Council, 3 December 2013

Indicative Sanctions Policy

Executive summary and recommendations

Introduction

A new provision has been added to the Indicative Sanctions Policy to provide guidance to Panels on multiple sanctions. Those revisions are attached to this paper as an appendix.

Decision

The Council is asked to discuss and approve the revisions to the Indicative Sanctions Policy

Background information

None

Resource implications

None

Financial implications

None

Appendices

Indicative Sanctions Policy

Date of paper

21 November 2013

Indicative Sanctions Policy

Introduction

1. This document sets out the Health and Care Professions Council's policy on how sanctions should be applied by Practice Committee Panels in fitness to practise cases.

2. The decision as to what sanction, if any, should be imposed on a registrant whose fitness to practise has been found to be impaired is properly a matter for the Panel which heard the case. Practice Committee Panels operate at 'arm's length' from the Council and it would be inappropriate for the Council to set a fixed 'tariff' of sanctions. This policy is only guidance and Panels must apply it as such. Panels must decide each case on its merits, and that includes deciding what, if any, sanction to impose.

3. This policy is intended to aid Panels in their deliberations and assist them in making fair, consistent and transparent decisions. The Council also provides further guidance to Panels on specific aspects of the adjudicative process in a series of Practice Notes.

The purpose of sanctions

4. The purpose of fitness to practise proceedings is not to punish registrants, but to protect the public. Inevitably, a sanction may be punitive in effect, but should not be imposed simply for that purpose. The Panel's task is to determine whether, on the basis of the evidence before it, the registrant's fitness to practise 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 whether he or she may pose a risk to those who may need or use his or her services in the future. Where such a risk is identified, the Panel must then determine what degree of public protection is required.

5. It is important for Panels to remember that a sanction may only be imposed in relation to the facts which a Panel has found to be true or which are admitted by the registrant. Equally, it is important that any sanction addresses all of the relevant facts which have led to a finding of impairment.

6. 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. However, in reaching their decisions, Panels must also give appropriate weight to the wider public interest, which includes:

   - the deterrent effect to other registrants;
   - the reputation of the profession concerned; and

- public confidence in the regulatory process.

7. If further action is to be taken then a range of sanctions is available which enables a Panel to take the most appropriate steps to protect the public. Article 29 of the Health and Social Work Professions Order 2001 (the **Order**) provides that those sanctions are:
   - mediation
   - caution
   - conditions of practice
   - suspension
   - striking off

8. Even if a Panel has determined that fitness to practise is impaired, it is not obliged to impose a sanction. This is likely to be an exceptional outcome but, for example, may be appropriate in cases where a finding of impairment has been reached on the wider public interest grounds identified above but where the registrant has insight, has already taken remedial action and there is no risk of repetition.

Proportionality

9. In deciding what, if any, sanction to impose, Panels should apply the principle of proportionality, considering the following questions in order to balance the interests of the public with those of the registrant:
   - is the sanction an appropriate exercise of the Panel's powers?
   - is it a suitable means of attaining the degree of public protection identified by the Panel?
   - does it take account of wider public interest issues, such as maintaining public confidence in the profession?
   - is it the least restrictive means of attaining that degree of public protection?
   - is it proportionate in the strict sense, striking a proper balance between the protection of the public and the rights of the registrant?

Insight and remorse

10. The Council is committed to promoting equality and valuing diversity and Panels are expected to adhere to that commitment and to conduct proceedings in a fair and non-discriminatory manner.

11. 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.

12. In taking account of any insight, explanation, apology or remorse offered by a registrant, Panels are reminded that there may be 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.

13. There is a significant difference between insight and remorse. In deciding what, if any, sanction is required, the issues which the Panel need to consider are whether the registrant has genuinely recognised his or her failings, has taken or is taking any appropriate remedial action to address them and whether there is a risk of repetition. Those issues should be addressed by consideration of the evidence on those issues rather than focusing on the exact manner or form in which they may be explained or expressed.

Procedure

14. The range of sanctions available to Panels should not influence the decision as to whether or not fitness to practise is impaired. The finding of impairment and sanctioning stages of a hearing should be (and be seen to be) separate elements of the process.

