IN THE GENERAL MEDICAL COUNCIL
FITNESS TO PRACTISE PANEL

CASE OF:-

JANE ANN BARTON

SUPPLEMENTARY NOTE
TO ADVICE OF 28/02/10

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1. In my advice of 28 February 2010, I indicated that there might be an arguable case that the conditions imposed on Dr Barton's registration by the Fitness to Practise Panel on 29 January 2010 were unduly lenient because they did not prevent Dr Barton from prescribing orally administered opiates. I indicated that the strength of this case would depend, to a large extent, on the exact wording of the conditions previously imposed by the Interim Orders Panel, of which I had not had sight.

2. I have been provided with a transcript of a determination of the Interim Orders Panel made on 12 November 2009, which refers back to previous determinations of 21 June 2001, 11 July 2008, 22 December 2008 and 1 June 2009. The transcript indicates that:

    a. The conditions imposed by the Interim Orders Panel (from 11 July 2008) required Dr Barton not to prescribe diamorphine and to restrict her prescribing of diazepam in line with BNF guidance.

    b. No restrictions were imposed by the Interim Orders Panel in respect of any other opiates.

    c. Dr Barton's prescribing was monitored by Neil Hardy, Head of Medicines Management for Hampshire NHS, who considered that Dr Barton had complied with the conditions imposed by the Interim Orders Panel.

    d. The voluntary restrictions to which Dr Barton was subject from October 2002 were in the same terms as the restrictions imposed by the Interim Orders Panel.

3. In light of the above, it is clear that the conditions (first voluntarily imposed and then imposed by the Interim Orders Panel) under which Dr Barton was practising as a GP in the ten years since the events at GWMH were less restrictive than the conditions imposed by the Fitness to Practise Panel on 29 January 2010 [Day 57, p.12-13]:

    a. The Fitness to Practice Panel's conditions prohibit Dr Barton from prescribing or administering any opiates that are administered by injection, not just diamorphine.

    b. The Fitness to Practise Panel's conditions require Dr Barton to keep a log of all prescriptions of opiates.

    c. The Fitness to Practise Panel's conditions require Dr Barton to comply with BNF guidelines in respect of all opiates.

    d. The Fitness to Practise Panel's conditions prohibit Dr Barton from undertaking palliative care work.

4. The Council should take into account that Dr Barton was practising safely for ten years under conditions that were less restrictive than those imposed by the Fitness to Practise Panel when considering whether the sanctions imposed by the Panel were sufficient to protect patients from the risk of individual harm .

5. I referred in my original advice to the case of patient H (Robert Wilson); the Fitness to Practise Panel found that a prescription of Oramorph (an orally administered opiate) was excessive to the patient's needs. I considered that the conditions imposed on Dr Barton's registration might arguably have been insufficient to protect against a similar prescription being written and administered in the future. The Council should consider this point, and may also wish to assess the following factors in determining whether the conditions that the Panel imposed were sufficient to protect future patients from such risk:

    a. Crucially, the conditions imposed by the Fitness to Practise Panel do not permit Dr Barton to undertake palliative care. Although patient H was admitted for rehabilitation, Dr Barton assessed him as requiring palliative care and administered analgesia on this basis (see [Day 29, p.75E]). She could not do this under the Fitness to Practise Panel's conditions.

    b. The conditions imposed by the Fitness to Practise Panel also require Dr Barton to prescribe only in accordance with BNF guidelines. The prescription in the case of patient H, for 10mg of Oramorph, written on 14 October 2008 to replace paracetamol and codeine, may have been contrary to these guidelines given the patient's alcoholism and liver disease. Although the initial dose was not outside the guidelines for a normal

patient,[1] arguably it was not in accordance with specific BNF advice to reduce the dose where there is hepatic impairment.[2]

6. The Council should reach its conclusion as to whether the conditions imposed on Dr Barton's registration by the Fitness to Practise Panel on 29 January 2010 were unduly lenient or manifestly inappropriate in light of the wording of the conditions imposed by the Interim Order Panel and the further information contained in the transcript of their determination.

PETER MANT
39 ESSEX STREET

9 March 2010

[1] The BNF 34th Edition states: *"A dose of 5–10mg is enough to replace a weaker analgesic (such as paracetamol or co-proxamol), but 10–20mg or more is required to replace a strong one (comparable to morphine itself)"* [Exhibit C1, Tab 3, p.2].
The wording in the current (58th) edition is the same save for removal of reference to co-proxamol.

