

## Indicative Sanctions Guidance Discussion Paper

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### Response Form

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*Please fill in your answer to the question in the space provided.*

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**a) What is your view of Objective 1?**

We welcome the Pharmaceutical Society of Northern Ireland's (PSNI) proposals on how it can make its Indicative Sanctions Guidance (ISG) document more accessible and understandable. Whilst an ISG's purpose and place in the fitness to practise process might be made more understandable by being situated in a 'broader document', we are unsure how it would become more accessible.

**b) Are there any additional issues the Council should consider in order to achieve Objective 1?**

None.

- c) What is your view on the Council’s objective of placing greater emphasis on the overarching principle of the public interest within the Indicative Sanctions Guidance?**

We agree with this approach.

Additionally, we welcome the use of the word ‘includes’ in Objective 2 when describing public interest considerations of a Statutory Committee (public protection, maintenance of public confidence in the profession and maintenance of proper standards of behaviour). We note that in paragraph 5 of the PSNI’s current ISG that the public interest is described to be ‘made up’ of the three purposes we just mentioned. The public interest may be wider and include other considerations.

- d) Are there any additional issues the Council should consider in order to achieve Objective 2?**

None.

- e) Are there any additional issues the Council should consider in order to achieve Objective 3?**

We note that in the PSNI’s current ISG ‘No actual or potential harm to patients or the public’ is listed as a mitigating factor. In *Judge*<sup>1</sup>, where the NMC committee cited the ‘absence of physical harm suffered by the patient’ as a mitigating factor, Mr Justice Garnham determined that the absence of physical harm was ‘simply’ an absence of an aggravating factor. In order to achieve Objective 3, we suggest removing the current ISG’s mitigation relating to ‘no actual’ harm.

- f) What is your view of the proposals outlined to provide additional guidance in the areas of dishonesty, duty of candour, raising concerns, sexual and violent misconduct?**

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<sup>1</sup> *Judge v Professional Standards Authority* [2017] EWHC 4354, at paragraph 41

We welcome the fact that the PSNI's new ISG will contain additional guidance on dishonesty, duty of candour, raising concerns, sexual and violent misconduct. We direct the PSNI towards the cases of Khan, Lusinga and Watters. In Khan<sup>2</sup>, the Court of Session noted that under the GPhC's ISG violent misconduct could result in the removal of a registrant. They also noted that violence covered a 'wide range of wrongdoing', and that Khan's behaviour was not the 'kind apparently contemplated by the guidance'.

The case of Lusinga<sup>3</sup> highlighted the potential usefulness for ISGs to differentiate between degrees of seriousness. In that case Mr Justice Kerr considered the NMC's ISG at the time not to differentiate sufficiently between different forms of dishonesty. He commented that the ISG took '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'. The Judge went on to say that guidance should have been 'more nuanced'. Relatedly, Mrs Justice Cheema-Grubb noted in the case of Watters that an ISG can be a 'somewhat blunt instrument when considering cases of dishonesty'.

This view is shared by research we commissioned with the public and professionals. Policis (who conducted the research) found that only a minority of participants 'judged any incidence of dishonesty as grounds for immediate expulsion from the profession'. In fact, the 'great majority' of participants took a 'more nuanced view with judgments more finely balanced around aggravating and mitigating factors'.<sup>4</sup>

**g) Are there any additional issues the Council should consider giving additional advice on? Please provide reasons for your response.**

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<sup>2</sup> Khan v GPhC [2016] CSIH 61 XA84/13 at paragraph 20

<sup>3</sup> Lusinga v NMC [2017] EWHC 1458 (Admin) at paragraph 103

<sup>4</sup> Policis, 2016, *Dishonest behaviour by health and care professionals: exploring the views of the general public and professionals*, Professional Standards Authority, pg.5. Available at: <https://www.professionalstandards.org.uk/docs/default-source/publications/research-paper/dishonest-behaviour-by-hcp-research.pdf?sfvrsn=34> [Accessed 10/11/2017]

We note that the current ISG does not refer to the Fleischmann<sup>5</sup> principle. This states that where a registrant is convicted of serious criminal offence, they should not be permitted to resume practice until the criminal sentence is satisfactorily completed. Mr Justice Newman said:

‘As a general principle, where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence. Only circumstances which plainly justify a different course should permit otherwise. Such circumstances could arise in connection with a period of disqualification from driving or time allowed by the court for the payment of a fine. The rationale for the principle is not that it can serve to punish the practitioner whilst serving his sentence, but that good standing in a profession must be earned if the reputation of the profession is to be maintained’.

We suggest that the PSNI’s guidance emphasises the importance of the Committee providing reasons for not following the Fleischmann principle.

We also recommend that the PSNI includes reference to the Khan<sup>6</sup> case for the new ISG’s section on review hearings. In the Khan case, the Court clarified that the role of the reviewing panel was not to reassess the appropriateness of an original sanction, but instead to examine a registrant’s actions since the principal hearing and consider whether they are fit to practise.

**h) Should the Council provide additional guidance to the Statutory Committee on considering Interim Restriction Orders when deciding upon sanction?**

We point to the case of Akhtar<sup>7</sup>, which could be of interest in relation to Interim Restriction Orders. There, the Court concluded that Panel has a ‘margin of judgment’ to determine the significance of an interim order when considering a sanction.

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<sup>5</sup> Fleischmann V CHRE [2005] EWHC 87 (Admin) at paragraph 54.

<sup>6</sup> Khan v GPhc [2016] UKSC 64

<sup>7</sup> Akhtar v GDC [2017] EWHC 1986 (Admin) McKenna J (sitting as a Justice of the High Court) at paragraphs 18 and 19

**i) What issues, if any, do you think the Council should take into consideration when deciding upon the content of any such additional guidance?**

None.