

The IC Decision-making Process

A case to answer

The IC has a duty to determine whether there is a case for the osteopath to answer in relation to the matters contained in section 20 (1) of the Osteopaths Act 1993 (the Act). Namely:

- (a) conduct which falls short of the standard required of a registered osteopath;
- (b) professional incompetence;
- (c) criminal convictions in the United Kingdom [which are materially relevant to the osteopath's fitness to practise osteopathy];
- (d) serious impairment to the osteopath's ability to practise as an osteopath because of his physical or mental condition.

The exercise of judgment

The appropriate standards of proficiency and conduct have been set by Council, and appear in the Standards 2000 Document (S2K) and the Code of Practice, respectively.

Some standards are drafted in unequivocal terms, for example clause 54 of the Code states "You must obtain patients' written consent before involving them in research..." This is the standard, even if few osteopaths were to comply with it. There may be mitigating circumstances but this is a separate issue to the standard itself.

Some standards are drafted less precisely, for example, clause 66 of the Code states, "When you accept someone as your patient, you have a duty to provide them with an appropriate consultation and good quality care..." "Good quality" can only be measured against the level of care provided by the "reasonable osteopath."

- Standards that are drafted unequivocally should be applied as drafted; but
- Aspirational standards should be interpreted against the practise of the reasonable osteopath.

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The osteopathic members of the IC should bring their experience of the profession to the process, not by imposing their own personal standards but by identifying the standard of practise of the ‘reasonable osteopath’. The ‘reasonable osteopath’ will fall within a band of reasonableness, which will tolerate a degree of variance in standards of practice. The IC must decide the lower limit of the ‘band of reasonableness’.

Every case is unique to some degree, even if it bears similarities to other cases. The IC must exercise its judgment in relation to each individual case.

A case to answer is established (subject to *Toth* exceptions, below) if the evidence before the IC is such that the osteopath should reasonable be called upon to answer it.

Burden of establishing a case to answer

GOsC has the burden of establishing a case for the osteopath to answer and it must do so on the evidence. The IC must confine itself to the evidence before it and not speculate.

The IC should not confine itself to the Screener’s Report (which is made before a detailed investigation is conducted), but consider all the evidence before it. If the IC decides that it requires more evidence, it should defer its decision pending further investigation.

Four principles of decision-making

The relevant principles are set out below. The principles compete with each other to some degree but that is why the IC must exercise judgment – to strike a balance – on the unique facts.

Principle 1 – the complainant’s evidence

The starting point is to consider the complainant’s evidence. The complainant’s evidence will disclose a case for the osteopath to answer if it could be accepted as proof of the matters in section 20(1) of the Act (above), if:

- believed; and
- left uncontradicted.

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Evidence that is so fanciful, irrational, implausible or self-contradictory, as to render it unworthy of belief, may be rejected.

Principle 2 – the osteopath’s information and observations

The next stage is to consider the osteopath’s evidence. IC is obliged to consider any evidence provided by the osteopath before determining whether there is a case for the osteopath to answer.

However, the osteopath’s evidence is of limited relevance at the IC stage (see Principle 3 below) but it may have a substantial impact on the IC’s decision.

- The osteopath’s evidence may explain the complainant’s evidence putting it in a none culpable context, or if it contains admission, or reveals sufficient (see below).
- The osteopath’s notes may well be significant, for example, by identifying any misunderstanding between the complainant and osteopath, or in relation to the next bullet point. The weight to attach to the notes will depend upon the individual circumstances of the case.
- The osteopath’s evidence will also help the IC to make a judgment as to whether the case against the osteopath has a reasonable prospect of success.

Principle 3 – IC is not the arbiter of disputed facts

In *R v GMC ex parte Richards (2001)* Sullivan J said that the Preliminary Proceedings Committee should not, deliberating in private, seek to determine factual issues which are in dispute and therefore in any such complaint the matter should be referred to the PCC for a public hearing and testing of the evidence.