[2] The BNF 34th Edition states: *"**Cautions**.... may precipitate coma in hepatic impairment (reduce dose or avoid but many such patients tolerate morphine well)... **Palliative Care.** In control of pain in terminal illness these cautions should not necessarily be a deterrent to the use of opioid analgesics. **Contra-Indications.** Avoid in... acute alcoholism."* [Exhibit C1, Tab 3, p.9]
*The current (58th) edition states: "**Cautions**...* A reduced dose is recommended... in hepatic impairment (avoid if severe;)... ***Palliative Care.** In control of pain in terminal illness these cautions should not necessarily be a deterrent to the use of opioid analgesics."*

Lawyers' Report for Section 29 Case Meeting

23 March 2010

Dr. Jane Ann Barton

Decision of the Fitness to Practise Panel of the General Medical Council

Date of Decision: 29 January 2010

Deadline for Referral: 25 March 2010

A Background

1. Summary of the facts

The Fitness to Practise Panel ("**FTP Panel**") of the General Medical Council ("**GMC**") heard the case of Dr Jane Ann Barton ("**Dr Barton**") between 8 June 2009 and 20 August 2009 and 20-29 January 2010. This was a hearing to decide whether Dr Barton was guilty of serious professional misconduct, and if so, to decide what sanction, if any, should be imposed. Dr Barton attended the hearing and was represented by counsel.

Dr Barton is a general practitioner registered with the GMC who worked at the Gosport War Memorial Hospital part-time between 1988 until she resigned her post in April 2000. Following her resignation from this post, Dr Barton has since been practising as a general practitioner for over eight years. In 2002, Dr Barton voluntarily agreed not to prescribe certain opiates, and this was formalised by conditions imposed on her registration by the Interim Orders Panel on 11 July 2008. This order has subsequently been reviewed three times, and these conditions have been maintained.

The charges in this case related to Dr Barton's treatment of twelve patients on two 'continuing care' wards at the Gosport War Memorial Hospital between 1996 and 1999. All of the GMC's allegations were based on Dr Barton's use of opiates to treat the twelve patients, all of whom died under her care. Dr Barton wrote anticipatory prescriptions for all of these patients, for opiates to be administered by syringe drivers.

The main heads of charge against Dr Barton were that:

a. the lowest doses of opiates prescribed by Dr Barton for certain patients were too high;
b. certain prescriptions were not clinically justified;
c. the doses actually administered or authorised, in some cases, were excessive or inappropriate to the patients' needs;
d. the range of doses provided for in prescriptions was too wide, creating a situation whereby drugs could be administered which were excessive to patients' needs; and
e. these actions were inappropriate, potentially hazardous and not in the patients' best interests.

It is very important to note that the GMC did not allege before the Panel that Dr Barton intended to hasten the death of any of her patients or that Dr Barton's actions necessarily caused any of their deaths.

Further allegations were made against Dr Barton concerning: the adequacy of her assessments of the patients before prescribing opiates; seeking the advice of colleagues; and the adequacy of her note-taking.

A police investigation into the deaths of the twelve patients was launched in 2000, but the Crown Prosecution Service decided not to proceed with a criminal prosecution.

Admissions and the FTP Panel's findings

Dr Barton admitted a significant proportion of the factual allegations against her, notably that the range of doses that she had prescribed in most of the cases was excessive and potentially hazardous. She also admitted that her note taking was inadequate.

The FTP Panel made a number of findings of fact, including that Dr Barton failed to obtain any advice from colleagues in relation to one patient, and that there was insufficient clinical justification for the prescription that was given to another patient. The FTP Panel found that Dr Barton was guilty of multiple instances of serious professional misconduct. The FTP

Panel held that Dr Barton had fallen short of the standards in Good Medical Practice in relation to various aspects of her practice. A full list of the ways in which the FTP Panel found that Dr Barton had fallen short is available in Appendix A.

Key Personnel

Chairman:	Mr Andrew Reid, LLB JP
Panel Members:	Ms Joy Julien
	Mrs Pamela Mansell
	Mr William Payne
	Dr Roger Smith
Legal Assessor:	Mr Francis Chamberlain (8 June 2009-20 August 2009)
	Mr Duncan Smith (20-29 January 2010)

Counsel

Mr Tom Kark	
Mr Ben Fitzgerald	Counsel for the General Medical Council.
Mr Timothy Langdale QC	
Mr Alan Jenkins	Counsel for Dr Barton.

2. Relevant decision

The relevant decision is the FTP Panel determination on 29 January 2010 that Dr Barton was guilty of multiple instances of serious professional misconduct, and imposing conditions on Dr Barton's registration for a period of three years. The full list of conditions is contained in Appendix B.

