

Council - 11 December 2008

## Indicative Sanctions Practice Note

### Executive summary and recommendations

#### **Introduction**

Article 29 of the Health Professions Order 2001 (the 2001 Order) sets out the orders that can be imposed by panels of the Health and Conduct and Competence Committee when they have determined that an allegation is well-founded.

The Executive undertakes a review of the indicative sanctions practice note once a year so as to ensure that it continues to reflect current practice and any changes in regulatory case law and legislation.

In the future, the practice note will be reviewed to include guidance on procedure to be adopted following the implementation of the Safeguarding Vulnerable Groups Act.

The changes to the document are underlined.

#### **Decision**

The Council is asked to discuss and approve the attached policy

#### **Background information**

Article 29 of the Health Professions Order sets out the sanctions that panels of the Conduct and Competence and Health Committee can impose.

#### **Resource implications**

None

#### **Financial implications**

None

#### **Appendices**

Indicative Sanctions Practice Note

#### **Date of paper**

1 December 2008

# Indicative Sanctions Policy

## Introduction

This document sets out the Council's policy on the sanctions which it considers should be applied by Panels in fitness to practise cases.

The decision as to what, if any, sanction should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the Panel which considered the case. To maintain the separation of policy making and adjudicative functions, Council members do not sit on fitness to practise Panels and it would be inappropriate for the Council to set a fixed "tariff" of sanctions, as a Panel must decide each case on its merits.

This policy is intended to aid Panels in their deliberations and assist them in achieving consistency and transparency in the decision-making process. In presenting cases to Panels, advocates appearing on behalf of the Council will draw this policy to the attention of the Panel in any submissions made at the sanctioning phase of a hearing.

## Equality & Diversity

The Council is committed to promoting equality and valuing diversity and Panels are expected to conduct fitness to practice proceedings in a fair and non-discriminatory manner.

As the primary purpose of fitness to practise proceedings is to identify and secure a proportionate measure of public protection rather than to punish, a key factor in many cases will be the extent to which a registrant recognises his or her failings and is willing to address them.

In taking account of any insight, explanation, apology or remorse offered by a registrant, Panels are reminded that there may be significant cultural differences in the way that these may be expressed - both verbally and non-verbally – and especially where the registrant may not be using his or her first language.

In deciding what, if any, sanction is required, the issue which the Panel needs to determine is whether the registrant has genuinely recognised his or her failings and the steps needed to address them rather than focusing on the exact form in which this may be expressed.

## The Purpose of Sanctions

The function of fitness to practise Panels is not intended to be punitive. A Panel's task is to determine whether, on the basis of the facts before it, the fitness to practise of a registrant is impaired. In effect, the task is to consider a registrant's past acts, determine whether the registrant's fitness to provide professional services is below accepted standards and to consider the risk that he or she may pose to those who may need or use his or her services in the future and thus what degree of public protection is required.

It is important to remember that a sanction may only be imposed in relation the facts which a Panel has found to be true or which are admitted by the registrant. In particular, if there is any suggestion that a case has proceeded on the basis of "specimen" allegations, then a sanction should not be imposed on a wider basis than that revealed by those specimen allegations.

If a Panel has determined that ~~an allegation is well founded~~ **a registrant's fitness to practice is impaired**, it is not obliged to impose a sanction and, if it is satisfied that it is appropriate to do so, may decide not to take any further action.

For example, taking no further action will be appropriate for minor, isolated, lapses where there has been an apology, remorse or corrective action taken and the registrant fully understands the nature and effect of the lapse.

If further action is to be taken then a range of ~~sanctions~~ **options** are available which will enable a Panel to take the most appropriate steps to protect the public. Article 29 of the Health Professions Order 2001 (the Order) provides that those ~~sanctions~~ **options** are:

- mediation
- caution
- conditions of practice
- suspension
- striking off

Although the primary function of any sanction is to address public safety from the perspective of the risk which the registrant concerned may pose to those who use or need his or her services, in reaching their decisions, Panels must also give appropriate weight to the wider public interest considerations, which include:

- the deterrent effect to other registrants;
- the reputation of the profession concerned; and
- public confidence in the regulatory process.

