



To: Council
From: Sheleen McCormack
Date: 17 July 2019
Paper: Rule 19: Cancellation of a Hearing Draft Practice Note

Classification Public

Purpose For decision

Issue This paper proposes the introduction of a Practice Note on Rule 19 GOsC (Professional Conduct Committee) (Procedure) Rules Order of Council 2000 to assist the Professional Conduct Committee (PCC) and the parties to a hearing

Recommendation To agree the draft Practice Note on the Cancellation of Hearings under Rule 19.

Financial and resourcing implications Within existing budget

Equality and diversity implications None identified

Communications implications A public engagement consultation was undertaken from 21 March 2019 – 16 May 2019. If approved, the Practice Note will be published on the GOsC website

Annexes A: Draft Practice Note Cancellation of a Hearing: Rule 19
B: Responses to Consultation

Background

1. In our Corporate Strategy for 2016-19, we state that we will continue to seek to identify improvements in our fitness to practise processes. As part of our reform programme, we continue to explore options and implement reforms which we consider could improve efficiency without requiring changes to our legislation. The GOsC Business Plan for 2018-19 states that we will, 'Develop and consult on a Rule 19 procedure and Practice Note'.
2. Rule 19 of the GOsC (Professional Conduct Committee)(Procedure) Rules Order of Council 2000 (the PCC Rules) provides as follows:

'Cancellation of hearing

19.—(1) Where after a complaint has been referred to the Committee for consideration it appears to the Committee that such consideration cannot due to exceptional circumstances properly take place, it may, after taking advice from the legal assessor and after consulting the Investigating Committee and obtaining the consent of the osteopath concerned, direct that a hearing should not be held and that the case should be concluded, provided that where there is an individual complainant the Committee shall, before it consults the Investigating Committee, endeavour to ascertain the views of the complainant.

(2) The Committee shall not be required to obtain the consent of the osteopath under paragraph (1) above where such consent could not properly be obtained due to death, mental or physical incapacity.

(3) As soon as any decision is reached as to cancellation of a hearing, the Committee shall send notice of that decision to the osteopath and to the complainant if any'

3. In effect, Rule 19 enables either the GOsC or the registrant to make an application to the Professional Conduct Committee (PCC) to conclude a case without a final hearing. The reasons behind such an application can range broadly depending on the facts of the case and any events that may arise subsequent to the Investigating Committee (IC)'s referral of the case to the PCC.
4. Over the period January to December 2017, the PCC considered two applications from the GOsC for a case to be discontinued under Rule 19. In one case, the application was made because the complainant was unfit to provide evidence at the hearing against the registrant. In the other case, evidence emerged subsequent to the IC's referral to the PCC which meant there was no longer a case to answer against the registrant. In the latter example, a Rule 19 application was made to avoid unnecessary stress on both the complainant and registrant in circumstances where there was no realistic prospect of the case being proved, or public interest in the case being pursued, at a hearing. The application also addressed concerns about the unnecessary time and expense that would be incurred if a hearing were held.

Discussion

5. As can be seen above, Rule 19 of the PCC Rules envisages a very prescriptive procedure for the cancellation of a hearing before the PCC. The intention of this Practice Note is to enable the PCC to adopt a workable and flexible approach to applications while preserving the safeguards built into Rule 19. The Practice Note will also ensure the PCC takes account of the protection of the public and the wider public interest.
6. The draft Practice Note has been designed to guide the PCC through the appropriate procedure for the cancellation of a case following referral from the IC for a substantive hearing. The document is designed to be read in conjunction with other relevant GOsC Practice Notes and guidance and specifically refers decision makers to the Hearings and Sanction Guidance (HSG).
7. The draft Practice Note forms part of a suite of Practice Notes that have been prepared for use by the GOsC fitness to practise committees. It will help the PCC achieve consistency in the approach to be taken in a Rule 19 application and will improve transparency by enabling parties to understand how the Rule 19 procedure.

Consideration by the Policy Advisory Committee

8. At its meeting in May 2018, the Policy Advisory Committee considered the draft guidance. The PAC agreed that the guidance should be recommended to Council in November 2018 for consultation after a further pre-consultation with key stakeholders was undertaken on the draft practice note.

