



Council
14 May 2015

Professional Conduct Committee Practice Note: Acting in the Public Interest

Classification	Public
Purpose	For decision
Issue	The paper proposes the introduction of a Practice Note to assist the decision making of the Professional Conduct Committee and the Health Committee.
Recommendation	To agree the Practice Note on Acting in the Public Interest.
Financial and resourcing implications	Met within budget
Equality and diversity implications	Monitoring of diversity data will form part of the Regulation Department Quality Assurance Framework.
Communications implications	Views from members of the Professional Conduct Committee and the GOsC Fitness to Practise Users Forum were sought and the views received were considered by the Osteopathic Practice Committee at its meeting on 12 March 2015. As the draft Practice Note reflects established case law, the Executive does not consider that there is any need to undertake a full public consultation.
Annex	Practice Note: Acting in the Public Interest
Author	David Gomez

Background

1. In October 2013, the Council agreed to introduce Practice Notes to assist its fitness to practise committees. The Practice Note on Acting in the Public Interest will form part of a suite of Practice Notes for the fitness to practise committees.
2. The Professional Conduct and Health Committees consider allegations about a Registrant's fitness to practise at hearings. The procedures followed at the hearing are set out in the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 (PCC Rules) and the GOsC (Health Committee) (Procedure) Rules 2000 respectively.

Discussion

3. In November 2012, the High Court issued guidance on the meaning of 'Unacceptable Professional Conduct' in the Spencer case¹. The case is regularly cited before the Committee by legal representatives.
4. During the course of a hearing, the Professional Conduct Committee may be required to make decisions on several issues. While the case of Spencer is guidance on the discrete issue of Unacceptable Professional Conduct, it is recognised that guidance on the factors that the Committee should take into account when making its decisions on other matters would be of great assistance.
5. On 26 March 2015, the Health and Social Care (Safety and Quality) Bill – a Private Members' Bill proposed by Jeremy Lefroy – received Royal Assent. The new legislation will amend the statutory purpose of all the regulators of the healthcare professions. The provisions of the new legislation will be brought into force on a date to be specified in regulations made by the Secretary of State.
6. In particular, the new legislation will amend the GOsC's functions as follows:

General Osteopathic Council

3(1) The Osteopaths Act 1993 is amended as follows.

(2) In section 1 (the General Osteopathic Council and its committees), after subsection (3) insert—

"(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;

¹ Spencer v GOsC [2012] EWHC 3147 (Admin)

- (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.”*
- (3) *In the Schedule, in Part 2 (statutory committees of the General Osteopathic Council)—*
- (a) *after paragraph 34A insert—*

"34B In exercising a function under section 8 or 22, the Professional Conduct Committee (or any panel by which the function is exercisable as mentioned in paragraph 34A) must have regard to the over-arching objective of the General Council under section 1(3A) (read with section 1(3B)).”;
 - (b) *after paragraph 38A insert—*

"38B In exercising a function under section 23, the Health Committee (or any panel by which the function is exercisable as mentioned in paragraph 38A) must have regard to the over-arching objective of the General Council under section 1(3A) (read with section 1(3B)).”

7. Under the new legislation, the GOsC’s Investigating Committee (IC) is not expressly made subject to the statutory objectives in the same manner as the GOsC’s Professional Conduct Committee (PCC) and Health Committee (HC).
8. It is recognised that the Professional Conduct and Health Committees would benefit from guidance on the new statutory overarching objective on the Council in the exercise of its fitness to practise functions; and the new statutory duty on the Professional Conduct and Health Committees to have regard to this overarching objective. The Committees would also benefit from guidance on how the Spencer judgment is to be interpreted in the light of the new objective.
9. Leading Counsel was therefore instructed to produce guidance to assist the Professional Conduct and Health Committees, in the form of a Practice Note. The draft Practice Note is set out at the Annex.
10. It is important to note that the proposed new statutory objectives are essentially a codification of the existing case law applicable to the Professional Conduct and Health Committees.

Views from the PCC and the FTP users’ forum

11. The draft Practice Note was considered by members of the Professional Conduct and Health Committees at their training day on 20 November 2014. The response was positive.
12. Views from the FTP users’ forum were sought on the draft Practice Note (together with a further draft Practice Note on Admissibility of Character

Evidence which is the subject of a separate paper to Council). Four responses were received (two from legal representatives who act on behalf of the Council and two from legal representatives who act on behalf of osteopaths):

"The two practice notes are helpful and I don't have any comments to make about either document".

Council Representative

"...I would like to say how impressive I think these documents are..."

Council Representative

"no comment to make on the guidance in relation to acting in the public interest"

Registrant Representative

"May I say as a general point that I think the opinions are drafted clearly, succinctly and in a form which leads to no ambiguity. The identity of the leading Counsel is unfortunately not included but he or she has done an excellent job.

