General Osteopathic Council

Osteopathic Practice Committee
25 June 2014
Development of Guidance on Threshold Criteria for Unacceptable Professional Conduct

Classification	Public
Purpose	For decision
Issue	
Recommendation	To recommend that Council approve for consultation, the draft Guidance on Threshold Criteria for Unacceptable Professional Conduct at Annex A.
Financial and resourcing implications	Cases that fall outside the agreed threshold criteria should not be referred by the Investigating Committee. This may impact on the number of formal cases considered by the Professional Conduct Committee.
Equality and diversity implications	None
Communications implications	A consultation on the draft guidance will be undertaken.
Annexes	A. Draft Guidance on Threshold Criteria for Unacceptable Professional Conduct. B. Examples of threshold criteria from other health care regulators.
Author	David Gomez

Background

1. This paper sets out proposals for development of new guidance on 'threshold criteria'.

2. The purpose of the new guidance is to assist Screeners and the Investigating Committee when making decisions on whether complaints and allegations should be investigated or referred for a hearing.

Discussion

The threshold established by recent case law

3. In *Spencer v General Osteopathic Council*[1], Mr Justice Irwin propounded a threshold test which must be satisfied before a finding of Unacceptable Professional Conduct could be made. The relevant paragraphs of the judgment are set out below:

"In my judgment, the starting point for interpreting the Osteopaths Act 1993 must be the language of the Act itself. Although one notes that "unacceptable professional conduct" has the definition in Section 20(2) "conduct which falls short of the standard required of a registered osteopath", there is an unhelpful circularity to the definition. Indeed one might not unfairly comment that the statutory definition adds little clarity. The critical term is "conduct". Whichever dictionary definition is consulted, the leading sense of the term "conduct" is behavior, or the manner of conducting oneself. It seems to me that at first blush this simply does imply, at least to some degree, moral blameworthiness. Whether the finding is "misconduct" or "unacceptable professional conduct", there is in my view an implication of moral blameworthiness, and a degree of opprobrium is likely to be conveyed to the ordinary intelligent citizen. That is an observation not merely about the natural meaning of the language, but about the likely effect of the finding in such as a case as this, given the obligatory reporting of the finding under the Act."[2]

"As it is, the Act stipulates that if unacceptable professional conduct is made out, there has to be at least a formal admonition and publicity which is bound to affect the Registrant's professional reputation. Those are considerable sanctions. In my view, they support the natural meaning of the language contained in the statute and **point to a threshold for a finding of "unacceptable professional conduct..."**[3]

4. The view expressed by the Court was that in order to meet this threshold, the allegations against a registrant had to be "worthy of the moral opprobrium and the publicity which flow from a finding of unacceptable professional conduct." [4]

---

[1] *[2012] 1WLR 1307, [2012] EWHC 3147 (Admin)*
[2] Paragraph 23 of Spencer v GOsC
[3] Paragraph 25 of Spencer v GOsC, bold added.
[4] Paragraph 28 of Spencer v GOsC

5. The allegations which the Professional Conduct Committee found proved against Dr Spencer were a failure to adequately record a case history on two separate occasions. The Court concluded that allegations relating to note taking and retention of notes, in the absence of "incompetence or negligence of a high degree" did not of themselves, meet this threshold.[5]

The view of the Law Commissions

6. In the context of fitness to practise proceedings, a central question that needs to be considered is the role of the regulator itself. The views recently expressed by the Law Commissions on the purpose and objectives of the health care regulators are instructive.

7. In April 2014, the Law Commissions of England and Wales, Scotland and Northern Ireland published their final report *Regulation of Health Care Professionals: Regulation of Social Care Professionals in England*[6] .

