



Council
17 July 2018
Investigating Committee Decision Making Guidance

Classification Public

Issue This paper invites Council to consider the draft Investigating Committee Decision Making Guidance. The guidance has been substantially updated and modified following consultation to enable the Investigating Committee to make consistent, fair and proportionate decisions

Recommendation To agree the draft Investigating Committee Decision Making Guidance at Annex B.

Financial and resourcing implications Within existing budget

Equality and diversity implications None identified

Communications implications The GOsC has undertaken a three month consultation on the draft guidance from 19 February 2018 – 15 May 2018. If approved, the guidance will be published on the GOsC website

Annexes

- A. Responses to the consultation
- B. 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. Their feedback was incorporated directly into the guidance.
 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.

The consultation

10. The GOsC undertook a three month public consultation from 19 May 2018 to 15 May 2018, in accordance with our engagement strategy. In addition to being published on our website, an article relating to the consultation was featured in the February/ March issue of *the osteopath* and in news e-bulletins sent to osteopaths.
11. The GOsC received six responses, including a response from the PSA. The feedback from the PSA largely focussed on form rather than substance and is fully set out within Annex A. Additionally, we received helpful responses from two experienced legal assessors who currently provide legal advice to the IC, Nicole Curtis who is a partner with Pennington's solicitors and Alastair McFarlane of counsel. Both concluded the guidance to be helpful, clear and thorough. We also received feedback from two current members of the PCC.
12. The consultation page was visited 216 visits with the relevant documents downloaded 92 times. This demonstrates the relative success of the engagement strategy. However we wish to encourage increased response rates and will be actively reviewing how to encourage more effective participation e.g. how feasible it would be to enable respondents to provide feedback in different ways.

13. A summary of the formal consultation responses we received are set out in Annex A.

Recommendation: to agree the draft Investigating Committee Decision Making Guidance at Annex B

Responses to the consultation

Consultation Question	Yes	No	Consultation response ¹	GOsC Response (where relevant)
Do you think the draft guidance is clear and accessible?	2	3		
If no, please set out your reasons and any suggestions for improvement			<p>Repetitious in parts, e.g. paragraph 31 and 32(f)</p> <p>In general yes, but there are several areas where further elaboration would help:</p> <p>Para 29 – determination by another regulator: where the osteopath has been included in the determination by another regulator, the IC should take proper regard of the other regulator's findings when considering the Real Prospect Test.</p>	<p>Amendment made to paragraph 34 to remove repetition (sub paragraph (f))</p> <p>This is a reference to the threshold criteria (now set out at paragraph 31 within the draft guidance). The threshold criteria were approved by Council in 2015. The IC guidance cannot cover every factual eventuality that may arise in individual cases but will be able to request advice from a legal assessor where appropriate. As a general point, where another regulator has made a decision against an osteopath (for example a ruling by the Advertising Standards Authority that an osteopath's website is non-compliant with the UK Code of Non broadcast Advertising, Sales Promotion and Direct Marketing (CAP code) then this may be prima facie evidence of misconduct and UPC depending on the facts of the case.</p>

¹ Some responses have been shortened

Annex A to 11

			<p>Regarding cautions/criminal offences outside the UK. This needs to be qualified by considering whether these offences would be considered as criminal under the legislation in force within the Registrants domicile; e.g. legislation relating to alcohol consumption; permissible limits of alcohol consumption; protection of individual's freedom of expression; marital status and any of the protected characteristics of UK legislation.</p> <p>The term Complainant has negative connotations (i.e. protesting, moaning, whinging, making a fuss), whereas the term Registrant is neutral and professional. A different term such as client or petitioner would be fairer.</p>	<p>Amendment made to paragraph 41 to make it clearer that cautions/convictions received outside the UK should be considered as capable of amounting to UPC if they would be regarded as equivalent to an offence within the UK.</p>
Do you think the draft investigating committee decision-making guidance will help the investigating committee (ic) decide which outcome is proportionate and appropriate?	4	1		
If no, please set out your reasons and any suggestions for improvement				

