



Council
1 November 2017
Draft Investigating Committee Decision Making Guidance

Classification	Public
Purpose	For decision
Issue	This paper invites Council to consider the draft Investigating Committee Decision Making Guidance. The guidance has been substantially updated and modified to enable the Investigating Committee to make consistent, fair and proportionate decisions
Recommendation	To agree to consult on the draft Investigating Committee Decision Making Guidance at the Annex.
Financial and resourcing implications	Within existing budget
Equality and diversity implications	None identified
Communications implications	Views from the members of the Investigating Committee have been sought and taken into account in the draft guidance. A public consultation will be required to be undertaken once the draft has been approved by Council
Annex	Draft Investigating Committee Decision-Making Guidance
Author	Sheleen McCormack

Background

1. In our Corporate Strategy 2016-19, we state that we will continue to seek to identify improvements in our fitness to practise processes. As part of our reform programme for 2017-18, we continue to explore options and implement reforms which we consider could improve our processes and improve patient protection but which do not require a change to our primary legislation, the Osteopaths Act. The GOsC Business Plan for 2017-2018 states that we will, 'review the Investigating Committee decision making guidance including developing separate guidance for the IC on issuing advice'.
2. The second edition of the Investigating Committee (IC) Decision Making guidance was reviewed in October 2013 and, for reference, can be found at: <http://www.osteopathy.org.uk/news-and-resources/document-library/fitness-to-practise/ic-decision-making-guidance/>. The IC Decision Making Guidance is for use by people involved in an IC meeting.
3. In summary, the IC is a panel of at least five people who meet in private and consider a set of cases, prepared and referred to them by the GOsC regulation team. The IC decides whether a matter ought to be referred to a public hearing before the Professional Conduct or Health Committee (the PCC and HC). The IC decides whether there is a case to answer where an allegation on one or more of the statutory grounds brought against an osteopath. The statutory grounds encompass unacceptable professional conduct, professional incompetence, conviction or serious impairment by reason of the osteopath's physical or mental health. The IC do not hear oral evidence. The IC makes decisions independently of the GOsC. When a case is considered by the IC, it will make its own independent decision.

Discussion

4. The GOsC legislation provides that the IC's role and function is performed in private. One of our purposes in reviewing the guidance is to ensure that the IC decision making is more fully understood which in turn will enhance the transparency of our procedures.
5. It is essential that the IC is supported by up-to-date guidance which clearly sets out the decision-making framework and the outcomes they can decide on. The IC has a range of specific guidance documents it can use when considering how to decide on the outcome of a case. This includes guidance on the threshold criteria for unacceptable professional conduct. The draft guidance has been updated to take account of the threshold criteria and contains detailed guidance on all the relevant information that the IC requires to reach a decision.
6. The key changes include:
 - Providing detailed guidance on the IC's role and function (including conflicts of interest)

- Being clearer about the process for reaching decisions
 - Detailed guidance on issuing advice
 - Providing reasons
 - Incorporating the threshold criteria within the draft guidance document
 - Executive recommendations.
7. As part of our pre-consultation engagement plan, we sought feedback from the IC on the entire guidance, including its tone and structure as well as content. At the Investigating Committee all-member training took place on 3 July 2017, the agenda included a structured discussion and feedback session on the review of the current Investigating Committee Decision Making Guidance document.
 8. The revised guidance is aligned to the GOsC strategic objective to promote public and patient safety through proportionate, targeted and effective regulatory activity.

Consideration by the Policy Advisory Committee

9. At its meeting on 10 October 2017, the Policy Advisory Committee considered the draft guidance. Useful feedback received at this meeting included placing more emphasis on the IC's function, including the realistic prospect test by setting this out earlier in the guidance. The PAC agreed that the guidance should be recommended to Council for consultation subject to these comments and the necessary amendments being effected.

Recommendation: to agree to consult on the draft Investigating Committee Decision Making Guidance at the Annex.



Draft Investigating Committee Decision-making Guidance

Effective

Introduction

This guidance document sets out the statutory duties and regulatory function of the IC in accordance with the Osteopaths Act 1993 (the Act) and the GOsC (Investigation of Complaints) (Procedure) Rules 1999.

This guidance has been produced to improve both the quality and consistency of the IC decision-making when determining whether there is a case for the osteopath to answer. In achieving these objectives the guidance has been designed to provide a framework for decision making by the IC but does not impact upon the Committee reaching independent decisions.

Equality and Diversity Statement

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.

Public Interest

1. The Act¹ requires GOsC to act in the public interest when an allegation is raised about a Registrant's fitness to practise. The public interest includes:
 - 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.
2. The public interest and the interests of the complainant and Registrant may demand that matters are fully and properly investigated and resolved at the PCC or HC.