8. In the report, the Commissions noted: "We were concerned by the examples given which suggested that the regulators were inappropriately imposing moral judgments in essentially private matters under the guise of maintaining confidence. If these reports are accurate, the regulators actions not only undermine the credibility of professionals regulation but also fail to have proper regard to article 8 of the European Convention on Human Rights. We strongly urge the regulators-and their fitness to practise panels-to consider carefully regulatory interventions which do not take some colour from the need to protect the public."[7]

9. The Law Commissions went on to state "...We do not think that the public interest requires that fitness to practise proceedings should be taken in cases of minor dishonesty, or misconduct in private life, unless they can be seen to have at least some relationship with patient safety, or at least with the public's confidence in the profession as a whole. Indeed, given the costs that proceedings impose on registrants and, in many cases, the National Health Service, *the pursuit of minor matters with excessive zeal would be contrary to the public interest*"[8]

10. In the view of the Law Commissions, the responses to the consultation proposals, "...demonstrated that the concept of misconduct has become too nebulous."[9]

[5] Paragraphs 27 and 28 of Spencer v GOsC.
[6] (CM 8839, SG/2014/26, Law Com No 345/Scot Law Com No 237/ NILC 18(2014). Available at http://lawcommission.justice.gov.uk/areas/Healthcare_professions.htm
[7] At paragraph 3.15, page 38 of the report.
[8] At paragraph 3.16, page 39 of the report (italics added).
[9] At paragraph 7.15, page 114 of the report.

11. The Law Commissions noted that "the vast majority" of responses to the consultation agreed that regulators should have powers to establish referral criteria for an investigation.[10]

12. However, in their final recommendations, the Law Commission considered that an express power in statute to establish such criteria was not necessary. The Law Commissions considered that, instead, regulators could use their general powers to issue guidance to produce a document similar to the General Pharmaceutical Council's threshold criteria.[11]

13. The Law Commission recommended that regulators should not be able to refer for *investigation*, any case that[12]:

    a. does not amount to an allegation

    b. is vexatious

    c. has been made anonymously and cannot be otherwise verified, or

    d. in which the complainant refuses to participate and the allegation cannot be verified.

14. In the view of the Law Commissions, decisions concerning the types of cases which regulators progress beyond the preliminary consideration stage is an area in which there is a strong public interest in achieving consistency.[13]

The practice of other healthcare regulators

15. Examples of the different approaches taken by some of the other regulators are included in Annex B.

The General Pharmaceutical Council

16. The General Pharmaceutical Council (GPhC) has a statutory requirement to publish threshold criteria. This requirement is set out in Article 52(2) (a) of the Pharmacy Order 2010. The rules made under that Order stipulate that allegations should not be referred to the Investigating Committee, if they are of a category included in the threshold criteria as not suitable for referral.

17. The approach adopted in the GPhC's threshold criteria is to require evidence that a number of principles which are derived from the Standard of Conduct have not been complied with.

---

[10] At paragraph 8.18, page 125 of the report.
[11] At paragraph 8.24, page 126 of the report.
[12] Recommendation 59, paragraph 8.24, page 126 of the report.
[13] At paragraph 8.22, page 126 of the report.

18. A case can only be referred for consideration if there is such evidence. These evidential requirements are set out in a series of statements underpinning each principle. In addition, the guidance includes a series of worked examples to assist the decision maker.

The Health and Care Professions Council

19. The Health and Care Professions Council (HCPC) publish *Allegations: Standard of Acceptance.* The rationale of the document is put thus: "To ensure that allegations are considered appropriately, this document sets out a modest and proportionate threshold which allegations must normally meet before they will be investigated by the HCPC. That threshold is known as the Standard of Acceptance."

20. In relation to the preliminary stages of fitness to practise proceedings, the legislation governing the GOsC and the HCPC is similar in terms of the mechanism for initial consideration of complaints and allegations.

