



Policy Advisory Committee
9 March 2017
Hearings and Sanctions Guidance Discussion Paper

Classification	Public
Purpose	For discussion
Issue	The paper presents a draft discussion paper which will inform our consultation on revised Indicative Sanctions Guidance
Recommendation	To provide feedback on the approach proposed for obtaining initial feedback on revision of the Indicative Sanctions Guidance.
Financial and resourcing implications	None
Equality and diversity implications	Equality and diversity implications will be considered as part of the formal consultation on revised indicative sanctions guidance
Communications implications	Contained within the report
Annex	Draft discussion document on hearings and sanctions
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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.
2. As part of our reform programme for 2016-17, we are continuing to explore options and implement reforms which we consider could improve and modernise our fitness to practise processes and improve patient protection but which do not require a change to our primary legislation, the Osteopaths Act. The purpose of these changes is to further enhance transparency and consistency in decision making whilst ensuring any sanction imposed by a Committee is both targeted and proportionate.
3. The third edition of the Indicative Sanctions Guidance (ISG) was approved by Council in October 2013 and, for reference, can be found at: <http://www.osteopathy.org.uk/news-and-resources/document-library/fitness-to-practise/indicative-sanctions-guidance/>. The ISG is used by Professional Conduct Committees (and Health Committees) at the sanction stage of a fitness to practise hearing. As a publicly available document the ISG enhances the accountability and transparency of the Committees decision making and is used by all the parties to a hearing including registrants and their representatives.
4. Since the publication of the current ISG there have been numerous developments in healthcare regulation and the regulatory landscape generally, which require a review of the ISG.
5. We have identified a number of issues about which we think it would be helpful to obtain preliminary feedback prior to further work taking place on the revised ISG. These are:
 - a. the degree to which a practitioner's insight and remediation can be taken into consideration at the unacceptable professional conduct stage of a hearing
 - b. how any period of suspension served prior to sanction should be taken into account
 - c. whether specific guidance is needed in cases of sexual misconduct.
 - d. whether the Committee should offer advice where no finding of unacceptable professional conduct has been made
6. By undertaking a short period of initial discussions on these topics we can obtain feedback to inform our views on updating the ISG, and reflect upon whether there are any additional areas we need to consider.

Discussion

Insight and remediation

7. Unlike other healthcare regulatory regimes, the GOsC's statutory scheme, as set out in the Osteopaths Act 1993 and the associated rules, does not require Committees to decide whether the osteopath's fitness to practise is impaired. Rather, the Act provides that a Committee must determine whether the osteopath is guilty of Unacceptable Professional Conduct (UPC). Case law establishes that UPC conveys an implication of moral blameworthiness and a degree of opprobrium similar to the threshold for misconduct in medical and dental legislation.
8. Unlike current impairment, unacceptable professional conduct is a backward looking concept which does not require a panel, as part of its decision making process, to undertake a distinct consideration of two issues (or steps), namely, 'misconduct' and 'impairment'. While misconduct is about the past, impairment is an assessment addressed to the future, albeit it is made in the context of the past misconduct.
9. However, equating UPC with serious misconduct used by other healthcare regulators has serious shortcomings.
10. Currently, there is little practical guidance available to panels on what the concept of UPC might encompass. For example, should the concept of UPC embrace the steps the osteopath has taken since the relevant events? In practice, at the UPC stage, panels frequently grapple with this past misconduct in circumstances where the osteopath adduces evidence of insight and remorse into their misconduct.
11. Another example that serves to illustrate this difficulty is the procedure adopted at review hearings. At the Medical Practitioners Tribunal Service (MPTS) the reviewing tribunal will consider whether the practitioner's fitness to practise is still impaired and whether any further action needs to be taken against their registration. The tribunal will only undertake a review of the previous sanction imposed where the practitioner's fitness to practise is still impaired (at the date of the review).
12. If this procedure was adopted at GOsC review hearings, because a panel must look at what has occurred in the past, this would inexorably lead to a present finding of UPC based upon past misconduct rather than focussing on the osteopath's current practice. This incongruity is brought into sharper focus where the panel's earlier finding of UPC is based upon the wider public interest and does not include patient safety issues.
13. Frequently, matters that are relevant at the sanctions stage may also be relevant at the UPC stage. Consequently, we are considering whether further guidance would benefit panels in assessing the relevance of insight, remediation and apology from the osteopath at both stages of the process.

