



**Council**  
**9 July 2020**

**Interim Practice Note on Questioning Witnesses**

<b>Classification</b>	Public
<b>Purpose</b>	For decision
<b>Issue</b>	This paper proposes the introduction of an interim Practice Note on questioning witnesses.
<b>Recommendation</b>	To agree the interim Practice Note on Questioning Witnesses at Annex A
<b>Financial and resourcing implications</b>	Within existing budget
<b>Equality and diversity implications</b>	This interim practice note will enhance our FtP processes and improve communication in hearings by supporting the PCC to apply a consistent, professional and sensitive approach to questioning witnesses.
<b>Communications implications</b>	A public engagement consultation will need to be undertaken later in 2020-21.
<b>Annex</b>	A - Interim Practice Note: Questioning Witnesses
<b>Author</b>	Sheleen McCormack

## Background

1. The GOsC Business Plan 2020-21 provides that we 'communicate case learning points, Professional Standards Authority for Health and Social Care (PSA) advice, relevant case law and regulatory developments to GOsC Committee members (and arrange training)'.
2. During the course of 2019, we received two statutory appeals. The first appeal, Kern v General Osteopathic Council [2019] was heard at the Royal Courts of Justice in March 2019. The appeal was dismissed.
3. The second statutory appeal, Beard v General Osteopathic Council [2019], took place over two days on 10 and 11 April 2019, at the Manchester High Court before Mr Justice Kerr. The approved reserved judgment was handed down on 24 June 2019. The main ground of appeal was upheld by the Court against the GOsC and the appeal allowed.
4. The factual background arose in connection with a complaint dated 7 September 2016 sent to the GOsC by Patient A about the registrant (B's) treatment of, and communication with him at two appointments: an initial appointment on 18 July 2016, and a follow-up appointment on 21 July 2016. They were his first and only appointments with B. It was alleged that at both appointments B did not conduct an adequate assessment of Patient A's left foot, did not provide a diagnosis, did not discuss/explain the proposed treatment and did not obtain valid consent for any treatment. Additionally, it was said that on 18 July 2016 she used excessive force when treating the foot, and that on 21 July 2016 she used unprofessional, dismissive, condescending and petulant language. The key issue for the Panel to resolve was, therefore, one of fact i.e. what happened at the two appointments. The PCC found B guilty of Unacceptable Professional Conduct and imposed a conditions of practice order for a period of 12 months.
5. The main ground of appeal related to the fairness of the overall hearing being compromised by the questioning of B by the lay panel member (N). The judge considered the protracted questioning by N (and the Chair who came after her) to be 'surprising' but it was the content and tone of the questions that troubled him. He concluded that N was allowed to pursue 'hostile' lines of questioning for too long, the relevance of those questions being nil or 'so tenuous' as to amount to 'vexing' B rather than illuminating the factual issues. N went beyond seeking clarity on relevant issues and in the process lost the mantle of impartiality, the hallmark of any panel. Neither the legal assessor nor the Chair prevented N's questions in time to preserve the integrity and fairness of the hearing, the legal assessor only belatedly suggesting a break. For these reasons the judge was satisfied that there was a procedural irregularity that was so serious as to render the decision unjust. As the credibility of B and that of the patient was the crucial issue in the case it was of the utmost importance to the overall fairness of the proceedings that this crucial issue was treated in an even handed and balanced way and not marred by 'inappropriate protracted and hostile questioning' by N.

## Discussion

6. Council discussed the Beard judgment, in private session, at the July 2019 Council meeting. Council concluded that, whilst the situation that arose in Beard was aberrant and not reflective of the ethos of hearings at the GOsC, nevertheless, decisive and timely action was required. Council agreed the need for a set of actions arising from the judgment. This included training on questioning and witness management to all the Professional Conduct Committee (PCC), augmented with the development of a practice note on questioning witnesses. Council also decided that the Executive should explore the development of performance indicators for legal assessors. This is an activity which is currently in the 2020-21 Business Plan, although presently delayed due to the immediate impact of COVID-19.
7. The PCC all members training day took place on 18 November 2019. The training event focused on questioning and managing witnesses at hearings and included input from senior disciplinary and regulatory specialists together with a consultant with extensive experience of the complainant/victims' perspective. To assist in the further development of the practice note, at the training day Committee members also provided detailed feedback on the draft practice note on questioning in hearings. We have reviewed this feedback and incorporated this in the current draft exhibited at the Annex.

### *Policy Advisory Committee*

8. A draft of the questioning witnesses practice note was considered at the Policy Advisory Committee meeting held on 4 March 2020. It was suggested that the practice note would benefit from examples being provided based on different cultural backgrounds and that tone of voice or tonal interpretation should be added. It was also suggested that an explanation of key words might be helpful. However, as the practice note is primarily addressed to the Professional Conduct Committee, we did not consider it was necessary to include a glossary of terms.

