

## Indicative Sanctions Guidance

### 1 Introduction

The purpose of this guidance is to assist Chairs and Committee members of Fitness to Practise Committees in deciding whether or not to impose a disciplinary order against a person's registration and, if so, what order that should be.

A key difference for Fitness to Practise Committees, as oppose to the former Professional Conduct and Competence Committees of the General Teaching EWC for Wales (GTCW), is to decide whether or not the specific Order imposed should be applied to not only the category of registration in which the person was practising at the time of the referral to the Education Workforce Council (EWC), but also to any other categories in which the person is registered at the time of the Committee's decision.

To assist the Committee in this respect, the EWC has responsibility for the registration and regulation of:

- school teachers
- further education teachers
- school learning support workers
- further education learning support workers
- youth workers
- youth support workers
- work based learning practitioners

**Committee members are reminded that the Indicative Sanctions Guidance is 'guidance only', and is not an alternative source of legal advice. Committee members will need to use their own judgement in deciding whether or not to impose an Order since every case will be different and will, therefore, need to be treated on its own unique facts and merits.**

The EWC's Indicative Sanctions Guidance will be continuously reviewed and re-issued.

### 2 Deciding whether or not to impose a disciplinary order

If a Committee has found the facts of one or more allegation proven, and that those proven facts amount to unacceptable professional conduct, serious professional incompetence or a conviction of a relevant offence, **even if the person is not registered with the EWC at the time of its decision**, the Committee must:

- (a) consider the previous history and character of the registered person and any mitigating circumstances;
- (b) determine whether to make a disciplinary order against the registered person, and, if applicable, specify the terms of one of the following orders:
  - **a Reprimand**

The registered person's registration is not affected. A Reprimand will remain on the Register of Education Practitioners ('the Register') for two years.

- a **Conditional Registration Order**

The registered person's continued registration is subject to a condition or conditions set by a Committee with which he or she is required to comply. These conditions can be imposed for a specified time period, or without limit of time.

- a **Suspension Order** (which may or may not include conditions)

The registered person is suspended from the Register. A Committee may impose this Order for a period of up to two years. A condition specified in a Suspension Order has effect for such period as may be specified, or without limit of time.

Once the Suspension Order has expired, subject to any conditions being met, the person concerned must re-apply for registration.

**It is for a Committee to determine, using its own judgement, the duration of the Order based on the seriousness of the particular case.**

- a **Prohibition Order.**

The registered person is removed from the Register. The Committee must set a time period of not less than two years before which the registered person is not permitted to make an application for eligibility for restoration to the Register. Once the period set has expired, he or she may apply to the EWC to become eligible for restoration. Any such application will be considered by a newly constituted Committee which will need to be satisfied that the character, competence and any other relevant factors are sufficiently acceptable to restore the person's eligibility to register.

Should a Committee grant an application for eligibility, the person concerned must re-apply for registration.

Should no application be made, the person will remain prohibited.

**It is for a Committee to determine, using its own judgement, the period of time that must pass before an application for eligibility for restoration can be made by the practitioner, based on the seriousness of the particular case**

- (c) decide whether or not the specific Order should be applied to only the category of registration in which the person was practising at the time of the referral to the EWC, or whether it should apply to other categories in which the person is registered at the time of the Committee's decision.

In making this decision, the Committee should think carefully how relevant the conduct or incompetence found proven is to the person's practice in any other categories of registration, and the risks were the Committee not to apply such an Order to them.

### **3 The Code of Professional Conduct and Practice for Registrants with the EWC**

In making its decisions under paragraph 2 above, a Committee **may** refer to the Code, although it is not bound to do so.

For example:

- a school teacher dismissed by his / her employer for downloading adult pornographic images on a school computer, in school time and in breach of the school policy may be viewed to have breached the section of the Code which states:

*‘Registrants act with honesty and integrity’ -*

*Registrants comply with policies, procedures and guidelines in respect of the use of workplace property, facilities, finance and ICT*

- a further education teacher dismissed by his / her employer for falsifying his / her application for employment at a further education institution may be viewed to have breached the section of the Code which states:

*‘Registrants act with honesty and integrity’ –*

*Registrants represent themselves, their experience, professional position and qualifications honestly*

- a youth worker dismissed by his / her employer for inappropriate conversations with a child on Facebook and by text, in breach of the Code which states:

*‘Registrants base their relationship with learners on mutual trust and respect’ –*

*Registrants follow policies, procedures and guidelines on matters such as communication with learners, physical pupil contact, behaviour management, inclusion, access and equality of opportunity*

However, if a Committee finds a registered person has breached the Code, it does not automatically mean an order should follow. A Committee must still consider the misconduct or incompetence found against the Indicative Sanctions Guidance, and address the **degree of seriousness** of that breach in determining whether or not a disciplinary order should be imposed.