- Although the IC should not determine disputed facts, it is entitled to assess the weight to be attached to competing evidence when determining whether there is a reasonable prospect of success.

Principle 4 – special and sufficient reason not to refer to PCC

In *R v GMC ex parte Toth (No1) (2000)* Lightman J stated that the general principle is that public confidence in the ... profession requires, and complainants have a legitimate expectation, that complaints *in the absence of some special and sufficient reason*, will be publicly investigated by the PCC and justice should be seen to be done.

The exception in *Toth* was examined in *Henshall v GMC [2005]*. It was established that the lack of a real prospect of success can amount to a *special and sufficient reason*. The prospect of success must be assessed against the relevant standard of proof.

Caution should be exercised when dismissing a case for lack of real prospect of success. Such decision should be weighed against the public interest in the case being referred to the PCC.

The IC may, on the individual facts of a case, decide that some other *special and sufficient reason* exists, other than merely a lack of real prospect of success.

Further considerations:

Public Interest

The IC may legitimately ask itself, “Is it in the public interest to refer this case to the PCC?” In answering this question the IC must act judiciously.

As indicated under Principle 4, the default position is that the IC should refer a case to the PCC if it reveals a case to answer. The exception to this is when there exists a *special and sufficient reason* not to do so. *Toth* identified a lack of ‘a reasonable prospect of success’ as falling within the exception but the IC may identify other reasons. It must be emphasised that each case must be considered on its own facts.

The IC may consider:

- Insight – if an allegation against an osteopath is relatively trivial and the osteopath has acknowledged his shortcoming and acted to address them, the IC may see little good in referring the matter forward;

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- Off-day – everyone is capable of having an off-day or making an occasional error of judgement. The IC may take this into account. If the osteopath in question has breached standards more significantly or frequently than would be expected of a reasonable osteopath, this may indicate that there is a case for the osteopath to answer. However, caution should be exercised when dismissing an alleged incident as a one-off occurrence, as members of the public are often reluctant to complain, and those that do may represent the ‘tip of an iceberg’.

No judgment following the finding of a case to answer

Section 20(12) requires the IC to refer the allegation to the HC or PCC when it concludes that there is a case to answer. The IC must resist the temptation to find no case to answer solely on the basis that the particular matter does not warrant the full rigour of the PCC or HC procedure. The PCC and HC have recourse to minor sanctions and may deal with relatively trivial matters.

Reasons for decisions

IC Rule 10 requires the IC to record its reasons for concluding that there is no case to answer and to supply those reasons to both the osteopath and the complainant. However, the recording of reasons for a finding of a case to answer is equally important for the efficient administration of cases.

The Rules provide for the GOsC's solicitors to draft the charges against the osteopath. But in order to do this effectively, the solicitor must know why the osteopath has been referred to the PCC or HC. It would be helpful to this process if the IC were to identify *the particular allegations* in respect of which a case to answer has been found and the *detailed reasons* for finding a case to answer in respect of those allegations.

Advice Letters

The IC has adopted the practice of issuing letters of advice to osteopaths after a finding of no case to answer. There is no statutory power for this but nor is there anything preventing the IC from expressing its views, as long as it does not suggest or imply that the osteopath has been

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guilty of unprofessional conduct or incompetence (even if a case to answer is established, the osteopath must be considered innocent of the allegations, until they are proved before the PCC).

Distinction between incompetence and performance

Shipman report distinguished between competence and performance. Competence describes knowledge and skill – what a practitioner can do; performance described what a practitioner does within actual practise. But in *Sadler v GMC [2003] 1 WLR 2259*, it was said that distinction between competence and performance should not be taken too far, as there is an obvious correlation.

This distinction need not be of major concern to the IC because, even taking the distinction to the extreme, if osteopath possessed the necessary knowledge, but chose to ignore it, that could be evidence of unacceptable professional conduct.