### *COVID-19*

9. At the start of lockdown, on 26 March 2020, we took the decision to postpone all final hearings that had not yet commenced until after 3 July 2020. As a consequence, we decided to temporarily pause the progress of the practice note to Council in May 2020 as planned. Public protection took precedence and we focussed on triage of concerns and risk management activity, prioritising high-risk investigations wherever possible. Throughout this period, we continued to manage urgent hearings remotely, including hearings of interim suspension orders, reviews and some part-heard cases. This has proved successful. We also observed that the civil courts and other regulators have also made effective use of virtual hearings.

10. As part of our evolving approach to our adjudication function, we have been exploring how we can progress cases given some form of social distancing measures is likely to be in place for an extended period of time. It is therefore our intention to expand our use of virtual hearings to substantive hearings from 3 July onwards. We have also been considering whether some cases might be suitable for 'blended' hearings (hearings in which some members attend virtually, and others are present at Osteopathy House), but we need to ensure we have properly risk assessed this (for staff, panellists and all those involved in our fitness to practise processes) before 'blended' hearings progress.
11. To support our work in this area, panellists need to feel enabled to continue to play a proactive role in fitness to practise proceedings. We therefore drafted an interim Remote Hearings Protocol as a companion piece to the practice note on questioning witnesses. Both documents formed part of the training event which took place for all PCC panellists on 22 June 2020. The training was facilitated by one of our experienced legal assessors, who is also a leading expert within professional regulation.

### **Next steps**

12. We are committed to ensuring our adjudication function is discharged in a fair, effective and transparent manner. Axiomatic to this is necessity for all witnesses to feel enabled to give their best evidence and engage effectively with the hearing process. The interim Practice Note forms part of a suite of Practice Notes that have been prepared for use by the fitness to practise committees to assist in meeting this objective. It is designed to be read in conjunction with other practice notes we have published.
13. As the public interest requires that cases are progressed and concluded in a timely manner, we are not proposing a three-month public consultation on the Practice Note before it can be utilised by the PCC. We are therefore proposing that the draft Practice Note is approved by Council on an interim basis. This will enable proper governance oversight of the Practice Note (and the Remote Hearings Protocol set out elsewhere on the July 2020 Council agenda) whilst enabling remote hearings we have been scheduling to go ahead, with the benefit that the PCC will be able to take into account both the Hearings Protocol and the Practice Note.
14. In the circumstances, we are proposing to Council that a period of public consultation takes place later this year or early 2021.

**Recommendation:** to agree the Interim Practice Note on Questioning Witnesses at Annex A.



**General  
Osteopathic  
Council**

## **Professional Conduct Committee Interim Practice Note:**

### **Questioning of Witnesses**

#### **Introduction**

1. This Practice Note focusses on the appropriate questioning of witnesses, including the registrant, when they attend a hearing before the Professional Conduct Committee (PCC) of the General Osteopathic Council (GOsC).
2. The GOsC is committed to ensuring that its adjudication function is discharged in a fair, effective and transparent manner.
3. The procedures followed by the PCC are set out in section 22 of the Osteopaths Act 1993 (the Act), and in the GOsC (Professional Conduct Committee) (Procedure) Rules 2000 (PCC Rules). Both of these documents are available in full on the GOsC website: [www.osteopathy.org.uk](http://www.osteopathy.org.uk)
4. The PCC has the power under paragraph 21 of the Schedule to the Act to regulate its own procedures. It uses this power to manage the procedures that are followed at a hearing. Witnesses may attend the hearing to give oral evidence. Further details about the arrangements for giving oral evidence are set out in Practice Note 2014/04. The PCC may ask questions of the witness. This Practice Note is intended to help support this process.

#### **Role of the Chair**

5. All those who appear before the PCC must be treated with courtesy and consideration. The PCC Chair should therefore ensure that all witnesses (including the registrant) are enabled to give their best evidence and engage effectively with the process. The Chair should ensure questions asked are capable of being understood and that any special arrangements or cultural issues are taken into account. For example, where a witness may be fasting.
6. The Chair is also responsible for ensuring that the hearing is properly managed and progressed. The Chair should remind all parties that these are professional proceedings and that behaviour should reflect this. The Chair may interpose where they consider that this is required to ensure fairness of the proceedings. For example, where one side's questioning of the witness is repetitive or overly aggressive or where a witness appears unduly stressed. Generally speaking, it should not be necessary for the PCC Chair to interrupt the parties or their representatives when asking questions.

7. The Chair should manage the process of the PCC members asking questions but each member of the PCC should have the opportunity to ask his or her own questions. The Chair may wish to speak to the PCC members in camera before panel questions to assist with the division and ordering of questioning.

