

Osteopathic Practice Committee
14 May 2013
Investigating Committee Guidance on Case to Answer

Classification	Public
Purpose	For decision
Issue	This paper asks the Committee to consider the updated Investigating Committee Decision Making Guidance and Flowchart and agree that Council is asked to approve them.
Recommendations	<ol style="list-style-type: none"> 1. To consider the draft guidance and flowchart at Annex B. 2. To agree that Council should be asked to approve this guidance and flowchart.
Financial and resourcing implications	None
Equality and diversity implications	None
Communications implications	If approved by Council, the Investigating Committee will need to be briefed on and possibly receive training in relation to the revised guidance. Key stakeholders, such as those who represent osteopaths, should be informed of the new guidance.
Annexes	<p>Annex A – Existing Guidance and Flowchart</p> <p>Annex B – Revised Guidance and Flowchart</p>
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Background

1. The Osteopathic Practice Committee's (the Committee) terms of reference confirms that it will consider and assist in the development and/or revision of documents published on behalf of fitness to practise committees and of legislation governing fitness to practise procedure.
2. The Investigating Committee is assisted by a decision making document that explains the basis on which it finds a 'case to answer'. This document is supported by a flowchart that is used by the IC each time it makes a decision in a case. The current version of the document and flowchart were produced in April 2007 and can be found at Annex A.
3. The Committee is now asked to review these documents, in light of the decision reached in *Spencer v General Osteopathic Council [2012]* and the fact that the guidance and flowchart have not been reviewed since first publication in 2007.

Purpose of the guidance and flowchart

4. The guidance should provide the IC with relevant information to enable it to understand what is meant by a 'case to answer', so that it can apply this test appropriately to the cases that it considers. It should identify other relevant factors – such as interpreting Unacceptable Professional Conduct and the need to take account of the public interest – that should be taken into account by the IC when it is making its decisions in each case. The flowchart is an easy guide that takes the IC through a step-by-step process of making a decision in each case.

The Review

5. The review of the guidance and flowchart has been prompted by the decision that was reached in *Spencer v General Osteopathic Council [2012] EWHC 3147*. This decision provides us with a clearer understanding of the meaning of Unacceptable Professional Conduct (UPC). It confirms that UPC is the same as 'misconduct' or 'serious misconduct', which are the terms used by the GMC and other healthcare regulators. It is not a lower threshold, as perhaps was once thought.
6. Although the review was prompted by the decision reached in *Spencer*, it was actually an appropriate time to review the document, given that it had been drafted some five years ago. It was necessary to review the document in light of any other developments in case law to ensure that accurately reflects the correct application of the relevant tests. It was also necessary to include reference to the new Osteopathic Practice Standards.
7. To Executive, having identified the need for a review of the document, sought advice from one of its legal assessors (Counsel). He undertook a review of current case and provided advice and guidance on the drafting of the revised document that now appears at Annex B.

8. In addition to the advice received from Counsel, the Executive sought the views of the Investigating Committee. On the whole, the IC finds the existing guidance helpful. It recognised that it needed to be updated and asked that it be kept in a concise form and that consistent language was used in the document and relating flowchart.
9. Finally, as part of the review the Executive has considered the guidance provided by other healthcare regulators to their own Investigating Committees. The test of case to answer is a common test and used by other healthcare regulators.
10. The flowchart is used by the IC at each meeting as a decision making aid. The IC wished to keep this document in its current form, recommending only some minor changes. Counsel, in his advice, confirmed that he did not consider that the flowchart needed to be amended in any way.

The Changes

11. Changes have been made to the Decision Making Guidance:
 - a. The layout of the document has been changed so that the key tests and questions that the IC should ask itself when deciding whether there is a case to answer are clearly stated at the start of the document.
 - b. Clarification has been given to the terms Unacceptable Professional Conduct and Professional Incompetence to reflect more recent case law, including Spencer and the case of Calheam v General Medical Council [2007] EWHC 2606 (Admin).
 - c. Reference to the Osteopathic Practice Standards has been included.
 - d. Changes have been made to make the document more concise and clearly structured.
 - e. The essence of the document has remained the same and it still covers the same decision making elements and factors that the existing document contains.
12. Minor changes have also been made to the flowchart:
 - a. The box that contained reference to the disputed facts has been removed. The IC did not consider that this added anything to the document given that it directed the IC to move onto the next box regardless of whether it answered 'yes' or 'no' to the question.
 - b. The box that contained the question 'Is there a real prospect of the alleged facts being proved before the PCC to establish unacceptable professional conduct, professional incompetence etc' Has now been separated to reflect the fact that these are separate questions that need to be answered.

Recommendations:

1. To consider the draft guidance and flowchart at Annex B.
2. To agree that Council should be asked to approve this guidance and flowchart.