

Tribunal Advisory Committee, 9 June 2020

Proposal for Refresh of Practice Notes

Executive summary

At its last meeting the TAC agreed to consider an option for the refresh of the current set of Practice Notes. The attached proposal takes into account the agreed format and purpose of the Practice Notes and provides an option to refresh the current notes taking into account the time and resource available.

Decision

The Committee is asked to consider the option.

Resource implications

The proposed refresh would be taken into account when new departmental work plans are formulated.

Financial implications

There are no financial implications arising from this update paper.

Appendices

Appendix 1 – Refresh of Practice Notes

Appendix 2 – Practice Notes Consolidated pack revised – mock up

Date of paper

13 February 2020

Practice Notes - option for refresh

1. Introduction

In February last year TAC considered a paper on the format and purpose of the Practice Notes, and in September engaged in further in-depth discussion. This short paper is intended to revisit principles and build on those discussions. It sets out an option for a refresh of the existing suite of practice notes.

The TAC has confirmed that the primary purpose of the practice notes is to provide guidance to panels on relevant areas of procedure relating to fitness to practise proceedings. They also provide useful guidance and context for registrants subject to a fitness to practise allegation or those with an involvement in fitness to practise proceedings. As well as setting out procedure, they incorporate HCPC's interpretation of the overarching legislation and rules and where applicable provide foot notes to relevant case law.

It has been agreed that a refresh of the current package of Practice Notes is required. Cost and resource constraints prevent a complete re-work but a programme of work will be undertaken to ensure a consistent format for the notes, to revive them so that they are seen as a useful and accessible tool. In addition a process is required to ensure that they are up to date and responsive to change (e.g. legislative change or feedback from panellists and other participants), and that such changes are incorporated in a timely and useful way.

The Executive will incorporate TAC's advice in relation to the review and development of the Practice Notes. However, due to the legal context of the content and their use by panels during fitness to practise proceedings they are also subject to final legal review and sign off.

2. Format

The agreed format has been used already in a number of revised Practice Notes, for example, Interim Orders and Fitness to Practise Impairment. This appears to have worked well and is a model that can be used going forward, ensuring the use of the following principles:

- Clarity and simplicity of language;
- Focus on the relevant issue, when the issue could occur, the legal context and what this means in practice for the hearing;
- Clear and consistent paragraph numbering, cross referencing and headings for ease of reference;
- Issues addressed in Practice Notes to be ordered so that the most frequent / relevant elements take prominence;

- Avoidance of unnecessary legalistic language and ensure they are accessible as guidance to Panels and registrants or the wider public who may have an interest in proceedings;
- Clear distinction between legal constraints, good practice and panel discretion: i.e. use of 'must' refers to all legal aspects, 'should' to matters that are best practice and 'may' to situations where the panel has discretion;
- Consistency with the Sanctions Policy and other relevant guidance;
- A systematic and timely programme for updating and review
- Alignment and synergy with training programmes.

3. Issues to be considered

TAC may wish to consider whether there should be a streamlining of Practice Notes, for example, is it feasible in the short term to combine any relevant notes. Longer term the need for supplementary guidance can also be reviewed.

The Executive will also need to review the existing internal and external feedback mechanisms to ensure information is routinely and reliably collected to inform review in a timely manner.

4. Proposal

It's proposed that we revise the Practice Notes so that the look and style of them is consistent with the Sanction Policy. An example of how the consolidated pack may look is attached to this paper. As with the Sanctions policy, the pack would contain a brief statement about the Practice Notes and their purpose. It's also proposed that we include a statement about Equality and Diversity and/ or reasonable adjustments.

The Practice Notes are currently grouped on the HCPTS website under specific headings which could be replicated in the consolidated pack to allow for greater ease of reference (as below):

- Witnesses and evidence
- Procedural
- Special measures
- Interim and review hearings
- Allegations
- Other / general

Further discussion around the most appropriate headings and proposal is welcome.

hcpts

health & care
professions
tribunal service

**The fitness to practise adjudication service
of the Health and Care Professions Council.**

Practice Notes

Contents

About the Practice Notes	X
Purpose of the Practice Notes	X
Equality and Diversity / Reasonable Adjustments	X
Witnesses and Evidence	X
Appointment of medical and registrant assessors	X
Assessors and Expert Witnesses	X
Child Witnesses	X
Competence and Compellability of Witnesses	X
Production of Information and Documents and Summoning Witnesses	X
Procedural	X
Case Management and Directions	X
Disposal of Cases via Consent	X
Drafting Fitness to Practise Decisions	X
Fitness to Practise Impairment	X
Half Time Submissions	X
Proceeding in the Absence of the Registrant	X
Postponement and Adjournment of Proceedings	X
Service of Documents	X