### Role of PCC

8. PCC members should play a proactive role in fitness to practise proceedings, making sure that the case is properly presented and the relevant evidence is placed before the PCC.<sup>1</sup> The proceedings should not be strictly adversarial; the PCC has an inquisitorial function. Questions should not be restricted only to clarifying matters which arisen earlier in the evidence. This is because the objective of the hearing is to enable the panel to reach the right decision for the protection of patients and the public.
9. The PCC may admit evidence (including oral evidence) which is relevant to the allegations being considered by the PCC as long as it fair to the registrant and in the interests of justice to admit it.
10. Panellists should ask questions and explore issues which they think are of relevance, even if it appears that the parties do not intend to do so. PCC questions need to be relevant to the issues which are in contention and the decisions which it must determine. It is appropriate for them to ask questions if they feel that any issue has not been adequately explored.
11. However, it is not the function of the PCC to ensure that a witness is 'cross-examined' and the style and nature of Committee members' questions should be distinct from the style which might be more appropriate for representatives who will be presenting on behalf of one of the parties.
12. It is reasonable for PCC members to test a witness's account to an appropriate extent and, if members of the PCC are concerned about whether a witness is being truthful on a particular matter, they are entitled to probe the witness about that matter and consider whether it affects their assessment of the witness's evidence.
13. Fairness requires that a registrant must be asked about all of the disputed allegations being brought against them. This will usually be done by the Presenting Officer but the PCC should also ensure that the registrant is not deprived of the opportunity to explain or defend him/herself against the allegation.
14. A registrant is entitled to have their case heard by an independent and impartial PCC and therefore in all aspects of Committee member's conduct, including the asking of questions, the PCC must ensure that there are not circumstances which would lead a fair-minded and informed observer to conclude that there was a real possibility, that the tribunal was biased.

---

<sup>1</sup> Council for the Regulation of Healthcare Professionals v General Medical Council and Ruscillo & Council for the Regulation of Healthcare Professionals v Nursing and Midwifery Council and Truscott [2005] 1 WLR 717 [79-80],

### Appropriate questions

15. It is important that questions are only asked of a witness at the appropriate stage in the proceedings. It is reasonable for the PCC to ask questions that may be relevant to a potential later stage of their deliberations as it is unusual for a witness or the registrant to be recalled to provide further evidence at any such later stage.
16. Therefore, if questions relate to a potential stage, such as asking questions of the registrant around insight and remediation, the panellist should be careful in how the question is framed to avoid the perception they have pre-judged any of the earlier issues or stages.
17. Questions should:
  - (a) Be relevant, justified and necessary for the PCC to be able to determine the issues in the case;
  - (b) Be expressed in an open-minded way;
  - (c) Be questions and not statements;
  - (d) Be straightforward, and use words the witness could be expected to understand;
  - (e) Keep, wherever possible, to chronological order;
  - (f) Be asked one at a time; and
  - (g) Should provide the witness time to answer fully, without interruption.
18. PCC members may find it helpful to refer witnesses to documents if these form the basis of the question. This may include referring to a document which presents an alternative account of events, to enable the witness to address any discrepancies.
19. Questions may be probing and as a result may cause the witness to feel uncomfortable.
20. Questions should not be:
  - (a) Hostile or aggressive;
  - (b) Unnecessarily repetitive, having regard to questions asked already by the representatives and other PCC members;
21. PCC members should be aware of their non-verbal communications during the hearing and particularly during questions. Pointing or wagging fingers, a raised voice, tone of voice or other aggressive postures may make otherwise acceptable questioning inappropriate.

22. Any agreed reasonable adjustments for witnesses must continue to be accommodated throughout questioning. This may encompass the PCC ensuring the time estimates provided allow for special arrangements such as frequent breaks to ensure adequate concentration levels or to enable a witness to observe religious or cultural needs e.g. set times for prayers. In some circumstances, the Chair may also direct a short adjournment to enable the PCC to agree in advance questions they wish to ask a witness to enable any questions to be focused, sensitive, and to avoid potential re-traumatisation. If a witness becomes confused or distressed, or appears to be overly tired, the Chair or Legal Adviser may suggest a short adjournment. Witnesses should be reminded that they remain on oath during such breaks.
23. The PCC should be mindful where a witness might be speaking in their second language, to ensure questions are properly understood.
24. The Chair or Legal Assessor should intervene during questioning if this is necessary to preserve the integrity and fairness of the proceedings.

### **Further information**

25. This Practice Note is part of a suite of Practice notes produced by the GOsC Council.
26. For further information about the PCC's procedures and guidance, please see the GOsC's website - [www.osteopathy.org.uk](http://www.osteopathy.org.uk) – or contact the Regulation Department on 020 7357 6655 x224.