21. As is the case with the legislation governing the GOsC, the 2001 Order provides a power for the HCPC to appoint Screeners[14]. As is the case with the GOsC's screeners, the role of the HCPC Screener is to consider whether power is given under the legislation to consider an allegation if it proves to be well founded[15]. And as is the case with the GOsC's Investigating Committee, the role of the HCPC's Investigating Committee is to consider whether or not there is a case to answer.[16]

22. As is the case with the GOsC, the governing legislation of the HCPC (the Health and Social Work Professions Order 2001, as amended) ("the 2001 Order") does not contain any explicit provision relating to threshold criteria or the Standard of Acceptance.

23. The HCPC' Standards of Acceptance appear to have been made under the HCPC's general powers to issue guidance. In any event, the document emphasises that:

    a. the HCPC's fitness to practise processes are designed to protect the public, and are "...not a general complaints resolution process, nor are they designed to resolve disputes between registrants and service users..." and

    a. investigating allegations properly is a resource-intensive process and "therefore resources should be used effectively to protect the public and should not be diverted towards investigating matters which do not raise cause for concern.

[14] Article 23(1) of the Health and Social Work Professions Order 2001
[15] Article 24(3) of the Health and Social Work Professions Order 2001
[16] Article 26(2)(d)(i) of the Health and Social Work Professions Order 2001

24. The document states "Importantly, we recognise that registrants do make mistakes or have lapses in behavior and we will not pursue every minor error or lapse."

25. In addition to technical matters such as the format and nature of the allegation, the Standard of Acceptance sets out certain categories of complaint that will generally not be considered by the HCPC. These include:

    a. anonymous complaints

    b. matters which have been resolved satisfactorily at a local level

    c. minor employment issues

    d. consumer related issues

    e. business disputes

    f. complaints which have no public protection implications but which are made simply on the basis that the complainant is aware that the other party to a dispute is a registrant (e.g. boundary disputes between neighbours)

    g. parking and penalty charge notice contraventions

    h. fixed penalty (and conditional offer fixed penalty) motoring offences, and

    i. penalty fares imposed under a public transport penalty fare scheme.

26. The guidance goes on to state that "HCPC fitness to practise proceedings should not be used as a forum for re-trying cases heard elsewhere, nor for settling differences of professional opinion..."

The General Medical Council

27. Under rule 4 of the General Medical Council (Fitness to Practise) Rules 2004, allegations which are made to the General Medical Council (GMC) are initially considered by the Registrar (in practice by staff with delegated authority).

28. The GMC's Registrar has a statutory power not to refer onwards, those allegations which he considers to be vexatious; which are more than 5 years old (unless it is in the public interest for such matters to be referred); or which do not amount to a statutory ground for impairment of fitness to practise.

29. However, where the GMC's Registrar considers that an allegation does fall within the statutory grounds, is not vexatious and is within time, he is required to refer it for consideration by appointed case examiners.[17]

30. The 2004 Rules and the Medical Act 1983 do not contain an explicit power to publish threshold criteria or guidance.

31. However, the GMC publishes "GMC thresholds", guidance for those who employ doctors which is designed to clarify the circumstances in which the GMC will take regulatory action against a doctor.

32. The GMC guidance sets out examples of the types of case that the GMC will close without any investigation:

    a. minor motoring offences not involving drugs or alcohol

    b. a delay of less than 6 months in providing a medical report

    c. a minor non-clinical matter, and

    d. a complaint about the costs of private medical treatment.

33. The GMC guidance then sets out the types of case that may be closed after a preliminary discussion of concerns with the doctor's employer or contractor, and where the GMC is satisfied that the complaint is not part of a wider pattern of concerns:

    a. complaints about quality of treatment received where there is no indication of any risk to the patient or that the doctor acted significantly below appropriate standards

    b. complaints about a doctor's poor attitudes to patients, or failing to take patient's preferences into account.

