

Harmonising Sanctions

Analysis of consultation responses

September 2008

Consultation

1. The CHRE consultation document on harmonising sanctions was produced during 2007. The purpose of the document was to seek views on the principle of harmonising sanctions across all the regulators of health professionals, and to identify the most appropriate range of sanctions to be available. It was widely distributed during November and December, in hard copy and via the website, with respondents able to use an online questionnaire. The deadline for comments was 14 March 2008.
2. There were 53 responses from a wide range of organisations and individuals. This paper presents a summary of the responses received to the consultation. The CHRE position is discussed in another paper.¹ The consultation questions can be found in annex 1.

Cautions/Warnings

3. A number of regulators have the power to issue a caution, warning, reprimand or admonishment. Cautions (or equivalent) are likely to be appropriate in cases in which there is a need to indicate to a registrant (and possibly more widely to the profession and the public) that their conduct or behaviour fell below acceptable standards, but when there is no need to take action to remove or restrict a registrant's right to practise.
4. For the majority of regulators cautions (or equivalent) are available following a finding of impairment. However, for the GMC, warnings are only available once a Fitness to Practise panel (or case examiners at the investigation stage) has concluded that the doctor's fitness to practise is not impaired. Similarly, the RPSGB's Disciplinary and Health Committees have the power to issue warnings and advice, and the Investigating Committee can issue advice, even though the registrant's fitness to practise is not found to be impaired. The GOC can also issue warnings where there is no finding of impairment. **There was a range of opinion on the opportunity to issue sanctions when fitness to practise is not impaired or before the panel stages. Further discussion on these two topics is warranted.**
5. Responses to our consultation backed the availability of a single common sanction, a caution (or equivalent), covering shortfalls in practice where a registrant's practice is found not to be impaired and when impairment is

¹ CHRE. Harmonising Sanctions. CHRE position. September 2008

found. **Further research will be carried out with patients and the public to determine the most acceptable term for this sanction.**

6. Cautions normally appear on the register for a set period of time. However, the period of time is dependent on the regulator. For example, GMC warnings remain in place for a period of five years, the NMC has the power to issue a caution for a period between one and five years, depending on the seriousness of the allegations, and the HPC can specify how long the caution applies, for instance two or three years. Other regulators do not have a time limit for how long a caution applies and would be disclosed on the register.
7. The majority of respondents felt that fitness to practise panels should have the option of issuing cautions for different lengths of time according to the circumstances of individual cases.
8. Warnings published by the GMC appear on the register during the period they remain valid and will be disclosed to any enquirer during that time. The publication of cautions or warnings underlines their seriousness. Although warnings do not restrict the registrant's practice, they indicate publicly that the registrant's conduct or behaviour fell below acceptable standards and must not be repeated. The disclosure of cautions or warnings to employers and prospective employers also ensures that they have a complete picture of any concerns regarding the registrant's fitness to practise and can take steps to monitor whether the registrant has responded.
9. In the interests of openness and transparency, a majority of respondents felt that cautions should appear on the register and be disclosed to enquirers while they remain 'live'. However some respondents felt that complete disclosure may not be appropriate in all circumstances and it may be the case that the existence of a caution is reported separately from the details of the sanction. **This topic draws together a number of wider issues that require further consideration. The availability of information on registers is an issue that will be considered in greater detail through CHRE's 2009/10 performance review process.**
10. If the registrant subsequently appears before a fitness to practise hearing it may be appropriate for the panel to take note of earlier cautions, for example, if the registrant's fitness to practise history suggests that he or she has not responded appropriately to the warning or has failed to show sufficient insight into the concerns about his or her fitness to practise.
11. It may be excessive or unfair, however, to reconsider or take account of an earlier caution in all cases. It could be seen as excessive, for example, to reconsider the concerns that led to a warning, after a gap of many years or if the original caution related to a very specific issue which does not have any relevance whatsoever to the subsequent issue.
12. **Responses to our consultation indicate that further consideration should be given to a standard procedure across all regulators to take previous cautions into account if a registrant appears before a fitness to practise at a future date. This procedure should address**

issues of relevance, timeliness and the registrant's response to any caution issued in the past.