3. Documents before the meeting

The papers available to the CHRE for the purpose of the case meeting are:-

(1) Transcript of the hearing dated between 8 June 2009 and 20 August 2009 and 20-29 January 2010;
(2) Exhibits put before the FTP Panel;
(3) Determination of the FTP Panel dated 29 January 2010;
(4) Correspondence received from the public;
(5) GMC's Good Medical Practice;
(6) Section 29 Process and Guidelines;
(7) GMC's Indicative Sanctions Guidance;
(8) Order of the Interim Orders Panel dated 12 November 2009;
(9) Lawyers' report prepared by Baker & McKenzie LLP dated 9 March 2010;
(10) Issues and advice prepared by Counsel (Peter Mant of 39 Essex Street), dated 28 February 2010; and
(11) Supplementary note to advice prepared by Counsel (Peter Mant of 39 Essex Street), dated 9 March 2010.

Given the length of the transcript and the volume of exhibits in this case, Counsel has been instructed to consider the issues and Mr Mant will attend the case meeting. In advance of the meeting, Mr Mant advised the CHRE to obtain a copy of the order of the Interim Orders Panel imposing conditions on Dr Barton. Mr Mant produced a supplementary note to his advice on a discrete point in relation to the interim order on 9 March 2010.

B Legal Framework: GMC

The FTP Panel heard the case in accordance with the General Medical Council (Fitness to Practise) Rules Order of Council 2004 (the "**GMC Rules**"). Please see Appendix C for the relevant sections.

C Legal framework: CHRE

The CHRE's legal framework is set out in the NHS Reform and Health Care Professions Act 2002 (the "**2002 Act**"). Please see Appendix D for the relevant provisions of the 2002 Act.

1. How CHRE should decide whether or not to refer a case

The purpose of this meeting is for the CHRE to decide whether or not to exercise its statutory discretion to refer this case to the High Court under s.29 of the 2002 Act. Please refer to

CHRE's Guidance Note on how it should approach consideration of a case under s.29 of the 2002 Act.

2. How CHRE might approach the correspondence received from third parties

CHRE has received correspondence from third parties objecting to the determination of the FTP Panel and raising issues for the consideration of CHRE.

Counsel has considered the issues raised by this correspondence in his advice of 28 February 2010. In considering this correspondence, CHRE should refer to paragraph 2.15 of CHRE's Section 29 Process and Guidelines, which states that "*Any officer, Chief Executive, appointee or Council member will exercise caution in giving weight to any comments or observations upon which other parties have not had an opportunity to comment.*"

3. Jurisdiction

The FTP Panel's determination in this case was a 'relevant decision' under the 2002 Act. If CHRE considers that it was unduly lenient and referral to the relevant court is desirable for the protection of members of the public, then it should indicate that it relies on section 29(4)(a) of the 2002 Act.

4. Limitation and referral to the relevant court

CHRE's time for referring the matter to the 'relevant court' under s.29 will expire on 5 April 2010, however as this is Easter Monday, the last day to lodge an appeal will be 1 April 2010.

Dr Barton's registered address is in Hampshire and therefore under s.29(5)(c) of the 2002 Act the relevant court is the High Court of Justice in England and Wales.

D <u>Public Protection and Undue Lenience</u>

1. Public protection

1.1 General advice

CHRE will have to consider whether a referral to the High Court is desirable for the protection of members of the public. Protection of the public is not defined in the 2002 Act and CHRE will need to consider what this means in this case. The members are referred to

paragraph 3A of the Guidance Note for Council Members Attending a Case Meeting. A non-exhaustive list of matters (in no order of priority) that have arisen in other cases referred to the Court are:

- risk of potential harm to patients and the public;
- whether other sanctions available would better protect the public;
- deterring the same or similar conduct by practitioners;
- whether the sanction imposed upholds the reputation of the profession in an appropriate fashion;
- public confidence in the healthcare professions; and
- public perception of the decision.

Accordingly, CHRE might consider:

- Was the FTP Panel's decision to impose conditions on Dr Barton's registration unduly lenient and a sanction that does not adequately reduce the risk of potential harm to patients and the public or protect the public, and will not serve to deter the same or similar conduct by practitioners?
- Was the FTP Panel's decision wrong in light of the need to protect the reputation of the profession, the need to maintain public trust in practitioners and the need to maintain public confidence in the system of regulation?

We set out below factors which may be relevant to these issues. CHRE may also identify other relevant matters.