34. In relation to cases that are the subject of a GMC investigation, the GMC guidance states that the GMC threshold for referral is likely to be met when any of the following features occur:

    b. a doctor's performance has deviated from the guidance set out in Good Medical Practice and as result has harmed patients or put patients at risk of harm

    c. attempts to improve a doctor's performance locally have failed and the employer or contractor identifies a remaining unacceptable risk to patient safety

[17] Rule 4 of the GMC (Fitness to Practise) Rules 2004

d. a doctor about whom the employer or contractor has developed significant concerns, leaves the employer or contractor's employment, and the employer or contractor is not confident that alternative safeguards are in place

e. a doctor has shown a deliberate or reckless disregard of clinical responsibilities towards patients

f. a doctor has abused a patient's trust or violated a patient's autonomy or other fundamental rights

g. a doctor has behaved dishonestly, fraudulently or in a way designed to mislead or harm others

h. the doctor's behavior was such that public confidence in doctors generally might be undermined if the GMC did not take action

i. a doctor's health is compromising patient safety

j. a doctor's lack of knowledge of the English language is compromising patient safety.

35. The guidance produced by other healthcare regulators is informative. However, it is acknowledged that these regulators have different statutory regimes and in relation to fitness to practise proceedings, employ a different test-whether or not a registrant's fitness to practise is impaired.

36. In addition, the nature of the osteopathy profession is such that a procedure involving consultation with a registrant's employer would not necessarily be appropriate or workable in a GOsC context.

The views of the British Osteopathic Association (now the Institute of Osteopathy)

37. In a recent article in Osteopathy Today, the British Osteopathic Association (now the Institute of Osteopathy) expressed concern at the types of case that are being referred by members of the profession to the General Osteopathic Council[18].

38. The article states: "...we are finding more and more that we have to deal with complaints, or the threat of complaints, made by principals about associates or associates about principals. There is only one reason why an osteopath should talk to GOsC about another osteopath and that is if they genuinely believe that patients are at risk. This is what the GOsC exists for-to protect patients, not to waste their time dealing with inter-practitioner squabbles about who stole whose patients of any other aspect of the break up of principal/associate relationship."

[18] "Are your standards high enough for the Institute of Osteopathy?" Osteopathy Today, April 2014, Vol20.03 at page 7

Developing threshold criteria for the GOsC

39. In exploring the potential development of threshold criteria for the GOsC, the views of the GOSC FTP User's forum was sought in March 2014. The forum consists of legal assessors to the GOsC FTP Committees, and registrant and GOsC representatives who routinely act in FTP proceedings.

40. The response from the BOA (now the Institute of Osteopathy) and GOsC representatives was positive. Suggestions for potential criteria have been incorporated in the draft at Annex A.

41. At the all members meeting of the GOsC Investigating Committee (IC) on 21 May 2014, members of the IC were also asked to consider the issue of guidance and threshold criteria. The response of the IC to this proposal was also positive.

42. IC members were tasked with producing a list of the types of case which, in their view, could never amount to Unacceptable Professional Conduct and which could not meet the threshold test established in the Spencer case. This list was compiled from the collective experience of the current members of the IC.

43. The criteria set out in the draft guidance have therefore been informed by and compiled from: the Spencer case; recommendations set out by the Law Commission; examples from the criteria used by other healthcare regulators; the views expressed by members of the GOsC Fitness to Practise Users Forum and the British Osteopathic Association (now the Institute of Osteopathy); and the list compiled by the members of the IC.

44. The draft criteria is set out below:

Matters which are not usually capable of amounting to Unacceptable Professional Conduct and which should therefore not generally be referred to the Professional Conduct Committee include:

a. Complaints about note taking and record keeping alone	In the absence of "incompetence or negligence of a high degree"
b. Complaints which do not fall within the statutory grounds of section 20	
c. Vexatious complaints	
d. Complaints which have been made anonymously and which cannot be otherwise verified	
e. Complaints in which the complainant refuses to participate and in which the allegation cannot otherwise be verified	
f. Complaints which relate to disputes between registrants and patients about	Provided that there is no allegation of dishonesty or intent