Undertakings

13. Undertakings are agreements between the regulator and the registrant that restrict a registrant's practice. Undertakings are not appropriate for all types of concern, particularly those that need to proceed to a hearing. However, they may be appropriate following a finding of impairment at a hearing, provided the panel is satisfied that they provide sufficient safeguards for patients and the public, that they cover all the conditions that they would otherwise impose and that the registrant has shown sufficient insight to comply with the undertakings.
14. Currently there are some significant differences between the powers of regulators to accept undertakings. Some regulators can accept undertakings given at a hearing, while others can agree undertakings at the investigation stage as an alternative to proceeding to a full hearing.
15. Some regulators have the same powers to take action following a failure to comply with undertakings as they do for breaches of conditions. The benefit of undertakings at the investigation stage is that they allow the regulator to agree undertakings with the registrant, without referring the registrant to a Fitness to Practise panel. They can offer an effective, timely and proportionate way of resolving certain types of concern.
16. Responses to the consultation supported a provision in regulators' rules for panels to accept written undertakings from registrants, if they provide an appropriate response to the need for public protection. Undertakings should be disclosable, monitored and reviewed to ensure compliance. Furthermore, all regulators should have a power to agree undertakings at the investigation stage, as an alternative to a referral to a hearing.
However, further discussions are needed to establish the value and place of undertakings if conditions of practise are available (see below).

Conditions

17. Conditions enable registrants to take steps to remedy any deficiencies in their practice while placing restrictions on the types of work that they may undertake. Conditions might be appropriate when there is evidence of incompetence or significant shortcomings in a registrant's practice, but the panel is satisfied that there is potential for the registrant to respond positively to retraining and supervision. Conditions are also likely to be appropriate when a registrant's fitness to practise is impaired by ill health, but they demonstrate sufficient insight to comply with conditions.
18. It is important to ensure that any package of conditions provides adequate safeguards and that they fully address any concerns that have been highlighted about the registrant's practice. It is also important that conditions should be drafted in such a way that it will be practicable for the

registrant to comply with them and for compliance to be documented and assessed by the panel, or perhaps a third party. It may be necessary to seek specialist advice to ensure that conditions are constructed effectively.

19. There will normally be a review hearing before the period of conditions comes to an end, to consider whether the registrant is fit to return to unrestricted practice. A number of regulators have developed arrangements to monitor a registrant's compliance with conditions. They are able to order an early resumed hearing in advance of the end of period of conditions if there is evidence that the registrant has failed, without good reason, to comply with the conditions, and to establish whether alternative action is necessary.
20. This practice of early review in the event of non-compliance was supported by respondents to our consultation. There was also strong support for the availability of conditions when regulatory bodies restore registrants to the register following suspension, although this may prove problematic if restoration to the register by implication indicates a practitioner's suitability to be on the register 'without restrictions'. **Again, in the light of the range of views expressed, it would be necessary for further discussion and consideration of this point before reaching a conclusion.**

Suspension

21. Most regulators have suspension available as a sanction. The effect of suspension is that the registrant is not able to practise for a specified period of time. Normally, the regulator will have the option of extending the period of suspension at a review hearing.
22. Suspension can be used to send out a signal to the registrant, the profession and public about what is regarded as unacceptable behaviour. Indicative sanctions guidance acknowledges that suspension from the register also has a secondary punitive effect, in that it prevents the registrant from practising (and therefore from earning a living in that profession) during the period of suspension.
23. This sanction is also appropriate in a case of impairment by reason of ill-health or deficient performance, where the registrant currently poses a risk of harm to patients, but there is evidence that they have a degree of insight into their deficiencies and have the potential to be rehabilitated. This is providing that they are prepared to undergo a rehabilitation programme.
24. In many cases when a registrant is suspended, there will be a requirement for a review hearing before the period of suspension ends. This will allow the panel to determine whether the registrant is fit to return to practice. In some cases, at the original hearing, the panel will outline the measures that the registrant should undertake during his or her period of suspension, in order to address the areas of impairment. In other cases, when a very short period of suspension is imposed, there is less likely to be a requirement for a review hearing.
25. Responses supported the opportunity for all regulators to be able to use suspension alongside other measures designed to restore the registrant to

practise. This would allow registrants to take steps to address those areas where their fitness to practise has been found to be impaired, such as further training. Review hearings would allow regulators to consider whether registrants are fit to return to practise.