Conditions Bank	X
Disclosure of Unused Material	X
Special Measures	X
Cross- examination in Cases of a Sexual Nature	X
Conducting Hearings in Private	X
Special Measures	X
Interim and review hearings	X
Interim Orders	X
Review of Article 30 Sanction Orders	X
Review of Striking Off Orders	X
Allegations	X
‘Case to Answer’ Determinations	X
Conviction and Caution Allegations	X
Discontinuance of Proceedings	X
Health Concerns	X
Joinder	X
Concurrent Court Proceedings	X
Other / General	X
Hearing Venues	X
Mediation	X
Restoration to the Register	X

Use of Welsh in Fitness to Practise Proceedings	X
Unrepresented Registrants	X
Conduct of Representatives	X
Preliminary Hearings	X

Purpose of the Practice Notes

Short statement to be included about the purpose of the PNs and how they are used.

Equality and Diversity / Reasonable Adjustments

Relevant information to be included

PRACTICE NOTE

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

Interim orders

1. Introduction

The HCPC has the power to apply to a Panel of any of HCPC's three Practice Committees for an interim order to be imposed on registrants in cases of the most serious nature.

The purpose of an interim order is to put in place interim safeguards to protect the public interest, including the protection of the public, whilst concerns about a registrant's fitness to practise remain unresolved.

Accordingly, an interim order is a temporary measure that will restrict the registrant's ability to practice and will usually apply until a final decision is made in relation to an allegation (including after any appeal).

Article 31 of the Health Professions Order 2001 (the Order) sets out the procedure by which a Panel may impose an interim order.

2. Discretion for Making an Interim Order

When considering an application for an Interim Order a Panel should consider the following in sequence: Grounds; Nature; Duration.

2.1 Grounds for an Interim Order

A Panel may make an interim order if it is satisfied that:

- It is necessary for the protection of members of the public; and/or
- It is otherwise in the public interest; and/or
- It is in the interests of the registrant concerned.

Careful consideration must be given to the imposition of an interim order solely on public interest grounds (i.e. When the Panel does not identify a need for the protection of the public or the registrant), and striking the appropriate balance may not always be straightforward.

In *Christou v NMC*¹, the court discharged an interim order imposed on a registrant who had accepted a caution for assault and failed to report it to the NMC, on the basis that it was difficult

¹ [2016] EWHC 1947 (Admin)

to identify why the Panel thought an order was needed to reflect public concern, given that this could be done appropriately when the case was finally heard.

In contrast, in *NH v GMC*² the court upheld a decision to impose an interim order on a registrant who was awaiting trial for allegedly assaulting and falsely imprisoning his younger sister for bringing 'dishonour' on their family. In that case, the court said that the question to be answered is:

"would an average member of the public be shocked or troubled to learn, if there is a conviction in this case, that the [registrant] had continued to practise whilst on bail awaiting trial?"

2.2 Nature of the Interim Order

If a Panel determines that it is appropriate to make an interim order, it must then decide whether to make either:

- An interim conditions of practice order, or
- An interim suspension order.

A Panel should always consider whether a conditions of practice order would be the more proportionate means of securing a degree of protection which the Panel considers necessary.

Interim conditions of practice are likely to be limited to specific restrictions on practice, for example, not to provide services to children, not to act as an expert witness or not to undertake unsupervised home visits. An interim conditions of practice order may also specify supervision requirements, including a requirement to provide regular reports from the supervisor to any Panel reviewing the order.

Normally, a Panel should not impose conditions of a kind which may be more appropriate after an allegation has been determined to be well founded at a final hearing, such as conditions requiring the registrant to undertake additional training.

An interim suspension order should be imposed only if the Panel considers that a conditions of practice order would be inadequate for that purpose.

2.3 Duration

The Panel must determine the duration of the interim orders. They cannot exceed 18 months.

Panels should not regard 18 months as the 'default' position: an interim order should be imposed only for as long as the Panel considers it to be necessary³.

3. Consideration of an application

In determining whether to impose an interim order before a final hearing has taken place, a Panel will rarely be in a position to consider and weigh all the relevant evidence but must act on the information that is available. At this stage the Panel is not determining the allegation. In essence, the Panel's task is to consider whether the nature and severity of the allegation is such that:

² [2016] EWHC 2348 (Admin)

³ in reaching its decision a Panel should be aware that an interim order can be varied or revoked, but cannot be extended, by a reviewing Panel.

