

## Response to the Pharmaceutical Society of Northern Ireland's consultation on its draft Indicative Sanctions Guidance

October 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](http://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 Pharmaceutical Society of Northern Ireland's (PSNI) consultation on its revised Indicative Sanctions Guidance (ISG).

### 2. Public protection

**Q1. Does the document clearly set out the processes of the Statutory Committee?**

**Q2. Does the document clearly set out the purpose of Indicative Sanctions Guidance?**

- 2.1 We notice that paragraph 1.3 says: 'The Statutory Committee carries out hearings to decide if a registrant's Fitness to Practise is impaired. If the Statutory Committee finds that a registrant's Fitness to Practise is impaired, it will reference this document when deciding on the most appropriate sanction to impose.'
- 2.2 We suggest that the ISG could be clearer on a panel's relationship to the ISG as the word 'reference' is vague. It would be useful for determinations to explain more about how an ISG was used rather than just saying it had been considered. It might be helpful if the ISG clarifies that it exists in order to enable panels' decisions to be transparent, fair and consistent. In paragraphs 2.5 to 2.8 of this consultation response we explain some of the principles of purpose of the ISG in panels' decision making.

- 2.3 In paragraph 1.19 it may be helpful to include some text reminding panels of the need to provide reasons and that their decisions must be made on the evidence before them.
- 2.4 Regarding the following paragraph in the section on ‘What is this document about?’:
- ‘This document provides Guidance from the Council of the Pharmaceutical Society NI to the Statutory Committee of the Pharmaceutical Society NI to use when deciding upon what sanction is appropriate in any given case. It also provides an overview of our Fitness to Practise hearings and how decisions are made.’
- 2.5 We suggest that the PSNI amends the paragraph above to mention that the ISG provides a framework to focus on the relevant issues to consider before arriving at sanction. On this subject, we refer to the case of *Abrahaem*:
- ‘Those are very useful guidelines and they form a framework which enables any tribunal, including this court, to focus its attention on the relevant issues. But one has to come back to the essential exercise which the law now requires in what lies behind the purpose of sanctions, which, as I have already pointed out, is not to be punitive but to protect the public interest; public interest is a label which gives rise to separate areas of consideration’.<sup>1</sup>
- 2.6 With the judgment above in mind, we suggest that ISGs do not simply provide guidance on sanctions but could provide a framework for how panels can arrive at a sanction.
- 2.7 We could also suggest that the PSNI confirms in the ISG that the purpose of the ISG is to provide a consistent approach to making decisions. We refer to the case of *Solanke*:
- ‘... neither the PCC nor the Court is bound to reach its decision within the framework of the Guidance. It is clearly and so stated to be indicative only; it is not legally binding on the PCC, let alone the CRHP or the Court. Having said that, I further agree ...that, together with the body of relevant case law, the Guidance assists the PCC to reach consistent decisions while at the same time taking account of the particular circumstances of each case. Such consistency is in the interests of the public, doctors and the GMC alike.’<sup>2</sup>
- 2.8 The case of *Leeper* also illustrates this point: ‘The GMC’s Indicative Sanctions Guidance for the Professional Conduct Committee is the equivalent to a sentencing guide. It helps to achieve a consistent approach to the imposition of penalties where serious professional misconduct is established.’<sup>3</sup>
- 2.9 Therefore, we consider that the PSNI could expand on the purpose of an ISG by confirming the importance of having an ISG, for amongst other reasons, to create a consistent approach to cases and the provision of a framework to focus on the relevant issues to consider before a sanction.

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<sup>1</sup> R (*Abrahaem*) v GMC [2004] EWHC 279 (Admin)

<sup>2</sup> *CHRP v GMC and Solanke* [2004] EWHC 944 (Admin)

<sup>3</sup> *CHRP v GMC and Leeper* [2004] EWHC 18501 (Admin)

**Q3. Is the Guidance on the public interest and proportionality (Pg.8) appropriate?**

- 2.10 Yes.
- 2.11 However, we suggest that the section could be clearer for panel members if paragraph 2.4 is moved towards the end of the section. This is because this section needs to clarify that proportionality requires the panel to weigh the interests of the public against the interests of the registrant, paragraph 2.7 is better suited particularly to being earlier in the section.

**Q4. Is the Guidance on when a particular sanction might be appropriate (Pg.9) clear?**

- 2.12 With regard to warnings, we note that if a panel has found impairment on public protection grounds, then they need to provide very clear reasons as to why a restrictive sanction is not being imposed

**Q5. Is the Guidance on when a particular sanction might be appropriate proportionate?**

- 2.13 In dealing with suspension, the ISG accurately confirms the position of Fleischmann<sup>4</sup> regarding the need for panels to be mindful of the general, but not complete, prohibition of registrants returning to practice before completing a sentence. It also emphasises the need for a panel to explain why it departed from the Fleischmann principle.
- 2.14 It may also be useful for the ISG to provide some guidance on determining the length of sanction.

**Q.6 Is the Guidance on mitigating and aggravating circumstances (Pg.12) appropriate?**

- 2.15 Yes.
- 2.16 Although we suggest that it should be made clear in the ISG that when weighing up mitigating and aggravating factors, the reasons should allow the reader to understand what weight the panel has given these features.
- 2.17 Additionally, we note that personal mitigation carries less weight in public protection matters as compared to the criminal context.