1.2 Issue that may be relevant to whether the decision meets the s.29 test

Counsel has reviewed the determination of the FTP Panel and provided a report highlighting the issues that may require consideration by CHRE when discussing the adequacy of this decision in protecting the public including the reputation and public trust in the profession. We set out in paragraph E below an executive summary of Counsel's advice and conclusions. Please also refer to the attached copy of Counsel's report in Appendix E, and Counsel's supplementary note in Appendix F. Ultimately, it is for CHRE to decide whether to refer this case, and CHRE may therefore reach a view that is different to that of Counsel.

2. Undue Lenience

2.1 General advice

Section 29 Process and Guidelines (July 2009) state that, *"[t]he role of the s.29 meeting is not to make its own findings of fact in relation to the original panel's decision. However it is entitled to consider and, where it decides to do so, draw conclusions from the panel's findings and/or the absence of findings."*(Paragraph 3.18)

When considering if the FTP Panel's decision was unduly lenient, CHRE should therefore:

- Undertake a thorough assessment of the facts of the case. CHRE should scrutinise the documents provided to them.

- Expressly bear in mind that the FTP Panel will have had the advantage of assessing the live evidence. This is an advantage that CHRE does not have. CHRE should consider whether the decision by the FTP Panel to impose conditions on Dr Barton's registration was unduly lenient, notwithstanding this disadvantage.

CHRE is entitled to consider all relevant matters to reach a decision on undue lenience. There will inevitably be a degree of overlap between the factors relevant to public protection and undue lenience. CHRE is referred to paragraph 3B of the Guidance Note for Council Members Attending a Case Meeting, which deals with undue lenience.

2.2 Was the FTP Panel's decision unduly lenient?

As detailed at point 1.2, above, Counsel has provided a report on the issues raised by this determination which might require consideration by CHRE when discussing the issue of undue lenience. Please refer to the Executive Summary in paragraph E below and to the attached copy of Counsel's report and supplementary note.

3. Appropriate Decision

If CHRE considers that it should exercise its discretion under s.29 to refer this case, it should indicate what it considers should have been the appropriate decision as to sanction.

E <u>Executive Summary: Counsel's advice</u>

1. Counsel's opinion

Counsel's opinion was that the FTP Panel's decision to impose a sanction of conditional registration rather than suspension or erasure on Dr Barton, was not unduly lenient. In the original advice, dated 28 February 2010, Counsel stated that it might be arguable that the conditions on registration that related to the prescription and administration of opiates were unduly lenient. However, in Counsel's supplementary note to the advice dated 9 March 2010, Counsel stated that he was of the opinion that it was not unreasonable for the FTP Panel to have concluded that the conditions that they imposed were sufficient to protect future patients from the risk of an excessive prescription being written and administered by Dr Barton in the future.

2. Counsel's general observations

As this case involved allegations relating to medical practices in a complex and difficult field, and also the controversial issue of the correct balance to strike between alleviating pain and sustaining life, CHRE must accord due respect to the FTP Panel's findings. The expertise of the FTP Panel in deciding what is needed in the interests of the public will carry greater weight in this type of case than it would in a case concerning sexual misconduct, for example.

3. The relevant evidence and correct legal tests

It is Counsel's view that the FTP Panel considered all of the relevant evidence and applied the correct legal tests. In Counsel's view, the FTP Panel:

- did not expressly refer to complaints made in 1991 by certain members of the nursing staff about Dr Barton's use of opiate analgesia, however the complaints were considered generally by the FTP Panel, and its finding that Dr Barton lacked insight was the main matter to which the complaints had relevance;

- believed that the conditions on registration would protect individual patients;

- gave due regard to the Indicative Sanctions Guidance, and although some of the factors that would suggest that erasure or suspension would be suitable were present in this case, each case turns on its own facts. Furthermore, factors suggesting that conditions should be imposed were also present.

4. The FTP Panel's balancing exercise

Counsel assessed the balancing exercise performed by the FTP Panel, noting that the main questions were whether the imposition of conditional registration was appropriate: (i) to protect individual patients; and (ii) to protect the wider public interest (including upholding the reputation of the profession and declaring and upholding standards).

4.1 The risk to individual patients

It is Counsel's opinion that it was open to the FTP Panel to conclude in general terms that the risk to individuals could adequately be controlled by way of imposing conditions on Dr Barton's registration. Dr Barton's evidence at the hearing demonstrated a disregard for the guidelines, however it could be said that her actions arose because of her particular views in particular circumstances. Counsel believes the FTP Panel reasonably concluded that the risks associated with that view could be effectively controlled with sanctions. The fact that Dr Barton has been operating under restrictions for the past eight years, was also evidence of the fact that restrictions are workable.

