



Council
14 May 2015
Draft Guidance for the PCC on Drafting Determinations

Classification	Public
Purpose	For decision
Issue	The paper proposes the introduction of new guidance for the Professional Conduct Committee on drafting determinations.
Recommendation	To agree that Council should consult on the draft guidance set out in the Annex to this paper.
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 the PCC Chair and panel chairs were obtained and considered by the Osteopathic Practice Committee at its meeting on 12 March 2014. In accordance with our usual practice, a full public consultation will be undertaken before Council is asked to approve the draft guidance.
Annex	Guidance for the Professional Conduct Committee on Drafting Determinations
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Background

1. At its meeting on 6 November 2014, Council appointed two members of the Professional Conduct Committee to act as panel chairs of that Committee.
2. In addition to the Chair, the Professional Conduct Committee now has three other members who are able to chair hearings.
3. With this increased availability to convene panels for hearings, it will be important to ensure consistency in the quality of the determinations produced by different constituted panels of the Professional Conduct Committee.

Discussion

4. At the introductory meeting with all the panel Chairs on 28 November 2014, the Chair of Council and the PCC panel chairs discussed mechanisms for achieving consistently good quality determinations, while respecting the statutory duty of the Professional Conduct Committee and the discretion afforded to the individual panels hearing cases.
5. These mechanisms will include peer review of determinations by the panel chairs, and the use of an independent lay observer to quality assure hearings and in-camera deliberations.
6. In addition, the Chair of the Professional Conduct Committee has suggested that it would be helpful for the GOsC to produce guidance on drafting determinations.
7. Such guidance is in line with our on-going commitment to quality improvement and follows best practice in other health care regulators which already have similar guidance.
8. In addition, the guidance will allow us to re-enforce any feedback and learning points on individual cases which have been provided by the Professional Standards Authority. As such, the guidance is intended to be a 'living document' which will be amended in the light of PSA feedback and developments in the case law.
9. The draft guidance for the Professional Conduct Committee on Drafting Determinations is at the Annex.

Views from stakeholders

10. The draft Practice Note was provided to the Chair and panel chairs of the Professional Conduct Committee for comment. Their detailed feedback was considered by the Osteopathic Practice Committee (OPC) at its meeting on 12 March 2015.

Consideration by the Osteopathic Practice Committee

11. The OPC considered that the draft guidance was a welcome and timely addition to the suite of guidance documents produced by Council for its fitness to practise committees.
12. Members of the OPC made a number of helpful drafting comments and suggestions which have been incorporated into the draft annexed to this paper.
13. In particular, members considered that paragraph 6 of the draft guidance should remind the Professional Conduct Committee that its determination should explain the reason why a witness was or was not believed (in whole or in part).
14. Members were firmly of the view that paragraph 6 of the draft guidance should also explicitly remind the Professional Conduct Committee to avoid attributing any motivation to a witness in the absence of explicit admissions by that witness as to his or her motivation for bringing a complaint; and to avoid drawing inferences in this regard.
15. Members further considered that, rather than refer explicitly to the Spencer case in paragraph 7 of the draft guidance, it would be more appropriate for the guidance to refer to 'the relevant case law.'
16. In line with our usual practice, the intention is that the GOsC will hold a public consultation on the draft guidance and the analysis of that consultation considered by Council at a future meeting.

Recommendation: to agree that Council should consult on the draft guidance on writing determinations set out in the Annex to this paper.

Guidance for the Professional Conduct Committee on Drafting Determinations

Effective: [Date]

1. The purpose of this guidance

This guidance is addressed to the Professional Conduct Committee. It has been produced to help ensure consistency in decision making by differently constituted hearings panels of the Committee and takes account of best practice within healthcare regulation.

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.

2. The Audience for the Committee's determination

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
- d) the osteopathic profession
- e) osteopathic patients (who are potential complainants)
- f) the general public.

3. The importance of accessibility

"Brevity, Simplicity and Clarity. These are the hall marks of good judgment writing. But the greatest of these is clarity."¹

¹ "On the writing of judgments" Lecture by the Hon Justice Michael Kirby to the First Australian Conference on Literature and the Law held at the University of Sydney, April 20-22, 1990.

*"Every judgment should be sufficiently well-written to enable interested and reasonably intelligent non-lawyers to understand who the parties were, what the case was about, what the disputed issues were, what decision the judge reached, and why that decision was reached"*²

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.

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.

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.

The Committee should be alert to avoid the appearance of discrimination and prejudice in its use of language.

It should avoid the use of stereotyping (e.g "it is difficult to attribute sexual motivation to an apparently happily married man") and consider using gender neutral language.

Language in determinations should be moderate, neutral and dispassionate.

4. Structure

A clear structure aids the accessibility of a written determination.

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.

² Lord Neuberger, President of the UK Supreme Court. First Annual Bailli Lecture, November 2012

It should then consider the legal issues that arise and, after again using a process of reasoning to relate the facts to the law, come to a conclusion.