A Committee should not use the Code as an indicator of seriousness – the Code is a general guide for registered persons as to proper standards of conduct and competence. A decision regarding seriousness is a judgment for the Committee.

The Code may not be referred to in the event allegations of unacceptable professional conduct/serious professional incompetence/conviction of a relevant offence occurred prior to:

- 1 September 2010 for school teachers
- 1<sup>st</sup> April 2015 for further education teachers
- 1<sup>st</sup> April 2016 for school learning support workers and further education support workers
- 1<sup>st</sup> April 2017 for youth workers, youth support workers and work based learning practitioners
- the date, if later than the above, on which the individual became a registered person in the relevant category or categories of registration

#### **4 The purpose of a disciplinary order**

In deciding whether or not to impose a disciplinary order, and if so, what order to impose, Committee members should have regard to the following key principles:

##### **4.1 The Public Interest**

The primary purpose of a disciplinary order is to **protect the interests of learners, the public and the education professions** rather than to be punitive, or to apportion blame. In this respect, this document defines ‘the public interest’ to cover each of these groups.

Judicial authority is clear the public interest includes:

- (a) the protection of learners and other members of the public;
- (b) the maintenance of public confidence in the education professions and the regulatory process
- (c) the declaration and upholding of proper standards of conduct and competence.

There is also judicial authority that there can be a public interest in an effective practitioner being able to continue to practise in their chosen profession.

It is acknowledged that an order may have a punitive effect.

## **4.2 Proportionality**

The principle of proportionality requires that a measure imposes no greater restriction upon a convention right than is absolutely necessary to achieve its objective. In the context of regulatory proceedings, the convention right referred to is the right of a person to practise in their chosen profession and the objective is the protection of the public interest. The Committee has to determine whether it is necessary to impose a disciplinary order and, if so, what is the least intrusive means of protecting the public interest.

In deciding whether to impose a disciplinary order and (if so) what order to impose, the Committee should have regard to the public interest considerations in favour of and against, as well as the interests of the registered person. In addition, it will need to consider any mitigation submitted by the registered person, relative to the nature and seriousness of the behaviour and incident(s) in question.

In considering the seriousness of the behaviour, it is important the Committee considers the influential role that a registered person can play in the formation of learners' views and behaviours.

If a Committee has determined that a certain disciplinary order is necessary to protect the public interest (and is therefore the minimum action required to do so), that order should be imposed, even where this may lead to difficulties for a registered person.

A Committee must ensure proportionality is clearly shown to have been considered when drafting and announcing its decision.

## **4.3 Mitigating and aggravating factors**

The Committee should have regard to mitigating and aggravating factors. However, the extent to which such mitigation or other factors should influence judgement on a finding of unacceptable professional conduct, serious professional incompetence or a conviction of a relevant offence should be dependent on the individual circumstances in the case and is at the discretion of the Committee.

Section 6 contains further guidance about these factors.

## **4.4 Reasons for decisions and orders**

In all disciplinary cases, it is essential that a Committee gives clear reasons for its decision either to not impose a disciplinary order, or to impose a particular disciplinary order. This should include:

- why it has *exceptionally* decided not to impose an order following a finding of unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence;
- the rationale for, and an explanation as to why a Committee has decided to impose a particular order rather than any other. The Committee should use the criteria described below to illustrate why lower level sanctions having been considered by the Committee, have been rejected, and, if relevant, why the next sanction up is not appropriate;
- the **level of seriousness** of the unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence found;
- the factors the Committee took into account;

- the extent to which the public interest was considered and weighed in the balance with the interests of the registered person;
- reference to the Code where appropriate.

A Committee should be mindful of Rule 38 when deliberating and documenting its reasons:

*‘Any person aggrieved by the decision of a Fitness to Practise Committee to impose a disciplinary order shall have the right of appeal against the order to the High Court within 28 days from the date on which Notice of the order is served on him or her.’*

#### **4.5 Relevant Case Law**

Case law has established the following principles:

##### **1. Needham v Nursing and Midwifery Council [2003] EWHC 1141**

- Fairness requires reasons to be given.
- Whether sufficient reasons have been given will depend on the particular circumstances of each case.
- Reasons need not be elaborate or lengthy, but should be such as to tell the parties in broad terms why the decision was reached.