15. To reinforce this point, Panels should retire to determine whether or not fitness to practise is impaired and then return to announce their decision and the reasons for that decision. Where the Panel has decided that fitness to practise is impaired it should then hear any submissions on behalf of the parties in relation to mitigating or aggravating factors before retiring again to consider (in ascending order) what, if any, sanction to impose. The Panel should then return to announce that sanction and the reasons for that sanction.

16. Panels must ensure that registrants fully understand any sanction which is being imposed upon them. The Panel Chair should carefully explain what sanction, if any, the Panel has imposed, the reasons for doing so and the consequences for the registrant in clear and direct language which leaves no room for misunderstanding or ambiguity. In particular, Panel Chairs should avoid the temptation to give lectures, which often obscure clear communication of the Panel's decision.[1]

Sanctions

Mediation

17. The Order provides that mediation may only be used if the Panel is satisfied that the only other appropriate course would be to take no further action. Thus, a case may only be referred to mediation if the Panel considers that no further sanction is required. Generally this will only be where impairment is minor and isolated nature and unlikely to recur, where the registrant fully understands the nature and effect of that impairment and has taken appropriate corrective action.

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[1] When considering sanctions in respect of a conviction allegation, Panels must be clear about the interaction of the sanction with any criminal penalty and should have regard to the Practice Notice on Conviction and Caution Allegations

18. 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.[2]

Caution Order

A caution order must be for a specified period of between one year and five years. Cautions appear on the register but do not restrict a registrant's ability to practise. However, a caution may be taken into account if a further allegation is made against the registrant concerned.

19. A caution order may be the appropriate sanction for slightly more serious cases, where the lapse is isolated or of a minor nature, there is a low risk of recurrence, the registrant has shown insight and taken remedial action. A caution order should also be considered in cases where the nature of the allegation (e.g. dishonesty) means that meaningful practice restrictions cannot be imposed but where the risk of repetition is low and thus suspension from practice would be disproportionate. A caution order is unlikely to be appropriate in cases where the registrant lacks insight and, in that event, conditions of practice or suspension should be considered.

20. At the Panel's discretion, a caution order may be imposed for any period between one and five years. 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 order. However, as Panels must consider sanctions in ascending order, the starting point for a caution is one year and a Panel should only impose a caution for a longer period if the 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 appear on the register and, most often, will restrict a registrant's practice, require the registrant to take remedial action or impose a combination of both.

21. 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 practice, albeit subject to conditions, poses no risk of harm or future harm. Panels need to recognise that, beyond the specific restrictions imposed by a Conditions of Practice Order, the registrant concerned is being permitted to remain in practice. Consequently, the Panel's decision will be regarded as confirmation that the registrant is capable of practising safely and effectively.

[2] this topic is considered in more detail in the Practice Note on Mediation

22. Conditions of Practice Orders must be limited to a maximum of three years and should be 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.

23. 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). In imposing conditions of practice, Panels must recognise that, to a large extent, the registrant will be trusted to comply with them. Consequently, before doing so, Panels need to be confident that the registrant will adhere to those conditions of practice.

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

25. 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 registrant not to carry out home visits, out of hours working, unsupervised care, or care outside of a particular setting may, in reality, amount to a suspension and thus be far too wide. Equally, care must be taken to ensure that the combined effect of the conditions imposed does not amount to a requirement only to perform the role of an unregistered assistant or support worker.

26. 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. In particular, the same or similar conditions of practice may not work for all professions.

27. As noted above, 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 based upon actions which constitute dishonesty, abuse or a breach of trust, conditions of practice are unlikely to be appropriate. However, if a Panel is considering imposing conditions in such a case, 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.

28. 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 make early review inappropriate.

Suspension Order

A suspension order must be for a specified period not exceeding one year. Suspension completely prohibits a registrant from practising their profession.

29. Suspension should be considered where the Panel considers that a caution or conditions of practice are insufficient or inappropriate to protect the public or where the allegation is of a serious nature but there is a realistic prospect that repetition will not occur and, thus, that striking off is not merited.

30. A registrant who is suspended cannot practise (and the register is marked accordingly). However, Article 22(8) of the Order provides that the registrant may be subject to further fitness to practice proceedings for events which occur whilst he or she is suspended.