## Proportionality

In deciding what, if any, sanction to impose, Panels should apply the principle of proportionality, balancing the interests of the public with those of the registrant.

## **Cases involving criminal convictions and cautions**

Where an allegation arises from a registrant's conviction for a criminal offence, the Panel cannot "go behind" that conviction and re-try the case but must determine the appropriate sanction on the basis of the nature and gravity of the offence concerned.

A similar approach should be adopted when considering an offence for which a registrant has accepted a police caution, as a caution cannot be given unless the offender has admitted guilt.

In considering the nature and gravity of an offence for which a registrant has been convicted or received a caution, Panels should take account of whether it brings the profession into disrepute or may undermine public confidence in the profession concerned.

Panels need to remember that most **criminal** offences penalise conduct rather than the motive for that conduct. Consequently, a person's motives will rarely have any bearing on the assessment of the gravity of an offence as, irrespective of motive, the same harm will arise from that offence. Offending behaviour can often be explained and indeed is explained on a daily basis in the courts, but the gravity of an offence will not be reduced by the asserted motive for it.

Although Panels cannot re-try criminal cases, in determining the appropriate sanction they may take account of whether or not the registrant pleaded guilty to the offence. A person who is convicted of an offence but maintains that the conviction was wrong may lack insight into their offending behaviour and this may have a significant bearing upon the sanction which a Panel should impose in order to protect the public.

In reaching its decision, a Panel should also take account of any punishment or other order imposed by the courts, but must bear in mind that the sentence imposed is not a definitive guide to the seriousness of an offence. Panels should not assume that a non-custodial sentence implies that an offence is not serious and must remember that, among the reasons which may have led the court to be lenient, is the expectation that the registrant will be subject to regulatory action.

## ***Community Sentences***

Community sentences are intended to enable the courts to address different aspects of an individual's offending behaviour and to combine punishment with rehabilitation or reparation. Consequently, a community sentence may not simply be an order to undertake unpaid community work but may also include other orders such as compliance with a curfew, exclusion from certain areas or a residence requirement or an order to undergo mental health, drug or alcohol treatment.

Where a registrant is subject to a community sentence Panels need to take account of the terms of that sentence but, generally, it will be inappropriate to impose a sanction which would allow the registrant to remain in or return to unrestricted practice whilst they are subject to that sentence.

Similar consideration needs to be given to any requirement to register under the Sex Offenders Act 1997. Although inclusion on the sex offenders' register is not a punishment, it is intended to secure public protection from those who have committed certain types of offences. Generally, Panels should regard it as incompatible with HPC's obligation to protect the public to allow a registrant to remain in or return to unrestricted practice whilst subject to registration.

### ***Child Pornography Offences***

The ease with which child pornography can be downloaded from the internet has resulted in a significant increase in cases involving child pornography before both the courts and regulatory bodies.

In determining the appropriate sanction in such cases, Panels needs to be aware that the Court of Appeal (in *R v Oliver* [2003] 1 Cr. App. R. 463) has established a test for determining the seriousness of offences involving downloading child pornography from the internet by reference to (1) the nature of the activity undertaken and (2) the nature of the images involved. In relation to the nature of the activity, consideration needs to be given to:

- proximity to, and responsibility for, the original abuse. Taking the original photographs is more serious than downloading images, which, in turn, is more serious than merely locating images on the Internet; and
- any element of commercial gain or activity, which although not for gain, fuels demand for such images (e.g. swapping of material).

In relation to the nature of the images, a scale from 1 to 5 has been set based upon the harm caused to the children involved in producing those images:

Level 1: erotic posing with no sexual activity;

Level 2: sexual activity between children, or solo masturbation by a child;

Level 3: non-penetrative sexual activity between adults and children;

Level 4: penetrative sexual activity between children and adults;

Level 5: sadism or bestiality.