##### **2. R (Paterson) v General Medical Council [2006] EWHC 891 (Admin)**

- It is insufficient for the Committee’s decision to merely recite the factors set out in the indicative guidance. The Committee’s decision should contain an analysis, explanation or reasoning to show how the indicative factors have been applied to the particular facts found by the Committee.
- If, for example, the Committee reaches the conclusion that a Conditional Registration Order is inappropriate, it is not sufficient for the Committee to say that it could not formulate appropriate conditions to impose on registration. The decision should explain why the Committee concluded that it could not formulate appropriate conditions.

##### **3. Mahmood v General Medical Council [2007] EWHC 474 (Admin)**

- It is unsatisfactory for a Committee to have something in mind in reaching a decision but then fail to state it as part of the reasons for reaching that conclusion.

#### **5 Disciplinary Orders**

The following outlines the disciplinary orders available to a Committee, and explains the likely criteria for the application of each. The sanctions should be considered in the following order, but a Committee, during its deliberations, is **not prevented from revisiting a lower disciplinary order, or no disciplinary order, once it has moved up the scale:**

- no disciplinary order;
- a **Reprimand**;
- a **Conditional Registration Order**;
- a **Suspension Order** (which may or may not include conditions);
- a **Prohibition Order**.

**A Committee is not prevented from imposing a disciplinary order upon a person who is:**

- **not currently registered with the EWC;**
- **not currently practising as a further education teacher, school learning support worker, further education learning support worker, youth worker, youth support worker, work based learning practitioner;**

- not carrying out the ‘specified work’ of a school teacher,

at the time of the Committee’s decision.

A person whose registration has been suspended by a disciplinary order is also capable of meeting conditions.

## 5.1 No disciplinary order

### Where no disciplinary order is appropriate

Where a Committee decides that the facts in a case are proved and amount to unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence, the Committee should consider whether or not a disciplinary order should be imposed.

**Committees should note that a finding of unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence will usually result in a disciplinary order being imposed.** The decision not to impose a disciplinary order should only be made by a Fitness to Practise Committee in *exceptional* circumstances, where it is clear that such a decision is not contrary to the interests of learners, the public and the education professions.

If a Committee decides that no order is to be imposed, it should give clear and detailed reasons for this decision.

A Committee should consider whether or not it is appropriate and sufficient for no disciplinary order to be imposed.

**If it considers that an order should be imposed, a Committee should decide whether or not a Reprimand is appropriate (5.2)**

## 5.2 Reprimand

### Where a Reprimand is appropriate

Where a Committee decides that it is not sufficient to conclude a case with ‘no disciplinary order’, a Reprimand is the lowest disciplinary order that can be applied. A Reprimand may therefore be appropriate and/or sufficient where the unacceptable professional conduct, serious professional incompetence or conviction of a relevant offence **is at the lower end of the scale, and a Reprimand is applied in order to mark the fact that the behaviour was unacceptable and must not happen again.** This does not, however, prevent the Committee from imposing a higher order, even if the criteria referred to below are met.

It is unlikely a Committee will consider a Reprimand appropriate where it makes findings of fact in relation to serious professional incompetence, even where the person has shown insight and taken corrective steps. This does not prevent a Committee from doing so however.

Reasons for imposing a Reprimand should be conveyed in the written decision of the Committee. Such reasons will be reiterated in the Notice of Decision issued to the registered person by the EWC.

### Effect of the Order

**A Reprimand does not affect the person’s registration** but remains on the Register for a period of two years. A Reprimand will be disclosed to an employer or prospective employer under Welsh Government Regulations as part of pre-employment checks on registration.

### Indicative Guidance

**This order may be appropriate where most of the following factors are present** (this list is not exhaustive):

- Evidence that the behaviour would not have seriously affected learners and did not occur during hours during which the registered person was practising.
- The registered person shows insight into his or her failings.
- The registered person admits the allegations.
- The incident was an isolated lapse and was not deliberate.
- The registered person provides a genuine expression of regret or apology.
- Evidence of acting under duress or provocation.
- The registered person has a previous good history.
- There has been no repetition of behaviour since the incident.
- The registered person has taken rehabilitative/corrective steps.
- Relevant and appropriate references and testimonials have been provided.

