

## Response to the General Osteopathic Council consultation on draft guidance on threshold criteria for unacceptable professional conduct

December 2014

### 1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.
- 1.2 As part of our work we oversee nine health and care professional regulators - including the General Osteopathic Council (GOsC) - and report annually to Parliament on their performance. We can also appeal fitness to practise cases to the courts if outcomes are unduly lenient and it is in the public interest. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).
- 1.3 We welcome the opportunity to respond to this consultation about the GOsC's proposed guidance on threshold criteria for establishing unacceptable professional conduct.<sup>1</sup>
- 1.4 In line with our statutory objective, the comments we provide are made for the purpose of promoting the interests of patients and the wider public in relation to the GOsC's performance of its fitness to practise function.

### 2. Concerns about the effect of the proposed guidance

- 2.1 If, as may happen, someone were to read the proposed guidance without the benefit of seeing the GOsC's existing guidance on complaints<sup>2</sup>, it could - in our view – deter them from raising a valid fitness to practise concern with the GOsC. For example:-
  - An Employment Tribunal finding that an osteopath had sexually harassed or otherwise unlawfully discriminated against an employee or job applicant would be relevant to their fitness to practise. However proposed threshold criteria (g) and (i) appear to indicate such matters could not amount to unacceptable professional conduct.
  - Threshold criterion (m) is narrowly drawn as it does not explain that public protection also involves maintaining confidence in the profession and

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<sup>1</sup> <http://www.osteopathy.org.uk/about/our-work/consultations-events/Draft-guidance-on-threshold-criteria/>

<sup>2</sup> <http://www.osteopathy.org.uk/information/complaints/>

upholding proper standards. A dispute between neighbours involving dishonesty or abusive behaviour could amount to unacceptable professional conduct.

- 2.2 To mitigate the risk of such misunderstandings we suggest the GOsC considers incorporating relevant aspects of the proposed guidance into its existing complaints guidance. This would ensure that they are read and understood in the context of the details that guidance provides about the types of allegations specified in section 20(1) of the Osteopaths Act 1993 and the GOsC Code of Practice and Standards. Similarly we suggest the meaning of the aspects of the guidance of relevance to screeners and the investigation committee would be clearer if they were amalgamated into the GOsC's existing guidance for screeners and standard legal advice for investigation committee<sup>3</sup>, rather than documented in the separate guidance proposed.

### **3. Uncertainty about the scope and purpose of the proposed guidance**

- 3.1 Irrespective of whether the guidance is amalgamated into existing guidance or remains a separate document, in our view, it requires clarification to resolve the following contradictions about its scope and purpose:

- The title, the second\* paragraph 6 and paragraph 7 suggest it is guidance about the meaning of unacceptable professional conduct. (\*The paragraph numbering is incorrect: two are numbered 6.)
- Whereas paragraph 1 says it is guidance 'about the sorts of matters the GOsC will investigate' (that is matters which fall within any of the six categories of allegation listed in s20(1) of the Osteopaths Act 1993 one of which is unacceptable professional conduct)
- Conversely, the first paragraph 6 says the guidance is about the types of complaints which will not usually be 'progressed' under the GOsC fitness to practise process. The first sentence of paragraph 7 suggests progressed means 'heard' however the threshold criteria listed in the subsequent table seem to be a mixture of:
  - thresholds for accepting/screening a complaint
  - thresholds for investigations and
  - factors of relevance to the real prospect test which the Investigating Committee applies when deciding whether to refer a case for a hearing before either the Professional Conduct Committee or the Health Committee.
- Consultation question 5 in the response form mirrors this ambiguity by asking if the guidance should be used at the screener or Investigation Committee point in the fitness to practise process.

