

Tribunal Advisory Committee, 16 November 2017

Review of Practice Notes

Introduction

Practice Notes exist to provide clear guidance to all parties with an interest or involvement in a Fitness to Practise investigation or Hearing. As our processes change, or there are case law or learning issues, it is necessary to review these documents. The following provides an update about the ongoing programme of review of these key documents.

There are currently 30 Practice Notes. These documents are available on HCPTS' website, and are actively referred to during the investigation and hearing processes.

We aim to review each Practice Note on an annual basis. The review has three stages: firstly, HCPC review any relevant case outcomes, complaints or learning points from bodies such as the Professional Standards Authority. Any changes to content or wording are then added. The second stage is for a review by HCPC's Special Counsel, to ascertain if any legislative changes are required. The third and final stage is to review the readability of the document prior to consideration at Council.

In most cases, there are little or no changes, or there is the requirement to edit the document to make it easier to understand or use.

The Practice Notes are not reviewed in isolation. Most relate to an element of an HCPC policy, so the review cycle of the Practice Notes is linked to the review of policies, or any operational guidance for HCPC or HCPTS team members.

The review cycle and number of documents is such that we envisage approximately three revised Practice Notes per Council meeting. We have prioritised the review based on operational impact on Fitness to Practise case activity, time elapsed since the previous review, and the volume of review time by Council.

Decision

The TAC is asked to:

- i) consider the attached paper; and
- ii) agree the proposed approach and timescale
- iii) agree the changes to the Restoration to the register Practice note. .

Background information

On the timetable presented previously to TAC, there were nine Practice Notes that were due to be reviewed by December 2017.

These Practice Notes are: Competence and compellability of witnesses, Conduct of representatives, Conviction and caution allegations, Directions and preliminary hearings, Drafting fitness to Practise decisions, Finding the fitness to practice is impaired, Health allegations, Opinion evidence, experts and assessors, and Service of documents.

All of these Practice Notes were reviewed in preparation for the Health and Care Professions Tribunal Service coming online in April 2017. There has been no significant change in process in these areas, nor any significant learning points or High Court cases.

In October 2017, we received the finalised performance review report from the Professional Standards Authority (PSA). This report assesses HCPC (and HCPTS) performance against their Standards of Good Regulation.

A number of the areas in the Practice Notes are therefore being reviewed in light of the Performance Report. These include how we draft allegations, how we identify and handle allegation that relate to health matters, and how we handle convictions and cautions.

HCPC Council agreed a policy relating to the conduct of parties attending a hearing in March 2017, and as such, the Conduct of representatives PN requires no change at this stage.

Therefore, there are no required changes to the nine PNs due for review in December, and any changes as a result of the review of the Performance Review will be considered at a future date. It may be that the PN review timetable will require review if there are significant changes to any of the PNs. It is unlikely that any changes will be made until January or February 2018. The next set of scheduled PNs to be reviewed are in March 2018.

There is a small change that has been identified in one of the existing PNs that was not on the list. This relates to the process of restoration to the register, and follows our experience of recent, successful restoration cases.

The minor changes to the existing practice note relate to providing guidance to Panels in creating their decision, and referencing the procedural issues relating to completing a return to practice course, and payment of fees before the registration can be restored.

We think that this addition helps both Panels, and registrants or their representatives, understand the order of activities before the registrant can practice again. We have developed a process with our Registrations Department, to enact this, and to ensure individuals cannot be restored before these conditions have been met.

<https://www.hcpts-uk.org/assets/documents/10005366Restoration.pdf>

Resource implications

The review process is managed through the existing FTP processes and existing resources.

Financial implications

The review of Practice Notes is part of the FTP workplan for 2017-18. Any deviations from the proposal may require review of the resources allocated to the workplan.