Lord Neuberger recommended that judges should include a short summary at the start of each judgment and provide guidance to its structure and contents. This approach could usefully be adopted by a Committee, particularly in complex cases.

The determination should make clear that a hearing has a number of different stages, and should make clear what issues are being determined at each stage.

The use of headings and sub-headings to sign post the reader to relevant sections and to break up the text is helpful in this regard.

Paragraphs and pages should be numbered.

Avoid internal inconsistency.

5. Preliminary matters and interlocutory applications

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; applications for adjournment; service and admissibility of evidence, including expert evidence.

When making 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 and the 'Jones Criteria' should be set out in the Determination.

6. Findings of Fact

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.

The Committee should avoid making any assumptions about the motivation of a witness. This is particularly important in relation to complainants in cases involving the transgression of sexual boundaries. It is preferable for the determination to deal with facts admitted or found proved.

When setting out such facts, the determination should describe the facts in sufficient detail for the reader to understand the nature and seriousness of the allegations.

The determination should refer to any legal advice received by the Committee and should refer to the evidence that the Committee relied on when reaching its findings.

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.

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 proved³

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).

If the Committee's finding turns 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).

The PSA's view is that the reliability and credibility of a witness should be judged on their clarity and consistency, and not on assumptions as to the motivation behind bringing the complaint. This is particularly important in cases alleging the transgression of sexual boundaries.

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.'*⁴

7. Findings on Unacceptable Professional Conduct (UPC)

It is well established that the issue of whether a registrant has been guilty of UPC is a matter of judgment for the Committee, rather than an issue of proof.⁵

In determining whether or not a registrant has been guilty of UPC, the Committee should refer to the relevant case law.

The Committee should also have regard to the Osteopathic Practice Standards and the determination should refer to the relevant parts of that document.

The Committee must always provide reasons as to why it considers that the conduct alleged does or does not amount to UPC.

8. Sanction

*'...it therefore followed that the Committee had to consider what interest was being served by sanction...the reasoning had to demonstrate why those interests required the sanction imposed.'*⁶

³ See rule 27(1) of the GOsC (Professional Conduct Committee) (Procedure) Rules 2000. SI 2000/241

⁴ R (on the application of) v Ashworth Hospital Authority & Others [2002] EWCA Civ 923 per Dyson LJ at paragraph 80.]

⁵ See CHRE v GMC and Dr Biswas [2006] EWHC 464 (Admin)

⁶ Brennan v Health Professions Council [2011] EWHC 41 (Admin). Per Ousely J at para.53

*'It is clear that the protection of the public is one of the factors which lead to the requirement to give reasons. If reasons for the imposition of a particular penalty are not adequately reasoned or are in other respects unclear, that duty is not fulfilled.'*⁷

The Committee's determination should refer to the public interest and the purpose of imposing sanctions which includes: the protection of the public, maintaining public confidence in the profession; and declaring and upholding proper standards.

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.

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.

The Committee's approach to sanction must be stated in the determination; the Committee is required to consider sanctions in an ascending order of seriousness.

The Committee is required to consider the full range of sanctions available and to give reasons for not imposing a lesser or more severe sanction.

In its determination, the Committee should explain how the sanction will adequately protect the public, maintain public confidence in the profession and declare and uphold proper standards.

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.

The PSA's 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).

The determination should refer to any submissions made by the registrant or by the Council on sanction.

The determination should also set out clearly any mitigating or aggravating factors identified by the Committee and must refer to the Indicative Sanctions Guidance produced by the GOsC.

⁷ *CHRP v General Dental Council and Marshall* [2006] EWHC 1870 (Admin) per Hodge J at paragraph 30.

10. Conditions of Practice Orders

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.

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.

This is particularly important where the conditions imposed do not actually restrict the ability of a practitioner to treat patients.

The determination must specify the period for which the order is to have effect⁸, and explain why that period has been chosen.

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. make recommendations about the evidence to 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 the training on both the registrant's understanding of the issues, and his actual interactions with patients.

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.

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 any review panel need to understand the original failures and how the conditions are intended to remedy them.

⁸ Section 22(4A) of the Osteopaths Act 1993

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.

The determination should also set out mechanisms for monitoring and independently verifying that the conditions have or are being complied with.

Any conditions imposed must be SMART (Specific, Measurable, Achievable, Realistic and Relevant; Time based)

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.

The determination should also confirm whether all conditions are to be published on the GOsC website.

When drafting its determination in relation to conditions, the Committee should use the standard bank of conditions as its starting point.

11. Suspension

The Committee's determination must state the period of suspension⁹ and explain why that period has been chosen.

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.

12. Immediate Orders

Where UPC has been found and a sanction of Conditions 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 should give reasons for its decision on this issue.

The determination should make reference to the submissions of the parties on this issue

13. Review Hearings

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)

⁹ S22(4)(c) of the Osteopaths Act 1993

- 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 panel at the review hearing.

