



Policy Advisory Committee

4 March 2020

Draft Practice Note: questioning witnesses

Classification	Public
Purpose	For decision
Issue	This paper proposes the introduction of a Practice Note on questioning witnesses.
Recommendation	To consider the draft Practice Note on questioning witnesses.
Financial and resourcing implications	Within existing budget
Equality and diversity implications	Ongoing monitoring of equality and diversity trends will form part of the Regulation department's future quality assurance framework
Communications implications	A public engagement strategy with key stakeholders will be required as part of a consultation process is necessary.
Annex	Draft Practice Note on questioning witnesses
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Background

1. The GOsC Business Plan 2019/20 provides that we 'communicate case learning points, PSA advice, relevant case law and regulatory developments to GOsC Committee members (and arrange training)'.
2. During the course of 2019 the GOsC 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.
6. 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

7. 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 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.
8. 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.
9. 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 draft 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.

Next steps

10. Following consideration of the feedback from the Committee, we intend to seek the approval of Council to publish the Practice Note for consultation.

Recommendation: to consider the draft Practice Note on questioning witnesses.