- the registrant, if permitted to remain in unrestricted practice, may pose a risk to the public or to themselves; or
- for public interest reasons the registrant's freedom to practise should be curtailed.

The decision to make an interim order is not one that must not be taken lightly and will depend upon the circumstances in each case.

Panels may have regard to the overall strength of the evidence, whether the allegation is serious and credible and the likelihood of harm or further harm occurring if an interim order is not made.

Although this list is not exhaustive, the types of case in which an interim order is likely to be made are those when:

- the registrant may pose an ongoing risk to service users, such as allegations involving violence, sexual abuse or other serious misconduct;
- a registrant with apparent serious health problems is practising and may pose a serious risk to service users or others, or be at risk of self-harm;
- although there may be no evidence of a direct link to professional practice, the allegation is so serious that public confidence in the profession and the regulatory process would be seriously harmed if the registrant were allowed to remain in unrestricted practice (for example, allegations of murder, violence, rape, the sexual abuse of children or other very serious offences);
- there may be an ongoing risk to service users from the registrant's serious or persistent competence failures or serious lack or professional knowledge or skills;
- the registrant has breached an existing suspension or conditions of practice order.

The Panel must balance the need for an interim order against the consequences for the registrant and ensure that they are not disproportionate to the risk from which the Panel is seeking to protect the public. This includes the financial and other impacts which an interim order may have on a registrant.

4. Procedure

4.1 When Interim Orders may be applied for

The HCPC may apply for an interim order to a Panel of HCPC's Practice Committees at any stage between being first notified of a concern about a registrant up to immediately after a sanction is imposed, although there are limitations.

The HCPC can apply to the Investigating Committee for an interim order at any time (subject to notice requirement - see below) between first notification of the matter received by the HCPC up to the moment the Investigating Committee determines whether or not to refer the case to the Conduct and Competence or Health Committee. A separate Investigating Committee Panel will be arranged to hear the application.

The HCPC may also apply for an interim order when the Investigating Committee makes an order that an entry in the register has been fraudulently procured or incorrectly made but the time for appealing against that order has not yet passed or an appeal is in progress.

The HCPC may apply to the Conduct and Competence or Health Committee (as appropriate and on notice – see below) for an interim order at any time between the Investigating Committee

referring the case to the relevant Practice Committee and that Committee making a determination on impairment. Any such application will be made to a panel arranged specifically to hear the application or the final hearing panel if it has met.

The HCPC may apply to the Conduct and Competence or Health Committee for an interim order after a Panel has determined to impose a sanction. Further guidance is given below.

5. Notice of Application

As the need for an interim order may arise as a matter of urgency, the usual notice period that applies to other proceedings such as final hearings do not apply.

No Interim Order can be applied for unless the registrant *“has been afforded an opportunity of appearing before the Committee and being heard”* on whether an interim order should be granted.⁴

Ordinarily, the HCPC will provide registrants with seven days’ notice of an application for an interim order. In exceptional circumstances, such as when the concerns are particularly serious or raise urgent public protection needs, the notice period may be substantially less, provided the registrant is afforded the opportunity of appearing and being heard.

The service of a Notice of (interim order) Hearing provides registrants with an opportunity of attending and being heard.

6. Proceeding in the absence of the registrant and applications to adjourn

The absence of the registrant does not preclude the proceedings from taking place, provided he or she has been offered the opportunity of attending. In the event that the registrant does not attend, the HCPC may make an application to proceed in the absence of the registrant. There is separate guidance regarding applications to proceed in absence relating to final and review hearings. The same/similar principles apply in relation to interim order proceedings, with the added factor being the inherent nature of interim order applications given their focus on an apparent urgent need to safe-guard the public and the wider public interest. Article 31 does not set out specific notice requirements for interim order hearings. These are separate proceedings held solely to consider the risk presented by a registrant’s practice, rather than to make findings of fact in relation to a particular allegation, the notice requirements in the Panel rules⁵ for other types of hearing do not apply. It will usually be appropriate for a Panel to proceed with an interim order hearing in the registrant’s absence if they fail to attend. If an interim order is made it is then subject to regular review.

Applications by registrants to adjourn will normally be considered by the Panel on the day. Due to the urgent nature of the risks, applications to adjourn should be granted only in the most compelling circumstances. Panels will decide the application based on the information available. If an interim order is made it is then subject to regular review. A registrant has the right to ask for a review of an interim order at any time outside the scheduled regular review cycle. Therefore, where an interim order has been imposed in the absence of a registrant, the

⁴ Article 31 (15) of the Health Professions Order 2001.