Panels should ensure that, in cases involving child pornography, they obtain and take account of appropriate guidance on the application of the Oliver criteria. However, whilst the courts distinguish between degrees of seriousness, largely to assist in sentencing decisions, the Council considers that all child pornography involves some degree of exploitation or abuse of a child and **the viewing, downloading and reproduction of such images creates further demand for them.** Therefore any conviction for such an offence is a serious matter which undermines patients' trust in registrants.

## **Sanctions**

### ***Mediation***

Mediation is not really a sanction as such but is a consensual process and will be most appropriate where issues between the registrant and another party (e.g., the complainant or an employer) remain unresolved.

Mediation may only be used where the Panel is satisfied that the only other appropriate course would be to take no further action. A case may only be sent for mediation if the Panel is satisfied that no further sanction is required. Clearly this will generally be only where the fitness to practise impairment is of a minor and isolated nature which is unlikely to recur, where the registrant fully understands the nature and effect of that impairment and has taken appropriate corrective action.

### ***Caution Order***

*A caution order must be for a specified period of between one year and five years.*

For slightly more serious cases, where there may be a low risk of recurrence but where the lapse has been corrected and was of a minor nature, a caution may be the most appropriate step to take.

*As cautions may be imposed for any period between one and five years at the Panel's discretion, in order to ensure that a fair and consistent approach is adopted, Panels should regard a period of three years as the 'benchmark' for a caution and increase or decrease that period if the particular facts of the case make it appropriate to do so.*

### ***Conditions of Practice Order***

*A conditions of practice order must be for a specified period not exceeding three years.*

Conditions of practice will be most appropriate where a failure or deficiency is capable of being remedied and where the Panel is satisfied that allowing the registrant to remain in practise, albeit subject to conditions, poses no risk of harm or future harm.

Conditions must be limited to a maximum of three years and therefore are remedial or rehabilitative in nature. Before imposing conditions a Panel should be satisfied that there is no general failure, that the matter is capable of correction and that appropriate, realistic and verifiable conditions can be formulated. Whatever the conditions imposed, another Panel must be able to consider and determine whether the conditions have or are being met.

Conditions of practice provide a very flexible means of disposing of cases. A combination of conditions may be imposed, including formal education and training requirements. Equally, in some cases it will be appropriate to impose a single condition for a relatively short period of time to address a specific concern (e.g. to undertake specific remedial training).

The imposition of conditions requires a commitment on the part of the registrant to resolve matters and therefore conditions of practice will not be suitable in situations where problems cannot be overcome such as serious overall failings, lack of insight, denial or matters involving abuse of patients or dishonesty.

Above all, conditions must be realistic and there is a limit to how far they may extend. For example, a combination of conditions which require a practitioner not to carry out home visits, out of hours working, unsupervised treatment, or treatment outside of an NHS setting may well amount in practice to a suspension and thus be far too wide.

In relation to drug abuse cases careful consideration needs to be given to whether conditions of practice are an appropriate remedy if they are being used as a means of controlling the setting in which a registrant operates and thus his or her access to prescription drugs. In particular, they may not work for all professions. For example, removing a radiographer from an accident and emergency setting may well be a realistic condition but suggesting that a paramedic does not work in such settings may not be a viable option.

Before deciding to impose conditions of practice, Panels need to reflect on the fact that, whilst conditions can be drafted so that they are verifiable, including providing mechanisms for verifying compliance, to a large extent the registrant will be trusted to adhere to those conditions. Where the allegation before the Panel is founded upon a breach of trust – for example, cases involving abuse or dishonesty – the Panel will need to consider carefully whether it is likely that the registrant can be trusted not to breach any conditions of practice which may be imposed.

Article 29(7)(c) of the Order enables Panels to specify a minimum period (of up to two years) for which a conditions of practice order is to have effect before the registrant may apply to vary, replace or revoke it. In general, Panels should only exercise that power in cases where either it is clear from the evidence that earlier review is unlikely to be of value or where the nature of the conditions imposed makes it inappropriate.

