

Harmonising Sanctions

CHRE position

September 2008

1. The sanctions available to the nine healthcare regulators as part of their fitness to practise procedures are central to their roles in protecting the public and in safeguarding the standards of the professions that they regulate. Each of the regulators was established with its own legal framework and its own set of sanctions.
2. CHRE has explored the possibility of increasing the level of consistency between the sanctions available for the regulation of the various healthcare professions through a consultation with interested parties.
3. The aim of the consultation was for CHRE to gauge support for the principle of harmonisation of sanctions, and to identify the range of sanctions that should be available when fitness to practise has been found to be impaired.
4. Sanctions are only part of the overall fitness to practise procedures.¹ They aim to protect public, but also to maintain the reputation of the profession, demonstrate professional standards, to act as a deterrent to others, and to encourage confidence in regulation. The judgement in the High Court case between The Council for the Regulation of Healthcare Professionals and the General Dental Council and Mr Alexander Fleishmann makes clear that the protection of patients includes maintaining the reputation of the profession.
5. It is not the purpose of sanctions to punish, but they may be punitive in their impact. For example, the use of suspension from practice is acknowledged as having a punitive effect by the GMC and the HPC.² Financial penalties can be seen as such too, but the GOC strongly argued that they were a useful option in their experience. The current range of sanctions available to regulators varies, reflecting the different legislative heritages of each regulatory body. The specific test applied to decide whether sanctions are required varies from regulator to regulator.
6. In spite of this variation there was clear support in our consultation for the principle of harmonisation, with a caveat that this should not lead to a rigid

¹ This paper does not consider other features of the fitness to practise framework, eg the guidance and training for panellists, the quality of decisions and the procedures operated by the regulators. This paper does not explore other mechanisms for responding to concerns about registrants' fitness to practise, such as mediation, nor does it consider the powers available to the regulators outside the context of their fitness to practise procedures, for example, in their registration processes.

² GMC (2005) *Indicative Sanctions Guidance*. paragraph 27; HPC (2007) *Indicative Sanctions Policy*, page 6

'one size fits all' approach. There was a sense that increasing the consistency in the range of sanctions available would have benefits and is in line with the development of healthcare delivery and regulation policy:

- Greater **clarity** for patients³, the public and employers; the current variation both in the powers of regulators to impose sanctions and in the terminology they employ is potentially confusing to a range of stakeholders;
 - Greater **fairness** to registrants; the increased consistency and clarity outlined above would also be beneficial to the regulated professions and to registrants;
 - Greater **consistency** across the regulators in terms of legislation, available sanctions and terminology; current variation limits the potential for inter-regulator learning, benchmarking and other forms of collaboration;
 - A **flexible and effective range of sanctions** is available for the regulation of healthcare professionals, enabling regulators to respond proportionately and appropriately when they determine that a registrant's fitness to practise is impaired.
7. Harmonising the range of sanctions available to regulators is also in line with one of the themes of the White Paper, that of greater consistency between regulators.⁴ It can also help to deliver better regulation that is proportionate, accountable, consistent, transparent and targeted.
8. This broad support for the principle of harmonisation has led CHRE to identify a common sanction set that may be applied by each regulator according to their respective indicative sanctions guidance when fitness to practise is found to be impaired. In identifying this set we have focused on the outcomes that sanctions can deliver:
- Indicating a fall below the standards expected of a registrant – all sanctions, but specifically currently delivered through cautions, warnings, admonishments, reprimands or fines
 - Restricting a registrant's practice – currently delivered through undertakings and conditions of practice
 - Preventing practice for a specified period of time – delivered through suspension
 - Preventing future practice – delivered through erasure, removal or striking off
 - Immediate protection of the public – through the targeted use of interim orders and immediate sanctions
9. Based on this, we have identified the following common sanction set and some broad principles about the use of sanctions. We suggest that the use of any particular sanction by a regulatory body to its professional groups

³ 'Patients' in this context refers to users of healthcare services and their carers

⁴ Department of Health (2007) *Trust, Assurance and Safety: the regulation of health professionals in the 21st century*.

should be guided by its own indicative sanctions guidance, with the indicative sanctions guidance being constantly updated to reflect changes and developments in professional practice.

10. After a finding of impaired fitness to practise, we believe the following common sanction set should apply:
 - Cautions – appropriate in cases in which there is a need to indicate to a registrant, and 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.
 - Conditions of practice - 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.
 - Suspension - the registrant is not able to practise for a specified period of time. Suspension can be used to send out a signal to the registrant, the profession and public about what is regarded as unacceptable behaviour. Suspension from the register also has a punitive effect (if not intention), in that it prevents the registrant from practising and may therefore prevent them from earning a living in that profession during the period of suspension.
 - Erasure – The most severe sanction, removing the registrant from the register. 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.
 - Fines – A contentious option, but on balance, the need to ensure that a sanction can be imposed against all types of registrant, including businesses, when there is a fall in standards has led us to conclude that fines have a place in a common sanction set.
11. We are aware that fines are an issue that prompts strong feeling and a wide range of views were expressed in the consultation. For some, the punitive nature of financial penalties precludes their use by regulators. This position was countered by others concerned about ensuring sanctions would be available for business registrants, and an acknowledgement that suspension is a punitive sanction.
12. Whether regulators would seek to use fines as a sanction would be dependent on their own assessment of appropriate sanctions as described in their respective indicative sanctions guidance.
13. We believe a common sanction set would bring the following benefits:
 - A single set of sanctions is most easily understood by the public

- This would allow for flexibility as professions develop and change. For example, although fines might not be widely applicable now, this might not be the case under future models of healthcare delivery
 - Indicative sanctions guidance on how the sanctions would be applied for different professional groups would ensure that differences were adequately catered for.
14. Furthermore, in the interests of clarity and consistency there should be a single term for a single sanction across all regulators instead of different terms being used for the same sanctions. We intend to test these terms with further research among patients and the public.
15. Thinking about the impact of sanctions and the function they fulfil, some broader principles can be identified.
- Where return to full practice is foreseen and the sanction is time limited, it is clear that the opportunity to review sanctions before they expire is essential, and guidance should be available to the registrant to enable them to demonstrate that return to practice is appropriate.
 - Enabling regulators to take action, when appropriate, to ensure the public are protected while fitness to practise is being assessed, or immediately once a registrant's practice is found to be impaired has been is another key principle.
16. Our focus here is on sanctions following a finding of impaired fitness to practise. However, many of the responses to our consultation highlighted related areas of regulatory processes, such as flexibility in fitness to practise procedures, opportunities for agreeing undertakings at investigation stages, the availability of sanctions when impairment is not found, the availability of information on registers, and what it means to rejoin the register. We have summarised the discussion arising from the consultation in the accompanying document for information and for the benefit of any further discussions on these topics.⁵
17. Looking forward, the Health and Social Care Act 2008 enabled the establishment of the Office of the Health Professions Adjudicator. At present it is foreseen that OHPA will adjudicate on GMC and GOC cases, but it is intended that other regulators will use OHPA in due course. The results of our consultation and the CHRE position would suggest that this may offer an opportunity to increase the consistency in the sanctions used in fitness to practise cases, while OHPA is guided by the Indicative Sanctions Guidance of the individual regulators. The analysis here and the results of our consultation may be interesting in this context and we look forward to further discussions on this point.

⁵ CHRE. Harmonising Sanctions. Analysis of Consultation Responses. September 2008