**Q7. Is the Guidance on insight and remedial actions (Pg.13) appropriate?**

- 2.18 We suggest that the ISG refers to the general point that remediation carries less weight if there are serious public confidence issues involved. In the case of Yeong<sup>5</sup>, it was confirmed:

‘... Where a FTTP [fitness to practise panel] considers that the case is one where the misconduct consists of violating such a fundamental rule of the professional relationship between medical practitioner and patient and thereby undermining public confidence in the medical profession, a finding of impairment of fitness to practise may be justified on the grounds that it is necessary to reaffirm clear standards of professional conduct so as to

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<sup>4</sup> CHRP v Fleischmann and GDC, [2005] EWHC 87 (Admin)

<sup>5</sup> Dr Cheng Toh Yeong v The General Medical Council [2009] EWHC 1923 (Admin)

maintain public confidence in the practitioner and in the profession. In such as case, the efforts made by the medical practitioner in question to address his behaviour for the future may carry very less weight than in case where the misconduct consists of clinical errors or incompetence’.

- 2.19 We also point out that panels ought to be aware that they should not impose a sanction based on ‘wishful thinking’ that a registrant may develop insight at a later stage when there is not likely to be any.<sup>6</sup>
- 2.20 Additionally, the ISG states at paragraph 2.19 that: ‘The Panel should consider whether there is evidence that the registrant has assessed and understood the reasons for their Fitness to Practise being impaired and whether they have displayed genuine regret and/or apologised for their actions, if appropriate.’ We suggest that panels should state how the actions of a registrant have remediated their conduct because it is not enough for panels to simply say that there is remediation. They should list, for example, in a record-keeping case that the registrant has remediated the concerns by undertaking a record keeping course.
- 2.21 Additionally, we point out that panels need to interrogate registrants in relation to any online courses they have taken to ensure that these have been of some value and panels should have in mind the timing of insight and remediation.
- Q8. Is the Guidance on testimonials (Pg.14) appropriate?**
- 2.22 Yes
- Q9. Is the Guidance on how the Statutory Committee should consider an Interim Suspension Order proportionate (Pg.14)?**
- 2.23 Yes.
- Q10. Is the section on additional issues identified for requiring further Guidance (Pgs. 14-16) clear?**
- 2.24 Yes.
- Q11. Is the content of the section on additional issues identified for requiring further guidance appropriate?**
- 2.25 We suggest that it needs to be made clearer in the document that these additional issues are the most serious types of misconduct and as such indicate that more serious action is likely to be required
- 2.26 In relation to paragraph 2.30 and 2.43, the impression might be given that erasure should be an automatic sanction. It might be preferable to say that dishonesty and sexual misconduct are very serious and may well merit erasure and, in all cases panels should give consideration as to whether erasure is an appropriate sanction and give reasons if they consider that it is not.
- 2.27 We find the guidance to be helpful on dishonesty, in that it confirms at paragraph 2.25 that: ‘allegations of dishonesty may relate to a registrant’s professional or personal life.’ That is confirmed in the case of Lawrance in

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<sup>6</sup> See case of PSA v NMC & Judge [2017] EWHC 817 (Admin).

which it was stated that ‘dishonesty by doctors will usually be misconduct even if it has nothing to do with professional competence’.<sup>7</sup>

- 2.28 We find the ISG’s emphasis of dishonesty impacting public confidence and trust in the profession is helpful. Similarly, we commend the ISG’s emphasis that if a panel imposes a less severe sanction for dishonesty, it should explain why.
- 2.29 Given the scope of potential fraud in the pharmacy profession we suggest that the PSNI expand the section on dishonesty to suggest that there is further information provided in relation to the spectrum of dishonesty. For example, in the case of Lusinga the Court raised concerns about the failure to distinguish different types of dishonesty:

‘I hope the Indicative Sanctions Guidance will be looked at again in the light of this judgment. The guidance does not differentiate between different forms of dishonesty and takes one of the most serious forms of dishonesty (fraudulent financial gain) as the paradigm, without alluding to the possibility that dishonest conduct can take various forms; some criminal, some not; some destroying trust instantly, others merely undermining it to a greater or lesser extent.’<sup>8</sup>

**Q12. Is the Guidance on actions when a sanction has been decided upon (Pgs. 18-20) clear?**

- 2.30 Yes
- 2.31 We point out the need for reviewing panels not to hold review after review for conditions, and that instead time scales should be put in place for the completion of specific requirements to return to the register. This is affirmed in the case of Annon in which the court confirmed ‘It is entirely a matter for the NMC but it may be that a repetition of this appeal could be avoided if consideration is given by panels dealing with this sort of case to a realistic time limit by which a course must be completed.’<sup>9</sup>

**Q13. Are any aspects of our proposals that could result in equality and diversity implications for groups or individuals based on one or more of the following protected characteristics? If yes, please explain what could be done to change this**

- 2.32 No comment.

**Q14. Do you have any other comments about the Draft Indicative Sanctions Guidance?**

- 2.33 We note that there is no reference to the issue of practising without indemnity insurance. Given the nature of pharmacy, we suggest this could be a useful addition to the ‘Guidance on specific issues’ section.

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<sup>7</sup> Lawrance v General Medical Council [2017] EWHC 586

<sup>8</sup> Lusinga v Nursing and Midwifery Council [2017] EWHC 1458 (Admin)

<sup>9</sup> Annon v The Nursing and Midwifery Council [2017] EWHC 1879 (Admin)

2.34 It may also be helpful to expand the section 'Health Cases' within the ISG so as to provide some guidance in relation to testing and monitoring through conditions.

### 3. Respondent details

I am responding on behalf of an organisation

Name	Michael Warren
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**Which of the following categories best describes your organisation?**

Other (please give details)

Oversight body of nine health and care professional regulators in the UK, including the Pharmaceutical Society of Northern Ireland.

### List of Respondents

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Are you content for your name to be listed in the consultation summary report?

Yes

No

### Responding on behalf of an organisation

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Are you content for the comments you submit to be attributed to your organisation in our consultation reports?

Yes

No

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#### 4. Further information

- 4.1 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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