### **Suspension Order**

*A suspension order must be for a specified period not exceeding one year.*

Suspension should be considered where conditions are insufficient to protect the public or where the allegation is serious but a realistic prospect exists that repetition will not occur and thus striking off is not merited.

A registrant who is suspended is treated as not being registered and thus cannot practise. However, Article 22(8) of the Order provides that the registrant's name is to remain on the register during that time (in an appropriately marked form) and and that the registrant may be the subject of further fitness to practice proceedings for events which occur whilst he or she is suspended.

Suspension is punitive in nature and this needs to be borne in mind. If the evidence suggests that the registrant will be unable to resolve or remedy his or her failings then striking off may be the more appropriate option. However, where the registrant has no psychological or other difficulties preventing him or her from understanding and seeking to remedy the failings then suspension may be appropriate.

Suspension for short periods of time (i.e. less than a year) is a punitive step which Panels generally should not use. In particular, Panels need to be aware that a short term suspension may have long term consequences for the registrant, including being dismissed from his or her current employment.

However, Sshort term suspension may be appropriate where a registrant's current status means that they would not be able to respond to and comply with conditions of practice but where there is a realistic prospect that, if they can resolve their present difficulties whilst suspended, conditions of practice could then be imposed.

This approach is likely to be most appropriate in cases involving, for example, substance abuse where, at the time of the case, the registrant is seeking or undergoing treatment but has not reached the stage where he or she could safely return to practice even subject to conditions. If a short term suspension is imposed for this sort of purpose, the Panel should give clear reasons for doing so.

Suspension orders cannot be made subject to conditions but, where the Panel expects the registrant to address certain issues or do certain things before he or she can be considered for restoration to the register – for example, to undergo substance abuse treatment – this must be made clear to the registrant so that, when the order comes to be reviewed, he or she understands what is likely to be expected of them and the evidence that may need to be submitted to the reviewing Panel.

Article 29(7)(b) of the Order enables Panels to specify a minimum period (of up to 10 months) for which a suspension order is to have effect before the registrant may apply to vary, replace or revoke it. In general, Panels should only exercise that power in cases where it is clear from the evidence that earlier review is unlikely to be of value.

### **Striking Off Order**

A striking-off order may not be made in respect of an allegation relating to competence or health unless the registrant has been continuously suspended, or subject to a conditions of practice order, for a period of two years at the date of the decision to strike off.

Striking off is a sanction of last resort for serious, deliberate or reckless acts involving abuse of trust such as sexual abuse, dishonesty or persistent clinical failure. Striking off should be used where there is no other way to protect the public, for example, where there is a lack of insight, continuing problems or denial. An inability or unwillingness to resolve matters will suggest that a lower sanction may not be appropriate.

Striking off is a long term sanction. Article 33(2) of the Order provides that, unless new evidence comes to light, a person may not apply for restoration to the register within five years of the date of a striking off order being made. Panels do not have the power to vary that restriction.

## **Sanctioning procedure**

The range of sanctions available to Panels should not influence the decision as to whether or not an allegation is well founded and the finding of fact and sanctioning phases of a hearing should be (and be seen to be) separate elements of the process.

To reinforce this point, Panels should first retire to determine whether or not an allegation is well founded and then return to announce their decision and the reasons for that decision. Where the Panel has decided that **fitness to practise is impaired** ~~an allegation is well founded~~ it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring for a second time to determine what, if any, sanction to impose and then return to announce that sanction and the reasons for that sanction.

Whilst it may appear obvious, Panels must ensure that registrants fully understand any sanction which is being imposed upon them. The Panel Chair~~man~~ should carefully explain what sanction, if any, the Panel has imposed, the reasons for it and its consequences for the registrant in clear and direct speech which leaves no room for misunderstanding or ambiguity. In particular, Chair~~man~~s should avoid the temptation to give homilies or lectures, which often obscure clear communication of the Panel's decision.

