

2020 Report to the Investigating Panel from the Independent Complaints Moderator for BAAC

This report is my ninth one as Independent Moderator of complaints for the British Acupuncture Council (BAAC). It covers the period 1 January – 31 December 2020 under the following headings:

- 1. Background**
- 2. Moderator role**
- 3. The BAAC complaints procedure**
- 4. Complaints this year: case summaries and observations**
- 5. Conclusions and recommendations**

It is important to note that during the period covered in this report, the UK, as elsewhere, was experiencing the Covid-19 pandemic. The BAAC, along with most organisations, was affected by periods of furlough, with an impact on response times. I have taken this into account in considering any concerns my review has raised about the BAAC's handling of complaints about practitioners in this period.

1. Background

The BAAC is a membership body and a professional regulator accredited by the Professional Standards Authority for Health and Social Care under its Accredited Register scheme.

All BAAC member practitioners are bound by a Code of Professional Conduct (revised in 2016), a Code of Disciplinary Procedures (revised in 2020) and a Code of Safe Practice (revised in 2016). These are the Codes that were in force at the time the complaints I reviewed were considered. The Guide to Safe Practice was revised in 2018; unlike the Code of Safe Practice (2016), the Guide is non-mandatory, although it contains extensive good practice guidance.

The Codes are enforced by the BAAC's three Ethics Committees: Investigating Panel (IP), Professional Conduct and Competence Panel (PCCP) and Health Committee (HC). The panels/committees are supported and administered by the Ethics Department of the BAAC and its Professional Conduct Officer (PCO).

Complaints about a practitioner (the 'registrant') who is a member of the BAAC can be made by a member of the general public, professional regulator, patient, fellow practitioner or member of any committee or employee of the BAAC. The PCO considers if a complaint falls within the scope of the BAAC's Code of Professional Conduct and/or the Code of Safe Practice; if it does, then the PCO will notify the registrant and progress the complaint, including referring it to the IP.

The IP is made up of three members (one lay person, one acupuncturist and one person who is either lay or an acupuncturist), and is managed and supported by the BAAC's PCO. It is referred to as a filtering panel. Its powers are explained in the BAAC Code of Disciplinary Procedures (2020). The process is intended not to punish a registrant but to consider if the registrant's conduct has fallen short of the standards expected and is potentially in breach of the Codes.

The IP itself has no power to sanction a member through fines or disciplinary action. Its role is to determine whether allegations should be referred to the PCCP or HC, specifically where it considers there is a realistic prospect of a finding of 'impairment' in relation to any allegation. ('Impairment' is defined in the Information for Complainants leaflet as '*any circumstance which impacts or may impact upon the ability and capability of an individual to undertake safe and effective practice*'.)

The IP can recommend that the seriousness of the issues warrants temporary removal of the registrant from the register (suspension) pending consideration of the case by the IP, PCCP or HC. The IP can also decide there is no case to answer, and it can exercise its discretion not to refer a complaint to the PCCP where it identifies minor breaches of the Codes. In some cases, the IP will provide feedback to the registrant and/or make recommendations for service improvements ('Letter of Advice'). These are not binding on the registrant, although the Ethics Department reports back to the IP as to whether the registrant has complied with the recommendations, and this can be followed up if necessary.

Complaints raising significant safety concerns can be considered, before investigation, by an Interim Orders Panel (IOP), which has the power to place temporary restrictions on registrants. The IOP does not investigate the complaint and cannot resolve disputes of fact; it makes a decision on whether an interim order is necessary for the public interest or the interests of the registrant. The IP, on the other hand, considers each allegation in the complaint, weighs evidence, and decides if there is a realistic prospect of a finding of impairment. The IP process therefore takes place following the IOP process, where the IOP is involved, and any interim order is only in place for as long as the full BAcC disciplinary progress takes to conclude.

2. Moderator role

My role as Moderator is set out in the BAcC Code of Disciplinary Procedures, Section 12 (2020). I have been appointed to review complaints made to the BAcC which the PCO decided not to refer to the IP and complaints that were referred to the IP but which the IP decided not to refer to the PCCP or HC.