Interim suspensions and undertakings

14. The recent High Court judgment of *Kamberova v Nursing and Midwifery Council* [2016] considered whether a period of suspension, served by a registrant under an interim suspension order, should be taken into account by a panel in determining the final, substantive sanction to be imposed upon the registrant. The court concluded that a panel *'should take into account the time spent by a registrant suspended under an ISO as a relevant factor when considering what is the appropriate and proportionate sanction'*. The court considered that if the appropriate sanction is a short period of suspension, the fact there has been an interim period of suspension may be relevant. However, if the appropriate sanction is removal, then the fact that there has been an ISO in place may not be relevant.
15. This issue is of particular importance in GOsC fitness to practise proceedings given that interim suspension orders imposed by the Professional Conduct Committee will remain in place until the case is substantively disposed of. Equally, this reasoning may be extended to circumstances where a registrant has given an undertaking, for example: a practice restriction such as submitting reports or not to treat women without a chaperone for the period pending the conclusion of the substantive matter.
16. Where subsequently a panel finds facts proved and UPC then it must go on to consider sanction. It may be that they consider that the registrant has good insight and has undertaken effective remediation in the period prior to the case being heard and that the behaviour is unlikely to be repeated. If the panel considered a condition that was similar to the undertaking already in place was the appropriate and proportionate sanction, the question then arises: can they then take into account the length of time that the registrant has already limited their practice when determining the length of time any conditions or suspension should run?
17. The alternative argument is that interim suspension orders have no relevance to sanction and the above proposition fails to take account of the fact that the purpose of imposing sanctions is the public interest, primary amongst this, the protection of public. However, it is an established principle that sanctions should not be punitive, albeit they may have a punitive effect.

Sexual Misconduct

18. Unlike comparable guidance issued by other healthcare regulators, (for example: the MPTS) the GOsC's current ISG does not contain a section on how Committees should approach cases involving sexual misconduct.
19. Sexual misconduct covers a wide range of conduct ranging from criminal convictions, sexual misconduct with patients, colleagues and others to breaching professional boundaries through non – consensual physical examination of patients. It is an abuse of the special position of trust that a healthcare

professional occupies. It seriously undermines public trust in the profession of osteopathy and can present a risk to patient safety.

20. Panels should take all evidence into consideration in individual cases when exercising their judgment and making a decision that is appropriate and sufficient.
21. However, where sexual misconduct is proven, especially in circumstances where there has been a breach of professional boundaries involving a particularly vulnerable patient and even where there is no conviction, it could be said that removal from the register is an appropriate sanction.

Advice

22. At its meeting on 1 February 2017, Council briefly discussed whether a Professional Conduct Committee can give advice to a registrant where no finding of unacceptable professional conduct has been made.
23. This prompted the inclusion of this issue within the discussion paper. Where a Professional Conduct Committee determines that a registrant does not comply with a provision of the *Osteopathic Practice Standards* but finds this does not amount to Unacceptable Professional Conduct, it might be in the public interest for the Committee to nevertheless issue the registrant with advice which addresses specific areas of the registrant's future conduct or performance.
24. Issuing advice in appropriate cases where the conduct alleged falls just short of the threshold for UPC would be consistent with the GOsC's overarching objective and would assist in maintaining confidence in the osteopathic profession whilst promoting and maintaining proper professional standards.