fees or the costs of treatment	to deceive
g. Complaints which seek to reopen matters which have already been the subject of an employment tribunal process or Civil proceedings	
h. Complaints which amount to a difference of professional opinion	
i. Complaints which relate to employment disputes	
j. Complaints which relate to contractual disputes, including arrangements for lease of premises and facilities	
k. Complaints relating to business disputes including: i. passing off/similar sounding web domain names or trading names ii. 'patient poaching' iii. matters arising from the break up of a principal/associate relationship	Provided that there is no allegation of a breach of patient confidentiality or Data Protection issues.
l. Complaints about a registrant's personal life (including matters arising out of divorce proceedings)	Unless the complaint relates to abusive behavior or violence, or brings the profession into disrepute
m. Complaints which have no public protection implications but which are made simply on the basis that the complainant is aware that the other party to a dispute is a registrant (e.g. boundary disputes between neighbours)	
n. Minor motoring offences, including: i. Parking and penalty charge notice contraventions; ii. Fixed penalty (and conditional offer fixed penalty) motoring offences	Provided that drugs or alcohol are not involved and there are no potential health issues in relation to the registrant
o. Penalty fares imposed under a public transport penalty fare scheme.	
p. Driving without due care and attention	Unless the registrant has been convicted

45. It is important that any draft criteria sit comfortably within the existing legislative framework that currently governs the GOsC's fitness to practise proceedings.

46. The Osteopath's Act 1993 and the rules made under that Act which govern the proceedings of the Investigating Committee and the Professional Conduct Committee do not contain an explicit power to establish threshold criteria.

47. However, Paragraph 15(1) of the Schedule to the Act provides a general power (subject to the provisions of the Act) for the GOsC to "do anything which is calculated to faciltate the discharge of its functions or which is incidental or conducive to the discharge of its functions."

48. The view of the Law Commissions, as stated above, is that regulators may use their general powers to issue guidance, to produce documents of this kind.

49. The most recent case law to interpret the fitness to practise regime set out in the Osteopaths Act 1993 (the Spencer Case), clearly establishes a threshold for Unacceptable Professional Misconduct: is the allegation "worthy of the moral opprobrium and the publicity which flow from a finding of unacceptable professional conduct?"

50. It would seem open for the GOsC to consult with its stakeholders, in order to seek to reach a shared understanding of the sorts of allegation which could not meet this threshold, and subsequently to publish guidance confirming this shared understanding.

51. An open and transparent process of consultation, including with those stakeholders who represent patients and the public, registrants, and the Professional Standards Authority would, it is submitted, enhance confidence in the regulation of the profession.

52. To mitigate any risk of legal challenge, the executive will obtain external legal advice to ensure that the wording and use of the proposed Guidance on Threshold Criteria, aligns fully with the GOsC's statutory scheme.

How might the draft guidance be used?

53. Under the current statutory scheme, where an allegation that a registrant has been guilty of Unacceptable Professional Conduct is made to the GOsC, the allegation must be referred to the Screener.

54. The role of the Screener is to "consider the allegation with a view to establishing whether, in his opinion, power is given by this Act to deal with it if it proves to be well founded."[19]

55. In the event that the Screener considers that there is power to deal with the allegation, the matter must be referred to the Investigating Committee.

---

[19] Section 20(6)(a) of the Osteopaths Act 1993

56. The role of the Investigating Committee is to "consider, in the light of the information which it has been able to obtain and any observations duly made to it by the registered osteopath concerned, whether in its opinion there is a case to answer."[20]

57. In deciding whether or not there is a case to answer, the Investigating Committee uses the "real prospect test" – whether or not there is a real prospect that the Professional Conduct Committee will the facts proved – and if so, whether or not there is a real prospect that the Professional Conduct Committee will find that the facts viewed individually or collectively, would amount to Unacceptable Professional Conduct.

