

Agenda item:	5
Report title:	Publication and disclosure of warnings
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Action:	For decision

Executive Summary

Currently, warnings are published for five years on the face of a doctor's record and disclosed to employers indefinitely. This approach is considered disproportionate, given that warnings are our lowest level of regulatory action. Following analysis of responses to a public consultation and internal discussions with case examiners, with the Medical Practitioners Tribunal Service, and with the Employer Liaison Service, we have identified several possible options for the publication period that should be applied to warnings.

Recommendations

The Board is asked to decide on the appropriate publication period for warnings:

- a** A fixed publication period of one year on the face of the doctor's record.
- b** A fixed publication period of two years on the face of the doctor's record.
- c** A tiered system enabling decision makers to give a warning with a publication period of either one year or two years on the face of the doctor's record.
- d** Publication for one year on the face of the doctor's record, and then a further year on the history page.
- e** No publication on the face of the doctor's record, but a two year publication period on the history page.

The Board is further asked to approve the introduction of a five year time limit on disclosing warnings to employers.

Background

- 1** As part of the 2014 consultation on the Sanctions guidance, we asked how long warnings should be published and disclosed. The reason for proposing change

was concern that a warning has a much greater impact on a doctor than originally intended. Warnings are intended for conduct which, although of serious concern, is just below the threshold of fitness to practise impairment. They serve as a strong reminder of the standards expected of a doctor, but do not impact on registration. However, because they are published on the face of a doctor's record for five years, they can be viewed as a very serious sanction.

Consultation outcomes

- 2** The three proposals in the consultation were:
 1. Keep the current system – five years publication and indefinite disclosure
 2. Publish warnings for one year and disclose to employers and responsible officers for five years
 3. Issue guidance to case examiners and tribunal members on determining length of publication on a case by case basis up to a maximum of five years. Indefinite disclosure to employers and responsible officers.
- 3** The majority of consultation respondents agreed that change was needed – only 8 percent chose option 1. However, views were fairly evenly split between the two other options. 36 percent chose option 2 and 40 percent chose option 3 – (although 12 percent of those specifically commented that they did not agree with indefinite disclosure).
- 4** Analysis of the consultation responses overall supports a move away from indefinite disclosure of warnings to employers, and we are proposing to introduce a five year limit. This will not prevent employers themselves asking doctors to declare any previous warning, eg on an application form, but it will ensure that we as the regulator are sending the message that we consider a warning ceases to be relevant after five years.

Publication period – further developments since the consultation

- 5** Since the consultation, medical defence organisations have continued to express strong concerns about the impact of warnings, primarily as a result of our current approach to publication, which they suggest is worse than a short suspension. A small scale research project by Community Research on the effects of having restrictions on practice or warnings, has confirmed the disproportionate impact that some doctors experience. Another difficulty with option 3, which allows for publication up to five years, is the total discretion proposed for decision makers. It would require extremely complex guidance, and potentially give rise to inconsistencies of approach, if publication were determined on a case by case basis. An alternative could be to introduce different tiers of publication period which can be applied by the decision maker

depending on the nature of the case, and this is reflected in option (c) in the Executive summary above.

- 6** Having discussed this option with case examiners, who primarily make these decisions, there are concerns about its workability, in part, for reasons of complexity and potential inconsistency, but also because they question the need for gradation given the current threshold for warnings of conduct just below the level of impairment. The MPTS also are opposed to this option, because of the difficulties of ensuring consistency in decision making. They consider a fixed period for a warning the best way forward.
- 7** As our lowest level of regulatory action, there is a strong argument that one year is an appropriate level at which to set a fixed period, and this option did receive considerable support in the consultation. Some case examiners, and also representatives of the ELS, have however expressed the view that two years represents a more appropriate response to the conduct they see. Both of these options are included at (a) and (b) above. A summary of a few recent cases for which warnings were issued is attached at Annex A.
- 8** The remaining options, (d) and (e), focus on where we publish information about warnings. All active sanctions ie suspension, conditions or undertakings are published on the doctor's status page, essentially the face of their record, on the online register. This is the first page to come up when searching for an individual doctor. When they are revoked or expire, they move to the doctor's history page on List of Registered Medical Practitioners. This is still publicly available but is not as prominent on the doctor's record. At present, warnings are published on the doctor's status page, ie on the face of the doctor's record, and they remain there for the full five years, whereas the longest suspension would move to the history page after one year.
- 9** One alternative – option (d) – would be to publish on the face of the doctor's record for one year and then for a further year on the doctor's history page. This would treat the warning as in force for one year with a one year additional publication period. The proposal lessens the impact of the current system by reducing publication to two years, and it maintains the current visibility of a warning for one year. Option (e) – that is to publish warnings only on the doctor's history page – treats the warning as issued at a moment in time rather than something in force for a period of time. In other words, the warning becomes historical as soon as it has happened. Under this proposal, the visibility of a warning would be less, as there would be no reference on the face of a doctor's record – an enquirer would need to click into the history page to see it. However, it still remains publicly available for two years.

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5 – Annex A

Examples of recent cases where a warning was issued

Case 1

The doctor received a conviction for common assault (domestic violence) resulting in an 18 month community order. He showed some insight by pleading guilty and expressing remorse. There were no previous convictions, fitness to practise issues or other concerns. However, there was little victim awareness and the assault of his wife occurred in front of their children.

Case 2

The doctor failed to provide a proper standard of care, in that serious test results were not followed up quickly, resulting in the death of a patient. The doctor self-referred and cooperated fully with the investigation. There was no fitness to practise history or adverse information. It was a single clinical incident, for which the doctor showed considerable remorse, and which had impacted on her own health.

Case 3

The doctor received a fixed penalty notice for theft, after stealing electrical equipment from a retail store. There were no concerns from the doctor's employer or other adverse information. The doctor expressed regret and highlighted the development of support networks to address the factors that had led her to act in this way.

Case 4

The doctor provided a backdated quote for contracting services, to help cover up the fact that there had been no proper tendering process, potentially helping a company the doctor also worked for. This was done at the request of a member of staff in an NHS Trust. There was no patient harm, and the doctor acknowledged he should not have acted in this way.