Pre consultation engagement

9. As part of our pre-consultation exercise we undertook further work on the draft practice note including inviting comments from the FtP forum made up of FtP Committee members, legal assessors and lawyers involved in our hearings. We received very helpful feedback. One of the comments we received queried whether the process could be streamlined by conducting the process on paper at a meeting similar to the Rule 8 procedure (without prejudice to the exercise of the Committee's discretion and with suitable oversight from a Legal Assessor). We consulted on this during the public consultation.

Consultation

10. The GOsC undertook a public consultation from 21 March 2019 – 16 May 2019. We received eight responses in total, including a detailed response from the PSA.
11. As a general indicator as to the relative success of the engagement strategy, it is relevant to note that over the consultation period there were 136 views of the Rule 19 consultation page on our website, with the consultation document being

downloaded 72 times. A summary of the formal consultation responses we received are set out in Annex B.

Recommendation: to agree the draft Practice Note on the Cancellation of Hearings under Rule 19.

Draft Practice Note: Cancellation of Hearing under Rule 19

Effective: [date]

Introduction

1. Within its statutory framework and fitness to practise procedures, the General Osteopathic Council (GOsC) seeks to address concerns about the fitness to practise of its registrants in a fair and proportionate manner. Once a case has been referred to it, the GOsC Professional Conduct Committee (PCC) has a duty to consider the case in this context, with reference to wider public interest considerations. The PCC should also take account of the distinctive features and particular facts of each case individually when reaching a decision.
2. Rule 19 enables either the GOsC or the registrant to make an application to the Professional Conduct Committee (PCC) to conclude a case without a final hearing. The reasons behind such an application can cover a broad range of cases depending on the facts of the case, and any events that may arise subsequent to the Investigating Committee's referral of the case to the PCC.
3. This Practice Note has been designed to provide a framework to best enable the PCC to achieve its objectives when considering an application to cancel a hearing under Rule 19 of the General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000 ('the PCC Rules').

Equality and Diversity Statement

4. The GOsC is committed to ensuring that processes for dealing with concerns about osteopaths are just and fair. All those involved in our processes are required to be aware of, and observe, equality and human rights legislation. Decision-making of the PCC should be consistent and impartial, and comply with the aims of the public sector equality duty.

The circumstances in which the Rule 19 procedure applies

5. Rule 19 of the PCC Rules sets out a prescriptive procedure as to the approach the PCC should adopt when giving consideration to a Rule 19 application, as follows:

'Cancellation of hearing

- 19.—(1) Where after a complaint has been referred to the Committee for consideration it appears to the Committee that such consideration cannot due to exceptional circumstances properly take place, it may, after taking advice from the legal assessor and after consulting the Investigating Committee and obtaining the consent of the osteopath concerned, direct that a hearing should not be held and that the case should be concluded, provided that where there is an individual complainant the Committee shall, before it consults the Investigating Committee, endeavour to ascertain the views of the complainant.
- (2) The Committee shall not be required to obtain the consent of the osteopath under paragraph (1) above where such consent could not properly be obtained due to death, mental or physical incapacity.
- (3) As soon as any decision is reached as to cancellation of a hearing, the Committee shall send notice of that decision to the osteopath and to the complainant if any'.
6. The Rule 19 procedure applies where the case against the registrant has been referred by the Investigating Committee to the PCC for consideration.¹
7. An application under Rule 19 may only be made if the following criteria are met:
- a. The allegation is that the registrant:
 - i. is guilty of unacceptable professional conduct; or
 - ii. is guilty of professional incompetence; or
 - iii. has been convicted in the UK of a criminal offence which has a material relevance to the registrant's fitness to practise osteopathy;
 - b. The Investigating Committee has been consulted on the proposed course of action;
 - c. the registrant has provided their written consent to the cancellation of the hearing; and
 - d. where there is a complainant, the GOsC has endeavoured to obtain their views

¹ It should be noted that, similarly to Rule 19 of the PCC Rules, Rule 36 of The GOsC (Health Committee) (Procedure) Rules Order of Council 2000 (the Health Committee Rules) enables the Health Committee to consider an application from either party to cancel a hearing. Due to the similarity in wording between Rule 19 and Rule 36, the GOsC considers that elements of the Rule 19 Practice Note could be applied to applications to the Health Committee under Rule 36 of the Health Committee Rules.

8. In practice, an application for a direction under Rule 19 will usually be made by the GOsC. However, this does not preclude a registrant from applying for the disposal of the case under Rule 19.

