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Dear Douglas

CHRE Consultation on Harmonising Fitness to Practise Sanctions across regulators

Please find enclosed the General Optical Council's response to the above consultation.

Should there be any matters that you would wish to discuss further, please do not hesitate to contact me. I await with interest the outcome of the consultation process.

Yours sincerely

Philip Grey
Director of Legal and Fitness to Practise
08-03-06 db

BRIEFING RE RESPONSES TO CHRE'S CONSULTATION OF HARMONISATION OF SANCTIONS

The responses of the General Optical Council to the CHRE's consultation document are set out below, in numbered paragraphs which accord with the numbering of the questions in the CHRE paper.

1. The Council can see the benefit of a degree of harmonisation, with the caveat that total harmonisation would undermine the ability of each regulator to exercise its Fitness to Practise function proportionately and in a manner that is appropriate to the professions it regulates. Particularly, the Council wishes to express its concern that such a process may result in the loss of fining as a sanction available to those regulators that wish to retain it. For regulators such as the GOC, that have jurisdiction over large corporate registrants, it is difficult to conceive of circumstances where such registrants would be subject to other forms of sanction, such as suspension or erasure. The GOC has available to it a significant maximum fine (£50,000) which enables a meaningful penalty to be imposed upon a corporate registrant where such a sanction would be appropriate. Further, we would suggest that fining is not a sanction that is only appropriate to corporate registrants. While we are aware that in some quarters fining is considered purely punitive and therefore not appropriate, such an argument could also be mounted against some uses of suspension. For conduct which needs to be marked as inappropriate but which falls short of requiring a period of suspension (which can be almost as damaging as erasure for self-employed practitioners) a fine can be an eminently sensible disposal.

2. The Council considered that regulators should have available to them all sanctions from this list. The caveat was that each regulator should have available to it those sanctions which are appropriate to the profession that it regulates and the risks posed by impaired registrants from that profession. A one-size-fits-all approach is unnecessary and not in the best interest of regulated professionals or patients.

3. The GOC does not suggest that any further sanctions should be added to the existing set.

4. The Council does not consider that there is any essential need for a universally adopted term. Should that approach be taken, however, striking-off was considered the term that would best resonate with the public. The Council has concerns over the adoption of the term “removal” to describe a sanction. At present, the GOC uses this term to describe the removal of a registrant for administrative reasons, such as a failure to pay the registration fee. A clear distinction should remain between the terms applied in these two different situations.

5. The Council would suggest that erasure should be available to all regulators in performance cases. It is strongly of the view that erasure should not be available in purely health cases (while acknowledging that deciding which cases are *purely* health related can be problematic). In cases where long-term, serious ill-health should preclude a registrant from practising, indefinite suspension is the proportionate and effective response. Were there to be any suggestion that erasure should become available in health cases, the Council would suggest that the CHRE should consult the Equality and Human Rights Commission.

6. The Council does not consider that there is a need for a universally applied minimum period that should elapse before restoration may be applied for.

7. In the light of its answer to question 6, the Council makes no comment to this question.

8. The Council can see merit in regulators providing standard written guidance to erased registrants who wish to apply for restoration. There is disquiet at the suggestion that this should be done on a case specific

basis. The general presumption is and should be that erasure is permanent. If that is not the case, a suspension order would be the proportionate sanction. The burden in restoration applications should be upon the applicant to demonstrate that s/he is fit to return to the profession. Requiring such applicants to reflect on and decide upon the type of evidence that s/he should advance at a restoration hearing (rather than specifying the type of evidence to the applicant in advance) can be revealing as to the applicant's insight into the reasons for his/her erasure. If it were suggested that the panel that imposes the erasure order should set out the type of evidence that should be produced at a restoration hearing, there is great concern as to the perception that this would cause among the public, particularly complainants. The panel's message would become very mixed: in effect, "You are not fit to be a member of this profession, but should you want to come back this is what you would need to demonstrate". A general guidance document would suffice.