Erasure/Striking Off/Removal²

26. Erasure is the most severe sanction available to regulators, removing the registrant from the register for that particular profession. **Opinion on the most suitable single term for this sanction was split among those responding to the consultation and further research with patients and the public will help to clarify this.**
27. Panels considering erasure as a sanction need to consider protecting the public, maintaining public confidence and maintaining standards, and erasure would be appropriate if sanctions guidance indicated no other action would be suitable.
28. The power for all regulators to erase registrants for performance issues was supported by the majority of consultation responses. However, respondents felt this should only follow after remediation has failed or where there is a danger to the public, and it should not be used where suspension would be more appropriate.
29. Regulators' use of erasure in health cases is more contentious. Currently, most regulators do not have the power to erase a registrant if the finding of impairment relates solely to the registrant's health, though in some cases, the regulator has the power to suspend the registrant indefinitely, after two years of continuous suspension, which has the same practical effect.
30. Our consultation backed the need for help and support for registrants before erasure in health cases. However it was felt by some that there may be circumstances where health conditions fail to respond to such an approach meaning erasure, either directly or through indefinite suspension, becomes a necessary option. **The option to erase in health cases demands further work is necessary in this area before conclusions can be reached.**

Restoration of registrants following erasure

31. When a registrant is erased from a register there is a general expectation that it will normally be for life and that the registrant will not be able to practise again.
32. However, registrants are able to apply to be restored to a register once a minimum period of time has passed. This period of time can vary significantly between the regulators. For example, at the GMC, the NMC and the RPSGB it is 5 years, at the GOC it is 24 months and at the GCC it is 10 months (although the GCC has asked the Government to extend this period to three years).

² For ease, 'erasure' is used throughout.

33. In the cases where restoration to the register may be possible, there was clear support for a standard minimum period across all regulatory bodies. There was some division of opinion on this minimum, but the overall preference in consultation responses was that a period of five years should expire before applications to rejoin a register are considered.
34. Erasure would not be appropriate if it was felt that there was a possibility that the professional could return to practice having undertaken appropriate programmes to ensure their practice was up to date. Therefore, any need for flexibility around the minimum period to meet individual circumstances could be addressed through the use of suspension.
35. Respondents felt that regulators should be able to specify the kind of evidence that would need to be considered at a restoration hearing. Specifying such evidence would assist the registrant in identifying the actions that needed to be taken to prepare for restoration. However this guidance should take the form of general rules rather than case-by-case advice available in cases of suspension, as this could be seen to indicate that an individual registrant's impairment could be corrected. A common framework across all regulators specifying the evidence that would be considered at a restoration hearing should be explored.

Financial penalties

36. Fines are not commonly available to the regulators. Currently, only the GOC and, recently, the GDC (in relation to dental companies) have the power to impose fines. The GOC has found fines to be a useful sanction, particularly against business registrants. The RPSGB, which also regulates corporate bodies, does not have the power to issue fines. Fines may also be a useful tool in relation to individual registrants, for example, in fraud cases, or where sight has been tested whilst the practitioner is unregistered (for example due to an administrative error). They may be appropriate in specific circumstances (for instance self-employment) if a short-term suspension might otherwise be appropriate, as a deterrent against a repetition of the registrant's action.
37. For some respondents the introduction of fines was seen as a punitive sanction (as well as deterrent) element that is not consistent with the emphasis on public protection. Financial penalties may not be appropriate in many cases in which a registrant's fitness to practise is found to be impaired. Panels may already, in some circumstances, suspend a registrant for a fairly short period, such as a month, which is similar to a fine. A further concern was the perception that fines may be used to generate funds for regulators.
38. Those supporting fines did so on grounds of equity, for example that fines might be used for retraining costs, or that they were the only effective sanction for businesses.
39. However among those opposing fines, some respondents recognised the case for them in relation to regulators of businesses. Although fines might

not be widely applicable now, this might not be the case under future models of healthcare delivery. In the interests of harmonisation fines could be available as a sanction for all regulators for use against business registrants. It would be left to each regulator to determine the circumstances in which it is applied. Further discussion of the application and use of fines would be expected.