Engagement

25. As part of our pre-consultation engagement plan, we have sought input from the GOsC FtP forum (which includes the views of experienced regulatory lawyers) including the Professional Conduct Committee Chairs and members and GOsC legal assessors. We received over 15 separate responses to the draft. All feedback we have received has been carefully reviewed and has been taken into account within the draft discussion paper which can be found at the Annex.
26. Our intention is to undertake a short period of public consultation – six weeks – with interested parties. These are likely to include:
 - a. Insurers and others engaged with the GOsC fitness to practise process.
 - b. The Institute of Osteopathy
 - c. The Professional Standards Authority
 - d. The GOsC Patient and Public Partnership Group.

27. The paper will also be published on our website to enable wider input.

Next steps

28. Based on the input to these discussions a revised version of the ISG will be brought to the Committee in June for discussion prior to approval by Council for consultation.

Recommendation: to provide feedback on the approach proposed for obtaining views on revisions to the Sanctions Guidance.



**General
Osteopathic
Council**

Discussion Paper on Hearings and Sanctions Guidance

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Discussion

The third edition of the Indicative Sanctions Guidance (ISG) was approved by Council in October 2013. The ISG is used by panels of the Professional Conduct Committee (and Health Committee) at the sanction stage of a fitness to practise hearing. As a publicly available document the ISG enhances the accountability and transparency of the panel's decision making and is used by all the parties to a hearing including registrants and their representatives.

Since the publication of the current ISG there have been numerous developments in healthcare regulation and the regulatory landscape generally. As part of our ongoing reform programme, we are continuing to explore options and implement reforms which we consider could improve and modernise our fitness to practise processes and improve patient protection but which do not require a change to our primary legislation, the Osteopaths Act. The purpose of these changes is to further enhance transparency and consistency in decision making whilst ensuring any sanction imposed by a panel is both targeted and proportionate.

We plan to review the ISG and want to explore in advance a range of topics relevant to Unacceptable Professional Conduct (UPC) and sanction including the relevance of remediation and insight at the UPC stage and taking account of time spent on an Interim Suspension Order when determining sanction. We plan to launch a six week public discussion paper requesting views and feedback.

We want to use the discussions arising from this public discussion to inform our views on updating the ISG, and to reflect

upon whether there are any additional areas we need to consider.

This discussion paper and questions do not commit the GOsC's Council to any future changes to the ISG, which will be subject to formal public consultation before they are implemented.

The ISG is available on the GOsC website at <http://www.osteopathy.org.uk/news-and-resources/document-library/fitness-to-practise/indicative-sanctions-guidance/> and will remain in force until this review and the subsequent formal consultation are complete.

Information a panel can take into consideration at the UPC stage

In contrast with other healthcare regulatory regimes, the GOsC's statutory scheme, as set out in the Osteopaths Act 1993 and the associated rules, does not require panels to decide whether the osteopath's fitness to practise is impaired. Rather, the Act provides that a panel must determine whether the osteopath is guilty of Unacceptable Professional Conduct (UPC)¹. Case law establishes that UPC conveys an implication of moral blameworthiness and a degree of opprobrium similar to the threshold for misconduct in medical and dental legislation.²

Unlike current impairment, unacceptable professional conduct is a backward looking concept which does not require a panel, as part of its decision making process, to undertake a distinct consideration of two issues (or steps), namely, 'misconduct' and 'impairment'. While misconduct is about the past, impairment is an assessment addressed to the future, albeit it is made in the context of the past misconduct.³

However, equating UPC with serious misconduct used by other healthcare regulators has serious shortcomings.

Currently, there is little practical guidance available to panels on what the concept of UPC might encompass. For example, should the concept of UPC embrace the steps the osteopath has taken since the relevant events? Is it permissible for the panel to take into account mitigation directly relevant to the conduct itself? For example: long hours, staff

shortages. In practice, at the UPC stage, panels frequently grapple with this past misconduct in circumstances where the osteopath adduces evidence of insight and remorse into their misconduct.

