



**Council**  
**21 November 2018**  
**Rule 19: Cancellation of a Hearing Draft Practice Note**

<b>Classification</b>	Public
<b>Purpose</b>	For discussion
<b>Issue</b>	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
<b>Recommendation</b>	To agree to consult on the draft Practice Note on the Cancellation of Hearings under Rule 19.
<b>Financial and resourcing implications</b>	Within existing budget
<b>Equality and diversity implications</b>	None identified
<b>Communications implications</b>	An engagement strategy with key stakeholders will be required
<b>Annex</b>	Draft Practice Note Cancellation of a Hearing: Rule 19
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## 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.

### *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 intend to consult on this during the public consultation.

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



## **Draft Practice Note: Cancellation of a Hearing: Rule 19**

**Effective: [date]**

### **Introduction**

1. Within its statutory framework and fitness to practise procedures, the 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. This Practice Note has been designed to provide a framework to best enable the PCC to achieve these 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**

3. The GOsC is committed to ensuring that processes of 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**

4. 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'*

5. The Rule 19 procedure applies where the case against the registrant has been referred by the Investigating Committee (IC) to the PCC for consideration<sup>1</sup>.
6. 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 IC 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.
7. 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.

### **Consideration by the PCC**

8. 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 his legal representative will then be invited to provide any further submissions.

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<sup>1</sup> It should be noted that, akin 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.

9. The PCC shall take advice from the Legal Assessor before determining whether there are exceptional circumstances pertaining in the case.
10. 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.
11. 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;
  - b. If so, whether there is a real prospect that those facts would amount to the statutory ground as set out in paragraph 6(a) above.
12. The PCC should have regard to 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, which are available on the GOsC website.
13. Where the PCC concludes there are no exceptional circumstances in the case or where the exceptional circumstances do not prevent consideration of the case from properly taking place at a hearing, it shall produce a written decision to that effect and the case will proceed to a final hearing.
14. 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.

### Exceptional Circumstances

15. There is no guidance within Rule 19 itself as to what constitutes 'exceptional circumstances'. What amounts to 'exceptional' turns on the facts and individual features of the case.
16. The courts have considered the definition on a number of occasions and 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'.*

17. 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.'*

18. 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 or fetter the PCC in applying its own independent judgement to the specific factual circumstances of a case.
- The ill health of the complainant.
  - That the registrant is unable to have a fair hearing.
  - That expert evidence received subsequent to the IC's referral rendered the gravamen of the case incapable of proof.

### **Public Interest**

19. The Act<sup>2</sup> 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:
- a. To protect, promote and maintain the health, safety and well-being of the public;
  - b. To promote and maintain public confidence in the profession of osteopathy;
  - c. To promote and maintain proper professional standards and conduct for members of that profession.
20. 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 expeditious disposal of the case.
21. 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.

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<sup>2</sup> 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 IC to have regard to these objectives when considering allegations, it is good practice that it should.