The FTP Panel was entitled to place significant weight on the fact that Dr Barton had been practising safely as a GP for over ten years since the incidents, a fact to which Dr Barton provided 184 testimonials from colleagues and patients in support.

It is Counsel's opinion that it was reasonable for the FTP Panel to decide that conditions restricting the prescription and administration of opiates could control any risk to individual patients.

4.2 Maintaining public confidence in the profession

Counsel is of the opinion that the FTP Panel was entitled to conclude that, with restrictions imposed, there was no risk of repetition even given Dr Barton's lack of remorse and insight.

It is Counsel's opinion that whilst Dr Barton's actions were serious, they were motivated by a particular view of her patients' best interests, and not malice or deceit. Therefore it could not be said that the FTP Panel's decision to impose conditional registration, rather than erasure or suspension, was "manifestly wrong".

4.3 Correspondence from interested parties

Counsel addressed some of the issues raised in the correspondence CHRE has received from interested parties and members of the public. While a number of the issues raised are already addressed in his opinion, the majority of the remaining issues were concerned with the testimonials. Counsel concluded that the fact that testimonials were authored by colleagues and patients did not mean that they lacked objectivity, and they should not be disregarded. Furthermore, those who provided testimonial were informed of the factual findings and confirmed that they wanted their testimonials to be used.

4.4 Conditions on prescribing opiates

Counsel noted that the FTP Panel found that Dr Barton's prescription of an orally administered opiate to a patient (Patient H) was excessive to the patient's needs. Counsel further noted that the conditions of registration imposed by the FTP Panel left open the possibility of Dr Barton prescribing oral opiates, and that it might be arguable that this was unduly lenient, particularly as Dr Barton's evidence suggested that the order of the Interim Orders Panel restricted her from prescribing opiates generally. However, upon reviewing the wording of the order, Counsel noted that the interim order required Dr Barton not to prescribe Diamorphine and restricted her to prescribing Diazepam in accordance with BNF Guidance. On this basis, Counsel concluded that the conditions imposed by the FTP Panel are in fact more restrictive than those imposed by the Interim Orders Panel. Counsel therefore considers that it was reasonable for the FTP Panel to conclude that the conditions they imposed were sufficient to protect patients from the risk of individual harm, considering that Dr Barton has been practising safely for ten years under less restrictive conditions.

Counsel is of the opinion that a crucial condition imposed by the FTP Panel is that Dr Barton cannot undertake palliative care, therefore Dr Barton would not be able to find herself in a situation similar to the one she encountered with Patient H, whom she assessed as requiring palliative care and administered opiates to on that basis. It is therefore Counsel's opinion, that the conditions imposed on Dr Barton's registration by the FTP Panel were not "manifestly inappropriate".

G CHRE's discretion to refer the case to court

CHRE is referred to paragraph 4A of the Guidance Note for Council Members Attending a Case Meeting, which deals with how CHRE might approach the exercise of its discretion. Section 29 provides no criteria or guidance on the exercise of CHRE's discretion. It is

therefore a broad power. However, the exercise of the discretion is subject to general public law principles including reasonableness, fairness and not exercising the discretion for improper purposes. As part of these principles, the exercise of discretion can also be challenged if there is a failure to take account of relevant matters or irrelevant matters are taken into account.

It is therefore important to approach each individual case with an open mind and to be prepared to consider whether or not a matter is relevant and, even if thought relevant, to consider what should be the proper weight to be given to that matter as against any or all other matters that are relevant.

The discretion provided by section 29 is sufficiently wide to allow CHRE to decide not to continue the case even if the section 29 criteria are satisfied. However the discretion to refer a case, and thereby continue these proceedings, does not arise if the section 29 criteria are not satisfied.

G Referral to the relevant court

1. CHRE's determination and reasons

Although the 2002 Act does not require that CHRE give reasons for its decision, consistent with past practise and the Section 29 Process and Guidelines (July 2009), a note of the meeting will be prepared to record:

(1) your decision;
(2) your reasons for the decision; and
(3) any learning points that have arisen in the discussion of the case.

2. Powers of the High Court

Section 29(8) of the 2002 Act provides that the Court may:

(a) dismiss the Appeal;
(b) allow the Appeal and quash the relevant decision;

(c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned; or

(d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the Court.

The Court may make such order as to costs as it thinks fit.