Another example that serves to illustrate this difficulty is the procedure adopted at review hearings. At the Medical Practitioners Tribunal Service (MPTS) the reviewing tribunal will consider whether the practitioner's fitness to practise is still impaired and whether any further action needs to be taken against their registration. The tribunal will only undertake a review of the previous sanction imposed where the practitioner's fitness to practise is still impaired (at the date of the review).

If the above procedure was adopted at GOsC review hearings, because a panel must look at what has occurred in the past, this would inexorably lead to a present finding of UPC based upon past misconduct rather than focussing on the osteopath's current practice. This creates unfairness to the registrant and skews the emphasis from patient protection (current risk of harm) to punishment (past wrong doing). This incongruity is brought into sharper focus where the panel's earlier finding of UPC is based upon the wider public interest and does not include patient safety issues.

Frequently, matters that are relevant at the sanctions stage may also be relevant at the UPC stage. Consequently, we are considering whether further guidance would benefit panels in assessing the relevance of insight, remediation and apology from the osteopath at both stages of the process.

Questions:

- 1. What is your view on a panel taking into account insight, apology and/or remedial steps undertaken by the osteopath at the UPC stage of a hearing?**

¹ An allegation must fall within the scope of the categories as defined within section 20(1)(a) – (f) of the Osteopaths Act 1993.

² Spencer v General Osteopathic Council [2012]; Shaw v General Osteopathic Council [2015]

³ Cranston J in Cheadle v General Medical Council [2009].

2. Are there any other matters that the panel should take into consideration at the UPC stage?

The relevance of “time served” under an interim suspension order

The recent High Court judgment of Kamberova v Nursing and Midwifery Council [2016] considered whether a period of suspension, served by a registrant under an interim suspension order, should be taken into account by a panel in determining the final, substantive sanction to be imposed upon the registrant. The court concluded that a panel ‘*should take into account the time spent by a registrant suspended under an ISO as a relevant factor when considering what is the appropriate and proportionate sanction*’. The court considered that, if the appropriate sanction is a short period of suspension, the fact there has been an interim period of suspension may be relevant. However, if the appropriate sanction is removal, then the fact that there has been an ISO in place may not be relevant. However, the Kamberova judgment does not prescribe what effect an ISO should have on the panel’s determination. Additionally, Kamberova does not appear to challenge the general principle that time spent subject to an interim order is not analogous to time spent remanded in custody.⁴

This issue is of particular importance in GOsC fitness to practise proceedings given that interim suspension orders imposed by a Professional Conduct Committee panel will remain in place until the case is substantively disposed off⁵. Equally, this reasoning may be extended to circumstances where a registrant has given an undertaking, for example: a practice restriction such as submitting reports or not to treat women without a chaperone for

the period pending the conclusion of the substantive matter.

Where subsequently a panel finds facts proved and UPC then it must go on to consider sanction. It may be that they consider that the registrant has good insight and has undertaken effective remediation in the period prior to the case being heard and that the behaviour is unlikely to be repeated. If the panel considered a condition that was similar to the undertaking already in place was the appropriate and proportionate sanction, the question then arises: can they then take into account the length of time that the registrant has already limited their practice when determining the length of time any conditions or suspension should run?

The alternative argument is that interim suspension orders have no, or limited, relevance to sanction and the above proposition fails to take account of the fact that the purpose of imposing sanctions is the public interest, primary amongst this, the protection of the public.

However, it is an established principle that sanctions should not be punitive, albeit they may have a punitive effect.

Questions:

- 1. What is your view on whether undertakings or ‘time served’ under an interim suspension order should be taken into consideration by the panel when determining sanction?**
- 2. What effect (if any) should “time served” under an ISO / undertakings have on any sanction imposed by a panel?**
- 3. How might guidance in this developing area of case law be framed to assist Committees?**

⁴ See for example: Adul-Razzak v General Pharmaceutical Council [2016]

⁵ Section 24(3)(a) of the Osteopaths Act

Sexual Misconduct

Unlike comparable guidance issued by other healthcare regulators, (for example: the MPTS) the GOsC's current ISG does not contain guidance on how panels should approach cases involving sexual misconduct.

