Tribunal Advisory Committee, 30 May 2018

Review of Practice Notes

Executive Summary

Practice Notes exist to provide clear guidance to all parties with an interest or involvement in Fitness to Practise proceedings. All Practice Notes undergo regular review.

The cycle of review for Practice Notes has been temporarily amended to ensure that the areas of work linked to the FTP improvement plan project are prioritised. A revised cycle is set out in appendix two which highlights whether a current review is required and if so, when these will be put before the Committee. Further changes are likely to be made to this cycle in the future.

Summary of changes to Practice Note for TAC approval

Review of Sanction Orders

The attached Review of Sanction Orders Practice Note is newly created. It incorporates the existing Article 30 (2) Reviews Practice Note. This has been created following feedback on the existing Article 30 (2) Reviews Practice Note and the lack of a general Practice Note on reviews of substantive orders.

The main changes in the documentation are:

- Inclusion of overview of general provisions of Article 30 (1) mandatory reviews
- Revision to paragraph concerning the discretionary power of Article 30 (2)
- Inclusion of paragraph relating to extending orders
- Revisions and clarification regarding panels powers and the issues to be addressed at review hearings

The Practice Note has been reviewed by HCPC's Special Counsel, who has confirmed that the document contains the required legislative background to support this area of work.

It is intended that, if necessary, any supporting operational guidance for Fitness to Practise team members and Presenting Officers will be revised in line with the proposed changes in this paper.

Decision

The Tribunal Advisory Committee is asked to discuss and approve the new Review of Sanction Orders Practice Note

Appendices

Appendix One: Practice Note: Review of Sanction Orders
Appendix Two: Planned cycle of Practice Note review – FTP improvement plan

Date of paper

16 May 2018

Appendix one

Health and Care Professions Tribunal Service

PRACTICE NOTE

Review of Sanction Orders

This Practice Note has been issued by the Tribunal Advisory Committee
for the guidance of Panels and to assist those appearing before them.

Introduction

Article 30(1) of the Health and Social Work Professions Order 2001 (the Order) requires all conditions of practice orders and suspension orders to be reviewed before they expire.

In addition to that mandatory review, Article 30(2) of the Order gives Panels discretion to review caution orders, conditions of practice orders and suspension orders at any time.

Article 30(1) mandatory reviews

Article 30(1) provides that a conditions of practice order or suspension order must be reviewed before it expires and that the reviewing Panel may:

- extend, or further extend the period for which the order has effect;
- make an order which could have been made when the order being reviewed was made; or
- replace a suspension order with a conditions of practice order.

Any order made following an Article 30(1) review takes effect from the date on which the order under review expires, so the registrant must continue to comply with the expiring order until then.[1]

[1] The power to impose interim orders does not apply to Article 30 reviews. A Panel should replace a suspension order with a conditions of practice order only where it is satisfied that the registrant will continue to comply with the existing order. An interim order cannot be imposed to ensure that the registrant does so.

Article 30(2) discretionary reviews

Article 30(2) of the Order provides that, on the application of the person concerned or otherwise, a caution order, conditions of practice order or suspension order may be reviewed at any time it is in force and that the reviewing Panel may:

- confirm the order;
- extend, or further extend, the duration of the order;
- reduce the duration of the order (but a caution order cannot be reduced to less than one year);
- replace the order with any other order which the Panel could have made (to run for the remaining term of the original order); or
- revoke the order or revoke or vary any condition imposed by it.

Article 30(2) is a discretionary power and does not specify the circumstances in which it may be exercised. Consequently, reviews are not limited to cases in which new evidence has come to light but may encompass any case where a significant and material change in circumstances has occurred since the original order was made, including breaches of that order by the registrant.

Any order made following an Article 30(2) review has immediate effect but, where an order is confirmed or replaced by another kind of order, it will have effect only for the remaining period of the order under review.

Extending Orders

The power to extend, or further extend, the duration of an order under Article 30(1) or (2) is subject to the following limitations in Article 30(5):

- a suspension order cannot be extended by more than one year at a time; and
- a conditions of practice order cannot be extended by more than three years at a time.

Procedure

Article 30(9) of the Order provides that, before a Panel exercises its powers under Article 30(1) or (2), the registrant concerned must be given the opportunity to appear before and be heard by the Panel, in accordance with the relevant Panel rules.[2]

[2] the HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 and the HCPC (Health Committee) (Procedure) Rules 2003.

The procedure to be followed by a Panel when conducting an Article 30 review will generally be the same as for other fitness to practise proceedings.

However, in the case of an Article 30(2) review on the application of the registrant concerned, Rule 13(10) of the Panel rules provides for the registrant (who has the burden of persuasion) to present their case first and for the HCPC to respond.

