



**Fitness to Practise Managers'
Forum**

16 September 2005

Item 2

Risk Factors in Section 29 Cases

Summary The risk criteria (see attached document at Annex A) are designed to assist with CHRE's decision-making in Section 29 cases by highlighting the risk factors involved in each of the categories of cases.

A set of draft criteria was originally considered at the private session of Council in February 2005 when it was decided to approach the regulatory bodies to find out whether they had undertaken any similar work.

At the May 2005 public meeting, Council considered revised risk criteria and suggested that feedback on the criteria should be sought from the regulatory bodies.

The risk criteria were sent to the Chief Executives in May 2005 and comments were sought at the FTP Forum meetings in May 2005 and July 2005.

The criteria were considered again at the CHRE Council meeting on 8 September 2005 and they were adopted by the Council for use in s29 case meetings. Council also agreed that the document will be formally reviewed annually along with the s29 Process and Guidelines document.

The Forum might wish to consider whether there is scope for the regulatory bodies to make use of the criteria in their assessment of Fitness to Practise cases.

Annex A

Risk factors for consideration of categories of cases under Section 29 of the National Health Service Reform and Health Care Professions Act 2002

Introduction

General

1. The attached checklists are intended to assist staff and Council members when they are assessing risk when considering categories of cases under Section 29. They were developed following discussions involving both members and staff of CHRE.

Categories of cases

2. The lists cover the most common and serious categories of cases considered by the regulatory bodies' fitness to practise committees. They cover the following categories of cases:

- a. Child pornography
- b. Dishonesty in relation to fraud/theft
- c. Dishonesty in relation to lying about qualifications
- d. Inappropriate prescribing/dispensing of drugs and appliances
- e. Performance cases
- f. Poor record keeping
- g. Research fraud
- h. Sexual misconduct
- i. Storage of drugs and appliances
- j. Substandard treatment
- k. Treating without consent
- l. Verbal abuse
- m. Violent behaviour

Purpose of the lists

3. The lists are designed to identify risk factors involved in each of the categories of cases and to assist in the consideration of aggravating and mitigating factors. They take into account factors relating to culpability and harm, or potential harm, caused.

4. Harm has been considered in terms of the following three principles:

- a. public protection;
- b. maintenance of confidence in the profession/system of regulation; and
- c. deterrence

5. The personal culpability of the registrant is considered in terms of aggravating and mitigating factors. Generally circumstantial mitigating factors (such as systemic issues outside the registrant's power) are likely to carry more weight in favour of the registrant than personal mitigating factors (i.e. personal problems suffered by the registrant at the time) (although CHRE notes that panels themselves often attach a significant weight to personal testimonials).

6. As they deal with risk, the lists are likely to be of most use in relation to the Section 29 test on whether it is desirable to refer "for the protection of members of the public". This has been defined in terms of the three elements a to c in paragraph 4 above in court judgements on Section 29 appeals, notably the Court of Appeal judgment on *Ruscillo* and *Truscott* and the High Court judgment on *Fleischmann*. The lists fulfil a different role from Indicative Sanctions Guidance which tends to be of more relevance in relation to the test of whether a decision is "unduly lenient". However, clearly there are links between the two and in most cases it is assumed that staff and members will have regard to both the criteria and any relevant indicative sanction guidance.

7. Some of the criteria are relevant to most or all of the categories. The following criteria have been identified as generic to all of the categories:

- a. harm to patients
- b. previous history (in relation to the specific "offence" or other "offences")
- c. frequency/extent of the "offences"
- d. insight
- e. impact on public trust in the profession (reputation of the profession)
- f. remedial action (taken by the registrant)

How to use the lists

8. Under each of the categories of cases there is a list of risk factors. Generally those factors which are considered to be the most important appear towards the top of the list. Alongside each factor there are three columns. The first relates to mitigation, the second aggravation and the third is for comments. Anyone considering a case is expected to make a judgment on all of the criteria as to whether they represent a mitigating or aggravating factor in relation to the registrant. In some instances the question is a binary one (i.e. whether the registrant has been convicted – yes or no) but in many cases there will be a judgment to be exercised (i.e. whether the registrant has insight). In the latter sort of cases there is a scale represented as [-----] and the person considering the case should consider where on the scale from aggravation to mitigation the case falls with respect to that criterion.