Sexual misconduct covers a wide range of conduct spanning criminal convictions, sexual misconduct with patients, colleagues and others to breaching professional boundaries through non – consensual physical examination of patients. It is an abuse of the special position of trust that a healthcare professional occupies. It seriously undermines public trust in the profession of osteopathy and can present a risk to patient safety.

Panels should take all evidence into consideration in individual cases when exercising their judgment and making a decision that is appropriate and sufficient.

However, where sexual misconduct is proven, especially in circumstances where there has been a breach of professional boundaries involving a particularly vulnerable patient and even where there is no conviction, it could be said that removal from the register is an appropriate sanction.

Questions:

1. **Should the guidance include direction on how a panel should approach misconduct?**
2. **What are the perceived advantages/disadvantages of including detailed guidance on how panels should approach cases where sexual misconduct has been found proved?**
3. **Are there any other areas where similar guidance should be developed, for example: dishonesty and the duty of candour?**

Issuing Advice to a registrant where no UPC is found

In Spencer v General Osteopathic Council [2012] Mr Justice Irwin, in concluding that a finding of UPC did not imply a lower threshold than exists for misconduct in medical and dental legislation, 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 Standards but where neither professional incompetence nor UPC is made out. Justice Irwin also observed that, had Parliament intended to give formal powers of warning or admonition to the GOsC in circumstances where a registrant had breached the Standards but had not been guilty of UPC, it “would have been very simple to do so”.

The Health and Social Care (Safety and Quality) Act 2015 amended the statutory functions of the GOsC to the effect that GOsC has acquired an overarching objective of protection of the public. This involves the pursuit of a number of objectives including maintaining public confidence in the profession of osteopathy and promoting and maintaining proper professional standards and conduct for members of the profession.⁶

Although a failure to comply with a provision of the Osteopathic Practice Standards does not in itself constitute UPC, it might be proportionate for a PCC to issue advice to the registrant where it has concluded that the threshold of UPC has not been reached in a particular case. It is envisaged that any advice given would address specific areas of the registrant's future conduct or performance.

Issuing advice in appropriate cases where the conduct alleged falls just short of the threshold

⁶ Practice note: 2015/1 The duty to act in the public interest

for UPC would be consistent with the GOsC's overarching objective and would assist in maintaining confidence in the osteopathic profession whilst promoting and maintaining proper professional standards.

The effect and parameters of any advice given by the PCC would need to be clearly stated within the sanctions guidance. The preliminary view is that this advice would not be recorded on the register as it would not be a formal sanction nor would any restrictions be placed on the osteopath's registration. If a PCC decided advice was appropriate it would be required to clearly set out what that advice should be and this would form part of its reasons for the decision and should therefore be included in the letter sent to the registrant. Any advice would also have to be relevant to the allegations found proved by the PCC.

Questions:

- 1. As a principle, what is your view on whether a PCC should be able to give advice to the registrant where it has not found UPC?**
- 2. Should this advice be kept on GOsC internal records as part of the registrant's FtP history? If so, for how long should this information be retained?**
- 3. Do you have other considerations or comments relating to a PCC issuing advice? If so, please set out what these considerations are.**

Annex A – Overview of GOsC Fitness to Practise Process

The GOsC has a duty under the *Osteopaths Act 1993* to investigate concerns about osteopaths.

Concerns are referred to us from many different sources, including members of the public, employers, registrants and the police. We may also become aware of a concern through other means, such as the media or the publication of a report. We have a duty to identify whether the concern is a legitimate matter that needs to be investigated.

Screeners

We conduct an initial assessment, called a triage, of every concern we receive, to enable us to decide if there is sufficient information for a Screener to determine whether the concern is capable of amounting to an allegation under the *Osteopaths Act*.

For each new concern, the GOsC tries to gather information (if it has not already been provided) that is detailed enough for a Screener (an osteopath member of the GOsC Investigating Committee) to reach a reasonable opinion on whether the concern is capable of amounting to an allegation.