31. 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.

32. Suspension for short periods of time (i.e. less than a year) is a sanction which Panels generally should not use. In particular, Panels need to be aware that suspension is punitive in effect and that a short term suspension may have long term consequences for the registrant, including being dismissed from his or her current employment. However, short term suspension may be appropriate where any lesser sanction would be unlikely to provide adequate public protection, undermine public confidence or be unlikely to have a suitable deterrent effect upon the registrant in question and the profession at large.

33. Short term suspension may also be appropriate where a registrant's current status means that he or she would be unable to respond to and comply with conditions of practice but where there is a realistic prospect that, if the registrant can resolve those difficulties whilst suspended, conditions of practice could then be imposed. In appropriate cases, this enables Panels to facilitate a staged return to practice for the registrant concerned.

34. This approach is likely to be most appropriate in cases involving, for example, substance dependency 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 their decision, so that the registrant clearly understands what is expected of them.

35. Suspension orders cannot be made subject to conditions. However, where the Panel expects the registrant to address specific issues or take specific action before the suspension order is reviewed – for example, to undergo substance abuse treatment – clear guidance should be given to the registrant so that, when the order comes to be reviewed, he or she understands what is expected of them and the evidence that may need to be submitted to the reviewing Panel. However, in imposing suspension orders, Panels should avoid being unduly prescriptive and must not seek to bind, or fetter the discretion of, a future reviewing Panel.

36. 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 removes a registrant's name from the Register and, on a permanent basis, prohibits the registrant from practising their profession.

37. 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.

38. 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 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.

39. Striking off may also be appropriate where the nature and gravity of the allegation are such that any lesser sanction would lack deterrent effect or undermine confidence in the profession concerned or the regulatory process. Where striking off is used to address these wider public protection issues, Panels should provide clear reasons for doing so. Those reasons must explain why striking off is appropriate and not merely repeat that it is being done to deter others or maintain public confidence.

40. 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 and Panels do not have the power to vary that restriction.

Interim Orders to give effect to decisions

41. If a Panel disposes of a case by making a striking-off order, suspension order or conditions of practice order, Article 31 of the Order provides the Panel with the discretionary power to impose 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.

42. It is important to recognise that the power is discretionary and, consequently, Panels should not regard the imposition of an interim order as an automatic outcome of fitness to practise proceedings.

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

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

- there is a serious and on-going 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.

Multiple sanctions

45. Article 29 of the Order provides an escalating range of sanctions and Panels may impose only one sanction at any one time. Similarly, when reviewing sanctions under Article 30 of the Order, a Panel may vary, extend, replace or revoke an existing sanction but cannot impose a second, additional sanction. Consequently, It will rare for a registrant to be subject to more than one sanction at the same time. However, if that situation does arise, Panels need to ensure that there is no doubt as to the duration and effect of each sanction.

46. A registrant is only likely to be subject to multiple sanctions where a sanction has been imposed in respect of one allegation and the registrant is then the subject of separate proceedings in respect of another allegation. Even then the circumstances in which multiple sanctions would be appropriate are limited. If the second allegation involves a repetition of prior conduct, is broadly similar in nature to the previous allegation or involves breach of the existing sanction, then escalation to a higher sanction is likely to be the more appropriate course of action. In addition, some sanctions will some simply 'trump' others. For example, the imposition of a suspension order will have the effect of ending a conditions of practice order.

47. In practice, multiple sanctions are only likely to arise where a sanction has been imposed in respect of one allegation and a second needs to be imposed in respectful of an entirely separate and unconnected allegation. For example, if an

allegation based upon misconduct is made against a registrant who is already subject to a competence-related conditions of practice order, then provided that the misconduct is unconnected, does not amount to breach of the existing order or raise wider concerns about overall fitness to practise, it might be appropriate to impose a separate caution order in respect of that misconduct. In that event, the Panel should be very clear as to the effect (if any) of its order on the existing sanction. In the example given, the Panel would be expected to make clear that the order it had made had no effect on the terms and duration of the conditions of practice order to which the registrant is already subject.

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