My role is to review those complaints, describe how they were handled, and comment on the way they were handled in terms of communication and consistency. Where appropriate, I can make recommendations for improvements in the way complaints are handled.

3. The BAcC complaints procedure

The complaints procedure sets out the steps in the complaints process, from the statement and supporting documents submitted by complainants through to the IP's decision. Practitioners complained of are required to provide a written response within 14 days of the BAcC requesting this, including copies of relevant patient notes. The IP then discusses the case at its next meeting, usually within one month.

The IP is entitled to ask for further information, including, where it deems it appropriate, to request the complainant's comments on the practitioner's response, further relevant practitioner's notes and records, and a report from an independent Technical Assessor. The IP is also entitled to seek information and evidence from third parties and to seek advice from a lawyer or doctor. The IP then reviews any further information at its next scheduled meeting.

The IP must decide, following its consideration, whether there is a realistic prospect of a finding of impairment in relation to any allegation. Complainants are to be informed of the IP's decision and the reasons for it within 14 days of the meeting at which the decision was made, although in practice this is usually done within 7 days of the decision meeting.

A guide to its complaints procedure (Information for Complainants), which clearly explains the role of the IP, the procedure, and what is required to submit a complaint, is sent to complainants and is also available on the BAAC website.

In 2020 an amendment to the Code of Disciplinary Procedures removed the right of the complainant and the practitioner to appeal against a decision (including a decision not to refer a complaint to the PCCP or HC) made by the IP. The reason for making the amendment was the BAAC's concern that it provides a 'second bite at the cherry' to a complainant.

4. Complaints this year: case summaries and observations

In 2020, the PCO received five complaints about practitioners. I have reviewed four of those five complaints; the fifth is being referred to the PCCP and therefore is not part of my review.

Two of the complaints I reviewed were linked and related to the same issue but two different practitioners. Only one complaint of the four I reviewed was referred to the IP.

I refer to the cases by the numbering system used by the IC. I provide a brief description of the issues only, and do not include any names of the complainant (referred to as 'C') or the registrant ('R'), in order to protect the anonymity of individuals involved.

Case summaries 1/2020 and 2/2020

Issues: practitioners delivering unaccredited training course

On receipt of a query, the BAAC raised complaints about two member practitioners who were advertising a training course that had not been accredited, a potential breach of the Code of Professional Conduct.

The practitioners, both longstanding members of the BAAC, resigned their membership when alerted to the complaints.

The PCO determined that it was not in the public interest to pursue the complaints, as no members of the public were affected. Therefore, it would be meaningless to refer the complaints to the IP. A file note records this decision and the reasons for it.

Observations:

Clearly it was a disappointment for the BAAC that the practitioners resigned their longstanding memberships of the BAAC in response to the complaints. In her letter to them, the PCO suggested that the BAAC could help them by working with the accrediting body in order for the training course to become accredited. This was a constructive suggestion, although it appears not to have been taken up by the registrants.

In a phone call with one of the practitioners, a member of the BAAC staff gave inaccurate advice about the remit of the organisation when a member resigns. He was told that as he had resigned his membership, the BAAC had no remit to pursue the complaint. However, the PCO had stated clearly in her letter to the practitioners that once a complaint is raised, the BAAC

has a duty to pursue it unless, in exceptional circumstances, it is deemed not in the public interest to do so.

It is important that the records are clear (and that members are aware) that the reason for not pursuing the complaints in these two cases was not that the practitioners had resigned and the BAcC therefore had no remit to investigate, but that the PCO determined, in my view reasonably, that it was not in the public interest to pursue them.

Case summary 3/2020

Issues: Refusal to provide treatment; rude and unpleasant behaviour

In a letter to the BAcC, C outlined her complaint and alleged that R had refused to treat her, had been negative in response to her, and had been brusque and rude to her.

R in this case was an employee of the BAcC and known to the PCO. There was no other individual who could consider the complaint. Noting this, the PCO made a file note of the conflict of interest and informed C of this as well.