Conflict of Interest

3. The IC must ensure fairness in its decision making at all times and the rules prevent a member of the IC considering a case at a committee meeting if it was considered by him/her in their capacity as Screener. Conflict checks are also completed by committee members in advance of IC meetings so that potential conflicts of interest can be raised and considered by the GOsC in advance of a meeting and/or considered by the Committee at the meeting following advice from the Legal Assessor.
4. Proceedings are considered unfair where there is actual bias, potential for bias or where there is the perception of bias. The test for bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the committee was biased.
5. Examples of potential conflicts include:
 - Close personal or professional relationship with any of the parties connected to a case which may affect a member's ability to consider the allegation fairly and impartially
 - Personal interest in the outcome of a matter.

IC Constitution

6. The General Osteopathic Council (Constitution of the Statutory Committees) Rules Order of Council 2009 stipulate that the IC shall consist of a maximum of

¹ Practice note: 2015/1 The duty to act in the public interest. While paragraph 3 of the schedule to the Health and Social Care (Safety and Quality) Act 2015 does not require the IC to have regard to these objectives when considering allegations, it is good practice that it should.

15 persons who are lay persons and registered osteopaths appointed to the Committee by the General Council.

7. The quorum of the Investigating Committee shall be five of which at least two must be lay persons and two registered osteopaths.
8. The Council appoints from the lay members panel chairs to chair proceedings of the Committee. If at any meeting of the Investigating Committee, the panel chair invited to chair the proceedings is absent, the members of the Committee at that meeting may nominate from amongst the members who are present a lay person to chair that meeting.

Function of the IC

9. The IC is not a fact finding committee and must only decide whether, in its opinion, there is a case to answer based on an assessment of the evidence and information placed before it. Section 20(9)(c) of the Osteopaths Act establishes the function of the IC. The IC is to investigate any allegation referred to it and to consider whether:

'in the light of the information which it has been able to obtain and any observations made to it by the registered osteopath concerned, whether in its opinion, there is a case to answer'².

10. The IC meets in private and its discussions are confidential. The parties do not attend the IC meeting nor are they represented at the meeting. Following the consideration of a case the IC can issue one of the outcomes below:

- Conclude that there is a case to answer before the PCC or HC
- Adjourn consideration of an allegation in order for further investigative enquiries to be undertaken by the Registrar
- Conclude that there is no case to answer
- Conclude that there is no case to answer and issue a letter of advice to the Registrant.

IC Decisions

11. The function of the IC is to determine whether there is a case to answer. This involves a consideration of two questions.
12. When considering whether this test is met, the IC should ask itself:
 - a. Is there a **real prospect** of the alleged facts being proved before the PCC/HC?

² Osteopaths Act 1993, section 20(9)(c)

- b. If so, is there a **real prospect** that those facts would amount to the statutory ground:
 - i. conduct which falls short of the standard required of a registered osteopath (unacceptable professional conduct), or
 - ii. professional incompetence, or
 - iii. ability to practise is seriously impaired because of a physical or mental condition, or
 - iv. conviction (at any time) in the United Kingdom of a criminal offence.
 - v. The osteopath has been included by the [Independent Safeguarding Authority] in a barred list
 - vi. The osteopath has been included by the Scottish Ministers in the children's list or the adults' list.

The Real Prospect Test

- 13. The real prospect test requires consideration on whether there is a genuine possibility of the matter being established by the PCC/HC as opposed to a remote or fanciful possibility.
- 14. The IC should consider the likelihood of the allegation as alleged being found proved and the statutory ground being established by the PCC/HC.
Note: the particulars of the allegation refer to the separate charges alleged (the allegation being unacceptable professional conduct and /or professional incompetence etc)
- 15. In relation to the first question, where there is more than one particular alleged, the IC should give consideration to each particular **separately**.
- 16. However, when deciding the second question, the proper approach is for the IC to consider whether together i.e. **cumulatively**, the particulars would amount to unacceptable professional conduct / serious professional incompetence etc.
- 17. The standard of proof applicable before the PCC/HC is the ordinary civil standard, namely the balance of probabilities and the GOsC has the burden of proving the facts before the PCC/HC.
- 18. If the IC is unsure about whether it is satisfied that the real prospect test is met, it should favour referral to the PCC.