9. The final column is for comments. In some cases a comment is already made suggesting the sort of issue which it might be worth considering in relation to that particular criterion.

Conclusion

10. This is a living document and the criteria will be subject to regular review. We would welcome any suggestions for amendments or additions. The criteria are intended to inform decision-making, in particular at case meetings of Council members. Staff will also have these criteria in mind in determining whether cases should be referred to case meetings.

11. The criteria will be added to the Section 29 manuals. The criteria and the other documents in the manual are intended to facilitate more systematic consideration of cases. The criteria will also be made available to the regulatory bodies who might find that they assist in the consideration of fitness to practise cases.

Michael Andrews
CHRE, Fitness to Practise Manager
September 2005

**RISK FACTORS FOR CONSIDERATION:
CHILD PORNOGRAPHY CASES**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
On Sex Offenders Register	No	Yes	for how long?
Category of Pornographic Material	Low (level 1) [-----]	High (level 5)	no. at each level
Extent of Material Possessed (i.e. size of 'collection')	Small [-----]	Extensive number of photos	
Where Accessed	Home	Work/Public	
Paid for Access	No	Yes	
Previous history	No	Yes	for same/other?
Level of involvement (e.g. took/distributed photos)	Low [-----]	High	
Direct risk of physical harm (e.g. access to children or evidence of inappropriate behaviour)	Low [-----]	High	
Insight	Apparent [-----]	Absent	
Impact on Public Trust in the Profession (or reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	
Undertaken therapy?	Some	None	carried out voluntarily or related to conviction

**RISK FACTORS FOR CONSIDERATION:
Dishonesty/fraud/theft**

	Mitigating	Aggravating	Comment
Caused harm to patients (e.g. theft from patient)	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Location	Outside work	at work	
Previous history	No	Yes	for same/other?
Deliberate targeting of vulnerable	No	Yes	
Intent (e.g. how much did they intend to steal)	Small scale [-----]	Large scale	
Extent of abuse of position of trust	Low [-----]	High	
Theft from employer or Public funds	Minor [-----]	Substantial	
Value of property stolen	Low [-----]	High	
Frequency of actions	Low [-----]	High	
Previous history	No	Yes	for same/other?
Method (e.g. violence, threats, working with others)	Minor [-----]	Aggravated	
Planned	Opportunistic [-----]	Highly prepared	
Insight	Yes [-----]	No	e.g. paid back /paying back

Likelihood of re-offending
(e.g. drug habit)

Low High
[-----]

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

**RISK FACTORS FOR CONSIDERATION:
Dishonesty – lying about qualifications**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Previous history	No	Yes	for same/other?
Criminal Conviction	No	Yes	sentence
Outcome	None	Obtained job beyond competence (or status/pecuniary advantage)	
Frequency of dishonesty	One-off [-----]	Repeated	
Nature of dishonesty	Omissions/ economy with truth [-----]	Serious intention to mislead	
Magnitude/scale	Slight fabrication [-----]	Significant untruths	
Insight	Apparent [-----]	Absent	
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	

**RISK FACTORS FOR CONSIDERATION:
Inappropriate and inaccurate prescribing/dispensing of drugs and appliances**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Previous history	No	Yes	for same/other?
Outcome/potential outcome	Minor [-----]	Serious/life threatening	
Frequency	Sole error [-----]	Part of a pattern	
Supervision (of registrant)	Inadequate	Adequate	
Departure from established processes/procedures	No [-----]	Yes	
Inappropriate delegation of functions to others	No	Yes	
Intent to harm	Low [-----]	High	
Personal advantage	No	Yes	
Institutional advantage	No	Yes	
Pressure from supervisor	Yes [-----]	No	
Likelihood of re-offending (e.g. drug habit)	Low [-----]	High	
Insight	Apparent [-----]	Absent	
Record keeping	Sufficient [-----]	Insufficient or deliberately altered	

