Response to the Health and Care Professions Council's consultation on its revised Indicative Sanctions Policy

September 2018

1. Introduction

1.1 The Professional Standards Authority for Health and Social Care promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament. More information about our work and the approach we take is available at www.professionalstandards.org.uk

1.2 As part of our work we:

- Oversee the nine health and care professional regulators and report annually to Parliament on their performance
- Conduct research and advise the four UK governments on improvements in regulation
- Promote right-touch regulation and publish papers on regulatory policy and practice.

1.3 We welcome the opportunity to respond to the Health and Care Professions Council's (HCPC) consultation on its revised Indicative Sanctions Policy (the Policy). Below, we have made a number of comments about the revised Policy.

2. Public protection

2.1 The purpose of professional regulation is to protect the public. Where the document explains the function of sanctions in paragraph 9, we suggest it may be useful to instead list the legislative objectives of the HCPC, these are:

(a) to protect, promote and maintain the health, safety and well-being of the public;

(b) to promote and maintain public confidence in the professions regulated under this Order;

(c) to promote and maintain proper professional standards and conduct for members of those professions.[1]

2.2 Therefore, the decision for a panel is to decide which sanction (if required) would most appropriately meet the above statutory objectives. We observe that public confidence in the regulatory process (a consideration of public

[1] Health and Social Work Professions Order 2001 Consolidated text.

protection cited by the HCPC in its draft Policy) is not listed in these objectives.

2.3 We note that paragraph 10 says: 'Sanctions are not intended to punish registrants. Inevitably, a sanction may be punitive in effect, but should not be imposed simply for that purpose'. We welcome the sentiment of the first sentence but suggest that the paragraph as a whole could emphasise more the message that the fitness to practise process intends to be protective and not to punish. We refer to the case of Bolton, which may be useful to elucidate the balance between sanctions imposed on a registrant and their purpose.[2]

2.4 Relatedly, we considered the section 'How long should a suspension order be imposed for?' in paragraphs 110 to 113 to be overly focused on impacts on the registrant. There is a risk this could be misinterpreted by the panel. For example, if a sanction may cause a long-term impact on a registrant then suspension could be discounted, when in practice a sanction should focus on what is necessary to protect the public.

2.5 The above comments are pertinent to paragraph 18 where the subject of proportionality of decisions is discussed. We observe that proportionality in decision-making also includes the need to strike a balance between the competing considerations of public interests against those of the registrant, noting the tripartite (listed in paragraph 2.1 of this response) considerations underpinning fitness to practise sanctions.

3. Providing reasons

3.1 Explanations of how a panel arrived at a particular sanction help registrants, the public and other stakeholders understand the reasons and logic of a decision. Panels should use clear English and explain their decision making as opposed to stating a conclusion or noting that a certain sanction is not being imposed because it is not necessary to achieve public protection objectives without explanation. Therefore, it may be useful for paragraph 90 to advise a panel to provide a clear explanation of why it has chosen a non-restrictive sanction even though a panel may have found that that there is a risk of repetition usually at the impairment stage.

3.2 Paragraph 18 may be aided by including advice to panels that they should explain why they have rejected one sanction before moving on to a more severe sanction available. Additionally, panels should test their sanction decisions by explaining why the next most severe sanction is not appropriate.

4. Mitigating and aggravating factors

4.1 We note, in relation to paragraph 20, that mitigating factors carry less significance in regulatory proceedings than to a court imposing retributive justice. This is because the overarching concern of the regulator is the

[2] *Bolton V Law Society, [1993] EWCA Civ 32 (Admin)*

protection of the public. We observe that panels should be careful in identifying mitigating factors. For example, the absence of physical harm suffered by a patient and a registrant's co-operation with regulators are 'simply the absence of what would otherwise be aggravating factors'.[3] It may be useful to include in the Policy that panels should properly evaluate the mitigating and aggravating factors they have identified as opposed to creating a list, as the mere length may be interpreted by panels as suggesting a certain course of action.

4.2 When a panel is considering whether a registrant has repeated misconduct, it should take account of whether the registrant was not employed or the subject of an interim order. This is because absence of repetition cannot be treated as a positive factor in those cases.

4.3 We also note that mitigation at the sanction stage can (i) explain the actions of the Registrant; (ii) address a registrant's culpability for the conduct itself or include factors that diminish the seriousness of the behaviour. There is also personal mitigation, for instance long service without previous complaint, but that does not reduce the seriousness of the proven conduct.

4.4 Regarding paragraph 20, whilst it is right that remorse and insight are relevant to the issue of risk, that does not mean that because the risk of repetition is reduced/low that a sanction is not required. The correct approach is to take into account that information, and then for the panel to take a step back and add into the balancing exercise the wider public interest considerations. Courts have found that remediation is not capable of mitigating the risk to the public or public confidence in cases relating to conduct that can be described as attitudinal or behavioural.

4.5 It would be helpful if the Policy made clear to readers that when considering insight, the fact that the registrant is of considerable unblemished experience does not assist the Panel. The Panel must consider the evidence before it at the time as to whether insight has developed or might develop with more time.

4.6 Additionally, paragraph 4.6 of the consultation summary document noted that the revised ISG policy included that lack of experience of a registrant may be a mitigating factor. We could not find this in the revised policy.

5. Dishonesty

5.1 We welcome the inclusion of a section on dishonesty on page 16 and the illustrative examples. However, the Policy could benefit from a more nuanced approach to dishonesty. The case of *Lusinga* is pertinent to this, where Justice Kerr said that indicative sanctions guidance should be nuanced and 'not lump the thief and the fraudster together with the mere contract-breaker'.[4]

[3] *Judge v NMC, [2016] High court CO/4354/2016*
[4] *Lusinga v NMC [2017] EWHC 1458 (Admin)*

6. Sections in the Policy

6.1 We welcome the introduction of a section on apologies and issues relating to the professional duty of candour. A section on deep seated attitudinal issues or behaviours may also be useful for panels. Similarly, a section focused on providing guidance on health cases may be useful for panels.

7. Other

7.1 It may be useful for the ISG to advise panels to suggest time scales for when it expects a registrant to complete conditions. We suggest this in the light of *Annon v NMC*[5], where the registrant was in 'professional limbo' and Mr Justice McGowan recommended a time limit on the completion of conditions.

7.2 Finally, we suggest that the questionnaire could benefit from a format that allows wider responses to questions. We note that the first eight questions are 'yes or no' questions. Whilst we agree that whilst this approach can have merits, we feel that there could be even more to be learnt from offering respondents who answered 'no' the opportunity to explain why (in addition to their answer of 'no').

8. Further information

8.1 Please get in touch if you would like to discuss any aspect of this response in further detail. You can contact us at:

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[5] *Annon v NMC, [2017] EWHC 1879 (Admin)*