## **Interim Orders to give effect to decisions**

If a Panel makes a striking-off order, suspension order or conditions of practice order, Article 31 of the Order enables the Panel to also make an interim suspension or conditions of practice order which will apply during the time allowed for appealing against the final disposal order or, if such an appeal is made, whilst that appeal is in progress.

The power to impose an interim order is discretionary and, consequently, Panels should not regard their making as an automatic outcome of such proceedings.

If the Panel is considering imposing an interim order, before doing so it must give the parties an opportunity to address the Panel specifically on the issue of whether or not such an order should be made.

Whether an interim order is necessary will depend upon the circumstances in each case, but panels should consider imposing an such an order in cases where:

- there is a serious and ongoing risk to service users or the public from the registrant's lack of professional knowledge or skills; conduct or health problems; or
- the allegation is so serious that public confidence in the profession or the regulatory process would be seriously harmed if the registrant was allowed to remain in practice on an unrestricted basis.

## **Review of orders**

~~In making a caution order, conditions of practice order or suspension order Panels may specify a period in which an application to vary, replace or revoke the order may not be made. The specified period shall not exceed two years in the case of a conditions of practice order or 10 months in the case of a suspension order.~~

~~For a striking off order, Article 33(2) of the Health Professions Order 2004 specifies that, unless new evidence comes to light, an application for restoration to the register may not be made within 5 years of the date of the order.~~

Conditions of practice orders and suspension orders must be reviewed by a Panel (but not necessarily the one that made them) before they expire and caution orders may but need not be similarly reviewed. Following any review the Panel may:

- confirm the order;
- extend the period for which the order has effect (but a conditions of practice order may not be extended by more than three years at a time or a suspension order by more than one year at a time);
- replace the order with one it could have made at the time it made the order being reviewed;
- make a conditions of practice order which takes effect when a suspension order expires;
- reduce the duration of an order (but a caution order may not be reduced to a duration of less than one year);
- revoke or vary any condition imposed by the order;
- revoke the order.

Article 30(6) of the Order enables a Panel, when revoking a suspension order, to do so subject to the registrant complying with HPC's "returners to practice" requirements. However, in many instances the "returners" requirements - which are primarily intended for those who have taken a career break and simply specify a fixed number of days supervised practice – may be insufficiently flexible to meet the needs of the case.

*In cases where Panels wish to impose specific requirements on a registrant who is being permitted to resume practising, replacing a suspension order with a conditions of practice order is likely to be the better option. This also provides the added safeguard that further action can be taken if there is any breach of those conditions of practice.*

## **Drafting decisions**

In drafting decisions Panels should set out all of the sanctions options which are available to them, the sanction they have decided to impose and the reasons for doing so. For example:

*The Panel has considered each of the sanctions available to it and has decided that, given the severity of the case, to take no further action or to impose a caution or conditions of practice in this case would not adequately protect the public. Consequently, the remaining options are suspension or striking off.*

*Taking account of the steps which you are taking to address your conduct, the Panel reached the conclusion that striking off would not be appropriate. Accordingly, the Panel has decided to suspend your registration for a period of one year. In all the circumstances we believe this to be a proportionate sanction.*

The Panel must also set out clearly the Order which they have made. Cautions, conditions or practice, suspension and striking off orders should be written in a form which is addressed to the Registrar who must annotate or amend the register in accordance with the Panel's decision. For example:

### **Caution Order**

**ORDER:** That the Registrar be directed to annotate the register entry of [name] with a caution which is to remain on the register for a period of [three] year(s).

### **Conditions of Practice Order**

**ORDER:** That the Registrar be directed to annotate the register entry of [name] to show that, from the date that this order takes effect ("the operative date") and for a period of [x] years, [name] must comply with the following conditions of practice:

1. within [time period] of the operative date, (s)he shall undertake, and provide evidence to the Committee that (s)he has undertaken training in [subject];
2. three months from the operative date and at quarterly intervals thereafter for a period of [time], (s)he shall submit to the Committee [evidence of ???];
3. promptly inform the Committee if (s)he ceases to be employed by [employer].

