

HCPC Consultation on the revised Indicative Sanctions Policy

Q1 Do you think the content in the policy covering proportionality is sufficiently detailed?

We note that the content covering proportionality has been updated and we believe that HCPC panels may find the updated content helpful. We take a similar approach to proportionality in our Sanctions Guidance ('the GMC/MPTS SG'); for example, both the HCPC's draft Indicative Sanctions Policy ('the draft ISP') and the GMC/MPTS SG explain that decision-makers should consider the least restrictive sanction first, and that the sanction imposed should be the minimum action required to protect the public. We agree these are two key elements of the principle of proportionality which should be specifically addressed in guidance.

However, the GMC/MPTS SG also addresses the balancing exercise which is central to the principle of proportionality and requires decision-makers to weigh up the interests of the public against those of the registrant. A number of other healthcare regulators take a similar approach to highlighting this balancing exercise in their guidance. We believe the explanation in the draft ISP could be expanded to include reference to this balancing exercise as this is likely to support panels in reaching a rounded view.

Whilst we note that the draft ISP currently requires panels 'to clearly explain why the sanction was required to protect the public' (paragraph 19), this could be expanded to make it clear that panels also need to explain why the sanction is proportionate. This may help to ensure that panels engage with the principle fully and that their written decisions clearly reflect that they have done so.

In addition, it may be useful for the draft ISP to highlight that it is important for panels to consider the full range of sanctions available to them, and to give reasons why they have chosen a specific sanction and, where appropriate, why a higher sanction is not required in the public interest, with regard to the specific circumstances of the case. The importance of giving reasons both for the sanction selected and for any other sanction considered and rejected has been recognised by the High Court in recent cases such as *GMC v Stone* [2017].

Q2 Does the policy provide adequate clarity around the difference between insight, remorse and apology?

The HCPC's decision to separate out the three concepts and provide individual explanations of what each means is helpful in providing clarity for decision-makers as to what evidence of each concept may look like.

We recognise that all regulators face a challenge in trying to translate these concepts into written guidance, whilst reflecting that they are nebulous, complex and highly networked, and the weight to attach to each will vary depending on the circumstances of individual cases. As a result, we think that particular care should be given to the drafting of passages dealing with insight, remorse and apology.

In light of the complex relationship between the concepts, we believe that a cautious approach should be taken to expressing the links. The interplay between the concepts is difficult to define with any clarity and we believe that panels may find it useful for the draft ISP to remind them that the links are not straightforward and that the interplay and relevance of each concept has to be case-specific and take into account contextual factors.

We believe that guidance on these concepts should not be too prescriptive and we have provided some specific comments in relation to how the concept of insight is defined in the draft ISP that the HCPC may find useful.

In relation to the general definition at paragraph 25 that describes insight as 'a registrant's **accurate** understanding and acceptance of concerns' (emphasis added) we wonder if panels may find it difficult to make an assessment of what 'accurate understanding' means in practice, particularly where a registrant believes that he or she accurately understands and accepts the concerns raised but the panel does not agree. An alternative form of wording such as 'genuine understanding', which the HCPC uses elsewhere in the draft ISP, may avoid this difficulty.

We also note that paragraph 26 states that genuine insight is likely to be demonstrated when 'exhibited **ahead** of a hearing' (emphasis added). In the GMC/MPTS SG, we advise tribunals that a registrant may develop insight **during** a hearing as well as ahead of it (paragraph 45(c)), although it should be noted that insight developed by a doctor ahead of a hearing is likely to carry more weight when considered by a tribunal.

Q3 Does the policy provide sufficient guidance about how insight, remorse and apology may impact a panel's decision on sanction?

Paragraph 21 of the draft ISP sets out clearly how the presence of the three concepts may impact a panel's decision in terms of reducing the ongoing risk posed to service user safety, and that this may justify a reduction in the severity of the sanction required.

However, as outlined in our response to question 2, insight, remorse and apology are complex concepts. We do not believe there are straightforward links between each

concept which can be easily captured in guidance and applied in a simple way in every case. Therefore, when assessing the impact of the three concepts, it is important that decision-makers assess the interplay and relevance on a case by case basis and take into account relevant contextual factors.