Case to Answer

- 19. When considering whether there is a case to answer, the IC should have regard to the following:

- a. Whether there is a case to answer is a matter for the IC's judgement.
 - b. Each case will turn on its own facts – even if it bears similarities to other cases. The IC must exercise its judgement in each individual case.
 - c. It is not the IC's role to determine whether those facts are proved or to determine that they amount to the relevant allegation – that is the remit of the Professional Conduct (PCC) or Health Committee (HC).
 - d. The IC should consider each element of the allegation, to see whether there is evidence to support the facts alleged and whether those facts would amount to the statutory ground.
 - e. In applying the threshold criteria, the IC should bear in mind that matters that are not usually capable of amounting to Unacceptable Professional Conduct, should generally not be referred to the PCC.
 - f. The IC should consider the particulars 'in the round' to ensure that they strike the right balance in terms of the case which the osteopath must answer.
20. If there are two or more separate allegations against a Registrant before the IC (UPC and Health), then the IC should refer the allegations to the appropriate Committee.
21. In the event that the IC determines that there is no case to answer, the IC can issue one of the following outcomes.

No case to answer – without advice

22. If after consideration there is no realistic prospect of either the allegations being found proved by a PCC/HC or the statutory ground being established, the IC should close the investigation case. A number of factors may assist the IC with determining whether there is no case to answer, such as the detail and nature of the evidence submitted, the practical impact (if any) of the Registrant's remediation on the allegation, any apparent insight, on-going risk to the public or patients, the absence of evidence or information capable of substantiating assertions made.
23. The IC should be mindful of the impact closing a case can have on the Complainant and should ensure that there is sufficient reasoning to justify their decision making.

No case to answer – advice

24. There is no explicit power contained within the Act or the Investigation Rules that provides that the IC can issue advice to a Registrant. However, in *Spencer v General Osteopathic Council*, Mr Justice Irwin considered there was 'nothing to

prevent the PCC from giving advice' to a Registrant where allegations have been made out which constitute a breach of the *Osteopathic Practice Standards* but where neither professional incompetence nor unacceptable professional conduct is made out. Correspondingly, the IC may offer advice to a Registrant in connection with his or her future conduct, performance or practice which may be appropriate.

25. Any advice given should be relevant to the allegations that are being considered by the IC. The advice should be designed to ensure future compliance with the *Osteopathic Practice Standards* and should clearly identify where the Registrant needs to reflect on his or her future conduct or performance.
26. If the IC decides advice is appropriate and proportionate, it should clearly set out what that advice should be. It should form part of the IC reasons for its decision, and be included in the outcome letter sent to the Registrant.
27. Advice may be appropriate where there is no real prospect of the facts amounting to unacceptable professional conduct or where there are no aggravating factors, or where the Registrant appears to have demonstrated insight and reflection or has undertaken adequate remediation. The IC should carefully consider whether specific advice can adequately deal with the issue.

Note: any advice issued does not affect a Registrant's registration status and will not be recorded on the Register of Osteopaths as it is not a formal sanction nor would any restrictions be placed on the osteopath's registration. However, the fact that advice was issued will become part of the Registrant's fitness to practise history.

Threshold Criteria

28. The guidance on *Threshold Criteria for Unacceptable Professional Conduct* has been developed to assist the IC when considering whether or not there is a 'case to answer' for matters relating to unacceptable professional conduct.
29. The following are not usually capable of amounting to Unacceptable Professional Conduct and should not generally be referred to the PCC:
 - Complaints about note-taking and record-keeping which do not suggest incompetence or negligence of a high degree
 - Complaints that do not fall within the statutory grounds of section 20 of the Act
 - Vexatious complaints, where the Complainant:
 - Repeatedly fails to identify the precise issue that he or she wishes to complain about

- Frequently changes the substance of the complaint or continually seeks to raise new issues
- Appears to have brought the complaint solely for the purpose of causing annoyance or disruption to the Registrant
- Complaints that are anonymous and cannot be otherwise verified
- Complaints in which the Complainant refuses to participate and/or provide evidence in which the allegation cannot be verified or proved
- Complaints that relate to disputes between Registrants and patients about fees or costs of treatment. Provided there is no allegation of dishonesty or intent to mislead
- Complaints that:
 - Seek to reopen matters which have been the subject of an employment tribunal or civil proceedings
 - Seek to pre-empt or influence the outcome of other regulatory or civil proceeds
 - Are within the jurisdiction of another regulator and should have been made to that regulator
 - Complaints that amount to a difference of professional opinion. Provided the opinion is accepted as proper and reasonable by a responsible body of osteopaths who are skilled in that particular area of practice or the opinion is reasonably held and capable of withstanding logical analysis.
- Complaints that relate to employment disputes
- Complaints about contractual disputes, including arrangements for lease of premises and facilities
- Complaints relating to business disputes, providing there is no allegation of a breach of patient confidentiality or data protection issues, including:
 - Passing off/similar sounding web domain names or trading names
 - Patient poaching
 - Matters arising from the break-up of a principal/associate relationship
- Complaints about a Registrant's personal life (including divorce proceedings) unless the complaint relates to abusive behaviour, violence or behaviour that brings the profession into disrepute