58. There are thus two potential points at which the threshold criteria could be considered:

    a. by the Screener in deciding that there is no power under the Act, because a complaint that did not meet the threshold criteria could never amount to an allegation of Unacceptable Professional Conduct;

    b. by the Investigating Committee in deciding whether or not there is a case to answer, because where a complaint did not meet the threshold criteria, there would be no real prospect of the Professional Conduct Committee finding the allegation proved.

59. The guidance has been drafted to reflect these two decision points. External legal advice will be sought on the most appropriate point at which the guidance should be taken into consideration.

Recommendation: To recommend that Council approve for consultation, the draft Guidance on Threshold Criteria for Unacceptable Professional Conduct, set out in Annex A.

[20] Section 20(7)(c) of the Osteopaths Act 1993

General Osteopathic Council

Guidance on Threshold Criteria for Unacceptable Professional Conduct

Purpose of this document

1. The purpose of this document is to provide guidance to complainants and registrants, and to the Screeners and Investigating Committee of the General Osteopathic Council (GOsC), about the sorts of matters that the GOsC will investigate under its fitness to practise proceedings.

2. The fitness to practise processes of the General Osteopathic Council are designed to protect the public. They are not intended to serve as a general complaints resolution process, nor are they designed to resolve disputes between registrants and patients.

3. Investigating allegations properly is a resource –intensive process and therefore resources should be used effectively to protect the public and should not be diverted towards investigating matters which do not raise cause for concern.

4. The GOsC has, in consultation with its stakeholders including public and patient representatives and the Professional Standards Authority, produced "threshold criteria".

5. The threshold criteria set out the types of complaint and allegations which will not usually be progressed under our fitness to practise processes.

The threshold criteria

6. The threshold for whether or not a complaint or allegation is capable of amounting to Unacceptable Professional Conduct was set out by the High Court in the case of *Spencer v the General Osteopathic Council*[21]

   "Is the allegation worthy of the moral opprobrium and the publicity which flow from a finding of unacceptable professional conduct?"

7. Matters which are not usually capable of amounting to Unacceptable Professional Conduct and which should therefore not generally be referred to the Professional Conduct Committee include:

a. Complaints about note taking and record keeping alone	In the absence of "incompetence or negligence of a high degree"
b. Complaints which do not fall within the statutory grounds of section 20	

[21] [2012[1WLR 1307, *[2012] EWHC 3147 (Admin), at paragraphs 25 and 28 of the judgment*

c. Vexatious complaints	
d. Complaints which have been made anonymously and which cannot be otherwise verified	
e. Complaints in which the complainant refuses to participate and in which the allegation cannot otherwise be verified	
f. Complaints which relate to disputes between registrants and patients about fees or the costs of treatment	Provided that there is no allegation of dishonesty or intent to deceive
g. Complaints which seek to reopen matters which have already been the subject of an employment tribunal process or Civil proceedings	
h. Complaints which amount to a difference of professional opinion	
i. Complaints which relate to employment disputes	
j. Complaints which relate to contractual disputes, including arrangements for lease of premises and facilities	
k. Complaints relating to business disputes including: i. passing off/similar sounding web domain names or trading names ii. 'patient poaching' iii. matters arising from the break up of a principal/associate relationship	Provided that there is no allegation of a breach of patient confidentiality or Data Protection issues.
l. Complaints about a registrant's personal life (including matters arising out of divorce proceedings)	Unless the complaint relates to abusive behavior or violence, or brings the profession into disrepute
m. Complaints which have no public protection implications but which are made simply on the basis that the complainant is aware that the other party to a dispute is a registrant (e.g. boundary disputes between neighbours)	

n. Minor motoring offences, including: i. Parking and penalty charge notice contraventions; ii. Fixed penalty (and conditional offer fixed penalty) motoring offences	Provided that drugs or alcohol are not involved and there are no potential health issues in relation to the registrant
o. Penalty fares imposed under a public transport penalty fare scheme.	
p. Driving without due care and attention	Unless the registrant has been convicted