In general both documents appear to lay out the generality of the situation much as I believe it currently is. In respect of the document concerning the Public Interest I felt that there was a modest tightening of the current arrangements whilst I really could find no significant alteration in the document concerning Admissibility of Good Character Evidence.

As always, it is important that 'Acting in the Public Interest' does not become any sort of witch hunt. I was reassured, in Point 17, that there is emphasis on the importance of not making too much of an isolated episode of misconduct against (often) many years of blameless, high quality, careful practice.

Overall, I do not believe that, from the perspective of someone involved in the defence of osteopaths accused of Unprofessional Conduct, that the clarifications will in themselves cause any significant difficulty."

Registrant Representative

Consideration by the Osteopathic Practice Committee

13. The draft Practice Note was considered by the Osteopathic Practice Committee (OPC) at its meeting on 12 March 2015.
14. The OPC agreed that the draft Practice Note was a useful addition to the suite of Practice Notes already developed by Council for its fitness to practise committees. Subject to minor drafting points, the OPC recommended that the draft should be approved by Council.
15. The draft at the Annex incorporates the minor amendments suggested by the OPC.

Communications implications

16. Given that the Practice Note reflects existing and well established case law, the executive does not consider that it is necessary to undertake a public consultation.

Recommendation: to agree the Practice Note on Acting in the Public Interest.

GENERAL OSTEOPATHIC COUNCIL

PROFESSIONAL CONDUCT COMMITTEE AND THE HEALTH COMMITTEE

PRACTICE NOTE: 2015/1

THE DUTY TO ACT IN THE PUBLIC INTEREST

EFFECTIVE: 14 May 2015

Introduction

1. This Practice Note provides a summary of the role of public interest considerations as they apply to hearings before the Professional Conduct Committee [PCC] and the Health Committee [HC] of the General Osteopathic Council [GOsC]. It does not cover the topic exhaustively, nor is it intended to restrict the judgment of the Committee when performing its decision-making function.
2. This Practice Note should be read in conjunction with: the GOsC's Indicative Sanctions Guidance; the Interim Suspension Order Guidance; and the Practice Note on Postponement and Adjournment Requests. All are available on the GOsC's website.
3. The GOsC was established by the Osteopaths Act 1993 (the Act). Section 1(2) of the Act provides that it is the duty of the Council to regulate and develop the profession of osteopathy. The Health and Social Care (Safety and Quality) Act 2015 amends the Act by inserting a new over-arching objective for the Council in the exercise of its functions which is 'the protection of the public'². For the Council, this will involve,

'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.'*

² Inserted by paragraph 3 of the Schedule to the Health and Social Care (Safety and Quality) Act 2015. These provisions come into force on a date to be specified in Regulations made by the Secretary of State.

4. The new legislation will require the PCC and the HC to have regard to these objectives when considering allegations (and in the case of the PCC, when considering applications for restoration). These objectives echo the public interest considerations that have applied, and continue to apply, to certain decisions of the Committees whose duty it is to determine allegations referred to it in accordance with section 20 of the Act.
5. The procedures followed by the PCC and the HC are set out in sections 22 and 23 of the Act respectively, and in the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 (the Conduct Rules) and in the GOsC (Heath Committee) (Procedure) Rules 2000 (the HC Rules). These documents are available in full on the GOsC website: www.osteopathy.org.uk

The Public Interest considerations

6. The public interest lies at the heart of healthcare regulation and the PCC are required to act in accordance with it. In this context, the principal public interest considerations are:
 - a) *the protection of patients, colleagues and the wider public from the risk of harm;*
 - b) *maintaining public confidence in the osteopathic profession;*
 - c) *declaring and upholding appropriate standards of conduct and competence among osteopathic professionals.*
7. In addition, there are other considerations, such as the public interest in a fair hearing and in the expeditious consideration and disposal of the case.
8. While there may also be a public interest in enabling an osteopath to return to safe practice, and Committee members should facilitate this where appropriate, they should bear in mind that the protection of patients and the wider public interest is their primary concern³.

When do public interest considerations arise in PCC hearings?

9. The public interest should be considered when making decisions in the exercise of the Committee's judgment, rather than decisions as to whether factual matters have been proved. These include, in some circumstances, decisions:
 - whether or not all (or part) of a hearing should be held in public;

³ See *Cheatle v GMC* [2009] EWHC 645 (Admin) at paras 38 and 40. Although the GOsC has no statutory public protection objective, its hearings are conducted on the premise that public protection is their primary function (*R (on the application of Low) v General Osteopathic Council* [2007] EWHC 2839 (Admin), para. 9 and *Varley v General Osteopathic Council* [2009] EWHC 1703 (Admin) para. 26; and *Moody v General Osteopathic Council* [2007] EWHC 2465 (Admin) para. 24 and [2008] EWCA 513 CA para.9)

- as to whether an application for postponement or an adjournment should be granted;
- on whether to refer the matter to the Health Committee;
- where some or all the alleged facts are found proved, on whether
 - (a) the threshold for unacceptable professional conduct or professional incompetence has been crossed, and
 - (b) on whether a criminal conviction is material to the practice of osteopathy;
- as to sanction;
- as to decisions made by the Health Committee.