⁵ HCPC (Investigating Committee) (Procedure) Rules 2003; HCPC (Conduct and Competence Committee) (Procedure) Rules 2003; and HCPC (Health Committee) (Procedure) Rules 2003.

registrant has recourse for the matter to be reconsidered should they wish later to appear before the Panel.

7. Interim orders imposed at final hearings after a sanction has been imposed

Once a final hearing panel reaches a final decision in respect of the substantive allegation, any pre-existing interim order terminates. The Registrant will then not be subject to any practice restrictions until a restrictive sanction order is made and comes into effect, unless an interim order is imposed. A sanction order will not come into effect until either (a) the expiry of the appeal period (28 days from service of the determination), or if there is an appeal, (b) the determination of that appeal.

In cases when the sanction is restrictive, namely a Striking Off Order, a Suspension Order, or a Conditions of Practice Order, the HCPC may apply immediately after a sanction is declared for an interim order to restrict the registrant's practice during the appeal period and any subsequent appeal proceedings up to the maximum of 18 months (and thereafter subject to the HCPC making an application to the High Court / Court of Session.)

If present at the final hearing, the registrant must be given the opportunity of making representations regarding the application for an interim order. If registrants are taken by surprise by the application for an interim order they may be incapable of formulating meaningful submissions, especially if they are unrepresented. This issue was considered in the case of *Gupta v GMC*.⁶ The court held that, in view of the potentially severe consequences of interim orders for registrants, the common law principle of fairness requires panels to give registrants notice of any intention to consider an interim order so that they have an opportunity to make meaningful representations.

Panels should therefore specifically warn the registrant after the impairment stage that an interim order might be considered at the final hearing, and that they will be entitled to make representations in relation to it.

If the registrant is absent, the HCPC will first have to make, and the Panel will have to determine, whether to proceed in the registrant's absence with the HCPC's application for an interim order and the HCPC will need to show that the registrant has been given notice that an application may be made. Such notice may be contained within the Notice of Final Hearing. As before, the overriding statutory objective of protecting the public and the wider public interest will weigh heavily in favour of an application to proceed in absence, particularly when the Panel has made a finding that fitness to practise is impaired.

Thereafter, the considerations to be given to an interim order are as set out above with regards to grounds, nature of the order and duration, and the factors to consider, along with the additional factor that the Panel will have made a finding of impairment and the need to impose a sanction.

⁶ [2001] EWHC Admin 631

8. Reasons

The draconian nature of an interim order means that a Panel must be very clear in its decision as to why an interim order is necessary and, if applicable, why an interim suspension order has been imposed rather than interim conditions of practice.

Panels need to conduct a balancing exercise, balancing the need for protecting the public or registrant, or the public interest generally, against the other consequences that an interim order would have on a registrant, and to consider whether the consequences of making the order are proportionate to the risk from which they are seeking to protect the public (or registrant for their own protection).

9. Review, variation, revocation and replacement

Interim orders must be reviewed on a regular basis; within six months of the date when it was made and then every three months from the date of the preceding review until the interim order ceases to have effect.

A registrant may also ask the HCPC for an interim order to be reviewed at any time if new information becomes available or circumstances change. A registrant may also appeal to the appropriate court for the order to be varied or revoked.

At a review, an interim order may be confirmed, varied, revoked, or replaced.

If an interim order is replaced by another interim order or extended by the court before it is first reviewed, that first review does need not to take place until six months after the order was replaced or extended. If replacement or extension occurs after the first review, then the next review must take place within three months of the order being replaced or extended.

If one type of interim order is replaced by another, the replacement order may only have effect up to the date on which the original order would have expired (including any time by which the order was extended by a court).

The HCPC may apply to the appropriate court to extend an interim order for up to twelve months. Registrants will be put on notice of any such application.

When an interim order is imposed in the absence of a registrant, or despite an application to adjourn, the registrant can apply for the Interim Order to be reviewed. This will often be a significant factor in support of a decision to proceed with an interim order hearing despite the registrant's absence or application to adjourn.

10. Terminating an interim order

Interim orders can be brought to an end in three ways:

- by the court, on the application of the person who is subject to the order;
- by the Practice Committee currently dealing with the allegation to which the interim order relates; or

- automatically, when it lapses or the circumstances under which the order was made no longer exist:
 - if the order was made before a final decision is reached in respect of an allegation, when that final decision is made (but a further interim order may be made at that time); and
 - if an order was made after a final decision was reached, to have effect during the 'appeal period', either when that period expires or, if an appeal is made, when the appeal is concluded or withdrawn.

September 2018