9. The Council expresses some caution as to imposing conditions during periods of suspension. If a registrant is subject to conditions, it is incumbent upon the regulator to monitor them. It is, however, very useful for panels to set out to a suspended registrant (if the intention is to have a review hearing before the end of the period of suspension) what they hope or expect that the registrant will do before that review. The onus is then on the registrant to do *and to provide evidence that s/he has done* the necessary things, whether that is to attend meetings and / or appointments relating to his or her health or to undergo retraining in a particular area.

   On the issue of what *powers* panels should have when reviewing suspensions at review hearings, the Council considers that maximum flexibility is important: the panel should have the power to remove the suspension (and conclude the case), extend it, replace it with conditions or order erasure, whichever is appropriate and proportionate

depending on the registrant's behaviour and actions during the period of suspension.

10. The Council is strongly of the view that this power is essential if conditional registration is to be effective and enforceable.

11. The Council considers that this would be a useful tool, enabling monitoring of the situation where it is felt appropriate for a registrant to return to the profession. Plainly, if this is not permissible (as, presently, it is not for persons erased by the GOC) it makes it more difficult for an erased individual to persuade a committee that s/he should be restored, given that the applicant has to demonstrate that s/he is fit to practise entirely unrestricted and unmonitored.

12. The Council considers that undertakings could be a useful tool, but is concerned that they must be phrased and enforced in such a manner as to ensure that public safety is fully protected. Broadly, the Council is supportive of them being available at a Fitness to Practise hearing.

13. The Council would support the availability of undertakings at the investigation stage, in cases where the issues do not demand that the case is ventilated at a public hearing, and where the registrant is constructively engaging with the process. Where this outcome would maintain public safety and be proportionate, such an approach can tackle the issue that led to a complaint being made while avoiding the cost and delay inherent in Fitness to Practice hearings. Monitoring of undertakings is a cost and resource issue, as it is already proving with conditional registration.

14. The Council does not consider that there is any particular need for a universally applied term. Should it be the case that this type of sanction can be imposed both in cases where no factual allegations have been proved, and in cases where they have, they may be merit in the universal application of different terms to reflect such differing

circumstances. For cases where no factual allegations have been imposed, “warning” would seem to be an appropriate term. In cases where they have been proved, “reprimand” would seem properly to reflect the situation.

15. The Council considers that flexibility should be retained – it should be for the panel that imposes the warning to direct how long it should remain on the registrant’s record.

16. Yes.

17. This question raises difficult issues surrounding the gathering and the use of “soft” information. When is it right to record (and possibly to comment publicly on) an unproved allegation with a view to making use of it later? What use can it be put to later? Should this option continue to be available to Investigation Committees, or their equivalent, in deciding whether to refer? Should it be available to the FTP Committee? Broadly, the Council would support the availability of such a sanction in both circumstances.

18. Yes, to both questions.

19. Please refer back to paragraph 17 above. For cautions imposed after a finding of impairment, it would seem appropriate for them to be taken into account in the same way as earlier cases that resulted in more severe sanctions. As for “non-impairment” warnings, it would seem appropriate for FTP panels to adopt the same approach as that presently used by the criminal courts in determining the admissibility of general “bad character” type evidence.

20. Yes, for any regulator that considers that it wishes to have them available. The fact that some regulators do not wish to make use of this option should not preclude its use by those who do. This is a clear example of the necessary limits to harmonisation.

21. Again, all regulators who wish to avail themselves of such orders should be able to.

22. At the very least, all regulators should have the power to impose immediate sanctions. It may be more appropriate for all sanctions to come into force immediately with the registrant being allowed to submit that a sanction should not come into force until the time period for the launching of an appeal has passed or the appeal is concluded.

23. The Council considers that such a right should exist in all such situations.

24. No.

25. The Council has no further comment to make.