Annex A to 11

Do you think the draft investigating committee decision-making guidance gives clear and helpful guidance to the ic in relation to:	4	1	I am not sure that paragraphs 24-27 are fair or clearly lawful. Spencer referred to the PCC, not the IC. The IC does not make a determination on the facts. If there is insufficient evidence even to amount to a case to answer, and even putting the GOsC case at its highest, it seems unduly harsh and unfair for the IC to issue advice which will form part of a Registrant's history when he/she has not had an opportunity to be heard or to test the evidence. Either there is a case to answer or there is not, at the IC stage.	The GOsC's overarching objective in the exercise of its functions is the protection of the public. The primary purpose of advice is to assist in mitigating any risk of future breaches of the Standards. In pursuit of this purpose the IC issuing advice may enable reflection on the registrant about their practice. The IC has been issuing advice to Registrants for several years. The new draft guidance lends transparency to the procedure. Advice is not a sanction and will not appear on the Register. We consider it is both reasonable and proportionate.
A) Issuing advice	3	2	Issuing Advice point could also reflecting on values, diversity training for unconscious bias, communication skills training, improving sensitivity to patients, etc. (as well as professional competence training).	
B) Executive recommendations	4	1	<p>Executive Recommendations: could be made clearer by giving examples of possible recommendations.</p> <p>Executive recommendations should not be made. The IC is an independent body and a GOsC recommendation, however well meant, will have the unwitting effect of putting the IC under pressure to find a case to answer. The point of having an Investigation Committee is to have an independent fresh look at the evidence, and it is not enough to say that a recommendation will not fetter the IC's discretion. In reality, it will.</p>	While there is no express provision for making recommendations to the IC within the Osteopaths Act 1993 or the associated rules, we do not accept that this means that we are prevented from making recommendations to the IC regarding the appropriate disposal of a case. The purpose of such recommendations is to encourage consistency in outcomes and is not to interfere with the impartiality or independence of the IC. The very title makes this clear. In all cases the IC must exercise its own

C) Providing reasons	4	1		independent judgement, with the assistance of an independent legal assessor, in deciding whether there is a case to answer.
D) The real prospect test	3	2	<p>The Real Prospect Test: the term fanciful is ambiguous. This implies complainants make things up. Unrealistic would be more objective and clearer. Furthermore, a complaint deemed fanciful could be rejected when it may have been poorly expressed rather than made up.</p> <p>We suggest that it might be better to merge the sections on the real prospect test and case to answer. We found the separation of the two sections to be confusing as it not made sufficiently clear that if the real prospect test is met on both facts and the statutory ground then there is a case to answer. We notice that in the current guidance the two are together. These sections would also benefit with guidance on when there is a conflict of evidence between a complainant and registrant.</p> <p>I think there may be a wrong emphasis in the third sentence of paragraph 43, which, as drafted, could lead the IC to move, unwittingly, to a more "fact finding" role than it should. I would not say "it can prefer...." but rather "it can evaluate available evidential material" but not resolve disputed factual issues (see Parker LJ in Henshall [2005] EWCA Civ 1520.</p>	<p>The language reflects case law on the real prospect test</p> <p>As a general comment, the guidance document is intended to be read as a whole and not in isolation of other sections. For example, the draft guidance already included a section on conflict of evidence. Nevertheless, we have removed headings relating to the complainant's evidence and the registrant's evidence and merged these sections under the heading 'Evidence' to improve presentation and ease of understanding.</p> <p>Amendments have been made to paragraph 20 to make this clearer as follows: <i>'The IC should consider all the information and evidence 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, in assessing the weight of the evidence, the IC should</i></p>
If you have answered no to any of the above then please set out your reasons and any suggestions for improvement				

			<p>Para 22: I wasn't entirely clear about the relevance of factors such as remediation, insight and on-going risk in this paragraph. I don't think that these factors are relevant to the "realistic prospect" test in relation to facts or misconduct/incompetence etc. For the realistic prospect test, the IC should consider the alleged conduct itself, rather than anything that has occurred afterwards, such as insight or remediation. These factors may however be relevant to the broader question of whether there is a case to answer, as part of a final stage assessment of whether a referral to the PCC is in the public interest. [As a separate point, this final stage is referred to in the flow chart at the end of the Manual ("Is there a special and sufficient reason why the case should not proceed further?") but there does not seem to be a separate specific reference to it in the main body of the text.]</p> <p>Alternatively, these factors (remediation, insight etc) may be relevant to deciding whether or not the IC should give advice when they close a case, which might be the reason for reference to them in this section?</p>	<p><i>take into account that there is other information/additional evidence which supports one version of a dispute over another. A conflict of evidence does not necessarily mean that the allegation should be referred to the PCC...'</i></p> <p>Amendments made to paragraphs 24, 27 and 29 of the current draft IC guidance to more fully reflect this</p>
--	--	--	--	---