A Committee should consider whether or not it is sufficient to conclude the case with a Reprimand.

**If not, the Committee should decide whether or not imposing conditions on the person's registration would be appropriate (5.3)**

### 5.3 Conditional Registration Order

#### Where a Conditional Registration Order is appropriate

A Conditional Registration Order may be imposed by a Committee where it considers **there is a real prospect of rehabilitation or remedial action being successful, and an unsatisfactory episode of behaviour or performance could be rectified** by, for example:

- training or re-training;
- personal or professional development;
- medical treatment or rehabilitation;
- a restrictive condition which specifies the parameters within which a registered person must operate in his or her professional role or personal life (until such training, re-training or development has taken place).

Conditions may involve expenditure on the part of the registered person concerned.

Before imposing conditions involving retraining or other development, a Committee should satisfy itself that:

- (a) the registered person has shown signs he or she would be amenable to improving the problems identified with the use of conditions;
- (b) the objectives of the conditions are clear; and
- (c) the duly authorised officer and any future newly-constituted Committee will be able to determine whether or not the conditions have been met.

A Committee should be mindful that conditions should not be treated as a 'less punitive' alternative to a Suspension Order (with or without conditions) or Prohibition Order, where a Suspension Order or Prohibition Order is more appropriate given a Committee's particular findings. The protection of learners, the public and the education professions should be a Committee's primary consideration.

A Committee should use caution if considering a Conditional Registration Order where it has made findings of fact in relation to serious professional incompetence, as this will allow the registered person to continue practising in, for example, a school or further education setting. In particular, a school teacher will be in a position to continue to carry out the 'specified work'.

Reasons for imposing a Conditional Registration Order should be conveyed in the written decision of the Committee, with a full explanation of the conditions imposed. Such reasons and conditions set will be reiterated in the Notice of Decision issued to the registered person by the EWC.

#### Effect of the Order

**A Conditional Registration Order allows the registered person to maintain his or her status as a registered person, subject to meeting certain conditions over a prescribed timescale.**

A Conditional Registration Order will be recorded on the Register for the period indicated in the order. If no period is set, then details of the Order will be held permanently. A Conditional Registration Order will be disclosed to an employer or prospective employer under Welsh Government Regulations as part of pre-employment checks on registration.

#### Indicative Guidance

**This order may be appropriate when most or all of the following factors are apparent** (this list is not exhaustive):

- There is no evidence of harmful deep-seated personality or attitudinal problems.
- The registered person does not pose a significant risk of repeating the behaviour, or performance deficiencies are, in the Committee's view, rectifiable
- There are identifiable areas of practice in need of retraining.
- There are identifiable areas for development.
- The registered person shows a potential and willingness to respond positively to professional development or retraining, and shows sufficient insight to suggest that he or she will be able to comply with the conditions.
- Learners will not be seriously disadvantaged/affected either directly or indirectly as a result of a Conditional Registration Order.
- The conditions will protect learners, fellow education practitioners or the public during the period they are in force.
- It is possible to formulate appropriate and practical conditions to impose on registration.

#### Specifics of the Order

The order will specify all the conditions relevant to the registered person's employment with which he or she is required to comply, and in relation to each condition, either the period for which it has effect, or that it has a permanent effect, without limit of time.

The EWC has developed separate guidance entitled ***Guidance on the Framing of Conditions***. If a Committee decides that conditions are to be applied, it should refer to this additional guidance for assistance.



A Committee should consider whether or not it is sufficient to conclude the case by imposing conditions on the person's registration.

**If not, the Committee should decide whether or not suspending the person from the Register would be appropriate (5.4)**

#### **5.4 Suspension Order (which may specify conditions)**

##### Where a Suspension Order is appropriate

A Suspension Order can be used to demonstrate/indicate a signal to the registered person, the profession and the public about what is regarded as unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence.

A Suspension Order is **likely to be appropriate and/or sufficient for misconduct or incompetence that is serious, but not so serious as to justify prohibition** (for example, where there may have been acknowledgement of fault, and where a Committee is satisfied that the behaviour or deficiencies in performance are unlikely to be repeated, although this may be more difficult to judge following a finding of serious professional incompetence).