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<sup>3</sup> GOsC *Guidance for Screeners* (September 2008) and "*Standard*" *Legal Advice as to the role of the Investigating Committee in UPC Cases* (April 2014). Both available at <http://www.osteopathy.org.uk/information/complaints/Guidance-practice-notes-and-policies/>

- 3.2 It would be helpful if the guidance clearly explained at what stage of the fitness to practise process it is to be applied; set out what steps can be taken to re-visit such a decision or what other information could be provided, and that it is guidance only and not rules. If the threshold criteria remain presented in a table format we suggest more detailed information might be provided in the right hand column to list the sorts of factors that will be taken into account when applying individual criteria.

#### **4. The Spencer judgment**

- 4.1 Having reviewed the Spencer judgment<sup>4</sup> referred to in the consultation papers we could not locate the quote cited in paragraph 6 of the proposed guidance. Page 4 of the consultation response form states 'The aim of the consultation is to achieve a consensus on what sort of matters merit the *very strong* public disapproval which is referred to, in the test established by the High Court.' (our emphasis). We do not consider the Spencer judgment sets such a high threshold for a finding of unacceptable professional conduct and therefore the GOsC may wish to review how it describes the judgment to the public and what matters could call into question an osteopath's fitness to practise. Our statement about the purpose of fitness of practise processes may be of assistance in this regard.<sup>5</sup>
- 4.2 Criterion (a) of the proposed threshold criteria relates to the Spencer judgment and suggests complaints about note taking and record keeping are not usually capable of amounting to unacceptable professional conduct unless there is 'incompetence or negligence of a high degree'. We do not consider this a sufficiently accurate or clear reflection of the Spencer judgment, particularly as that decision related to only two instances of inadequate note taking. Repeated (possibly deliberate) minor misconduct might amount to unacceptable professional conduct even if it did not amount to the separate concept of incompetence.

#### **5. Vexatious complaints**

- 5.1 Criterion (c) of the proposed threshold criteria refers to vexatious complaints. We do not agree a complaint is necessarily vexatious if the complainant 'repeatedly fails to identify the precise issues that he or she wishes to complain about' or 'repeatedly changes the substance of the complaint or continually seeks to raise new issues'. Some complainants find it hard to articulate their concerns clearly but that does not mean they are vexatious. In addition, a vexatious complaint could still include valid concerns about an osteopath's fitness to practise. Whilst we recognise the intention to help distinguish those cases that are truly vexatious, it is important to remain vigilant to real concerns, even when they are not well expressed.

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<sup>4</sup> Spencer v General Osteopathic Council [2012] EWHC 3147 (Admin). Available at <http://www.bailii.org/ew/cases/EWHC/Admin/2012/3147.html>

<sup>5</sup> Professional Standards Authority (July 2014). *Statement explaining the purpose of fitness to practise processes*. <http://www.professionalstandards.org.uk/library/document-detail?id=132f599e-2ce2-6f4b-9ceb-ff0000b2236b>

## **6. Unwilling complainants**

- 6.1 We consider proposed threshold criterion (e) is unclear and suggest this could be resolved by referring to the failure of a complainant to participate and provide evidence where the allegation(s) cannot otherwise be proven.

## **7. References to the Professional Standards Authority**

- 7.1 Page 4 of the consultation response form, says that ‘all cases which are closed by the Investigating Committee are subject to a periodic audit by the Professional Standards Authority’. This is not quite accurate. We will not necessarily audit the GOsC every year and in those years when we do if the number of GOsC case closures were to exceed the sample size built into our audit process (currently 100 cases) we would not audit all the closures. More information on our current audit process is available at <http://www.professionalstandards.org.uk/library/document-detail?id=ba684993-1738-41ad-9824-2f56ffbb88f4>
- 7.2 Paragraph 5 of the proposed guidance states ‘The GOsC has, in consultation with its stakeholders including public and patient representatives and the Professional Standards Authority, produced “threshold criteria”’. Some may read this as meaning we have approved the criteria. To avoid the possibility of such interpretations we would be grateful if this reference to us is removed or the sentence otherwise rephrased to avoid any suggestion that the Authority was involved to a greater degree than other respondents to this consultation.

## **8. Further information**

- 8.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

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