The PCO wrote to C to explain that it was her decision that the complaint should not proceed to the IP. The reasons given were that the behaviour complained about does not breach the Code of Professional Conduct or the Code of Safe Practice. The first allegation, related to refusal to provide treatment, was not a breach because there is no requirement in the Codes to treat a patient. The second allegation was more complex, and although the PCO acknowledged that on the face of it, R had not treated C in a sensitive manner, this was not a breach of the Codes.

The PCO also advised C that she could raise her concerns directly with R or his clinic.

Observations:

I believe the conflict of interest was handled well and fairly. The situation for the BAcC is that with limited staff, and especially during periods of furlough, it was not possible for someone other than the PCO to consider the complaint. She explained her reasons for not referring the complaint to the IP, which were based on the circumstances alleged in the complaint and not on any connection with R.

The PCO's letter to C was sensitive and clear. It was helpful for the PCO to suggest that C could raise her concerns directly with R or his clinic. The Code of Disciplinary Procedures is not well placed to cover allegations such as these, which are more amenable to informal means of resolution. The PCO also had the option (under para 6.1 of the Code of Disciplinary Procedures) to consider whether it would be appropriate for the complaint to be resolved informally or by mediation. The Code goes on to state (para 6.4) that matters involving no breach of the Codes may be suitable for informal resolution or mediation. However, this is only an option, and if, as in this case, the PCO considers but decides not to offer it, that is a matter of her professional judgement.

Para 6.5 of the Code of Disciplinary Procedures states that the PCO shall write to C and R within 7 days and invite C to consider whether to submit any additional significant evidence. This did not happen, and I am unclear what the expectation is regarding this paragraph. If the intention is that this should happen in every complaint that the PCO decides not to refer to the IP, then it should be made more clear. If so, then there was a failure in this case to act on the obligation in para 6.5 to contact C and R. I expect the intention is that this is a matter for the

PCO's discretion, a judgement to be made on the circumstances of each case, and if so, then that should be made clear in the Code.

I do think it would have been helpful, whatever decision was made on offering informal resolution or mediation, to let R know that the complaint had been made. I understand and accept that as the complaint was not made formally (ie on the BAAC complaint form), the PCO would only have notified R of the complaint with C's permission.

Case summary 5/2020

Issues: Inappropriate treatment; adverse effects of treatment

C contacted the BAAC with a complaint alleging that she had suffered adverse effects from treatment she had received from R several years before. The PCO reviewed the complaint and contacted R for a response. There were a number of delays in the case progressing, due to staff being on furlough. Once R's response was received, the PCO informed C of that and said the next step would be the IP meeting, and she would update her on when that would take place. C requested to add to her submission, and given the length of time that had passed since the original submission, the PCO agreed to that. The PCO also explained to C that everything C submits will be sent to R for comment.

Once the IP date was set, the PCO informed C and R of the date and also explained that the new Code of Disciplinary Procedures, which had just been revised in Oct 2020, would apply to proceedings.

The IP's consideration

The IP met, virtually, to discuss the complaint, a meeting which I attended as observer. Following consideration of all the evidence, the IP concluded that both during and after treatment, there was no evidence of inappropriate treatment or behaviour, no breach of the Codes, and no realistic prospect of a finding of impairment by the PCCP. There was no question that C was experiencing significant symptoms, but the IP considered whether C's symptoms could have been caused by the treatment and concluded that none of the medical evidence submitted suggested that the treatment had caused the symptoms.

The IP considered whether to issue a Letter of Advice, because it would be useful for R to discuss the experience of this complaint as part of reflective practice, but it determined that a Letter of Advice was not meant for this situation.

Following the IP meeting

The PCO sent a letter to C and to R conveying the decision and explaining that a summary of the decision and reasons for it would be sent to them. Following this, C wrote to the BAAC saying she had not yet received the summary of the decision; she was concerned that all her evidence had been disclosed to R; and she requested a review of the IP's decision as set out in the Information for Complainants leaflet of March 2020.