This typically means inviting the complainant or third parties to provide further information. However, how we conduct our investigation will depend on the nature of the concerns. For example, we may need to get an expert report if the concern relates to an osteopath's clinical practice, or an assessment by one of our medical assessors if the concern relates to an osteopath's health.

In reaching a decision, Screeners are able to refer to 'threshold criteria' to help them decide whether an activity complained about constitutes unacceptable professional conduct. If the Screener decides that the GOsC has no power to investigate the concern against the osteopath, the case will be closed.

If the Screener decides that the GOsC has the power to deal with the complaint, the

We have three Statutory Committees:

- The Investigating Committee carries out the initial scrutiny of complaints about osteopaths, and decides whether the osteopath has a case to answer.
- The Professional Conduct Committee hears cases involving criminal convictions or allegations against an osteopath's conduct or competence. If the Committee finds the allegation is well founded, it imposes an appropriate and proportionate sanction on the osteopath.
- The Health Committee considers cases where an osteopath is alleged to be in poor physical or mental health. Appropriate action is taken in the interests of the public and the osteopath.

Each committee meeting or hearing is attended by a legal assessor – a legally qualified person who provides the committee with advice on matters of law and procedure.

Any of our fitness to practise committees can impose an interim suspension order on an osteopath, if they feel it necessary to protect the public in a case involving serious allegations.

An interim suspension order means the osteopath's registration is suspended pending the investigation and outcome of the hearing.

case will be referred to the Investigating Committee.

The Investigating Committee

The Investigating Committee meets in private to consider cases on the papers. What this means is that the Investigating Committee considers the allegation based upon written information. It considers whether there is a case to answer against the osteopath. The

Investigating Committee will take the threshold criteria into account when making a decision.

If the Investigating Committee decides there is no case to answer or the case does not meet the threshold for referral, the case will be closed. The Investigating Committee may issue the registrant with advice about their future conduct or performance.

If the Investigating Committee decides that there is a case to answer, a hearing will be arranged before the GOsC's Professional Conduct Committee or, if the matter relates to the osteopath's health, before the Health Committee.

Professional Conduct Committee

Each hearing of the Professional Conduct Committee takes place before a panel comprising three members of the Committee. There will be at least one osteopath member and one lay member. The Chair must be a lay member.

Hearings are usually held in public, unless there is a reason why some or all of it has to be held in private. This means that members of the public, including the press, are able to attend.

Stage 1

Where some or all of the facts alleged are in dispute, the panel will need to first consider whether they find those facts proved. The standard of proof which applies is called the 'balance of probabilities'. This means that the panel will only find the alleged fact 'proved' if it considers that it is more likely than not that it happened.

If the panel does not find any of the facts proved, it will ask parties to return to the hearing room and formally announce the decision and the case will be concluded.

Where the panel finds some or all of the facts proved, they will ask parties to return to the hearing room so that the Chair can formally announce the decision and reasons and the hearing will then progress to Stage 2.

Stage 2

Once the panel's findings of fact have been announced, the GOsC's Case Presenter and the Registrant will be invited to make submissions on Unacceptable Professional Conduct.

The Legal Assessor may provide the panel with legal advice and the panel will then retire in private to consider whether the facts found proved amount to Unacceptable Professional Conduct.

After the panel has reached a decision, parties will be invited into the hearing room and the Chair of the panel will announce their decision on Unacceptable Professional Conduct.

Stage 3

Where a finding of Unacceptable Professional Conduct is made, the panel will proceed to impose a sanction.

Sanctions

If a hearing finds an allegation against an osteopath is well-founded, the panel can impose one of four sanctions on the osteopath:

- admonishment
- imposition of conditions on the osteopath's practice
- suspension from the Register
- removal from the Register.

In cases where it finds that the osteopath's fitness to practice is seriously impaired because of their physical or mental condition, a Health Committee panel can impose conditions of practice or a suspension only.

Annex B – FtP Process