9 March 2010

Baker & McKenzie
100 New Bridge Street, London EC4V 6JA
Ref: JXL/YXG

APPENDIX A

The following is a list of the ways in which the FTP Panel found that Dr Barton fell short of the standards in Good Medical Practice in relation to the following aspects of her practice:

(a) undertaking an adequate assessment of the patient's condition based on the history and clinical signs, including where necessary, an appropriate examination;

(b) providing or arranging investigations or treatment where necessary;

(c) referring the patient to another practitioner where indicated;

(d) enabling persons not registered with the GMC to carry out tasks that require the knowledge and skills of a doctor;

(e) keeping clear accurate and contemporaneous patient records;

(f) keeping colleagues well informed when sharing the care of patients;

(g) ensure suitable arrangements are made for her patients' medical care when she is off duty;

(h) prescribing only the treatment, drugs or appliances that serve patients' needs;

(i) being competent when making diagnoses and when giving or arranging treatment;

(j) keeping up to date;

(k) maintaining trust by:

  (i) listening to patients and respecting their views;

  (ii) treating patients politely and considerately;

  (iii) giving patients the information they ask for or need about their condition, treatment and prognosis;

  (iv) giving information to patients in a way they can understand;

  (v) respecting the right of patients to be fully informed in decisions about their care;

  (vi) respecting the right of patients to refuse treatment;

  (vii) respecting the right of patients to a second opinion;

(l) abusing her professional position by deliberately withholding appropriate investigation, treatment or referral.

APPENDIX B

The FTP Panel imposed the following restrictions on Dr Barton's registration for a period of three years, with provision that these restrictions be reviewed shortly before the end of the period of conditional registration:

(a) She must notify the GMC promptly of any post she accepts for which registration with the GMC is required and provide the GMC with the contact details of her employer and the PCT on whose Medical Performers List she is included.

(b) At any time that she is providing medical services, which require her to be registered with the GMC, she must agree to the appointment of a workplace reporter nominated by her employer, or contracting body, and approved by the GMC.

(c) She must allow the GMC to exchange information with her employer or any contracting body for which she provides medical services.

(d) She must inform the GMC of any formal disciplinary proceedings taken against her, from the date of this determination.

(e) She must inform the GMC if she applies for medical employment outside the UK.

(f) –

(i) She must not prescribe or administer opiates by injection. If she prescribes opiates for administration by any other route she must maintain a log of all her prescriptions for opiates including clear written justification for her drug treatment. Her prescriptions must comply with the BNF guidelines for such drugs.

(ii) She must provide a copy of this log to the GMC on a six monthly basis or, alternatively, confirm that there have been no such cases.

(g) She must confine her medical practice to general practice posts in a group practice of at least four members (including herself).

(h) She must obtain the approval of the GMC before accepting any post for which registration with the GMC is required.

(i) She must attend at least one CPD validated course on the use of prescribing guidelines within three months of the date from which these conditions become effective and forward evidence of her attendance to the GMC within one week of completion.

(j) She must not undertake Palliative Care.

(k) She must inform the following parties that her registration is subject to the conditions, listed at (a) to (j), above:

(i) Any organisation or person employing or contracting with her to undertake medical work;

(ii) Any locum agency or out-of-hours service she is registered with or apply to be registered with (at the time of application);

(iii) Any prospective employer or contracting body (at the time of application);

(iv) The PCT in whose Medical Performers List she is included, or seeking inclusion (at the time of application);

(v) Her Regional Director of Public Health.

APPENDIX C

Relevant extracts from the General Medical Council (Fitness to Practise) Rules Order of Council 2004

Procedure before a FTP Panel

Rule 17:

(1) A FTP Panel shall consider any allegations referred to it in accordance with these Rules, and shall dispose of the case in accordance with sections 35D, 38 and 41A of the Act.

(2) The order of proceedings at the hearing shall be as follows -

(a) the FTP Panel shall hear and consider any preliminary legal arguments;

(b) the Chairman of the FTP Panel shall -

(i) where the practitioner is present, require the practitioner to confirm his name and registration number, or

(ii) otherwise, require the Presenting Officer to confirm the practitioner's name and registration number;

(c) the person acting as secretary to the FTP Panel shall read out the allegation, and the alleged facts upon which it is based;

(d) the Chairman of the FTP Panel shall inquire whether the practitioner wishes to make any admissions;

(e) where facts have been admitted, the Chairman of the FTP Panel shall announce that such facts have been found proved;

(f) where facts remain in dispute, the Presenting Officer shall open the case for the General Council and may adduce evidence and call witnesses in support of it;