Action following identification of case under the Rule 19 procedure

The Committee has delegated the function of deciding whether a Rule 19 meeting is appropriate to a Panel Chair of the PCC.

9. Where the GOsC's Regulation Department and the registrant consider that the case may be appropriate for disposal at a meeting under the Rule 19 Procedure, the Regulation Department and the registrant should agree a 'bundle' of relevant documents to be sent to a Panel Chair of the PCC.

Consideration by PCC Panel Chair

10. Before deciding whether a Rule 19 meeting is appropriate, the PCC Panel Chair shall have regard to all the circumstances of the case, including the guidance set out in this Practice Note; the views of the Investigating Committee, the complainant (where these have been able to be obtained), the GOsC and the registrant. The PCC Panel Chair should provide written reasons for every decision made. However, usually it will only be appropriate to agree that the Rule 19 application can be dealt with at a meeting or a hearing where there has been a material change such as new evidence or information has come to light, or where a witness, who provides the sole or decisive evidence in support of the majority of the allegation, is no longer available.
11. It is not possible to set out an exhaustive list of indicative factors that would suggest a Rule 19 application is suitable for consideration at a meeting (as opposed to at a hearing). However, where the issues giving rise to the Rule 19 application are not contentious or where the issues are straightforward and it is unlikely that oral representations from the parties will be required and where both the GOsC and the registrant are in agreement that a meeting is suitable, may all be indicative factors that a meeting is both an appropriate and sufficient mechanism to manage the Rule 19 application. For example: the long-term illness of a complainant who provides the main or sole evidence in the case who is unable to take part in the hearing because of their ill health.

Communication with the Complainant

12. Not all cases that may be suitable for disposal under Rule 19 involve complainants. However, where the case involves a witness who has provided evidence during the investigation. Where the case involves a complainant (and other witnesses) it is essential that that the GOsC takes all reasonable and proportionate steps to engage

with the complainant and seek their view so that their view can be taken into account by the PCC Chair and the PCC.

13. However, while the views of the complainant are important, their consent to disposal by way of Rule 19 is not an essential requirement of the process.

Meeting: Consideration by the PCC where a meeting is considered appropriate

14. Where the PCC Panel Chair has determined that the Rule 19 application may be considered at a meeting, the PCC will consider the Rule 19 application on the papers at a meeting where a Legal Assessor must also be present. This means that neither the GOsC nor the registrant will attend and no oral submissions can be made. At this meeting the PCC shall consider the documents considered by the PCC Panel Chair including:

- any observations made by the Investigating Committee;
- the views of the complainant (where these have been able to be obtained);
- any additional documents from the GOsC or registrant including any evidence obtained post referral;
- Full written submissions from the GOsC (and the registrant where these have been provided);

15. The PCC shall decide whether or not the case can be disposed of under Rule 19, taking into consideration the procedure set out within paragraphs 19 to 25 of this practice note. If the PCC determines that the Rule 19 Procedure is not appropriate, the PCC members who made that decision shall not form part of the PCC panel at the substantive hearing.

16. The PCC will produce written reasons for their decision, which will be served on the registrant within seven days of the decision being made.

Hearing: Consideration by the PCC where a hearing is required

17. Where the PCC Panel Chair considers that a Rule 19 hearing is appropriate, a notice of hearing will be served on the registrant giving them at least 28 days' notice of the hearing. The notice of hearing will specify the date, time and venue for the hearing.

18. At this hearing, the PCC shall first invite submissions from the GOsC on the background facts and what it considers to be the exceptional circumstances of the case. The registrant or their legal representative will then be invited to provide any further submissions.