The issues to be addressed

The review process is not a mechanism for appealing against or 'going behind' the original finding that the registrant's fitness to practise is impaired. The purpose of review is to consider:

- whether the registrant's fitness to practise remains impaired; and
- if so, whether the existing order or another order needs to be in place to protect the public.

The key issue which needs to be addressed is what, if anything, has changed since the the current order was imposed or last reviewed. The factors to be taken into account include:

- the steps which the registrant has taken to address any specific failings or other issues identified in the previous decision;
- the degree of insight shown and whether this has changed;[3]
- the steps which the registrant has taken to maintain or improve his or her professional knowledge and skills;
- whether any other fitness to practise issues have arisen;
- whether the registrant has complied with the existing order and, if it is a condition of practice order, has practised safely and effectively within the terms of that order.
- Panels will expect to see evidence or information to confirm the steps taken by the registrant.

The decision reached must be proportionate, striking a fair balance between interfering with the registrant's ability to practise and the overarching objective of public protection.[4]

[3] refusing to accept the findings of the original hearing Panel should not be treated as a lack of insight, but that continuing denial is relevant to any review decision: *Yusuff v GMC* [2018] EWHC 13 (Admin).

[4] which includes protecting service users, declaring and upholding proper standards of behaviour and maintaining public confidence in the profession: *Cohen v GMC* [2008] EWHC 581 (Admin).

HCPC review applications

Where an Article 30(2) review application is made by the HCPC, Panels should expect the HCPC to explain at the outset why the application is appropriate.

In cases where new information becomes available or circumstances have changed, that explanation should be straightforward and, in many cases, the appropriateness of the application will be self-evident. This will be the case where, for example, the registrant is breaching the terms of an existing order or is complying with an order which is ineffective.

In cases where there is no new evidence or change in circumstances, the Panel should expect the HCPC to provide a compelling explanation as to why it is appropriate for the original order to be reviewed. That explanation must go beyond mere disagreement with the original order and should be, for example, that the order:

- is clearly impractical (for example, by requiring a registrant to undertake a training course which does not exist);
- is improper (for example, by imposing conditions of practice which, in effect, amount to suspension from the practice of the relevant profession); or
- exceeds the Panel's jurisdiction (for example, by purporting to impose obligations on a person other than the registrant - "your employer must...").

[Date]

Appendix two

Practice Note review activity – FTP improvement plan

Practice Note	Date of current version	Team	Current review required and by when
Article 30 (2) Reviews	Mar- 17	CPC	To be discontinued and superseded by new Sanction Reviews PN
Case Management and Directions	Mar- 17	INV/CPC	N
Case to Answer Determinations	Mar- 17	INV	N
Child Witnesses	Mar- 17	TS	N
Competence and Compellability of Witnesses	Mar- 17	CPC	N
Concurrent Court Proceedings	Mar- 17	CRT/INV/CPC	N
Conduct of Representatives	Mar- 17	TS	N
Conducting hearings in private	Mar- 17	TS	N
Conviction and Caution Allegations	Mar- 17	CRT/INV/CPC	N
Cross-Examination in Cases of a Sexual Nature	Mar- 17	CPC	N
Directions and Preliminary Hearings	Mar- 17	TS	N
Discontinuance of Proceedings	Feb- 18	CPC	N
Disposal of Cases via Consent	Feb - 18	CPC	N
Drafting Fitness to Practise Decisions	Mar- 17	TS	N
Finding that Fitness to Practise is Impaired	Mar- 17	TS	N
Half time submissions	Mar- 17	CPC	N
Health Allegations	Mar- 17	INV/CPC	Y – For TAC approval in Sept - 18
Hearing Venues	Mar- 17	TS	N
Interim Orders	Mar- 17	CRT/INV/CPC	N
Joinder	Mar- 17	CPC	N
Mediation	Mar- 17	INV/CPC	N

Opinion Evidence, Experts and Assessors	Mar- 17	CPC	N
Postponement and Adjournment of Proceedings	Mar- 17	TS	N
Proceeding in the Absence of the Registrant	Mar- 17	TS	Y – For TAC approval in Sept-18
Restoration to the Register	Nov- 17	CPC	N
Review of Striking Off Orders: New Evidence and the	Mar- 17	CPC	N
Service of Documents	Mar- 17	INV/CPC	N
Special measures	Mar- 17	TS	N
Unrepresented Parties	Mar- 17	TS	N
Use of Welsh in Fitness to Practise Proceedings	Mar- 17	TS	N
Witness and Production Orders	Mar- 17	CPC	N