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

**Risk Factors for consideration
Performance Cases**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Previous history	No	Yes	for same/other?
Complaints from patients	Few [-----]	Many	
Due to poor health	Yes	No	
Level of Supervision (of registrant) (if working in supervised context)	Inadequate	Adequate	
Likelihood of repetition	Low [-----]	High	
Departure from established processes/procedures	No [-----]	Yes	
Performance Assessment *	Many of areas of concern [-----]	few areas of concern	
Improvement since first performance assessment (if relevant) *	Yes [-----]	No	
Cooperated with performance Assessment * (if relevant)	Yes [-----]	No	
Long history of poor performance	No [-----]	Yes	
Followed previous recommendations of Panel? (if relevant)	Yes [-----]	No	

Likelihood of rectifying areas of concern (Stage in career, age, attitude)	Strong [-----]	Poor
Evidence of efforts to address areas of concern	Yes [-----]	No
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High
Taken remedial action	Some [-----]	None
Insight	Apparent [-----]	Absent

* Most likely to be relevant in GMC cases

**RISK FACTORS FOR CONSIDERATION:
Poor record keeping**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Previous history	No	Yes	for same/other?
Frequency	Sole error [-----]	Part of a pattern	
Deliberate	No	Yes	
Departure from established processes/procedures	No [-----]	Yes	
Level of Supervision (of registrant) (if working in supervised context)	Inadequate	Adequate	
Destroying records	No	Yes	
Insight	Apparent [-----]	Absent	
Attempted to cover up (including involving other people in covering up)	No	Yes	
Deliberately tampering with colleague's records	No	Yes	
Use of inappropriate/offensive terms	No	Yes	
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	
IT capability	Some [-----]	None	intransigence in learning IT?

**RISK FACTORS FOR CONSIDERATION:
Research fraud**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Fraudulently obtaining funding	No	Yes	
Presenting fraudulent research for publication	No	Yes	
Including patient's/patient data without their consent	No	Yes	
Intent (i.e. how much did they intend to gain)	Small scale [-----]	Large scale	
Departure from established processes/procedures	No [-----]	Yes	
Frequency of actions	Low [-----]	High	
Personal advantage	No	Yes	
Institutional advantage	No	Yes	
Pressure from supervisor	Yes [-----]	No	
Using other researcher's names in research without their consent	No	Yes	
Insight	Apparent [-----]	Absent	

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

**RISK FACTORS FOR CONSIDERATION:
Sexual misconduct**

Inappropriate relationships

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Age of victim	Adult	Underage	
Coercion (violence, threats)	No evidence [-----]	Apparent	
Vulnerability of victim (e.g. drug or emotional dependency)	Low [-----]	High	
Using knowledge of marital /relationship problems or abuse	No	Yes	
Degradation of the victim	Low [-----]	High	
Prescribing contraception for victim	No	Yes	
Context of relationship	Social	At work	
Abuse of professional position	Low [-----]	High	
Repetition with same person	Few times [-----]	Many times	
Repetition with other patients or family members of victim	One person [-----]	Many people	
Insight	Apparent [-----]	Absent	

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

Undertaken therapy?

Some None

carried out
voluntarily or related
to conviction

**RISK FACTORS FOR CONSIDERATION:
Sexual misconduct**

Indecent assaults

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Contemporaneous victim complaint to a third party	No	Yes	
Previous history	No	Yes	for same/other?
Number of victims	Low [-----]	High	
Intimidation (e.g. use of violence, threats)	No evidence [-----]	Apparent	
Vulnerability of victim (e.g. underage, elderly)	Low [-----]	High	
Pretence of clinical appropriateness	No	Yes	
Abuse of practice and procedures (e.g. no chaperones, breach of codes)	No	Yes	
Trying to cover up actions in patients' notes	No	Yes	
Insight	Apparent [-----]	Absent	
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	
Undertaken therapy?	Underway	Not Considered	