19. The PCC shall take advice from the Legal Assessor before determining whether there are exceptional circumstances in the case.
20. If the PCC determines that there are exceptional circumstances, it will then proceed to consider whether the effect of the exceptional circumstances in the case is such that consideration of the case at a hearing before the PCC cannot properly take place.
21. In reaching a decision, the PCC should give consideration as to whether, notwithstanding the exceptional circumstances and other features in the case, the case should continue. This encompasses the following two questions:
 - a. whether there is a real prospect of the alleged facts being proved before a PCC; and
 - b. if so, whether there is a real prospect that those facts would amount to the statutory ground as set out in paragraph 7(a) above.
22. The PCC should take into account the public interest and other relevant GOsC Practice Notes, including [the Hearings and Sanctions Guidance](#), and [Practice Note: 2015/1 The duty to act in the public interest](#), both of which are available on the GOsC website at the links provided.
23. Where the PCC concludes that there are no exceptional circumstances in the case, or the exceptional circumstances do not prevent consideration of the case from properly taking place at a hearing, the PCC shall produce a written decision to that effect and the case will proceed to a final hearing.
24. Where the PCC concludes that consideration cannot properly take place due to exceptional circumstances, it shall direct that the case should be concluded and produce a written decision to that effect.
25. Both the registrant and the complainant (and other witnesses in the case) will be informed of the decision of the PCC within seven days of the hearing.

Public Interest

26. The Act² requires the PCC to act in the public interest when considering an allegation about a registrant's fitness to practise. In fulfilling this duty, the PCC should have regard to the following three objectives:

² Practice note: 2015/1 The duty to act in the public interest. While paragraph 3 of the schedule to the Health and Social Care (Safety and Quality) Act 2015 does not require the Investigating Committee to have regard to these objectives when considering allegations, it is good practice that it should.

- to protect, promote and maintain the health, safety and well-being of the public;
- to promote and maintain public confidence in the profession of osteopathy;
- to promote and maintain proper professional standards and conduct for members of that profession.