There may be cases where a Conditional Registration Order is not sufficient to serve the public interest, but where there is **evidence that the registered person has the potential to be rehabilitated if prepared to undergo retraining/development**. In such cases and to protect the public, a Committee may wish to impose a period of suspension and apply conditions in terms of the type of retraining programme the practitioner might undergo during the suspension, or action he or she might take (as 5.3).

Reasons for imposing a Suspension Order should be conveyed in the written decision of the Committee, with a full explanation of any conditions imposed. Such reasons and conditions set will be reiterated in the Notice of Decision issued to the registered person by the EWC.

##### Effect of the Order

A Suspension Order has a punitive effect in that it **prevents the person from practising** in the category or categories of registration in which they are registered at the time of the Committee's decision (and therefore from earning a living as in that regard ) for the period of the Suspension Order.

**The person will be removed from the Register for the period specified.** A Suspension Order will be disclosed to an employer or prospective employer under Welsh Government Regulations, as part of pre-employment checks on registration.

**Suspended persons whose Suspension Order is subject to conditions remain ineligible for registration if they fail to comply with those conditions, even beyond the expiry date of the Order.**

**A condition imposed 'without limit' by a Committee would mean the condition can be completed 'at any time' during the period of the Suspension Order, rather than within a specified, defined period.**

##### Indicative Guidance

**This sanction may be appropriate when some or all of the following factors are apparent** (this list is not exhaustive):

- A serious instance or protracted period of unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence where a lesser sanction is not sufficient.

- The behaviour or performance issues found proven are not fundamentally incompatible with continuing to be a registered person.
- There is no evidence of harmful deep-seated personality and attitudinal problems.
- The registered person does not pose a significant risk of repeating the behaviour, or being unable to improve his or her competence as an education practitioner.

#### Specifics of the Order

The order will specify the period (**not exceeding 2 years**) at the end of which the person again becomes eligible for registration and any conditions to be complied with by him or her before they can become eligible again for registration.

***The period of the order is a matter for the Committee's discretion and judgement, depending on the seriousness of the particular case, and needs careful consideration.***

The EWC has developed separate guidance entitled ***Guidance on the Framing of Conditions***. If a Committee decides that conditions are to be applied, it should refer to this additional guidance for assistance.

A Committee should consider whether or not it is sufficient to conclude the case with a Suspension Order.

**If not, the Committee should decide whether or not removing the person from the Register would be appropriate (5.5)**

### **5.5 Prohibition**

#### Where a Prohibition Order is appropriate

Prohibition from the Register is appropriate where there is evidence of serious, deliberate or reckless acts and/or seriously deficient performance and the **only means of protecting learners and maintaining public confidence in the education professions**. However, Committees should not feel it necessary to prohibit a registered person in order to satisfy public demand for blame and punishment.

Whether or not a prohibition is appropriate will depend on the particular facts of each case, and a Committee should use its own judgement in making such a determination.

Reasons for imposing a Prohibition Order should be conveyed in the written decision of the Committee. Such reasons will be reiterated in the Notice of Decision issued to the registered person by the EWC.

#### Effect of the Order

**A person who has been prohibited from practising in the education professions is removed from the Register. Prohibited persons who do not apply for eligibility for restoration to the Register remain ineligible for registration.**

A person will remain prohibited unless he or she makes an application for eligibility for restoration to the Register, according to a timescale determined by a Committee. If, at this point, such an application is made, a newly-constituted Committee will need to be satisfied that the practitioner's character, competence and any other relevant factors are now sufficiently acceptable to restore his or her eligibility to register.

A Prohibition Order will be disclosed to an employer or prospective employer under Welsh Government Regulations as part of pre-employment checks on registration.

**A Prohibition Order applies in England where it relates to conduct, unlike all other orders available to the Committee.**

#### Indicative Guidance

**This sanction is likely to be appropriate when the behaviour is fundamentally incompatible with being a registered person, their competence is unlikely to improve, and involves any of the following** (this list is not exhaustive, and does not prevent a Committee using its own judgement as to the seriousness of the conduct or incompetence).