The PCO responded to C and apologised for the delay in her response. She explained that she would review the wording in her letters to make it clear that everything submitted by a complainant will be disclosed to the registrant. She also explained that usually R's response is not sent to C and that the current Code of Disciplinary Procedures (revised in Oct 2020) is the one that applies (which does not allow for an appeal). She noted that in light of how her initial letter was received, conveying the decision before sending the summary and reasons, she will

in future consider delaying conveying the outcome of the IP meeting before the summary of the decision is sent.

In response, C wrote to the PCO informing the BAAC that she would be taking further action against R. She also raised a number of complaints about how the BAAC had handled her complaint:

- It was inappropriate that all her evidence was disclosed to R, especially sensitive evidence relating to her medical history.
- It was inequitable for her not to receive R's response to the complaint, and this also contradicted the information she had been sent when making her complaint. There were factual inaccuracies in R's response that she could have challenged had she been aware of them.
- The IP decision seemed to reflect a preconceived judgement and it only referenced parts of the evidence that supported its conclusions. For example, the IP referred to a text message from C to R immediately following the treatment, when some symptoms were not mentioned, although evidence did show that she reported all her symptoms the following day.
- The IP should have considered obligations under the Codes regarding informed consent. R had not explained the rationale or implications of the more extensive treatment he gave.
- The medical evidence she submitted did note that the onset of symptoms followed treatment, contrary to the IP's assertion that the medical evidence did not suggest the symptoms were caused by the treatment.
- The revised Code of Disciplinary Procedures should not be applied retrospectively, and she should have a right of appeal in line with the Code in place at the time she made her complaint.

In response to this letter, the PCO wrote to C to address each point. She explained:

- It is important for R to have sight of the complaint and evidence supporting it.
- The BAAC had decided to allow only one submission each from complainants and registrants; otherwise the exchange could potentially be endless if further responses and comments were allowed from each. This change was made after the Information Leaflet was sent to C.
- Only brief reasons are given for the IP decision, and she accepted there was poorly drafted wording in relation to one conclusion.
- The change to the Code meant that appeals are no longer allowed. On barrister's advice, the BAAC had decided that the change should be implemented as soon as the revised code came into effect.

Observations

I have several observations on this complaint. The first relate to the IP's decision-making, and the second to the handling of the complaint.

The IP's consideration

I attended the IP's discussion of this complaint, as an observer, and I have seen the notes of the meeting. The discussion was thorough and went through each of the allegations and all the evidence submitted, which, given the seriousness of the allegations, was substantial. I have no concerns with the way the IP considered the allegations and the evidence. I have noted in previous reports that it can be difficult to determine whether there is a causal connection between a problem experienced by a patient following treatment and the treatment itself, and

it was not unreasonable for the IP to decide that there was insufficient evidence for such a causal connection in this case and that R had not committed a breach of the Codes.

The BAcC Guide to Safe Practice explains how registrants should respond to such adverse effects of treatment, including making a note in the patient's file and completing an Adverse Incident Report. This is guidance and is not mandatory, but it may be appropriate to include in a Letter of Advice. In this case, the BAcC Safe Practice Officer was asked if R had submitted an Adverse Incident Report, and he had not, unless he did so anonymously. The IP does not appear to have considered including this in a Letter of Advice, despite the fact that it is considered good practice.

I have raised this before, but I think it is worth raising again. It would be helpful for the BAcC to clarify in what circumstances it is appropriate for the IP to expect a registrant to complete an Adverse Incident Report. It is not a breach of the Codes not to do so, and therefore would not lead to a referral to the PCCP, but the BAcC has the option to remind the registrant of this in a Letter of Advice. I explain my concerns in more detail in Section 5 below.

The handling of the complaint

There were periods of delay in handling this complaint, including a period of nearly two months when C was not kept informed about what was happening. I imagine that given the seriousness of the allegations, she was anxious to know when it would be considered. However, this was during a period when the PCO was on furlough, and another staff member was covering her post. I am conscious that during the pandemic and periods of lockdown and furlough, it would have been difficult to maintain the high standards that I have observed the BAcC has maintained in the past, in relation to response times. At the least, however, an apology should have been given to C for the delays.