(g) the practitioner may make submissions regarding whether sufficient evidence has been adduced to find the facts proved or to support a finding of impairment, and the FTP Panel shall consider and announce its decision as to whether any such submissions should be upheld;

(h) the practitioner may open his case and may adduce evidence and call witnesses in support of it;

(i) the FTP Panel shall consider and announce its findings of fact;

(j) the FTP Panel shall receive further evidence and hear any further submissions from the parties as to whether, on the basis of any facts found proved, the practitioner's fitness to practise is impaired;

(k) the FTP Panel shall consider and announce its finding on the question of whether the fitness to practise of the practitioner is impaired, and shall give its reasons for that decision;

(l) the FTP Panel may receive further evidence and hear any further submissions from the parties as to the appropriate sanction, if any, to be imposed or, where the practitioner's fitness to practise is not found to be impaired, the question of whether a warning should be imposed;

(m) the FTP Panel may take into account any written undertakings (including limitations on his practice) entered into by the practitioner -

(i) which it considers to be sufficient to protect patients and protect the public interest, and

(ii) where the practitioner expressly agrees that the Registrar shall disclose details of any such undertakings (save those relating exclusively to the health of the practitioner) to -

(aa) any person by whom the practitioner is employed to provide medical services or with whom he has an arrangement to do so;

(bb) any person from whom the practitioner is seeking such employment or such an arrangement; and

(cc) any enquirer;

(n) the FTP Panel shall consider and announce its decision as to the sanction or warning, if any, to be imposed or undertakings to be taken into account and shall give its reasons for that decision;

(o) where the FTP Panel considers that an order for immediate suspension or immediate conditions should be imposed on the practitioner's registration, it shall invite representations from the parties before considering and announcing whether it shall impose such order, together with its reasons for that decision; and

(p) the FTP Panel shall deal with any interim order in place in respect of the practitioner.

(3) Where it appears to the FTP Panel at any time that -

(a) the particulars of the allegation or the facts upon which it is based, of which notice has been given under rule 15, should be amended; and

(b) the amendment can be made without injustice,

it may, after hearing the parties and consulting with the Legal Assessor, amend the particulars on appropriate terms.

(4) At any stage in the proceedings, before making a determination that a practitioner's fitness to practise is impaired, the FTP Panel may, having regard to the nature of the allegation under consideration, adjourn and direct -

(a) that a specialist health adviser or specialist performance adviser be appointed to assist the FTP Panel; or

(b) that an assessment of the practitioner's performance or health be carried out in accordance with Schedule 1 or 2.

(5) On receipt of an assessment report produced further to a direction under paragraph (4)(b), the FTP Panel may -

(a) proceed to consider and determine the allegation in accordance with paragraph (2); or

(b) refer the allegation to the Registrar for consideration by the Case Examiners in accordance with rule 10(2).

(6) When determining whether a practitioner's fitness to practise is impaired by reason of adverse physical or mental health, the FTP Panel may take into account -

(a) the practitioner's current physical or mental condition;

(b) any continuing or episodic condition suffered by the practitioner; and

(c) a condition suffered by the practitioner which, although currently in remission, may be expected to cause a recurrence of impairment of the practitioner's fitness to practise.

(7) Where a practitioner has been referred under rule 7(6)(ii) for failure to comply with reasonable requirements imposed by an Assessment Team, the FTP Panel may dispose of the case, where it considers it appropriate to do so, by suspending the practitioner's name from the register or imposing conditions on his registration in accordance with section 35D of the Act.

(8) Subject to paragraph (7), where a practitioner has failed to submit to, or to comply with, an assessment under Schedule 1 or 2, and -

(a) there is credible evidence before the FTP Panel that the practitioner's fitness to practise is impaired;

(b) a reasonable request has been made by the Registrar to the practitioner that he submit to or comply with the assessment; and

(c) no reasonable excuse for such failure has been provided by the practitioner,

the FTP Panel may take such failure into account in determining the question of whether the practitioner's fitness to practise is impaired.

(9) At any stage before making its decision as to sanction or warning, the FTP Panel may adjourn for further information or reports to be obtained in order to assist it in exercising its functions.

APPENDIX D

Relevant Provisions of the NHS Reform and Health Care Professions Act 2002

General Functions of CHRE

s.25(2) of the 2002 Act provides that the general functions of CHRE include:

> *"to promote the interests of patients and other members of the public in relation to the performance of their functions by ... (regulatory bodies) and by their committees and officers."*

s.25(3) includes the General Medical Council as a relevant regulatory body.