Appendices

Appendix 1: Restoration to the register practice note (marked up revisions)

Date of paper

4 November 2017

Health and Care Professions Tribunal Service

PRACTICE NOTE

Restoration to the Register

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 33(1) of the Health and Social Work Professions Order 2001 (the Order) provides that a person who has been struck off the HCPC Register and who wishes to return to the Register must make an application for restoration.¹

Applications for restoration must be made in writing to the Registrar, but the Order requires the Registrar to refer restoration applications to a Panel of the Practice Committee which made the striking off order.² In most cases this will be a Conduct and Competence Panel.

When a restoration application can be made

A restoration application cannot be made until five years have elapsed since the striking off order came into force. In addition, a person may not make more than one application for restoration in any period of twelve months.

If a person makes two or more applications for restoration which are refused, the Panel refusing the second application may make a direction suspending the applicant's right to make further restoration applications. If such a direction is made, the applicant may apply to have it reviewed three years after it was made, and at three yearly intervals after that.

These time constraints are subject to Article 30(7) of the Order, which enables a Panel to review a striking off order at any time if new evidence comes to light which is relevant to the making of that order. A review of that kind should be treated in all other respects as if it was an application for restoration.

Article 33 of the Order and the Panel rules³ provide for restoration applications to be considered at a hearing before a Panel.

¹ an order of the Investigating Committee, removing a person's Register entry because it was fraudulently or incorrectly made, is not a striking off order and cannot be the subject of a restoration application.

² or, where previous applications have been made in connection with the same striking-off order, the Committee which heard the last application.

³ the HCPC (Conduct and Competence Committee) (Procedure) Rules 2003 and the HCPC (Health Committee) (Procedure) Rules 2003.

The procedure to be followed will be similar to that for other fitness to practise proceedings and, for example, Panels may give directions, hold preliminary hearings, order the production of documents or the attendance of witnesses, etc. as they consider appropriate.

However, one significant difference is that, as the applicant has the burden of proof in a restoration case, the Panel rules⁴ provide for the applicant to present his or her case first.

Panels should always make it clear to applicants that they have the burden of proof and explain what this means; that it is for the applicant to prove that he or she should be restored to the Register and not for the HCPC to prove the contrary.

Although the Panel rules require the applicant to present his or her case first, it is often helpful at the start of a hearing for the HCPC Presenting Officer to set out the history of the case and the circumstances which led to a striking off order being made. Permitting the Presenting Officer to do so is not contrary to those rules if their comments are limited to background information of that kind and do not include any substantive arguments which the HCPC wishes to put to the Panel in relation to the restoration application.

Issues for the Panel

Article 33(5) of the Order provides that a Panel must not grant an application for restoration unless it is satisfied⁵, on such evidence as it may require, that the applicant:

- meets the general requirements for registration; and
- is a fit and proper person to practise the relevant profession, having regard to the particular circumstances that led to striking off.

Striking off is a sanction of last resort, which should only be used in cases involving serious, deliberate or reckless acts and where there may be a lack of insight, continuing problems or denial or where public protection in its widest sense⁶ cannot be secured by any lesser means.

The reasons why the applicant was struck off the Register will invariably be highly relevant to the Panel's consideration of the application and it is insufficient for an applicant merely to establish that they meet the requisite standard of proficiency and the other general requirements for registration.

⁴ rule 13(10)

⁵ "satisfied" in this context means satisfied on the balance of probabilities

⁶ this includes not only protection of the public but also the maintenance of public confidence in the profession and the regulatory process and the wider public interest

An application for restoration is not an appeal from, or review of, the original decision. Panels should avoid being drawn into 'going behind' the findings of the original Panel or the sanction it imposed and attempts by the applicant to persuade the Panel to do so may be indicators of a continuing lack of insight or denial.

In determining restoration applications, the issues which a Panel should consider include:

- the matters which led to striking off and the reasons given by the original Panel for imposing that sanction;
- whether the applicant accepts and has insight into those matters;
- whether the applicant has resolved those matters, has the willingness and ability to do so, or whether they are capable of being resolved by the applicant;
- what other remedial or rehabilitative steps the applicant has taken;
- what steps the applicant has taken to keep his or her professional knowledge and skills up to date.