I understand C's concerns that sensitive information about her medical history was disclosed to R. However, the PCO explained that it is important for R to see all the evidence submitted in order to respond to it. Furthermore, the Information for Complainants leaflet informs complainants that their complaint and any enclosures will be shared with the registrant. In her letter responding to C's request to submit further evidence before the IP meeting, the PCO explained that everything C submitted would be sent to R. Therefore, I do not think there was any failure on the part of the BAcC to explain this in advance to C.

The correspondence to C from the PCO was sensitive, clear and thorough. However, I am concerned that the promises made to C, in the version of the Information for Complainants leaflet she was sent, were not kept to, specifically the promise to send her R's response to the complaint, and the promise of a right of appeal. The Code of Disciplinary Procedures has stated, since 2018, that R's response 'may' be sent to C, and in practice the PCO has sent R's response to C. However, the advice the BAcC received was that this prompted a potentially endless exchange of responses, and it was therefore sensible to limit it to one submission each from complainants and registrants. I understand that concern. However, given that in this case C was told that she would be sent a copy, I believe she should have been sent it. It would be impossible to determine whether, had she been given the opportunity to comment on R's response, the outcome of the IP meeting would have been different. She has said she would have challenged what she considered to be factual inaccuracies. I believe she was at least entitled to be given the opportunity she had every reason to expect.

On the issue of a right of appeal, again she was informed, when making her complaint, that she would have this right. It was in the Information to Complainants leaflet she was sent,

although it has been removed from the 2020 version of the code of Disciplinary Procedures. The fact that the Code was amended while her complaint was in progress, but before it went to the IP, means that on barrister's advice, the BAAC decided to apply the new Code and to disallow any right of appeal that had been promised prior to the revision. This is problematic, again because C was entitled to expect that she would be afforded that right.

5. Conclusions and recommendations

In **cases 1 and 2**, my only question is whether the BAAC should consider clarifying, through practice guidance to members, that it is within its remit to pursue a complaint against a practitioner member even if that practitioner resigns from BAAC membership. Whether or not it is in the public interest to pursue a complaint in such circumstances is within the discretion of the PCO.

In **case 3**, I believe the decision not to refer the complaint to the IP was reasonable for the PCO to take, and this decision was explained clearly. In my view, it would also have been reasonable for the PCO to consider whether informal resolution or mediation might have been appropriate for this case, where there did not appear to be any breach of the Codes but there was an allegation of rudeness on the part of a practitioner. Such complaints may be amenable to direct and facilitated contact between complainant and registrant and may benefit both by allowing the opportunity to repair an ongoing relationship and limit damage to professional reputations. However, there is no obligation for the PCO to do this.

There does appear to be an obligation, under para 6.5 of the Code of Disciplinary Procedures, for the PCO to write to both C and R in such cases and to invite C to consider submitting further significant evidence. This did not happen in this case. I think it would be helpful for the BAAC to clarify that this is a matter for the PCO's discretion, and to clarify in what circumstances it expects the PCO to act on this obligation in para 6.5 when deciding not to refer to a case to the IP. I also think it would be helpful for member practitioners to be informed by the BAAC when a complaint is raised against them.

In **case 5**, I have noted that this was a difficult case given the seriousness of the allegations, and I believe the PCO's correspondence was sensitive, clear and thorough. I have also noted several aspects of concern around the expectations raised for the complainant in relation to receiving the response from the registrant and in having a right to appeal the IP decision. Given the difficult circumstances of Covid-19 during 2020, it seems to me that the cause of this failure was use of an outdated Information for Complainants leaflet. The leaflet sent to the complainant was in conflict with the Code of Disciplinary Procedures, both the one in place at the time the complaint was made, and the revised version implemented at the time the IP considered the complaint.

I suggest that the BAAC should contact C to inform her of my conclusion and apologise for the failure to meet her expectations regarding R's response and the right of appeal. I do not believe it would be appropriate to allow an appeal at this stage, not least because it appears the case has progressed through other channels.