**RISK FACTORS FOR CONSIDERATION:
Storage of drugs or appliances**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Outcome/potential outcome	Minor [-----]	Serious/life Threatening	ended up on black market?
Nature of drugs	Non-prescription [-----]	Controlled	drugs of abuse
Amount	Low [-----]	High	
Out of date drugs	No	Yes	
Poor labelling	No	Yes	
Departure from established processes/procedures	No [-----]	Yes	
Insight	Apparent [-----]	Absent	
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	

**RISK FACTORS FOR CONSIDERATION:
Substandard treatment**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Outcome/potential outcome	Minor [-----]	Serious/life threatening	
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Frequency	Sole error [-----]	Part of a pattern	
Over-treatment	No	Yes	
Failure to refer	No	Yes	
Supervision of registrant if working in supervised context	Inadequate	Adequate	
Deliberate	No	Yes	
Mistakes	No	Yes	
Due to systemic issues	Yes	No	
Departure from established processes/procedures	No [-----]	Yes	
Acting outside competence	No	Yes	
Likelihood of re-offending (e.g. drug habit)	Low [-----]	High	
Insight	Apparent [-----]	Absent	
Attempted to cover up (including involving other people in covering up)	No	Yes	

Failure to supervise junior colleague

No Yes
[-----]

Motivation

Non-discriminatory Discriminatory types of discrimination e.g. racial, sexual, religious

Poor record keeping

No Yes
[-----]

Impact on Public Trust in the Profession
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

**RISK FACTORS FOR CONSIDERATION:
Treating without consent**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence?
Acting against patient's express wishes	No	Yes	
Previous history	No	Yes	for same/other?
Deliberate	Oversight [-----]	Intentional	
Arrogance/not caring whether patient consents	No [-----]	Yes	
Cavalier attitude	No [-----]	Yes	
Departure from own established processes/procedures	No [-----]	Yes	
Departure from Trust/PCT Employers' protocol/ procedures	No [-----]	Yes	
Intimidation	No [-----]	Yes	
Consent given but not understood	No	Yes	
Failure to get informed consent	No	Yes	
Acted in patient's best interests	Yes	No	
Insight	Apparent [-----]	Absent	

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

**RISK FACTORS FOR CONSIDERATION:
Verbal abuse**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Vulnerability of victim (i.e. deliberate targeting of a vulnerable patient)	Low [-----]	High	
Motivation	Non-discriminatory	Discriminatory	types of discrimination e.g. racial, sexual, religious
At work	No	Yes	
Level of intimidation	Low [-----]	High	
Extent of abuse of position of power	Low [-----]	High	
Insight	Apparent [-----]	Absent	
Registrant subject to provocation	Yes [-----]	No	
Impact on Public Trust in the Profession (or Reputation of profession)	Low [-----]	High	
Taken remedial action	Some [-----]	None	

**RISK FACTORS FOR CONSIDERATION:
Violent behaviour**

	Mitigating	Aggravating	Comment
Caused harm to patients	No [-----]	Yes	extent of harm
Criminal Conviction	No	Yes	sentence
Previous history	No	Yes	for same/other?
Number of victims	Few [-----]	Many	
Number of offences against one victim	Few [-----]	Many	
Vulnerability of victim (i.e. deliberate targeting of a vulnerable patient)	Low [-----]	High	
Location of action	Other	Work	
Degree of violence (e.g. use of weapon, acting in a group)	Low [-----]	High	
Rough handling of patient	No [-----]	Yes	
Neglect of patient	No [-----]	Yes	
Ill treatment of patient	No [-----]	Yes	
Sexual motivation	Absent	Present	
Health of registrant	In treatment	Not an issue	
Planned	No [-----]	Yes	
Motivation	Non-discriminatory	Discriminatory	types of discrimination e.g. racial, sexual, religious

Response to provocation
(e.g. racial harassment)

Yes No
[-----]

Insight

Apparent Absent
[-----]

**Impact on Public Trust
in the Profession**
(or Reputation of profession)

Low High
[-----]

Taken remedial action

Some None
[-----]

ERROR: undefinedfilename
OFFENDING COMMAND: c

STACK: