23 MARCH 2010.

COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE
NOTE OF SECTION 29 CASE MEETING ON 23 MARCH AND 29 MARCH 2010

DR. JANE ANN BARTON

PRESENT: Harry Cayton (in the Chair)
Michael Andrews
Tim Bailey

IN ATTENDANCE: 23 March 2010
Briony Mills (Senior Scrutiny Officer, CHRE)
Bethan Bagshaw (s29 Legal Secondee, CHRE)
Joanna Ludlam (Baker & McKenzie LLP, Legal Advisor)
Peter Mant (Counsel, 39 Essex Street, Legal Advisor)

29 March 2010
Briony Mills (Senior Scrutiny Officer, CHRE)
Bethan Bagshaw (s29 Legal Secondee, CHRE)
Tom Cassels (Baker & McKenzie LLP, Legal Advisor)
Mark Richardson (Baker & McKenzie LLP, Legal Advisor)
Peter Mant (Counsel, 39 Essex Street, Legal Advisor)

1. DEFINITIONS

In this note the following abbreviations will apply:

"CHRE"	The Council for Healthcare Regulatory Excellence
the "Members"	CHRE as constituted for this Section 29 case meeting
"*Ruscillo*"	The decision of the Court of Appeal in CHRE v Ruscillo [2004] EWCA Civ 1356
the "2002 Act"	The National Health Service Reform and Health Care Professions Act 2002
the "Panel"	The Fitness to Practice Panel of the General Medical Council
the "GMC"	The General Medical Council

2. THE RELEVANT DECISION

The relevant decision is the Panel's determination on 29 January 2010 that Dr Barton was guilty of multiple incidences of serious professional misconduct, and imposing conditions on Dr Barton's registration for a period of three years.

3. DOCUMENTS BEFORE THE MEETING

The following documents were available to the Members:

3.1 Transcripts of the hearing dated between 8 June 2009 and 20 August 2009 and 20 - 29 January 2010;

3.2 Exhibits put before the Panel;

3.3 Determination of the Panel dated 29 January 2010;

3.4 Correspondence received from the public, including a letter from Blake Lapthorn dated 23 March 2010, received at the start of the meeting;

3.5 GMC's Good Medical Practice;

3.6 Section 29 Process and Guidelines;

3.7 GMC's Indicative Sanctions Guidance;

3.8 Order of the Interim Orders Panel dated 12 November 2009;

3.9 Lawyers' report prepared by Baker & McKenzie LLP dated 9 March 2010;

3.10 Note of Advice prepared by Counsel dated 2 March 2010; and

3.11 Supplementary Note to Advice prepared by Counsel dated 9 March 2010.

4. CONFLICTS OF INTEREST

The Chair asked whether the Members had any apparent conflict of interest. No conflicts were declared. The Chair confirmed that the Members convened had no conflicts of interest and none were registered.

5. JURISDICTION

The Members confirmed that they were satisfied that CHRE had jurisdiction to consider this case under Section 29 of the 2002 Act, and noted that this section 29 case meeting was taking place within the statutory time for an appeal, which would expire on 5 April 2010. As 5 April 2010 falls on Easter Monday, the last day to lodge an appeal will be 1 April 2010.

The purpose of this section 29 case meeting was to consider this case in full under Section 29 of the 2002 Act.

6. APPLYING SECTION 29 OF THE 2002 ACT

Undue Leniency

The Members noted that the test they had to apply when considering "undue leniency" is whether the decision was one which the Panel, having regard to the relevant facts and to the objective of the disciplinary proceedings, could reasonably have imposed.

The question is whether the decision of the Panel was "manifestly inappropriate" having regard to Dr Barton's conduct and the interests of the public (*Ruscillo*). The Members noted that it was not enough that they themselves might have come to a different view.

The Members considered the legal principles governing sanctions. They noted that the purpose is not to punish the practitioner for misconduct, but to protect the public (which included protection of patients, maintenance of public confidence in the profession and declaring and upholding proper standards of conduct and behaviour).