I also noted that there was a period of delay in handling this complaint and keeping the complainant informed, although I recognise that this was during a time of staff furlough and therefore the usual response times would have been difficult to maintain. In such circumstances, an explanation and apology would have been helpful to acknowledge the delay.

Previous recommendations:

In my report last year, I recommended that the BAAC:

- Consider giving complainants and registrants a clear explanation of the language used in relation to IP findings ('not a realistic prospect of a finding of impairment' in relation to allegations made).
- Consider whether the IP should have gone back to R in this case to ask if she had advised C on side effects.
- Consider clarifying in what circumstances it is appropriate for the IP to expect a registrant to complete an adverse incident report form.

The first two have been addressed. The definition of 'impairment' has now been added to the Information for Complainants leaflet. The PCO considered the option of returning to R and concluded that in that case it would not have been appropriate, but that would not always be true, and each case is considered on its own facts and circumstances.

I remain concerned about the BAAC approach to Adverse Incident Reports, and it has arisen again in this review, in case 5. Last year I suggested that it may be helpful for the BAAC to clarify in what circumstances it is appropriate for the IP to expect a registrant to complete an Adverse Incident Report form when a patient reports an adverse effect following treatment. My understanding is that IP members have been advised of this recommendation. Their view is that although the BAAC encourages members to file such a report when appropriate, it is not an obligation on member practitioners, and therefore the IP could only infer that by completing one, a practitioner has taken a step towards doing all they possibly could in the circumstances.

I am not satisfied with this response. The issue arises in any complaint featuring treatment and adverse effects, and certainly in several complaints I have reviewed. Sometimes these are minor and temporary after-effects, but in some cases the patient reports significant and persistent after-effects. The BAAC Guide to Safe Practice emphasises the importance of Adverse Incident Reports:

"The importance of reporting adverse incidents cannot be underestimated as it's a hugely important element of helping us develop our safe practice guidelines as well as provide research and information to our insurers and further afield.

By sharing these experiences throughout the membership it enables us to understand how to deal with adverse incidents in our own practice. A practitioner who is confident in handling an adverse reaction will often be able to reassure a patient and may well avoid a complaint. Many of the complaints we receive are as a result of badly handled adverse reactions to treatment."

The Guide goes on to state:

"The more events that get reported the better as it helps us build up a picture of where support or updated guidance is needed. It could be a minor bruise or a serious burn whatever it is we would like to hear about it."

As noted in the Guide, the purpose of filing a report is to contribute to learning and development of safe practice. I suggest it also helps to protect practitioners and patients by ensuring there is a contemporaneous record of adverse effects reported. Even the most

common and benign side effects of treatment, such as drowsiness and nerve pain or irritation, are listed in the Guide as examples of adverse incidents. In several places in the Adverse Incidents section of the Guide, the language used ('You should', not 'You should consider') implies it is an obligation for the practitioner to complete an Adverse Incident Report form (eg nerve pain, skin infections, burns).

I conclude from this that the BAAC clearly considers completing an Adverse Incident Report to be best practice when a patient reports an adverse side effect following treatment. It seems that in some sections, the Guide implies an obligation on practitioners ('should'), although the Guide is only recommended guidance and not mandatory. I believe that the IP should take a firmer stance on this, particularly where significant and ongoing adverse effects are reported. Although not filing such a report is not a breach of the Codes, the fact that it goes against very clear best practice guidance suggests to me that the failure to file such a report should be the subject of a Letter of Advice at the very least.

Finally, as with last year, I would like to note that the correspondence from the PCO to both complainants and registrants – some of which conveys difficult decisions – is clear and sensitively worded.

Thank you for the opportunity to consider the work of the IP in 2020. I would like to acknowledge the continued support and cooperation of Caroline Jones, the BAAC Professional Conduct Officer, especially in light of the difficult circumstances arising from Covid-19 in 2020.

Margaret Doyle
Moderator, BAAC
May 2020