We believe there are additional contextual and situational mitigating factors that may influence how insight, remorse and apology impact on sanction which the HCPC might wish to consider including in the draft ISP. For example, paragraph 44 of the GMC/MPTS SG recognises that registrants may face challenging systems in their places of work which prevent them from raising concerns or from apologising to a patient who has been harmed. HCPC registrants may also be vulnerable to environmental issues as they often work as junior members of multidisciplinary teams where challenging team hierarchies and structures could exist.

Matters such as the stage of a registrant's career and ill-health are also factors we identify in the GMC/MPTS SG as being of potential relevance to the concepts of insight, remorse and apology (paragraphs 27-30 and 47). We note that the HCPC's consultation paper states an intention to include a passage addressing the relevance of the stage of a registrant's career but that this does not currently appear in the draft ISP. As these factors form part of the broader factual background of a case we think they should be taken into account in order for decision-makers to take a rounded approach to deciding on the appropriate sanction.

Finally, we note that paragraph 24 of the draft ISP helpfully sets out a number of conclusions which the presence of genuine insight, remorse and apology may indicate are appropriate for the panel to make. However, as presently drafted it is not clear if the HCPC is guiding panels to find that, where all three concepts are present, this indicates that one or more of the conclusions can be drawn, or that all of the conclusions should be drawn. If the intention is that one or more of the conclusions can be drawn, it may be preferable for the penultimate bullet of paragraph 24 to be amended to say "and / or".

Q4 Is it clear from the policy what remediation is and how a panel might take account of any remediation activities in making their decision?

The new remediation section in the draft ISP provides helpful clarification of what remediation means as well as providing good illustrative examples of different types of remediation activities that registrants can undertake. We believe that this will be useful for registrants and their representatives as well as decision-makers.

We do however think that there are some additional points about remediation that the HCPC may wish to consider making. For example, the draft ISP could emphasise the importance of remediation activities being genuine and highlight that decision-makers will need to take a qualitative approach to assessing evidence of remediation. This would ensure that registrants understand the importance of engaging in remediation activities which are meaningful and address the specific concerns that have been raised.

We note that the examples of remediation activities set out in the draft ISP include courses, training and personal reflection and we agree that these are good examples of remediation activities commonly undertaken by registrants.

The HCPC may also wish to consider the interplay between remediation and whether the activities undertaken are sufficient to have addressed each of the limbs of the overarching objective that are engaged in the context of the individual case.

As remediation is a mitigating factor, we have included a number of wider observations below relevant to the issue of mitigation which we hope the HCPC will find helpful.

Recent case law in this area has confirmed that matters of mitigation are likely to be of considerably less significance in regulatory proceedings because the overarching concern of the regulator is the protection of the public. This principle is something that all regulators may wish to capture in their guidance as it provides advice to decision-makers about the weight they should place on mitigating factors.

We note that the draft ISP does not address what happens in cases where a registrant has fully remediated any fitness to practise concerns. We recognise that this issue may already have been considered by the panel when deciding whether the registrant's fitness to practise is currently impaired. However, we think it may assist decision-makers if the HCPC clarified the relevance of full remediation to the impairment and sanction stages, as it has done elsewhere in relation to mitigating and aggravating factors (paragraphs 20 and 36 of the draft ISP).

Paragraph 34 of the draft ISP usefully sets out examples of cases where a registrant's fitness to practise concerns are so serious that remediation will not reduce the risk to the public or to public confidence in the profession. We acknowledge that the draft ISP does not frame the list of cases in an exhaustive way but the HCPC may also wish to consider including some criminal convictions for serious offences in this list. Whilst it will remain important for panels to take all relevant circumstances of the individual case into account, criminal conviction cases often involve serious allegations capable of undermining public confidence in the profession.

At paragraph 35 of the draft ISP, guidance is given about the content of the panel's written decision and the need to give reasons when activities intended to remediate the concern are considered to be insufficient. The HCPC may wish to consider expanding the last bullet point of this paragraph to make it clear that panels should consider the relevance of each limb of the overarching objective and provide reasons why the remediation is not sufficient with reference to each limb that is engaged.