<p>Please provide us with any other comments you may have</p>		<p>Adjournments</p> <p>We found this section to be clearer in the current guidance, paragraphs 22 to 24. We suggest that it may be helpful to insert the word 'adequately' into the following sentence: '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 [adequately] investigated'. It is not enough that a matter has been investigated by the GOsC, if the IC considers that further investigation of the matter is required.</p> <p>In paragraph 49, it would be useful to add that an adjournment would be required in the circumstances described in the paragraph. This would allow the registrant sufficient time to make observations on the amended allegations.</p> <p>In the 'Standards of Conduct and Practice' section it is mentioned that the <i>Osteopathic Practice Standards</i> (OPS) will apply to events on or after 1 September 2012. It would be useful for the guidance to clarify what happens regarding events prior to this date.</p>	<p>An amendment has been made to paragraph 45 as follows: <i>'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 inadequate information to suggest that these concerns have been properly investigated to enable the IC to determine whether there is a case to answer..'</i></p> <p>The draft guidance includes an additional section on amendments not covered in the current guidance document. As previously stated, the guidance document is intended to be read as a whole and not in isolation of other sections. It is apparent, when read together, that the IC should provide the registrant with additional time to make observations on any additional material.</p> <p>Amendment made(as a footnote)</p>
---	--	---	--

		<p>We note that the last bullet point of paragraph 10 (that the IC can issue a letter of advice as an outcome to a registrant) is inconsistent with paragraph 26 in the same document. In paragraph 26 it is stated that the advice should form part of the IC's reasons. This could potentially cause confusion for those reading the guidance.</p> <p>Some cases are inevitably complicated and IC and Council need to pay more attention to the Complainant and the substance of the concern rather than drafting allegations which disproportionately focus on ancillary issues which are not the substance of the Complainant's concern. This ultimately reflects on public confidence in the Regulator as to whether or not it deals with the concern proportionately.</p> <p>Paragraph 18 [now paragraph 16 in current guidance] is inappropriate. The IC's job is to make a decision on whether there is a case to answer. If it doesn't have enough evidence to decide this, it must adjourn for further investigation to take place. Once all the available</p>	<p>Amendment made</p> <p>It is not part of GOsC's statutory function to resolve complaints between the complainant and the osteopath. An awareness of this distinction is essential to understanding the process. The purpose and context in which the GOsC operates its regulatory function and which underpins its fitness to practise procedures, requires that action should be taken where there is evidence that the osteopath may have fallen below the OPS. We are under a duty to fully investigate concerns brought to our attention but we are not confined to what the complainant perceives as the heart of their complaint. Where additional concerns come to light, we are under a duty to investigate those concerns in the public interest. In addition, the IC must reach their decision independently from the GOsC.</p> <p>We have moved this reference to paragraph 16 as an additional sub paragraph (g) and amended it to include the words '<i>in the unusual situation...</i>' This also has the benefit of following more closely the approach the IC should undertake when determining whether there is a case to answer.</p>
--	--	---	--

		<p>evidence is before the IC, it should not duck the decision by being 'unsure' and therefore referring the case to the PCC. This involves the GOsC in considerable extra expense in having to run a PCC hearing, which is unfair on the regulator. Giving the IC this 'let-out' is an abdication of its responsibilities and also a favouring of one party over the other, which is unfair to the Registrant. It is also unfair to the Registrant who will not know that the reason the IC referred the case to the IC was because it was 'unsure'. The IC is paid to make a decision. They should make it.</p> <p>May I suggest a slight addition to paragraph 44, 'where the complaint is clearly based on a misunderstanding</p> <p>I do hope these comments are helpful – they are intended to be. They are based on many years' experience of regulatory work both as a member of PCCs and as Chair of an IC</p> <p>I think that overall this is an extremely helpful, clear and thorough document.</p> <p>Overall, a clearer and more detailed guidance.</p> <p>With regard to this consultation response format, it is most definitely not user friendly and does not encourage engagement. On important issues such as this a much more accessible online response mechanism is required.</p>	<p>Additionally, any perceived concerns of retaining this paragraph are ameliorated by the requirement that the IC is required to provide reasons for its decision (whether this is to refer the case for a hearing or to close). Regard should be had to paragraph 51 in the draft guidance entitled '<i>Providing Written Reasons</i>'</p>
--	--	--	--

			Care should be taken to distinguish between genuinely vexatious complaints and people with different communication styles (e.g. ADHD, Autism, Dyslexia). These groups could be misunderstood without assistance to write, detail and describe their complaint.	
--	--	--	--	--