**

#### **Professional Conduct Committee**

**Case No:** [enter]

#### **Professional Conduct Committee Hearing**

##### **Decision**

**Case of:** [enter registrant name]

**Committee:** [enter chair name] (Chair)

[enter lay member name]

[enter osteopathic member name]

**Legal Assessor:** [enter legal assessor name]

**Representation for Council:** [enter name]

**Representation for Osteopath:** [enter name]

**Clerk to the Committee:** [enter name]

**Date of Hearing:** [enter date]



## **Allegation and Facts**

[enter Allegation and facts]

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## **Decision:**

### **To include:**

- **Preliminary matters**
  - **Background**
  - **Submissions from the parties**
  - **The Committee's findings on the facts**
  - **The Committee's Findings on the allegation (UPC/Conviction etc)**
  - **The Committee's decision on sanction**
- 

Under Section 31 of the Osteopaths Act 1993 there is a right of appeal against the Committee's decision.

The Registrant will be notified of the Committee's decision in writing in due course.

All final decisions of the Professional Conduct Committee are considered by the Professional Standards Authority for Health and Social Care (PSA). Section 29 of the NHS Reform and Healthcare Professions Act 2002 (as amended) provides that the PSA may refer a decision of the Professional Conduct Committee to the High Court if it considers that the decision is not sufficient for the protection of the public.

Section 22(13) of the Osteopaths Act 1993 requires this Committee to publish a report that sets out the names of those osteopaths who have had Allegations found against them. The Registrant's name will be included in this report together with details of the allegations we have found proved and the sanction that that we have applied today.