As the need to uphold public confidence is often the determinative factor in cases that are irreparable, it may help to specifically draw the panel's attention to this. Whilst we recognise that the HCPC has a wide pool of registrants and the relevance of needing to maintain public confidence in the profession may vary as a result, we still believe it is

important that panels routinely consider whether this limb of the overarching objective is engaged.

Q5 Do you think the aggravating factors detailed in the policy are appropriate?

We consider that the aggravating factors detailed in the draft ISP are appropriate and provide helpful guidance for decision-makers as to a number of factors which might make a case more serious and warrant the imposition of a more serious sanction.

Whilst we have included some additional comments which we hope are helpful, we appreciate that the HCPC has a broad pool of registrants who work in different ways to doctors and so any variance may have an impact on how relevant the HCPC considers the following points to be.

In the GMC/MPTS SG we include some additional aggravating factors: a registrant's failure to tell the truth during a hearing or failure to remediate following a promise to do so (paragraph 52), and the circumstances surrounding the event, such as failing to work collaboratively (paragraph 55).

Circumstances surrounding the event may be relevant for a number of HCPC registrants in light of the collaborative setting in which they work and the system pressures which they may face. We believe that having an understanding of the surrounding circumstances is important to ensure that decision-makers are fully informed about all relevant facts in a case, which they can then categorise as aggravating or mitigating, before forming a view on sanction.

In the GMC/MPTS SG we have chosen to provide guidance on how decision-makers should approach issues arising in a doctor's personal life, such as probity, inappropriate behaviour towards children or vulnerable adults and violent or sexual misconduct. We consider these to be important aggravating factors which may also be relevant to other healthcare professionals. However, we are aware that the public's expectations of how a doctor conducts themselves in their personal life may differ from the expectation they have of HCPC registrants.

Q6 Do you think the types of cases which are aggravating are appropriate?

The change to include a broader 'serious cases' section in the draft ISP is positive as it provides greater clarity and improves the structure of the policy. The policy also now provides helpful examples of cases and illustrations of behaviour which would indicate that a case is more serious. This is likely to benefit both panel members and other users of the policy, such as registrants and their representatives.

Below we have made some further suggestions relevant to this issue of serious case types which the HCPC might wish to take into account.

In the GMC/MPTS SG we categorise cases involving a failure to raise concerns (paragraphs 133 to 135) and a failure to work collaboratively with colleagues (paragraphs 136 to 138) as serious. The HCPC may wish to consider extending its categories of serious cases to include these further examples as they raise important issues in the healthcare environment which are capable of having an impact on patient safety, and a proportion of the HCPC's registrants will work collaboratively and / or in multidisciplinary teams.

We believe there are a number of case types in which the seriousness of the behaviour will vary from case to case, including cases relating to dishonesty, convictions and abuse of professional position. In order to ensure that the sanction imposed is proportionate, it is important that decision-makers recognise that there can be a range of seriousness when considering cases which fall into one of these categories.

Q7 Is the detail provided against each of the sanctions available to the panel sufficient?

We note that the HCPC has expanded the explanation given of each sanction in the draft ISP to make it clear what the purpose of each sanction is, when a sanction may be appropriate and how long it can be imposed for. We believe the revised sections are comprehensive and well laid-out, providing panels with important advice about each available sanction.

We have set out some observations below on what may be seen as opportunities for the HCPC to review the order, flow and meaning of some passages.

We note that paragraph 84 of the draft ISP explains that mediation is an option for panels where the only alternative is to take no further action. The paragraph also contains an explanation of the purpose of mediation and when it is likely to be appropriate. However, it does not explore in any further detail what the relationship is between mediation and taking no action, such as what happens where mediation is subsequently unsuccessful. Further information about the relationship between the two outcomes may be helpful for panels when they are considering whether mediation is a suitable option.

We also note that paragraph 84 of the draft ISP indicates that mediation will 'only be appropriate where the impairment is minor'. We consider that the relevant issue at the sanction stage is the extent to which the registrant's fitness to practise is impaired and what action is required as a proportionate response to protect the public. The HCPC may wish to consider whether it is appropriate to refer to impairment as 'minor' and whether doing so may give rise to confusion for decision-makers.