- Complaints that have no public protection implications but are made simply on the basis that the Complainant is aware that the other party to a dispute is a Registrant (e.g. boundary disputes between neighbours)
- The following motoring offences, provided that drugs or alcohol are not involved and there are no potential health issues:
 - Parking and penalty charge notice contraventions
 - Fixed penalty (and conditional offer fixed penalty) motoring offences
- Penalty fares imposed under a public transport penalty fare scheme.

Unacceptable Professional Conduct

30. Unacceptable professional conduct is conduct which falls short of the standard of a registered osteopath. The standards of conduct and practice expected of a registered osteopath are contained in the *Osteopathic Practice Standards* (OPS). The OPS outlines the safe, competent and ethical practice of osteopathy and it will be used as a guide when determining unacceptable professional conduct.
31. When exercising their judgement as to whether the facts found proved amount to unacceptable professional conduct, the IC should have regard³ to the effect of whether, to an ordinary intelligent citizen such facts, if proved, would convey an implication of moral blameworthiness and a degree of opprobrium.
32. Case law has established the following principles regarding the concepts of misconduct:
 - a. A breach of the Osteopathic Practice Standards shall not be taken of itself to constitute UPC. A breach of the OPS is a starting point and is relevant, but it is not determinative of UPC and does not create a presumption of UPC. A breach of the OPS may be established and may be significant without making it UPC.
 - b. Not every minor error or isolated lapse will result in a case to answer.
 - c. In determining UPC – the critical term is ‘conduct’. ‘Conduct’ is behaviour – or the manner of conducting oneself.
 - d. UPC is not a lower threshold than ‘misconduct’ in other health professions. To reach the threshold of UPC, the unacceptable conduct must be serious.
 - e. A single negligent act or omission is less likely to cross the threshold of UPC than multiple acts or omissions. Nevertheless, and depending on the circumstances, a single negligent act or omission, if particularly grave could be characterised as UPC.

³ judicial guidance of Irwin J in *Spencer v General Osteopathic Council* [2012] EWHC 3147 (Admin)

- f. A finding of UPC would mean that a 'degree of opprobrium' would be likely to be conveyed to the ordinary intelligent citizen. UPC carries an 'implication of moral blameworthiness'.⁴

Professional Incompetence

33. Professional incompetence indicates a standard of professional performance which is unacceptably low. A single incident of negligent treatment would be unlikely to constitute professional incompetence unless it was very serious.
34. Except in exceptional circumstances, professional incompetence should be based on consideration of a fair sample of the Registrant's work.
35. A number of factors should be taken into consideration when determining if there is a realistic prospect that the facts would amount to professional incompetence, including:
- The length of the period of the alleged professional incompetence
 - The number of patients concerned
 - A number of failings/shortcomings which may not be serious individually, but together might give rise to a pattern of incompetence
 - The seriousness of the alleged clinical failings.

Convictions and Cautions

36. When an osteopath is convicted of a criminal offence in the United Kingdom, the IC are required to consider whether there is a real prospect that the PCC will determine the criminal offence has material relevance to the osteopath's fitness to practise osteopathy under Section 20 (1)(c) of the Osteopaths Act 1993.
37. The IC should bear in mind the OPS which requires Registrants to maintain public trust and confidence in the profession. The IC may conclude that there is no case to answer if it considers that there is not a real prospect that the offence has material relevance to a Registrant's practice as an osteopath.
38. While each case is considered on its own merits there are certain categories of cases that would engage the public interest and would result in a likelihood of the allegations as alleged being found proved and the statutory ground being established by the PCC. These may include cases relating to:
- Murder, manslaughter or offences against the person
 - Sexual offences

⁴ Osteopaths Act 1993, section 19(4)

- Fraud/dishonesty
 - Criminal damage, theft, burglary etc.
39. A caution for a criminal offence or a criminal conviction received outside the UK should be considered as an unacceptable professional conduct matter (reference should be made to the unacceptable professional conduct section for guidance).
40. **Note:** If the IC concludes that a conviction has no material relevance to the Registrant's fitness to practise as an osteopath, it may determine that there is no case to answer.