In particular, the determination must state clearly whether the registrant has complied with any conditions previously imposed on his registration; and whether the registrant has demonstrated insight into his previous failings.

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.

The panel is required to make a finding as to whether or not the registrant has complied with conditions. If the panel 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.

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.

If no further review is necessary, the determination must explain why.

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.

In particular, the determination should address any risk to the public, and explain how the public will be protected by the decision taken.

14. Reasons

'In every case, as it seems to me, every Tribunal (including the PCC of the GMC) needs to ask itself the elementary 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?

If, in asking itself those questions the PCC comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake.

Respondents to proceedings before the PCC of the GMC are liable to be found guilty of serious professional misconduct and struck off the Register. They are entitled to know in clear terms why such findings have been made.⁴⁰

¹⁰ Robert Phipps v the GMC [2006] EWCA Civ 397 per Wall LJ at para.85

it is important that the reasons for judgment 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.

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 lost¹¹
- Reasons must be given for every decision. Decision making must be structured and reasons should be given even where there is no statutory requirement to do so¹²
- the exact wording from the Act or Rules should be used – do not paraphrase
- Conversely, avoid incantations/'parroting the formula'¹³

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'¹⁴
- All panel members must be involved in producing the panel's decision and reasons
- The Committee's decision stands or falls on its own – it is not usually possible to give evidence about your reasoning or to supplement it later if the decision is challenged

15. Interim Orders

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.

In explaining the reasoning of the Committee, the determination should:

- identify clearly any concerns about the registrant.
- identify clearly any risks to the public identified.

¹¹ R v Brent LBC, ex parte Baruwa [1997] 29 HLR 915

¹² Needham v NMC [2003] EWHC 1141

¹³ R (Paterson) v GMC [2006] EWHC 891

¹⁴ Stefan v GMC [1999] 1 WLR 1293

- address the seriousness of the allegation; the likelihood of the alleged conduct being repeated before the substantive hearing; severity of harm likely to result if alleged conduct is repeated; 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.
- If the Committee imposes an Interim Suspension Order, it must then go on to make a separate decision on the length of that Order. The determination must therefore explain why the Committee has chosen this period of time.
- In relation to an Interim Order, the High Court has criticised a Panel's reasons as "*the recitation of formulae as if this were part of a religious service. The usual remarks were made about a real risk of repetition and risk of significant harm to the health and well being of patients....*" NMC v Maceda [2011] EWHC 3004

16. Responsibility for drafting the determination

Responsibility for producing the Committee's determination ultimately rests with the Chair of the panel hearing the case.

However all members of the panel hearing a case bear a collective responsibility for the decisions made by the panel and the reasons for those decisions.

The legal assessor's guidance can be sought on questions of structure and the presentation of the reasons, but not, of course, on the reasons themselves.¹⁵

¹⁵ Needham v Nursing and Midwifery Council [2003] EWHC 1141 per Newman J at para.13

Annex: Template for PCC Decisions

Case No:

GENERAL OSTEOPATHIC COUNCIL
Determination of the Professional Conduct Committee

Determination in the case of:

Registration No:

Committee: (Chair)
(Osteopath member)
(Lay member)

Legal Assessor:

Representation for Council:

Representation for Osteopath:

Clerk to the Committee:

Date of Hearing:

- 1. Summary of Decision**
- 2. Details of the Registrant and Background to the Complaint**
- 3. The Allegation**
- 4. The Hearing**
 - 4.1 Preliminary Matters**
 - 4.2 Applications Made by the Parties**
- 5. Documents Submitted to the Committee**
- 6. The Council's Case**
- 7. The Registrant's Case**
- 8. Legal Advice Received by the Committee**
- 9. Expert Opinion Received by the Committee**
- 10. Submissions From the Parties**
- 11. Relevant Issues**
 - 11.1 We have decided that the following are the relevant issues for the purposes this determination:
- 12. Burden and Standard of Proof**
- 13. The Committee's Findings of Fact**

14. The Committee's Findings on the Allegation

[Include references to the relevant part of the Osteopathic Practice Standards]

15. The Committee's Decision on Sanction

[Include references to:

mitigating and aggravating features;

submissions of the parties;

any testimonials, and the weight given to such material;

the GOsC's Indicative Sanctions Guidance]

16 Other Matters

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

16.2 The registrant has a right of appeal under section 31 of the Osteopaths Act 1993.

16.2 With the exception of any order for Immediate Suspension made by the Committee, this decision shall not come into effect until 28 days after the date on which notification was served on the registrant; or in the event of an appeal, until that appeal is determined or withdrawn.

16.2 All decisions of the Professional Conduct Committee are considered by the Professional Standards Authority (PSA).

16.3 Under section 29 of the NHS Reform and Healthcare Professionals Act 2002, the PSA may refer a decision of the Professional Conduct Committee to the High Court if it considers that the decision was "unduly lenient" or "should not have been made"; and that it would be desirable for the protection of members of the public for the PSA to refer the matter.

16.4 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.

SIGNED

DATE