

Response to the GOsC consultation on the draft Practice Note: Cancellation of Hearing under Rule 19

May 2019

1. Introduction

- 1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk
- 1.2 As part of our work we:
- Oversee the nine health and care professional regulators and report annually to Parliament on their performance
 - Conduct research and advise the four UK governments on improvements in regulation
 - Promote right-touch regulation and publish papers on regulatory policy and practice.

2. General comments

- 2.1 We welcome the opportunity to respond to this consultation on the draft Practice Note on the use of Rule 19, which allows a hearing to be cancelled after a case has been referred to a hearing by an Investigating Committee. We highlighted the need for clear published guidance on the use of this power in our 2017-18 Performance Review of the GOsC.¹
- 2.2 We are pleased that the GOsC has decided to publish this guidance, as Rule 19 is a relatively broad power. For reasons of public protection and public confidence, it is important these decisions are understood, and able to be scrutinised.
- 2.3 Throughout the consultation document, we find that generally, the importance of communication with the complainant is understated, and we have identified in our response some key points where their views need to be sought.
- 2.4 In addition, we suggest that overall the Practice Note could be made clearer with more detail on the circumstances in which:
- It would and would not be appropriate to dispose of a case under Rule 19, and

¹ See paragraph 6.85. Available at: https://www.professionalstandards.org.uk/docs/default-source/publications/performance-review---gosc-2017-18.pdf?sfvrsn=5e137520_0

- It would or would not be appropriate to refer a Rule 19 decision to a meeting rather than a hearing.
- 2.5 Some discussion of the benefits and limitations of the proposed new meeting route would have assisted in commenting on this proposal. As this Rule is a power to bring fitness to practise cases to a close, it is essential that decisions are transparent, particularly when they are made behind closed doors.
- 2.6 Finally, as the Practice note is intended to document a process that already exists, we would have welcomed greater clarity on what scope there was for changes to the process itself through this consultation, aside from the introduction of the option of a Rule 19 decision being taken at a meeting rather than a hearing.

3. Detailed comments

Question 2. Did you find the Practice Note helpful and informative?

- 3.1 In part. See our response to Question 3.
- 3.2 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.

Question 3. After reading the draft Practice Note, did you get a clear understanding of how the Rule 19 process will work in practice?

- 3.3 In part.
- 3.4 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.

Information to be presented to the PCC Panel

- 3.5 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.
- 3.6 The documentation should cover all the evidence seen by the Investigating Committee (IC), the IC decision itself, and any additional evidence obtained post-referral. The registrant's fitness to practise history should be included if relevant, so that the Panel can fully understand the potential risk presented by the registrant. The application must also satisfy the panel of the nature of the enquiries undertaken, to allow the PCC to identify possible under-investigation or under-prosecution by the GOsC. This is to avoid a situation in which a hearing is cancelled where there may nevertheless be a risk to public.

Deciding whether to grant a Rule 19 application

- 3.7 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.

- 3.8 In our view, these should be limited to situations where, following the referral of the case to the PCC by the IC, there has been a material change, such as the withdrawal of key evidence, or the discovery of new evidence; or the discovery of compelling legal reasons why the GOsC should not proceed with prosecuting this case. To spell this out in the guidance would help staff, Panellists, registrants and complainants understand the purpose of the process.
- 3.9 In addition, the Practice Note could include some reassurance for the public that the process would only be used to close down potentially serious cases if there were insurmountable legal or evidential obstacles to pursuing them. For example, we presume that cases where there appeared to be a serious risk of patient harm, or those relating to convictions that would incur custodial sentences, would be unlikely to be disposed of via Rule 19.
- 3.10 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 the very least, the case law is explained in plainer English for these audiences.

Recording Rule 19 decisions

- 3.11 The PCC Panel should produce a note of its decision to approve, or not, a Rule 19 application, clearly setting out any exceptional circumstances. This would help to ensure that the decision is transparent, and to maintain public confidence in the process. This goes for both hearings and meetings, but would be particularly important for the latter, as in our experience meetings do not have transcripts.

Communication with the complainant

- 3.12 The process as a whole would also benefit from greater emphasis on the complainant’s role. From our research with patients and the public,² we know that communication with the complainant throughout the fitness to practise process is important on three fronts:
 - Communication needs to be regular so that the complainant knows what is happening with the case, even if there has been no progress
 - The views of complainant should be sought at key junctures, and taken into account by decision-makers, and

² See for example, research we commissioned in 2013 on public attitude to alternatives to panel hearings, available at <https://www.professionalstandards.org.uk/publications/detail/alternatives-to-final-panel-hearings-for-fitness-to-practise-cases-the-public-perspective>. Or research from 2011 on enhancing confidence in fitness to practice adjudication, available at: <https://www.professionalstandards.org.uk/publications/detail/enhancing-confidence-in-fitness-to-practise-adjudication---research-report>

- Decisions about whether or not the case should proceed need to be clearly communicated, particularly when cases are closed.

3.13 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 to require that the complainant is given clear reasons for the Rule 19 application, and that their views are systematically sought. Decision-makers could be presented with evidence that this has been done, and any comments given by the complainant. 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.

Rule 19 applications from the registrant

3.14 The Note could have set out more clearly how a registrant might apply for a Rule 19 disposal, and how the GOsC would deal with such an application.

Timings

3.15 The Practice Note does not specify any minimum or maximum timescales for any of the stages of the Rule 19 process. For example, it would be good practice to set out the timescales for seeking the views of the Investigating Committee, the registrant, and the complainant under paragraph 7.

Question 4. 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)?

3.16 In part.

3.17 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 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.

3.18 In paragraph 11 of the Practice Note, it would have been helpful to have more detail about the circumstances in which it might be appropriate for a PCC Chair to decide to hold a Rule 19 meeting. We found the reference to 'exceptional' here confusing, as it is our understanding that the 'exceptional circumstances' test applies not to the decision about whether to hold a meeting or a hearing, but to the decision about whether to grant a Rule 19 application.

- 3.19 In line with our above points about the role of the complainant, we also suggest that the guidance should refer to the views of the complainant, and not just the GOsC and the registrant, in its consideration of whether the issues in a case are contentious.

Question 5. 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?

- 3.20 In part.
- 3.21 We have outlined above the ways in which we believe the proposals could be amended to ensure greater levels of public protection, but also public confidence.
- 3.22 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:

“(3A) The over-arching objective of the General Council in exercising its functions is the protection of the public.

(3B) The pursuit by the General Council of its over-arching objective involves the pursuit of the following 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; and

(c) to promote and maintain proper professional standards and conduct for members of that profession.”³

4. Further information

- 4.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

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³ Health and Social Care (Safety and Quality) Act 2015, Schedule, 3 (2). Available at: <http://www.legislation.gov.uk/ukpga/2015/28/schedule/enacted>.

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