### ***Suspension Order***

**ORDER:** That the Registrar be directed to suspend the registration of [name] for a period of [x] year(s).

### ***Striking Off Order***

**ORDER:** That the Registrar be directed to strike [name] off the register.

### **Drafting Conditions of Practice**

From the above examples it will be seen that the drafting of Conditions of Practice Orders is the more difficult task. This is especially so given that Orders do not take effect until the relevant appeal period has expired or, if there is an appeal, it has been disposed of or withdrawn. As a result the date from which an Order takes effect will not be a fixed date.

For most other Orders, which simply run for a fixed period of years, this does not cause much difficulty. However, conditions of practice inevitably involve periodic compliance arrangements and, if conditions of practice are to work, the dates on which evidence of compliance is to be sent to HPC must be clear and certain, so that appropriate follow up action can be taken in relation to those who breach an Order. The simplest way to overcome this difficulty is to define the date on which the Order finally takes effect as its operative date and then to relate all other dates and time limits to that operative date.

In drafting conditions of practice Panels also needs to consider the following three questions:

#### ***1. are the conditions realistic?***

- will the registrant be able to comply with these conditions?
- are the conditions proportionate and do they provide the necessary level of public protection?
- will they work if the registrant changes jobs?

For example, if the conditions require the registrant to improve treatment premises, facilities or equipment, they should only be set at the standard reasonably required of a typical practitioner from the profession or specialism concerned. In setting conditions of this kind, Panels should take account of any relevant guidance issued by professional bodies or similar organisations.

Equally, if conditions have been prepared with the support of the registrant's employer and are thus job-related, it may be necessary to include a condition requiring the registrant to inform HPC if he or she changes jobs.

#### ***2. are the conditions verifiable?***

- do they impose obligations that require straightforward yes or no compliance decisions?

- do they simply require the registrant to do something or must they also prove it has been done?
- can the due dates be clearly determined from the Order?

For example, conditions requiring a registrant not to treat certain types of case or patient may not need ongoing proof of compliance but many other conditions will need to be supported by evidence, such as periodic written confirmation from a clinic that the registrant is continuing to undergo alcohol dependency treatment. Where evidence is required it should be in a form which allows yes or no decisions to be made. Conditions requiring registrants to submit documents or records to HPC for assessment or audit will not meet this requirement.

In cases where compliance with conditions may need to be verified by HPC by means of inspection - for example, conditions to improve premises or facilities, record keeping systems or chaperoning arrangements - the Panel's order should include a specific requirement that the registrant must allow and co-operate with inspection by HPC upon reasonable notice.

### **3. are the conditions directed at the right person?**

- do the conditions clearly impose obligations on the registrant?
- are any conditions mistakenly directed at someone else?

It is for the registrant to comply with the conditions which have been imposed and, in drafting orders, care must be taken not to inadvertently impose a condition on a third party, such as an employer or GP. There is a significant difference between "you must submit to the Committee evidence from the doctor treating you that..." and "your GP must submit to the Committee evidence that..."

### **Advice from the Legal Assessor**

Panel members are reminded that Article 34(3) of the Order allows Legal Assessors to assist the Panel in drafting their decisions. Panels should therefore take advantage of the expertise Legal Assessors can offer in this regard, particularly in relation to the drafting of conditions of practice.

*The Legal Assessor's role is to assist in the drafting of the decision and not the making of that decision. Panels should have established a clear outline of their decision, including their findings in relation to the evidence and on impairment, before asking the Legal Assessor to join them and assist in drafting that decision.*

Panels must take steps to ensure that no confusion arises on the part of the registrant or any other party as to the role the Legal Assessor is playing, for example, by making it clear in open session that the Panel has reached a decision and is now asking the Legal Assessor to join them to assist in the drafting of the decision or inviting the Legal Assessor to explain this particular aspect of their role to the parties before the Panel retires.

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