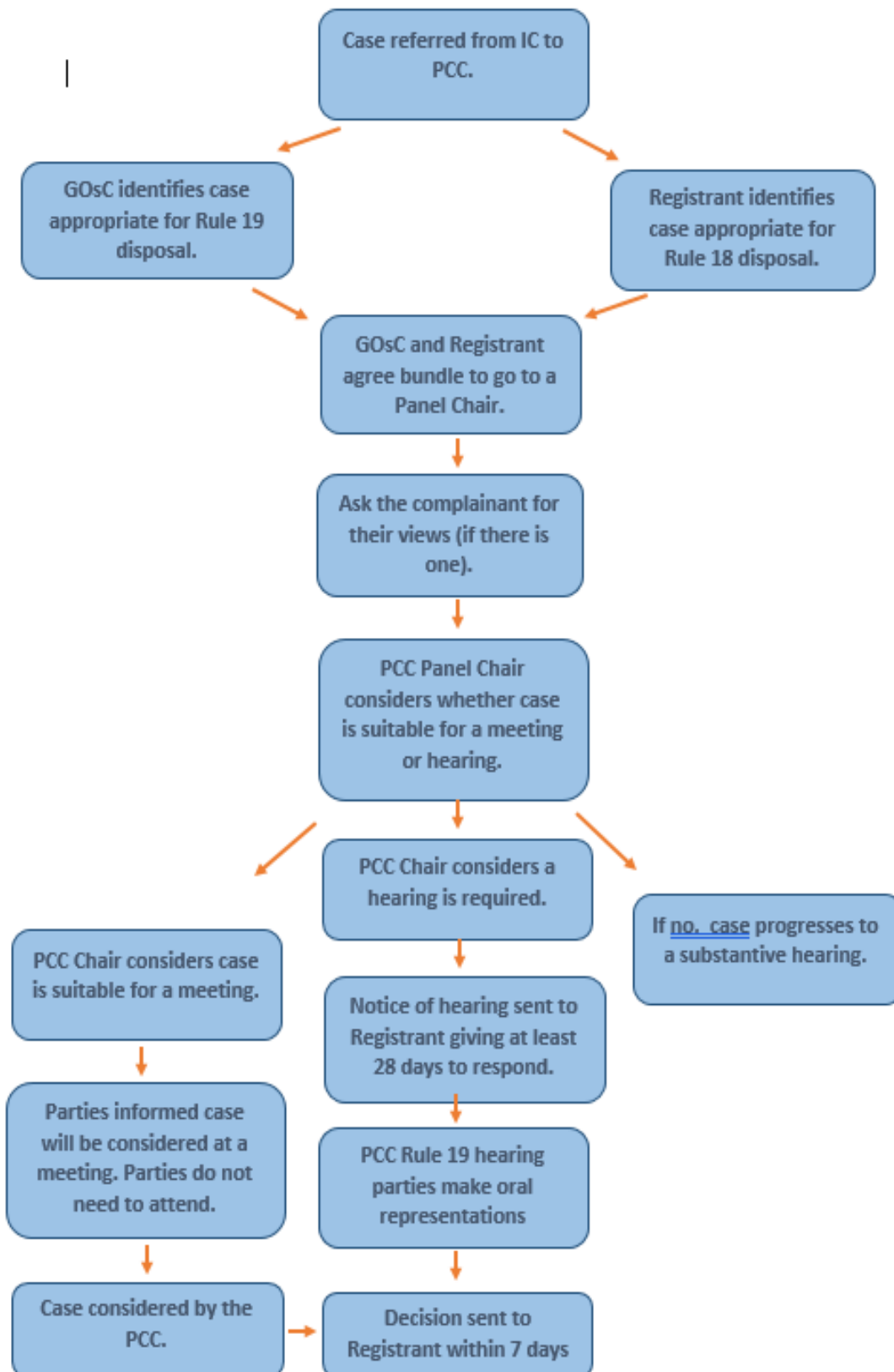
Exceptional Circumstances

27. There is no guidance within Rule 19 itself as to what constitutes 'exceptional circumstances'. What amounts to 'exceptional' depends on the facts and individual features of the specific case. The word exceptional is not a term of art and should be given its ordinary, everyday meaning. The Oxford English dictionary defines it as 'unusual, not typical'.
28. The PCC may also be assisted by how the courts have approached the definition of 'exceptional circumstances'. Other regulators have adopted (with the approval of the higher courts) Lord Bingham's formulation in **R v Kelly (Edward) [2000] QB 198**:
- 'We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.'
29. Proportionality should also be considered in assessing what may amount to exceptional circumstances and therefore outweigh the public interest in holding a hearing. In **R (On the Application of Agyarko) v Secretary of State for the Home Department [2017] UKSC11**, Lord Reed stated:
- '... the ultimate question is how a fair balance should be struck between the competing public and individual interests involved, applying a proportionality test.'
30. The reasons behind a Rule 19 application can be of broad application, depending on the facts of the case and any events that may arise subsequent to the Investigating Committee's referral of the case to the PCC. The following examples of exceptional circumstances, taken from previous cases considered by the PCC, are illustrative only. They are not meant to be exhaustive, nor intended to restrict the PCC in applying its own independent judgement to the specific factual circumstances of a case. Previous illustrative examples of exceptional circumstances:
- The ill health of the complainant.

- Expert evidence received subsequent to the Investigating Committee's referral made it impossible to prove the material or significant part of the complaint.
- persistent non-engagement of the complainant and where all reasonable steps had been taken to secure the complainant's attendance at the hearing where their evidence is a critical part of the case against the registrant.

31. It should be noted that the above list is not intended to prevent the PCC from taking other factors into account, such as the public interest in a fair hearing and in the efficient disposal of the case. The PCC should therefore give appropriate weight to the wider public interest. In doing so, the PCC should bear in mind that, if it is not in the public interest to proceed, then to do so would be disproportionate, bearing in mind the exceptional circumstances of the case. The PCC should balance this against the interests of the complainant and the public interest in the case being fully and properly considered at a substantive hearing before the PCC.

Rule 19 Procedure Flowchart



Annex B to 11

Responses to the consultation on Rule 19 Practice Note

Consultation Question	Yes	No	Consultation response ³	GOsC Response (where relevant)
<p>Did you find the draft Practice Note helpful and informative?</p> <p>Please provide any suggestions about how the Practice Note could be improved</p>	7 In part	0	In terms of the presentation of the Practice Note, it might have been helpful to have a separate section setting out the process, perhaps with a flowchart showing the different stages, decisions made, and decision-makers and so on.	We have produced a process flowchart to the Practice Note delineating the distinct stages and decision makers at each stage which should make the approach clearer
<p>If not, please provide any suggestions about how the Practice Note could be improved</p>	6 In part	1	We are pleased that the GOsC has decided to publish guidance on the use of Rule 19, but we found that the Note itself lacked some key information.	
<p>After reading the draft Practice Note, did you get a clear understanding of how the Rule 19</p>			Para 11: where the issues in the case to be considered are not contentious'. Does this mean just the issues around whether a Rule 19 application is appropriate? The main issues of the case are invariably contentious.	We have amended this to make this clearer that issues is not a reference to the allegation but rather the issues giving rise to the Rule 19 application.