Conditional restoration

If a Panel grants an application for restoration, it may do so unconditionally or subject to the applicant:

- meeting any applicable education and training requirements specified by the Council; or
- complying with a conditions of practice order imposed by the Panel.

The only "applicable education and training requirements" would be the requirements for 'return to practice'. These are generic requirements, primarily designed for registrants who have taken a career break but where there is no cause for concern about their fitness to practise. Consequently, they may be of limited use in dealing with restoration cases.

If a Panel considers that 'return to practice' requirements are appropriate, ~~it should also consider whether the updating period needs to~~ those requirements must be satisfactorily completed before the applicant ~~may return to unrestricted practice and draft its order accordingly~~ is restored to the register.

Where Panels wish to impose bespoke requirements on a registrant who is being restored to the Register, ~~replacing including updating requirements which may be completed following restoration, the better and more flexible alternative is to replace the striking off order with a conditions of practice order~~ offers a better and more flexible alternative. Conditions of practice can be tailored to meet the specific needs of a particular case, will be reviewed and, if necessary, can be extended. Such an order also provides the added safeguard that swift action can be taken against the registrant if there is any breach of those conditions.

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Appeals

An applicant may appeal to the appropriate court if the Panel:

- refuses an application for restoration;
- allows an application, but subject to the applicant satisfying education and training requirements under Article 33(6); or
- makes a direction under Article 33(9) suspending indefinitely the applicant's right to make further restoration applications.

Panels should ensure that applicants are made aware of any right of appeal. For this purpose the "the appropriate court" means the High Court in England and Wales, the High Court in Northern Ireland or, in Scotland, the Court of Session.⁷

Drafting Restoration Orders

Where a Panel decides to restore a person to the Register, it must clearly set out the order which it has made. The order should be addressed to the Registrar, who must amend or annotate the Register as required. ~~A restoration order, and~~ should provide that it is only to take effect once the applicant has:

- provided the Registrar with the information and declarations required from any applicant seeking admission to the Register; ~~and~~
- satisfied the Registrar that appropriate cover under an indemnity arrangement is or will be in force in relation to the applicant;
- paid the prescribed restoration fee; and
- if the Panel so decides, satisfied the Registrar that the applicant has successfully completed the 'return to practice' requirements.

A restoration order template is out below:

ORDER: The Registrar is directed to restore the name of [*name*] (the **Applicant**) to the [*relevant profession*] Part of the Register, but restoration is only to take effect once the Applicant has:

- (a) provided the Registrar with ~~the any~~ information and declarations required for admission to the Register; ~~and~~
- (b) paid the prescribed restoration fee; ~~and~~

~~[The (c) satisfied the Registrar is further directed to annotate the Register to show that, from the date in relation to the Applicant, there is or will be in force appropriate cover under an indemnity arrangement[.]; and]~~

⁷ in the case of an appeal relating to a social worker in England, the appropriate court means the High Court in England and Wales regardless of where the applicant resides.

~~[(d) _____ provided evidence which satisfies the Registrar that this Order takes effect (the **Operative Date**), the Applicant must:~~

~~(a) undertake has successfully completed a 60 day period of professional updating in accordance with the HCPC Standards for Return to Practice; and]~~

~~(b) limit [his][her] practice to the completion of that updating until such time as the Applicant provides evidence which satisfies the Registrar that the Applicant has successfully completed that period of updating.]~~

OR

paragraph (d) may be omitted or, as an alternative:

[The Registrar is further directed to annotate the Register to show that, for a period of [*time*] from the date that this Order takes effect (the **Operative Date**), the Applicant must comply with the following conditions of practice:

[*set out conditions*]].

22nd March 2017