Drink or Drug related offences

41. The GOsC policy for alcohol or drug related offences requires that where alcohol or drugs were involved in the commission of the offence there is the presumption that the Council will refer an allegation to the IC under section 20(1)(d) of the Act. A health assessment is not required when two or more of the following factors are present:
- a. Where the level of alcohol found to be present in the Registrant does not exceed:
 - 42 micrograms of alcohol in 100 millilitres of breath, or
 - 96 milligrams of alcohol per 100 millilitres of blood, or
 - 128 milligrams of alcohol per 100 millilitres of urine.
 - b. This is the first offence involving alcohol or prescription drugs (or failure to provide a specimen of breath) since the Registrant was first registered, or the first in the 10 year period preceding the offence now notified.
 - c. There are exceptional mitigating circumstances (for example, the Registrant drove a car when over the limit in a medical emergency).

Health

42. A Registrant's ability to practise as an osteopath may be seriously impaired if they are suffering from a physical or mental health condition. The IC will normally be provided with a recent health assessment report when health concerns have been raised. This report should confirm whether the Registrant is currently suffering from a condition that, in the opinion of the medical assessor, could impair their fitness to practise. The health assessment report should assist the IC with their consideration as to whether there is a case to answer.

Evidence

43. The IC should consider all the information before it and evaluate the material in order to determine whether, in its opinion, this raises a case to answer. In doing so, the IC should not try to resolve significant conflicts of evidence. However, it can prefer one version of a dispute over another on the basis of other supporting/additional evidence before it. A conflict of evidence does not necessarily mean that the allegation should be referred to the PCC. Where there is a plain conflict between the two accounts, either one of which may be correct, and on one account there is a real prospect that the matter could amount to unacceptable professional conduct, the conflict should be resolved by the PCC or HC. For reasons of fairness the IC should not consider any evidence which has not been disclosed to the Registrant prior to the IC meeting.

Complainant's evidence

44. A Complainant's evidence that is fanciful, irrational, implausible or self-contradictory, as to render it unworthy of belief, may be rejected by the IC.

Registrant's evidence

45. The IC is obliged to consider any evidence provided by the Registrant before determining whether there is a case to answer. If the Registrant has not provided evidence by the deadline but the information is received the day before or on the morning of the IC before the IC considers the case, it is at the discretion of the IC whether to include this information or not. Either way this should be specifically referenced in the IC's written decision.

Standard of conduct and practice

46. When deciding whether any alleged fact or set of facts may amount to an allegation, the IC should have regard to the standards set out in the OPS. These standards will apply to events that took place on or after 1 September 2012.

Adjournments

47. The IC should adjourn a case when it has insufficient evidence on which to reach a decision. It may also be appropriate for the IC to adjourn consideration of a case when additional concerns are apparent but there is no information to suggest that these concerns have been investigated.
48. The IC should set out clearly in its reasons what additional information is required.

Amendments

49. Particulars are drafted at an early stage in what is a dynamic investigative process. The IC should ensure that the particulars of concern are a fair and proper representation of the case. If the IC varies or amends an allegation to a

material degree, the osteopath concerned should be given a further opportunity to make observations on the revised allegation before a final case to answer decision is made.

Indemnity

50. Osteopaths are required by law to have appropriate professional indemnity insurance (PII) in place. Section 37 of the Osteopaths Act states that a failure to comply with the appropriate indemnity arrangements may be treated as unacceptable professional conduct.
51. Osteopaths must have appropriate arrangements in place for patient to seek compensation if they suffer harm. The IC should consider whether a Registrant had appropriate indemnity insurance during the period alleged and should not be persuaded merely by the fact that a Registrant may have ceased working or has since obtained retrospective indemnity cover for the alleged period.

Executive recommendations

52. Executive recommendations are drafted by the GOsC to assist the IC with the consideration of a case. The recommendation may offer a suggestion on how to dispose of a particular case or offer amendments to the particulars of concern. The recommendation is shared with the osteopath in advance of the IC meeting to consider the case. This information is provided as guidance only as is not intended to fetter the independence of the IC.

Reasons

53. The IC is required to provide written reasons on how it reached a decision in every case. Reasons should be clear and intelligible but do not need to be lengthy or identify each individual piece of information taken into account. Reasons will be sufficient if they explain to the parties in broad terms why a particular decision has been reached. However, simply reciting the real prospect test does not amount to giving adequate reasons. Every decision should include the following:
 - the evidence/information the IC took into consideration
 - the decision made
 - the IC should make it clear in its decision which particulars of the allegation have been referred and which have not
 - why the decision was made
 - how the decision was reached (including the 'real prospect' test)

Annex to 9

- why any advice or material (including the expert evidence) was rejected, if this happened
- why the IC chose not to follow the executive recommendation, if this happened, and
- why it chose not to follow any guidance and/or the advice of the legal assessor.