In the 'multiple sanctions' section of the draft ISP the HCPC seeks to explain that there may be instances where a registrant is subject to more than one sanction at a time. The content of paragraph 126 is not clear about what would happen to the initial allegation if an existing sanction was overridden by a more stringent sanction. We recognise that this may be difficult to explain and invite the HCPC to consider whether incorporating practical examples to illustrate the point would be helpful to users of the policy.

Q8 Does the policy provide enough information about how a panel should approach a review hearing?

We believe the review hearing section of the draft ISP is clear in its explanation of what a review hearing is and what the panel's primary consideration should be at a review hearing (paragraphs 127 and 128). However, the draft ISP could be clearer in explaining the interplay between the approach panels should take to considering impairment and sanction at a review hearing and the relevance of the original panel's findings to ensure that the panel does not inadvertently go behind them.

Q9 Do you consider there 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, as defined by the Equality Act 2010 and equivalent Northern Irish legislation? If yes, please explain what could be done to change this.

It is difficult for us to provide detailed comments about any ED&I implications for groups or individuals with protected characteristics without sight of the HCPC's Equality Analysis / Equality Impact Assessment and data analysis.

That being said, we do note that the ED&I aspects of the draft ISP have been significantly improved; the expanded 'Equality and Diversity' section clearly sets out the HCPC's commitment to its public sector equality duty (paragraph 13) and provides important guidance to panels about being mindful of ED&I issues throughout the decision making process, for example, in relation to the impact cultural differences may have on a registrant's approach to an investigation (paragraph 16).

We see the HCPC has strengthened the language used in several sections of the draft ISP which may have potentially positive implications for groups with certain protected characteristics who may be affected by the actions of a registrant. For example, the HCPC has used more robust language and provided more expansive guidance in the sections dealing with predatory behaviour, vulnerability and sexual misconduct. This stronger stance may result in positive outcomes for women, elderly people and children, all of whom we have observed can be overrepresented in the categories of victims in these types of cases.

In addition, we note that discrimination features in the lists of acts at paragraphs 97 and 117 which may indicate that conditions aren't appropriate and that a striking off order may be appropriate (where the acts are 'serious, persistent, deliberate or reckless'). We believe highlighting the seriousness of discrimination in these parts of the draft ISP may have positive implications for certain groups with legally protected characteristics.

Q10 Do you have any other comments about the revised policy?

We have included in this section some general comments on the content of the draft ISP that the HCPC may find helpful.

Overall layout and content

The changes made to the overall layout and content mean the draft ISP is more comprehensive and user-friendly than the current policy.

Interim orders

The HCPC may wish to clarify how decision-makers should approach the existence of an interim order which has been imposed before the substantive hearing. We believe this is relevant to a number of areas, including:

- i The impact of an interim orders on the issue of proportionality. For example, the HCPC may want to include an explanation as to when the time spent by a registrant under an interim order will be a relevant factor when deciding on the appropriate and proportionate sanction, in line with the judgment in *Kamberova v Nursing and Midwifery Council [2016]*.
- ii The approach that panels should take to an interim order when considering aggravating factors. For example, the HCPC may wish to clarify that panels should not give undue weight to whether a registrant has had an interim order and how long the order was in place. We set this out at paragraph 22 of the GMC/MPTS GMC/MPTS SG.

Overarching objective

At paragraph 15 of the GMC/MPTS SG we explain that all references to 'protecting the public' should be read as including the three limbs of the overarching objective. The HCPC may wish to consider giving more detailed guidance to panels about the various limbs of the overarching objective and how to address the relevance of each limb when determining what a proportionate sanction to impose in each case is.

Other guidance

We note there are a number of other references throughout the draft ISP to how the panel's considerations at the impairment stage are different to its considerations at the sanctions stage, for example in respect of mitigating factors, aggravating factors and review hearings. We believe it would assist users of the draft ISP to know if there is existing guidance on these issues that they should also refer to.