- A particularly serious departure from the personal and professional standards expected by the Code and Practising Teacher Standards.
- A deliberate or reckless disregard for the principles set out in the Code.
- The conduct or incompetence is seriously affecting the education and/or well-being of learners.
- There is a continuing risk to the education and/or well-being of learners.
- Abuse of position of trust (particularly involving vulnerable learners), or violation of the rights of learners.
- Dishonesty (especially where there have been serious consequences, persistence and covering up, or conducted for personal gain).
- Putting their own interests before that of learners.
- Sustained or serious bullying, or other deliberate behaviour that undermines learners, the education professions, colleagues and/or the employer.
- Sexual misconduct e.g. involving actions that were sexually motivated or of a sexual nature and/or that use or exploit the trust, knowledge or influence derived from the individual's professional position.
- The commission of a serious criminal offence.
- Persistent lack of insight and/or denial into seriousness of actions or consequences.
- Evidence of harmful deep-seated personality and attitudinal problems.
- An inability, unwillingness or refusal to resolve matters.
- Abuse of professional colleagues in a manner that seriously violates their rights or capabilities.

#### Specifics of the Order

A Prohibition Order will specify the period (**which shall not be less than 2 years, beginning with the date on which the order takes effect**) before the end of which no application may be made by the person that he or she is eligible for registration.

***The period of the order is a matter for the Committee's discretion and judgement, depending on the seriousness of the particular case and needs careful consideration***

## 6 Additional Guidance

### 6.1 Setting time periods

As explained above, it is for a Committee to determine, using its own judgment, the duration of the Conditional Registration, Suspension or Prohibition Order consequent to the seriousness of its findings.

Whilst the EWC does not provide indicative guidance on setting specific time periods, a Committee should bear in mind that a tension may arise where a Committee's findings indicate a serious departure from the standards expected by the Code, but the time period set is short, allowing a return to practise without any restrictions relatively quickly after the decision is made. A Committee should always consider whether the duration of a particular order adequately protects the public interest and is proportionate.

If a Committee determines that a short duration is appropriate, the Committee should be able to give reasons why an order of short duration is appropriate.

An example of a situation in which there might be a good reason for a short period of suspension is where the Committee determines that the registered person would benefit from retraining in relation to a specific area of his or her practice, but the Committee concludes that the public interest would not be protected by a Conditional Registration Order. If the Committee concludes that the public interest would only be protected by the relevant training being undertaken before the registered person returns to practice, this might be accomplished by a Suspension Order of a short duration which would enable the training to be conducted during the period of suspension.

### 6.2 Conviction Cases

#### Convictions

A disciplinary order may be imposed when a registered person has been convicted (at any time) of a relevant offence. A 'relevant offence' means in the case of a conviction in the United Kingdom, a criminal offence other than one having no material relevance to the person's fitness to be a registered person in the relevant category of registration. In the case of a conviction elsewhere, an offence which, if committed in England and Wales, would constitute such an offence. **A conviction gives a Committee jurisdiction, even if the criminal offence did not involve misconduct in the course of a person's practice**, provided the Committee concludes that the offence was of material relevance to fitness to be a registered person.

#### Other criminal sanctions

'Other criminal sanctions' can also be considered by a Committee, for example, a formal caution, reprimand or warning administered by a police force, a bind over or fixed penalty.

#### A Committee's role

In a hearing involving a conviction or other criminal sanction, the Presenting Officer will be invited to adduce evidence as to the circumstances leading up to a conviction or other criminal sanction, character and previous history of a registered person. A registered person will have the opportunity to address a Committee by way of mitigation and present any evidence in respect of this. However, he or she will only be afforded this opportunity should the Committee make a finding of unacceptable professional conduct and/or a conviction of a relevant offence (refer to 6.2).

The purpose of a hearing in relation to a conviction or other criminal sanction is not to punish the registered person a second time for the offence(s) for which he or she has been convicted or sanctioned, but to protect the learners who might be taught or instructed by the registered person, and to maintain the high standards and good reputation of the education professions.

A Committee's role is therefore to balance:

- the nature and gravity of the offence(s) and their bearing on the registered person's fitness to practise against the need for the imposition of a disciplinary order; and
- its consequences upon the ability of the registered person to practise within his or her profession.

### **6.3 Mitigating and aggravating factors**

#### **Mitigation**

All aspects of mitigation should be considered against the EWC's statutory responsibility described in 4.1 above.