The Members noted that, when assessing public protection, the Panel must have regard to the Indicative Sanctions Guidance, although it was accepted that the Indicative Sanctions Guidance is not a rigid tariff. They also noted that the Panel should consider all aggravating and mitigating factors. Mitigation might consist of evidence of the doctor's understanding of the problem and attempts to address it, as well as evidence of the practitioner's overall adherence to important principles of good practice. Mitigation could also relate to the circumstances leading up to the incidents, testimonials, lack of training or supervision at work.

The Members then considered the series of points set out in the Guidance, most or all of which should be present for conditions to be imposed. The points are as follows:

- No evidence of harmful deep-seated personality or attitudinal problems.
- Identifiable areas of the doctor's practice in need of retraining.
- Potential and willingness to respond to retraining.
- Willingness to be open and honest with patients if things go wrong.
- Patients will not be put in danger either directly or indirectly as a result of conditional registration itself.
- It is possible to formulate appropriate and practical conditions.

The Members went on to consider the evidence relevant to sanction, noting that the Panel had the benefit of hearing the evidence first-hand, and that the Members should accord due respect to this fact.

The Members observed that Dr Barton had stated, in evidence, that she would not do anything differently if she was presented with the same circumstances today. They noted the Panel's finding that she displayed a "worrying lack of insight" and its concern at her intransigence. Although the Members noted that Dr Barton had admitted certain allegations (such as the range of doses being too wide), they considered that the admissions were in fact limited, and that there was no admission in relation to key findings. In particular, she did not admit that any of her actions had not been in the best interests of her patients.

The Members further noted Dr Barton's disregard for guidelines, and considered the evidence suggested that it was arguable that Dr Barton had an attitudinal problem. The Members doubted whether, if she considered she had done nothing wrong, it was possible for Dr Barton to be retrained.

When undertaking the consideration as to whether the decision of the Panel was unduly lenient, the Members noted the mitigating factors that had been raised in Dr Barton's favour. In particular, Members noted the evidence regarding Dr Barton's working conditions, the lack of regular consultant cover and Dr Barton's evidence that her prescribing practices were necessitated by circumstances. However they also noted that in stating that she had done nothing wrong and that she would do the same again Dr Barton was not claiming that her working circumstances were the only reason for her practice.

The Members noted that failing to keep accurate patient records is a serious matter. They noted the Panel's comment that poor record keeping by Dr Barton had contributed to the difficulties in deciding the case. The Members observed that this failing might well apply to all aspects of Dr Barton's practice, not just in the context of palliative care. The Members further observed that the conditions, as drafted by the Panel, were arguably not wide enough to embrace the concerns as to record keeping in Dr Barton's general practice. Practising in a group of at least four doctors did not guarantee appropriate record keeping by Dr Barton. On the other hand the Members noted the testimonials from Dr Barton's peers, observing that the appraisers had not raised any concerns as to Dr Barton's note-taking.

The Members made similar observations in relation to the Panel's finding that Dr Barton had fallen short of maintaining trust by respecting the views of patients. Again, this failing might conceivably apply to Dr Barton's general practice, not just her conduct in the context of palliative care, and it was not certain that the conditions, as formulated by the Panel, are sufficiently broad and specific to protect individual patients and the public. The Members once again noted, however, the positive testimonials of Dr Barton's peers.

The Members considered that it was practically possible to draft appropriate conditions to address the failings of Dr Barton. The Members noted, however, the numerous findings of serious professional misconduct, and expressed their concern that the conditions, as drafted, fail to address all the matters where Dr Barton's conduct fell short of being acceptable, especially in relation to her failure to keep proper medical records, to respect patients' views and to assess properly a patient's condition before prescribing. These were all areas which were relevant to Dr Barton's general practice as well as palliative care. Nevertheless, Members also stated that it would be difficult to conclude that the conditions were inadequate to meet their objectives, which would be required in order to conclude that they were a manifestly inappropriate sanction to impose in the circumstances.

The Members were concerned by the findings of the Panel in relation to Dr Barton's lack of insight and her failure to acknowledge her mistakes and apologise for them.

The Members noted the seriousness of the case, affecting as many as twelve aged and vulnerable patients. They noted the Indicative Sanctions Guidance applicable to erasure which set out a series of bullet points, any of which "may well" make erasure the appropriate sanction, in particular "persistent lack of insight into seriousness of actions or consequences". The Members considered that these bullet points could be said to apply to Dr Barton but did not feel able to draw a final conclusion on the issue of undue leniency without obtaining further legal advice.

