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Sanctioning Guidelines

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While few Canadian regulators have published guidelines on choosing appropriate disciplinary sanctions, several UK regulators have them in place. The Health and Care Professions Council, which regulates several health professions, is currently consulting on an updated guidelines document. Since choosing the appropriate sanction for a discipline finding is one of the most difficult tasks for regulators, we were especially interested in reviewing this document.

Description

The proposed guidelines begin with a reminder that the process of choosing an appropriate sanction and outcome itself must take equity principles into account. Accompanying the proposed guidelines is a detailed equality impact assessment identifying how the disciplinary process appears to have a disproportionate effect on some groups (e.g., older practitioners, male registrants, and registrants who are transitioning genders).

There is then a discussion of the purpose of a sanction: "… to uphold standards and public confidence in the professions we regulate and take the action necessary to protect the public." The document goes on to state that "Sanctions should be tailored to the specific circumstances of each case, balancing public protection with the broader public interest." Under the UK approach, sanctions should only be imposed if the registrant's ability to practise safely is currently impaired.

The core principle of the proposed sanctions is balancing the competing interests of the registrant and protecting the public.

Factors to consider include the following:

- The seriousness of the conduct, in terms of risk of harm to "service users";
- Culpability, such as intent, recklessness, or foreseeable harm;
- Conduct is also more serious if it involves a breach of trust (e.g., to a vulnerable service user, especially

children), is repeated or frequent, or involves dishonesty;
- Failing to raise observed concerns or to work in partnership with colleagues is also seen as making the conduct more serious;
- Conduct that crosses financial, confidential, or professional boundaries (e.g., inappropriate relationships, especially where sexual in nature) can be seen as abusive;
- Similarly, conduct that involves discrimination or harassment is more serious;
- Violence is always troubling; and
- The degree of insight, remorse and any remediation already undertaken.

The document emphasizes the importance of the tribunal giving reasons explaining how it has balanced these considerations.

In terms of process, the proposed guidelines suggest an approach that is not widely followed in Canada:

> In determining what sanction, if any, is appropriate, the panel should start by considering the least restrictive sanction first, working upwards only where necessary. The final sanction should be a proportionate one and will therefore be the minimum action required to protect the public and maintain standards and confidence in the profession.

The proposed guidelines then go through the available sanctions suggesting when each would be appropriate. For example, a caution (similar to a Canadian "reprimand") would be appropriate for isolated, minor misconduct with a low risk of repetition and where the registrant has demonstrated good insight. Conditions of practice are best where the concerns are capable of being remediated or managed and the registrant is likely to participate constructively.

Meanwhile a suspension "is likely to be appropriate where there are serious concerns which cannot be reasonably addressed by a conditions of practice order, but which do not require the registrant to be struck off the Register."

The proposed guidelines also address the appropriate approach to reinstatement hearings (called "review hearings").

Courts in the UK seem to be supportive of the use of sanctioning guidelines, and use them to scrutinize the suitability of a sanction in individual matters: *General Medical Council v Konathala* [2025] EWHC 1550 (Admin).

Discussion

The value of such guidelines is obvious. By providing detailed advice (the document is 37 pages long) all participants are given a useful checklist of consistent considerations. Novices to the process can gain a comprehensive overview of the sanctioning process and principles. For example, the discussion of the circumstances in which a particular sanction is appropriate is quite helpful, as is the detailed discussion on the concept of degree of insight.

Developing a tool designed for the professional misconduct context is a welcome departure from the criminal sentencing approach that many tribunals still use. (Having said that, the proposed guidelines document still uses the aggravating and mitigating factors language that some may find to be more in line with a criminal sentencing approach.)

The lack of technicality in the document is refreshing. For example, there was no lengthy discussion of how a lack of remorse is the absence of a mitigating factor but should not be considered an aggravating one.

A challenge is that there is still a lack of clear consensus on sanctioning principles.

Concepts remain in debate and are rapidly evolving. For example, while systemic discrimination is alluded to frequently in the document, little is said as to how a panel is to take it into account.

Similarly, other, often more controversial, sanctioning considerations are not mentioned at all. For example, there is no analysis on the use of precedents of previous sanctions imposed on other registrants for similar misconduct. As well, there is no reference to the debate as to whether denunciation of clearly offensive conduct is a relevant purpose of sanctions. The good character and seniority of the registrant is also not discussed (even if only to suggest that these points warrant minimal weight in many circumstances).

Perhaps one of the most significant challenges in developing sanctioning guidelines is determining who should prepare them. The proposed guidelines discussed above were developed by the regulator itself, rather than the tribunal that is supposed to act at arms length. While the document clearly states that the tribunal acts independently of the Council and makes decisions on a case-by-case basis, there could still be a "perception problem". This perception is likely reduced as a result of regulator having undergone an extensive consultation in developing the document. Also, as a matter of capability, regulators generally have superior policy-development skills than adjudicative tribunals.

One of the few Canadian examples of publicly-available sanctioning guidelines partially sidesteps this issue by having the document apply both to the prosecution arm of the regulator as well as the tribunal. The Canadian Investment Regulatory Organization says that its guidelines are "intended to assist":

- "CIRO Enforcement Staff and respondents in negotiating settlement agreements
- hearing panels in determining whether to accept settlement agreements, and in the fair and efficient imposition of sanctions in disciplinary proceedings"

Another approach is for the tribunal itself to develop precedents that articulate the sanctioning considerations in a less prescriptive way. See, for example, *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 22 (CanLII).

Conclusion

Sanctioning guidelines can have significant value for all participants in the discipline process. However, finding a suitable process for developing helpful and comprehensive principles – let alone developing the principles themselves – can be challenging.

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