Interim Orders

40. Interim orders (suspensions and conditions) are available to regulators when it is necessary to take action to suspend or restrict a registrant's registration before a final decision is taken, for example, while investigations are taking place. They allow regulators to act if a registrant faces allegations of such a nature that it may be necessary for the protection of the public, is in the public interest or in the interests of the registrant, for their registration to be restricted while the allegations are investigated.
41. **Our consultation indicated widespread support for all regulatory bodies to have the option of using interim orders, with some qualification that they should be subject to appeal, time limited, and the reasons for their imposition should be clearly stated.**

Immediate sanctions

42. Registrants can appeal decisions that affect their registration, such as sanctions, to the High Courts (Northern Ireland, England and Wales) or the Court of Session (Scotland). Consequently, no sanction would take effect until the appeal period expires (28 days for most regulators, but three months for the PSNI) or any appeal is determined. Registration remains effective during this time, unless the panel imposes an immediate order, allowing the sanction to take effect immediately.
43. Some regulators have the power to impose an immediate order if they believe it is necessary for public protection, it is in the public interest, or it is in the interests of the registrant. In contrast others do not have this power and have to make an interim order to cover the appeal period when it is considered necessary to do so.
44. Responses to the consultation backed the availability of immediate sanctions for all regulatory bodies, and suggested that they should be monitored. However reservations were expressed that there should be a right of appeal first; that they should be imposed only if there was a serious risk to patients or the professional involved, and provided that the complaint was proven.

Registrant's right to appeal

45. Registrants are entitled to appeal to the High Courts (in Northern Ireland, England and Wales) and the Court of Session in Scotland against any

decision to affect his or her registration. However, currently registrants with some regulatory bodies do not have a right of appeal following the issuing of a caution or warning. They may seek leave for a judicial review of a decision to issue a caution or warning. A registrant will, however, have a right of appeal against a warning that follows a finding of impairment.

46. The majority of respondents considered that registrants should have a leave to appeal against all decisions that affect their registrations, including cautions. Some reservations were expressed that the right of appeal should be limited to conviction only, that it should not apply to cautions, or it should be restricted to process issues. **Further discussion of this issue is necessary before firm conclusions can be reached.**

Annex 1

Consultation questions

Common sanctions

1: Should all regulators in FTP cases have available the same set of sanctions?

2: If you believe that there should be a standard set of sanctions, which of the following existing sanctions should be available to all regulators: erasure from the register, suspension from practice, conditions on practice, cautions or warnings, fines?

3: Are there any other sanctions that should be included in the standard set?

Erasure / Striking off / Removal

4: Should there be a common term for 'erasure'/'striking off'/'removal' across the regulators? If so, what is your preferred term?

5: Should erasure be available to all regulators in cases in which allegations relate solely to health and/or performance?

Restoration

6: Following erasure, should there be a standard minimum period that must expire before an individual can apply for restoration to the register?

7: If so, what should it be?

8: Should all regulators be able to specify to the registrant the kind of evidence the regulator would want to consider at a restoration hearing?

Suspension

9: What powers/ recommendations can regulators have/ make when imposing and reviewing suspension orders?

Conditions

10: Should all the regulators be able to review a case early if the registrant does not comply with conditions?

11: Should the regulators be able to restrict a registrant's practice by imposing conditions on restoration to the register?

Undertakings

12: At a hearing, should there be provision in the rules of all regulators for panels to accept written undertakings from the registrant?

13: Should all regulators have a power to agree undertakings at the investigation stage, in appropriate circumstances, as an alternative to referral to a hearing?

Cautions

14: Should there be a single common sanction of warnings or cautions? If so, what should it be called? Currently, caution, warning, reprimand or admonishment are used.

15: Should cautions remain in place for a single fixed period of time? If so, for how many years?

16: Would it be helpful if FTP panels had the option of issuing cautions for different lengths of time (e.g. five years, three years, one year) to take account of the particular circumstances?

17: Should cautions be available in cases in which the registrant's fitness to practise is found:

- not to be impaired
- to be impaired?

18: Should all cautions be required by law to appear on the relevant public register? Should all cautions be disclosed to enquirers?

19: Should there be a standard procedure across regulators to take into account a previous caution, if a registrant appears before a FTP hearing at a future date?

Fines

20: Should financial penalties be made available to all regulators?

Interim orders

21: Should all regulators have a power to impose interim suspension and conditions?

Immediate sanctions

22: Should all sanctions imposed by FTP panels come into force immediately and/ or should all panels have the power to impose an immediate order?

Registrant's right to appeal

23: Should registrants have a right of appeal against all decisions that affect their registration, including cautions?

Other powers

24: Are there any other sanctions for regulators to consider?

Other comments

25: Are there any other comments or suggestions that you would like to make regarding this consultation?