Applications for postponement or an adjournment

10. The reader should consult the GOsC's Practice Note: *Postponement and Adjournment Requests*, (20 June 2013), which provides the key considerations when deciding if an application for a postponement or an adjournment should to be granted. These include that the PCC Chair should take into account the public interest in the expeditious disposal of the case.
11. In some cases it may be relevant to consider whether the public interest in ensuring that the public are appropriately protected can be met during the period of the proposed adjournment⁴.

Referrals to the Health Committee

12. Rule 62 of the Conduct Rules provides that if it appears to the PCC that an osteopath's ability to practise osteopathy may be seriously impaired by reason of his physical or mental condition, it may refer the case to the Health Committee for determination, whether or not the allegation has been proved or sanction applied.
13. The Health Committee does not have power to remove the osteopath's name from the register (s.23 (2)). In exercising its discretion whether to refer the matter to the Health Committee, the PCC should consider whether the public interest requires that the osteopath's name should be removed from the register.

⁴ See R (on the application of *Toth*) [2003] EWHC 1675 Admin para. 23, Elias J.

14. Where the case is sufficiently serious that the public interest will not be satisfied by any disposal less than removal from the register, the PCC should not refer the case to the Health Committee, regardless of the strength of the medical evidence. The decision should not be made until the PCC knows enough about the facts of the case to be able to assess whether removal from the register might be necessary⁵.

Unacceptable Professional Conduct [UPC]

15. Section 20(2) provides that UPC is 'conduct which falls short of the standard required of a registered osteopath.' Section 19 of the Act requires the GOSC to publish a Code of Practice, which lays down the standards of conduct and practice expected of a registered osteopath. The *Osteopathic Practice Standards* (OPS) contains the Code of Practice and it will be used as a guide by the PCC when determining unacceptable professional conduct and/or professional incompetence.
16. The Act provides that failure to comply with any provision of the Code of Practice does not of itself constitute UPC, but it must be taken into account when considering whether the threshold for UPC has been crossed (s.19(4)).
17. In interpreting these provisions, the Court in *Spencer v General Osteopathic Council* [2012] 1 WLR 1307, found that UPC implies moral blameworthiness and a degree of opprobrium that is likely to be conveyed to the ordinary intelligent citizen, learning of the matter as a result of the obligatory reporting of it under the Act. It found that UPC is indistinguishable from the concept of misconduct in the medical and dental legislation. Applying a decision on appeal from the General Medical Council,⁶ the Court restated the principle that mere negligence does not cross the threshold for misconduct, unless it is particularly serious, and a single negligent act or omission is less likely to cross the threshold of misconduct than multiple acts or omissions, although it could amount to misconduct if particularly grave.
18. In most allegations of UPC, including allegations of incompetence or negligence of a high degree, an element of moral blameworthiness will be readily identifiable. However, in some instances the PCC may be assisted in their decision as to whether the threshold for UPC has been crossed by having specific regard to public interest considerations (and, when in force, the newly codified objectives of the GOSC's General Council).

⁵ See *Crabbie v GMC* [2002] 1 WLR 3014, PC, *Sreenath v General Medical Council* [2002] UKPC 26 and *Toth* [2003] EWHC 1675 para. 28, 31-33.

⁶ *Calhaem v General Medical Council* [2007] EWHC 2606 Admin. The principles are endorsed in *Spencer* at para. 26

19. For example, in allegations of failures of the osteopath's duties under the Data Protection Act, or serious failures of communication with patients, the issue might be resolved by considering whether, on the facts found proved, the public interest in protecting the patients, maintaining the reputation of the profession and/or declaring and upholding appropriate standards of conduct and competence among osteopathic professionals, requires a finding of UPC and action to be taken on the osteopath's registration. If it does, it is likely that those facts also imply moral blameworthiness.

Professional incompetence

20. Professional incompetence is not specifically described in the Act although section 13 requires the GOsC to determine the standard of proficiency that is required for the competent and safe practice of osteopathy. A Statement of the Standard of Proficiency is published in the OPS, and it will be used as a guide by the PCC when determining professional incompetence.
21. The public interest (and the newly codified objectives of the GOsC's General Council when they come into force) may be taken into account in determining whether the facts proved amount to professional incompetence: if they demonstrate the need for action to be taken on the osteopath's registration in the interests of public protection, maintaining the reputation of the profession or declaring and upholding appropriate standards of conduct and competence among osteopathic professionals, professional incompetence will have been established.

