



Policy Advisory Committee

12 June 2018

Cancellation of a Hearing: Rule 19 Draft Practice Note

Classification	Public
Purpose	For discussion
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 consider 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 strategy with key stakeholders will be required
Annex	Draft Practice Note Cancellation of a Hearing: Rule 19
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Background

1. In our Corporate Strategy 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 for 2017-18, we continue to explore options and implement reforms which we consider could improve efficiency and streamline our processes but which do not require changes to our legislation. The GOsC Business Plan for 2017-2018 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 2000') 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, a successful Rule 19 application before the Professional Conduct Committee (PCC) is a decision that a final hearing should not be held. This can occur for a myriad of reasons post referral of the case by the Investigating Committee to a final hearing.
4. Over the period January to December 2017, the PCC considered two Rule 19 applications by the GOsC for a case to be discontinued. In one case, the witness provided evidence that she was unfit to provide evidence at the hearing against the registrant. In the other case, evidence emerged post referral of the matter from the Investigating Committee 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 the unnecessary time and associated expense of a hearing being incurred. This also avoided stress on both the complainant and registrant in circumstances where there was no realistic prospect of the case being proved.

Discussion

5. The Rules envisage a very prescriptive procedure for the cancellation of a hearing. The draft rule 19 practice note is less prescriptive providing agility in the approach the PCC adopts to a Rule 19 application while preserving the safeguards built into the rule (decisions are taken by independent panellists appointed to sit on the PCC assisted by the advice of a legal assessor) while ensuring 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 Investigating Committee for a substantive hearing. The document is designed to be read in conjunction with other Practice Notes and guidance and specifically guides decision makers to the Hearings and Sanction Guidance (HSG) and other relevant Practice Notes (for example, The Duty to Act in the Public Interest <http://www.osteopathy.org.uk/news-and-resources/document-library/fitness-to-practise/pcc-hc-practice-note-duty-to-act-in-public-interest>).
7. The draft Practice Note forms part of a suite of Practice Notes that have been prepared for use by the 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 a rule 19 hearing will proceed.

Recommendation: to consider 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 the framework established by legislation, the GOsC seeks to address concerns about the fitness to practise of its registrants in a fair and proportionate manner. In doing so, it has regard to the wider public interest considerations. In achieving these objectives, this Practice Note has been designed to provide a framework for decision making by Fitness to Practise Committees. The Committee should take account of the distinctive features and particular facts of cases individually when reaching a decision.

Equality and Diversity Statement

2. 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 Committee 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

3. Rule 19 of the General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000 ('the PCC Rules 2000') sets out a prescriptive procedure as to the approach the Professional Conduct Committee (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'

4. The Rule 19 Procedure applies where the case against the registrant has been referred by the Investigating Committee ('IC') to the PCC for consideration.
5. Rule 19 only applies to an allegation that a registrant:
 - a. is guilty of unacceptable professional conduct;
 - b. is guilty of professional incompetence;
 - c. has been convicted in the UK of a criminal offence which has a material relevance to the registrant's fitness to practise osteopathy;and
 - d. the IC has been consulted on the proposed course of action;
 - e. the Registrant has provided his written consent to the cancellation of the hearing;
 - f. where there is a Complainant, the GOsC shall endeavour to obtain their views.
6. In practice, an application for a direction under Rule 19 of the PCC Rules 2000 that the hearing against a registrant should not be held and the case concluded will generally be made by GOsC. However, this does not preclude a registrant from applying for the disposal of the case under the Rule 19 provisions.

Consideration by the Committee

7. The PCC shall first invite submissions from the GOsC and the Registrant on the background together with the exceptional circumstances of the case.
8. The PCC shall take advice from the Legal Assessor before determining whether there are exceptional circumstances pertaining in the case.
9. If the PCC determines that there are exceptional circumstances, the PCC will then proceed to consider whether the effect of the exceptional circumstances in the case is such that consideration of the case by the PCC cannot properly take place.
10. 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 5 above.
11. The PCC should have regard to the public interest and other relevant Practice Notes, including the Hearings and Sanctions Guidance.
 12. 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 issue such a direction to that effect and the case will proceed to a final hearing.
 13. Where the PCC concludes that consideration cannot properly take place due to exceptional circumstances it shall direct that the case should be concluded.

Exceptional Circumstances

14. There is no guidance within the legislation as to what constitutes 'exceptional circumstances'. What amounts to 'exceptional' turns on the facts and individual circumstances of the case.
15. 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'.

16. The following features, extrapolated from previous cases considered at the PCC, are illustrative only. They are therefore not meant to be exhaustive, nor intended to restrict or fetter the PCC in exercising its own independent judgement to the specific factual circumstances of a case.
 - The ill health of the complainant
 - Registrant unable to have a fair hearing
 - Expert evidence received after referral from the IC which rendered the gravamen of the case incapable of proof

Public Interest

17. Regulation is about the maintenance of standards, the protection of the public and maintenance of public confidence in the profession. The Act¹ requires the PCC to act in the public interest when an allegation is raised about a Registrant's fitness to practise.
18. 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 with the interests of the complainant and the public interest in these matters being fully and properly investigated and resolved at a PCC hearing. These are key factors in making the decision whether the case should be concluded without a hearing.
19. The public interest includes:
 - 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, and
 - c. to promote and maintain proper professional standards and conduct for members of that profession.

¹ 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.