Relevant Decision and Power to Refer a Disciplinary Case to Court

Section 29 sets out the provisions under which CHRE may refer a disciplinary decision to Court.

Relevant Decision

s.29(1): *"This section applies to:*

> *(c) a direction by a Fitness to Practise Panel of the General Medical Council under section 35D of the Medical Act 1983 (c 54) that the fitness to practise of a medical practitioner was impaired otherwise than by reason of his physical or mental health),"*

The Power to Review

s.29(4) *"If the Council considers that -*

(a) *a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both, or*

(b) a relevant decision falling within subsection (2) should not have been made,

and that it would be desirable for the protection of members of the public for the Council to take action under this section, the Council may refer the case to the relevant court."

s.29(5) *In subsection (4), the "relevant court"—*

(c) in the case of any other person [who was not notified of the decision at an address in Scotland or Northern Ireland], means the High Court of Justice in England and Wales.

APPENDIX E

Advice of Peter Mant, 39 Essex Street, in the case of Dr Jane Ann Barton, dated 28 February 2010

APPENDIX F

Supplementary note to advice of Peter Mant, 39 Essex Street, in the case of Dr Jane Ann Barton, dated 9 March 2010

APPENDIX F

Extracts from the relevant Case Law

Please note that this section sets out only short extracts from cases (both CHRE and practitioner appeals) that may be relevant to the case under consideration. It is important that extracts from cases are put in the context of the case they are taken from. Also, these are only a limited selection and there may be other cases that are relevant to the particular case under consideration. The Legal Adviser should address these issues at the meeting.

A. ***Ruscillo –v- CRHP and GMC and CRHP –v- the NMC and Truscott [2005] 1WLR 717***

Test under s.29(4)(a) of the 2002 Act

The Court of Appeal considered the problem of the drafting of s.29(4)(a) of the Act and ruled how it should be interpreted:

67 Our solution to the problem gives to section 29(4)(a) the following meaning:

If the Council considers that-

> *(a) a relevant decision falling within subsection 1 has been unduly lenient, whether because the findings of professional misconduct are inadequate, or because the penalty does not adequately reflect the findings of professional misconduct that have been made, or both...*

this reading of the subsection accords with the scheme of section 29 and is not in conflict with the language used.

Test under s.29(4)(b) of the 2002 Act

68 Although section 29(4)(b) says nothing about undue leniency, it seems to us implicit that the Council will not refer a case to the High Court unless it considers that the failure of the disciplinary tribunal to impose any penalty is unduly lenient to the practitioner.

Test of undue leniency

73 The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.

76 We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.

77 In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and interests of the public.

Deference to the FTP Panel

78 The question was raised in argument as to the extent to which the Council should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed.

Procedural shortcomings

80 The disciplinary tribunal should play a more proactive role than a judge presiding over a criminal trial in making sure that the case is properly presented and that the relevant evidence is placed before it.

B. *Council for the Regulation of Healthcare Professionals v General Medical Council and Professor David Patrick Southall [2005] EWHC 579 (Admin)*

Comments on deference to the FTP Panel

In paragraph 10 Collins J quotes from paragraph 78 of the Court of Appeal judgment in Truscott/Ruscillo set out above. He then goes onto say:

11. The amount of weight to be attached to the expertise, assuming regard has been had to relevant factors, will depend on the circumstances of a particular case. Thus where there is misconduct constituted by a failure to reach proper standards in treating patients, the expertise of the tribunal in deciding what is needed in the interests of the public is likely to carry greater weight. This will apply more particularly in cases involving fitness to practise. But where, for example, dishonesty or sexual misconduct is involved the court is likely to feel that it can assess what is needed to protect the public or to maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the tribunal. The question of deference has been considered by the Privy Council in a number of cases. The more recent approach, which reflects the influence of article 6 of the European Convention on Human Rights, is to be found in Ghosh v General Medical Council [2001] 1 WLR 1915. At paragraph 34 on page 1923, Lord Millet said this:-

> *"For these reasons the Board will accord an appropriate measure of respect to the judgment of the committee whether the practitioner's failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the committee's judgment more than is warranted by the circumstances. The Council conceded, and their Lordships accept, that it is open to them to consider all the matters raised by Dr Ghosh in her appeal; to decide whether the sanction of erasure was appropriate and necessary in the public interest or was excessive and disproportionate; and in the latter event either to substitute some other penalty or to remit the case to the committee for reconsideration".*

That approach was followed in Preiss v General Dental Council [2001] 1 WLR 1926 and is reflected in what the Court of Appeal said in Ruscillo at paragraph 78.