Criminal convictions

22. Section 22(3) of the Act provides that in a criminal conviction case the Committee may take no further action if they consider that the criminal offence in question has no material relevance to the fitness of the osteopath concerned to practice osteopathy.
23. In many cases the determination of the 'material relevance' of the conviction to the fitness of the osteopath to practice will be clear cut and easily articulated. In other cases, deciding the issue may require the PCC to take account specifically of the public interest (and the newly codified objectives of the GOsC's General Council when they come into force) to reach a determination.
24. For example, there might be some doubt as to whether a relatively minor conviction for dishonesty, or for common assault or for dangerous driving is materially relevant to the fitness of the osteopath to practice osteopathy.

25. In such cases the PCC should assess all the facts and then consider whether the public interest in public protection, maintaining the reputation of the profession, or declaring and upholding appropriate standards of conduct and competence among osteopathic professionals, demands that a disciplinary sanction should be imposed. If it does, material relevance has been established.

Sanction

26. Public interest considerations lie at the heart of the decision as to sanction. They are described fully, along with the related issue of proportionality in the GOsC's Indicative Sanctions Guidance (October 2013), paragraphs 18-23.

The Health Committee

27. The HC may only consider a complaint if it was been referred to it by the Investigating Committee [IC] or the PCC⁷. After referral the HC must take the prescribed steps to obtain report/s of medical examination/s in accordance with rules 5-7 of the HC Rules.
28. Thereafter the HC has the duty to make the following decisions:
- (i) if the conditions concerning the report on the osteopath's health in rule 8(1) (a)-(c) are satisfied, whether it judges the ability of the osteopath to practise osteopathy is seriously impaired by reason of his physical or mental condition, and whether it shall be sufficient to impose a conditions of practice order **(rule 8(1) HC Rules and s.23 (2) (a) of the Act);**
 - (ii) if the HC finds that the osteopath's ability is seriously impaired, and that it is sufficient to impose a conditions of practise order, and the osteopath agrees, a conditions of practice order will be made on the papers, and the HC has a duty to decide on the conditions **(rules 9 and 24 of the HC Rules)**
 - (iii) where, in the circumstances at (i) above, a conditions of practice order is not sufficient and the osteopath has not requested a hearing, the HC shall decide whether it is desirable that there should be a hearing of the case **(rule 10 of the HC Rules)**.
29. Where there is a hearing of the case, the HC has the duty to make the following decisions:
- (i) where the osteopath is neither present nor represented, and the notice has been served, or all reasonable steps have been taken to serve the notice, whether to proceed in his or her absence **(rule 16(4) and (5) HC rules);**

⁷ Rule 4 of the Health Committee Rules

- (ii) whether the hearing should be adjourned to allow for oral evidence to be given or for further medical reports or other information as to the osteopath's physical or mental condition or fitness to practise to be obtained **(rules 19 and 20)**;
 - (iii) whether it judges the ability of the osteopath to practise osteopathy is seriously impaired by reason of his physical or mental condition, taking into account the matters in rule 21(2) and (3) of the HC Rules (likelihood of recurrence of a condition in remission, refusal or failure to submit to an examination etc.) **(rule 21)**;
 - (iv) if the HC finds serious impairment, whether it is sufficient to impose conditions on his registration for a period not exceeding three years, and if so, what conditions **(rule 21(4) and (5))**;
 - (v) if conditional registration is not sufficient, the HC must decide on the length of the period of suspension of registration **(rule 22)**;
 - (vi) where the osteopath has not requested a hearing and the HC has decided that it is not desirable that there should be a hearing, decisions on written material as to whether the ability of the osteopath to practise osteopathy is seriously impaired by reason of his physical or mental condition and if so, the appropriate measure/s to be imposed **(rule 24)**.
30. The public interest in the protection of the public (and the newly codified over-arching public protection objective of the GOsC's General Council, when it comes into force), will be central to all the decisions outlined in paragraphs 28 and 29 above.
31. Due to the confidential nature of the medical matters under consideration, hearings before the HC are usually conducted in private.
32. The GOsC's Fitness to Practise Publication Policy states that the Notice of Hearing will not be published on the GOsC's website; at the conclusion of a hearing in which the registrant's fitness to practice is found to be seriously impaired because of his physical and/or mental health, only the finding of serious impairment, with details of the restrictions on the registrant's practice (not the full determination) will be published on the GOsC's website.
33. In these circumstances the other two principal elements of the public interest (maintaining the reputation of the profession of osteopathy and declaring and upholding appropriate standards of conduct and competence) may play a less significant role in the decision-making referred to at paragraphs 28 and 29 above.