³ Some responses have been shortened

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<p>process will work in practice?</p>			<p>The practice note rightly states that it is necessary to "ascertain the views of the complainant." Should it also state that, while the views of the complainant are important, the consent of the complainant is not essential in order to cancel the hearing</p>	<p>We have added an additional section to the guidance on communicating with complainants which includes this point.</p>
<p>If not, please provide any suggestions about how the draft Practice Note could be improved/what could be added to improve understanding of the procedure?</p>			<p>We understand that the guidance cannot be too prescriptive in describing the circumstances in which it would and would not be appropriate to approve a Rule 19 application, because much of the decision-making must be down to the Panel's judgement. That said, the Note could be clearer in explaining the circumstances that would generally lead to a Rule 19 application being considered, and the exceptional circumstances that would lead to it being approved.</p> <p>Along with the documents listed in paragraph 12 to be provided to the Professional Conduct Committee (PCC) at a Rule 19 meeting or hearing, PCC Panels should be presented with full reasoned written or oral submissions by the regulator setting out why they believe there are exceptional circumstances.</p> <p>We find that the use of case law to define 'exceptional circumstances' (paras 24 and 25) does not assist much in understanding when Rule 19 might be used, particularly if the Practice Note is intended to be read by registrants and complainants, as well as decision-makers. We would recommend that at</p>	<p>We have added additional detail around the process. However, the Practice Note is fundamentally a procedure document. Equally it needs to strike a balance between offering structure and guidance without fettering the judgement of the PCC Chair or PCC.</p> <p>We have made amendments to make this clear.</p> <p>We have made amendments to frame this in plainer English and have referenced the Oxford dictionary definition of 'exceptional' whilst retaining the approach set out in case law. This is because we know from feedback obtained from PCC panellists that they find the references to the case law to be helpful.</p>

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			<p>the very least, the case law is explained in plainer English for these audiences.</p> <p>We understand that the wording of Rule 19 is that the GOsC should 'endeavour to obtain the views' of the complainant. However, in practice the GOsC could go beyond the wording of this in the guidance. Furthermore, we recommend that the Note require complainants to be provided with the written summary of the Panel's decision following the Rule 19 meeting or hearing, provided there are no confidentiality issues in doing so.</p>	<p>As above. We have added a separate section on communicating with complainants and changed the language throughout the Practice Note to highlight engagement with the Complainant / witnesses.</p>
<p>Do you consider that the Rule 19 process should be updated to provide for some Rule 19 applications to be decided at a meeting without the need to hold a formal hearing on every occasion, which would require the attendance of the parties (GOsC and the registrant)?</p>	<p>7 In part</p>	<p>0</p>	<p>It's a good step forward and can be less stressful for the registrant and more cost-effective</p> <p>This is a sensible and appropriate proposal.</p> <p>We understand the need to streamline processes, and ensure that valuable resources are not wasted. Overall though, we found there was insufficient information in the consultation documents about when a meeting would be appropriate, as opposed to a hearing. There was no discussion of the differences between meetings and hearings, and their impact on decision-making, or of the implications for the registrant and the complainant. It is therefore difficult to comment on this proposal, other than</p>	<p>We have added additional content on disposal of Rule 19 at meetings. The main difference between a meeting and a hearing is that the parties do not need to attend the hearing nor is there a requirement to give 28 days notice of the meeting. Both elements are specifically referenced in the practice note.</p> <p>The Practice Note requires that full written reasons are provided for the decision reached. In addition, Rule 19 decisions (whether by meeting or hearing) are not</p>

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If not, please provide reasons			to highlight the importance of transparency and accountability of all decisions made in private. This means that policies, processes, and decisions must be clearly and comprehensively documented, and published where possible.	publishable. However, as a final decision they are sent to the PSA under the provisions of section 29.
Do you consider that the approach proposed in this consultation supports the GOsC's overarching objectives and values including protecting, promoting and maintaining the health, safety and well-being of the public? If no, please provide reasons	7 In part	0	In the Practice Note itself, we would expect to see the section on the Public Interest, which currently sits at the end of the guidance, given greater prominence, as the over-arching duty should guide all decisions made, both by the PCC and others. We also found it unhelpful that the duty was not set out in full, and recommend that the final Practice Note quotes the full text of the relevant sections.	Amended.
Do you have any other comments?				