Following a Committee's decision regarding findings of fact, and a determination that those proven facts amount to unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence, a Committee should have due regard to any mitigation. This includes any mitigation presented by or on behalf of a registered person. However, a Committee should note a registered person will not always be present at a Fitness to Practise Committee hearing to present verbal mitigation, or may decide not to put forward any mitigation in writing for presentation on the day. Therefore, even where no mitigation is formally presented by, or on behalf of the registered person, the Committee should have regard to any information which the Committee considers amounts to mitigation, including the following examples:

- Explanation of circumstances and/or events leading to the unacceptable professional conduct, serious professional incompetence and/or a conviction of a relevant offence established.
- Personal mitigation, such as periods of stress or illness, personal and financial hardship, level of experience at the time in question, level of support in the work place (the list is not exhaustive).
- Time elapsed since the relevant events.
- Any apologies or expressions of regret given by the registered person to a complainant, employer or any other person relevant to the conduct, incompetence or relevant offence established.
- Evidence of efforts made by the registered person to avoid such events reoccurring, or any efforts to correct the difficulties. For example, counselling, anger management rehabilitation, further training.
- Evidence of a previously unblemished career.
- History of the practitioner.
- Personal and third party character references or testimonials.

While personal mitigation may carry considerable weight in favour of a practitioner when punishment is being imposed in the criminal justice system, in regulatory proceedings it is likely to weigh less. This is because it will be balanced against the public interest as 4.1 above, and the fact that the purpose of regulatory sanctions is to protect that public interest and not impose punishment. It must be accepted that sanctions may have a punitive effect, but this is not their purpose, as outlined above.

Mitigation evidence may be presented by way of references and testimonials.

#### **References and Testimonials**

Often, a registered person will present references and testimonials as to his or her standing in the community and/or area of professional practice. As with other mitigating or aggravating factors, these will need to be weighed

appropriately by a Committee against the nature and seriousness of the conduct, incompetence or relevant offence established.

The quantity, quality and range of references and testimonials will vary from case to case.

A Committee should note the following when considering a reference and/or testimonial so as to be clear as to whether or not such a submission stands as an accurate, genuine and reliable portrait in light of the proven facts of a case.

- When the reference or testimonial was written.
- By whom the reference or testimonial was written, whether or not it has been signed by that individual and written on letter-headed paper (where appropriate). For example, by a professional colleague, an employer, or personal friend or relative, and his or her ability to provide relevant or expert comment.
- Whether or not a reference or testimonial has been provided specifically in relation to the conduct, incompetence or offending for which the registered person has been referred to a disciplinary Committee, or whether the author shows no awareness of it.
- Whether or not the author of the reference or testimonial was a witness to the conduct, incompetence or offending, and can therefore give a first-hand account.

Where a written reference has not been signed and/or is similar in style, font or language to other references submitted, the Committee may wish to seek clarification of the circumstances in which the references or testimonials were requested or provided.

A Committee will need to consider all such factors when looking at references and testimonials to determine what weight should be attached.

### **Expressions of Regret and Apology**

An admission by a registered person to a Committee that, in hindsight, he or she should or could have behaved or practised differently and intends to take, or has taken steps to prevent a recurrence of the conduct, incompetence or offending may be an important factor for a Committee.

However, a Committee should be aware that there may be differences in the way that insight is expressed, for example, how an apology or expression of regret is framed and the way it is communicated. This is a particularly important if the registered person is not represented or supported at a hearing, and is speaking on his or her own behalf without professional advice or guidance.

The prime consideration for a Committee when hearing an expression of regret or apology is therefore to be satisfied that learners are protected, and that the registered person has recognised that steps need to be taken, and what these steps should be – rather than the form in which this may be expressed.

### **Aggravation**

As well as considering the mitigating features of a case, the panel will need to consider any aggravating features, such as:

- any previous regulatory or disciplinary findings;
- concealment of wrong-doing;
- abuse of a position of trust;
- sexual misconduct;
- dishonesty;
- pre-meditation;

- lack of insight into failings, regret or remorse;
- a pattern of misconduct over a period of time.

### Dishonesty

Dishonesty, even where it does not result in direct harm to learners or is related to matters outside a registered person's professional practice, can be regarded as serious because it can undermine the trust the public place in the education professions. Honesty, integrity and trustworthiness are to be considered the linchpin of any education practitioner.

### Lack of insight

A practitioner is likely to lack insight if they:

- refuse to apologise or accept their mistakes
- promise to remediate, but fail to take appropriate steps
- do not demonstrate the timely development of insight
- fail to tell the truth during the hearing

### Sexual misconduct

The misconduct will be particularly serious where the proven actions were sexually motivated or of a sexual nature and/or used or exploited the trust, knowledge or influence derived from the practitioner's position in the education professions. Sexual misconduct seriously undermines public trust in the professions.

The risk to learners is a vital consideration for Committees.