Public Protection

The Members then considered the question of whether the imposition of conditional registration was appropriate to protect individual patients and the wider public interest (including upholding the reputation of the profession and declaring and upholding standards). The Members expressed their grave concern at the number of patients involved, the breadth and seriousness of the findings of serious professional misconduct and Dr Barton's cavalier attitude to the guidelines. Members considered that there remains a possibility that Dr Barton's attitude, views and practice could give rise to different dangers in another context. The Members observed that a doctor who does not follow evidence-based guidelines may be seen to put her patients at risk.

The Members adjourned in order to take the required advice, which would include advice on the likely prospects of an appeal being upheld, and will reconvene as soon as that legal advice is available and in any event in order to take a decision before 1 April 2010.

7. RECONVENED MEETING ON MONDAY 29 MARCH 2010

The Chair asked whether any events had taken place which presented a conflict of interest since the meeting was adjourned on 23 March 2010.

No conflicts were declared. The Chair confirmed that the Members convened still had no conflicts of interest and none were registered.
The Chair opened the reconvened meeting by informing the Members that two issues had arisen since the meeting was adjourned:

1. Additional legal advice had been obtained from Robert Jay Q.C.; and
2. Confirmation of Dr Barton's current employment status had been obtained.

As to the second point listed above, the Members noted that CHRE had been informed that Dr Barton had resigned from her GP practice and intended to retire on 31 March 2010. Members observed that although Dr Barton currently remains on the GMC's register, it would appear that it is her intention not to return to practise.

Undue Leniency

Members expressed some concern that certain elements of the Indicative Sanctions Guidance pointed toward erasure as being the most appropriate sanction to reflect Dr Barton's actions. However, Members concluded that the findings of the Panel were not fundamentally incompatible with her continued practise as a doctor. It was also noted by Members that a measure of deference should be accorded to the Panel in a decision of this nature, where a detailed assessment of the registrant's medical practice is required.

Having taken legal advice, plus all of the other materials that had been put before them, Members concluded that although the sanction imposed on Dr Barton was lenient, it was not unduly lenient according to the established tests laid down in *Ruscillo* and subsequent cases.

Public Protection

Members noted the new information that Dr Barton was due to retire from practice within the next couple of days. Members noted that this did not mean that she would be unable to practise but that she would remain under the same conditions if she did so. Members considered this when determining the public protection issues that arose.

Members noted some concern that erasure may be required to uphold the reputation of the profession. It was agreed that the test to be applied was whether an informed member of the public would demand that Dr Barton be erased. Although Members agreed that this was not a straightforward decision, they concluded that this test would not be met on the facts.

In reaching this conclusion, Members took into account a number of considerations, including the mitigating factors that Dr Barton was able to put before the Panel, which had to be considered both when determining whether serious professional misconduct had occurred and when considering the sanction imposed.

There were two types of mitigation; the circumstances in which Dr Barton was working at the time of her misconduct and the testimonials from both patients and colleagues that she had practised safely in the interim.

These would also have to be included in the informed member of the public test. Members also noted that, for the same reasons, an appeal to Court would be unlikely to be upheld and that an informed member of the public would consider that the costs to the public purse would not justify referral to Court.

Members also noted that there was no convincing evidence that Dr Barton posed a threat to the public or individual patients, particularly in the light of the restrictions imposed by the conditions and by her impending retirement. As such, the threat of any repetition by Dr Barton of her misconduct was low and a referral was not required to protect members of the public or individual patients.

8. CONCLUSIONS

Members concluded that they considered erasure to be the most appropriate sanction in the circumstances of this case. There were three factors that influenced this determination:

1. The leniency of imposing conditions on Dr Barton's registration given the facts of the case
2. The need to uphold confidence in the medical professions: and
3. The need to maintain public confidence in the regulation of the medical professions.

Nevertheless, Members concluded that the tests for referral under s29 of the 2002 Act, as developed in subsequent case law, had not been met in this case.

As there were no further issues for consideration, the Chair declared the meeting closed.

Signed: Code A **Date:** 31 March 2010

Harry Cayton
Chair