PROFESSIONAL, REGULATORY AND DISCIPLINARY BAR ASSOCIATION OF IRELAND

SANCTIONING BY REGULATORS

A talk by Nicholas Butler, S.C. delivered on 27 October 2016

Introduction.

These remarks are based on the regimes regulating a range of professions, for the most part by statute. I have reviewed the following and will refer to features of some of them:

- The Medical Practitioners Act 2007.
- The Nurses Act 1985 and the Nurses and Midwives Act 2011.
- The Pharmacy Act 2007, regulating pharmacists and pharmacy businesses.
- The Health Care and Social Care Professionals Act 2005, establishing CORU, which regulates a wide range of professionals, including Occupational Therapists, Physiotherapists, Radiologists, Social Workers and Dieticians.
- The Building Control Act 2007, regulating Architects, Quantity Surveyors and Building Surveyors.
- The Teaching Council Act 2001.
- The Dentists Act 1985.
- The Solicitors Acts and the Legal Services Regulation Act 2015.
- The Chartered Accountants Regulatory Board (curiously not regulated by statute but pursuant to bye-laws under a Royal Charter of 1888).

Individual Regulators may also have statutory rules which have a bearing on sanctioning and related processes.

The more recent legislation provides for greater openness and public accountability, for example, by means of lay majorities on Boards, Councils and Committees and a shift towards public hearings.

Provisions establishing regulators also define their object with increasing emphasis on the protection of the public and the promotion, maintenance and improvement of standards.

These trends, in so far as they relate to sanctions, also find expression in the authorities, including one High Court decision on the topic which has defined the task of ensuring the continued trust of the public in the medical profession as "*one of the fundamental purposes inherent in the relevant provisions of the (Medical Practitioners) Act of 2007*".[1]

1 *Per Charleton J in* Hermann v Medical Council *[2010] IEHC 414*

Such developments, even if they represent no more than a shift in emphasis, have probably contributed to easier access to the complaints process and more publicly available information. In turn, this brings the issue of sanctions into a sharper focus in the public mind and can only benefit public confidence in the professions.

Fitness to Practise regimes for regulators under this legislation have many features in common, and some important differences, many of them difficult to rationalise.

In these remarks "sanctions" includes measures to deal with practitioners' shortcomings, wrongdoing and also physical, mental or other conditions amounting to a disability or impairment affecting their ability to practise.

The framework from which sanctions emerge.

In summary, the structures laid down by the relevant legislation comprise a four-stage decision-making process, each involving adherence to the principles of natural justice *(audi alteram partem, nemo iudex in causa sua)* and reasons being provided for the decision at each stage, identifying its essential rationale. In general, these stages are:

1. Screening of the complaint. The grounds of complaint are invariably defined and require an element of wrongdoing (e.g. professional misconduct, poor professional performance, non-compliance with a condition previously attached to registration) or a disability, physical or mental, impairing or disabling a person from practising his or her profession safely. Addictions and misuse of drugs or alcohol feature prominently under this heading.
2. The Inquiry, conducted by a dedicated Committee, with formal allegations, advance notice of the nature of the sworn evidence to be adduced and a criminal standard of proof. Findings on the allegations are incorporated in a report of the Inquiry Committee which may include any other observations they consider relevant. Under this heading they frequently include their recommendation as to sanction.
3. Deciding on the sanction. This is done by the Board or Council of the Regulator, having considered the Inquiry report and further submissions. The rationale for having one body determining whether the allegations have been proven and another body deciding on sanction is questionable. Any advantages seem to me to be outweighed by the additional cost (in time and expense) and stress for the practitioner.
4. Confirmation of the sanction by the High Court. (The need for this arises from the provisions of Article 37 of the Constitution reserving the administration of justice to Courts with the exception of "limited functions and powers of a judicial nature" being vested in domestic tribunals and the Supreme Court's finding that the striking off of a solicitor was punitive in nature and therefore not such such a limited function[2]. Confirmation applications can happen either following an unsuccessful appeal by the practitioner or, if there is no appeal, on an *ex parte* application by the regulator. Significantly, the provisions governing such *ex parte* applications vary widely: in some instances, (e.g. decisions of the Medical Council and the Nursing and Midwifery Board) the Acts provide that the Court shall confirm the sanction decision unless it sees good reason not to do so. In other instances (e.g. decisions of the Veterinary Council) the Court has the additional options of sending the decision back to the regulator with appropriate directions to reconsider the sanction. In one further instance (the Pharmaceutical Society of Ireland), the Court can confirm the decision but need not do so, with no power to remit.

2 *In re Solicitors Act, 1954 [1960] IR 239, at 275.*

What sanctions can be imposed?

These can vary widely and are often specific to the consequences of wrongdoing in a particular profession. So, for example, sanctions under the Legal Services Regulation Act[3] include directions to pay restitution, handing back all or part of fees paid by a client and the delivery of documents. The Medical Council can transfer a practitioner from one division of the register to another[4]. Generally, possible sanctions include:

- advice, admonishment, censure or warning;
- a fine;
- the attachment of conditions to registration;
- suspension for a specified period;
- erasure (with or without a minimum time period before a restoration application can be made).
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Which sanction is appropriate? The authorities.

In a number of recent decisions the High Court has laid down the approach to be adopted in identifying the appropriate sanction. In *Hermann v The Medical Council*[5] Charleton J cited with approval the following statement of Finlay P in *Medical Council v Murphy*[6] dealing with the approach to be taken by the Court on appeal against sanction in a relatively serious case of professional misconduct:

"First, I have to have regard to the element of making it clear by the Order to the medical practitioner concerned, the serious view taken of the extent and nature of his misconduct, so as to deter him from being likely, on resuming practice, to be guilty of like or similar misconduct. Secondly, ...the Order should point out to other members of the medical profession the gravity of the offence of professional misconduct. And thirdly, ... there is the specific element of the protection of the public which arises where there is misconduct... I have as well an obligation to assist the medical practitioner with as much leniency as possible in the circumstances"

Charleton J then proceeded to consider whether or to what extent a form of curial deference should be extended by the Court to the Medical Council's sanction decision:

"10. The question arises as to what test should the court apply to the issue of sanction where that issue alone is appealed to the court under s. 75 of the Act? It is urged that some form of curial deference should be exercised by the High Court towards decisions of the Medical Council. The Fitness to Practice Committee of the Medical Council is a specialist body dealing with complaints of professional misconduct on a frequent basis. The members of the Committee have

3 *Section 82(1).*
4 *Medical Practitioners Act, 2007, section 71(d)*
5 *[2010] IEHC 414*
6 *High Court, Unreported, 29 June 1994*

ready access to relevant precedents and are therefore in a position to assess both the nature of the conduct complained of, and where it fits as to category, gravity, and the type and severity of penalty that has been established as appropriate by prior decisions. I have no doubt that the Medical Council should take this approach as a general guide to the imposition of penalties. I am also satisfied that it is not the only principle which is applicable. Guidelines derived from previous sanctions establish both an appropriate level of knowledge among members of the Medical Council and also informs medical practitioners and their legal representatives as to what kind of sanction may be faced in an event of a finding being made of misconduct. That, while an appropriate guide, is not completely restrictive. No court exercising a sentencing jurisdiction ever regards itself as boxed in by sentencing precedent. Exceptional circumstances can arise which move one category of case from a particular band of gravity into a higher or lower category. Mitigation of circumstances should be considered to see if some particular factor lessens the gravity of the appropriate response. Consistency of appropriate sanction against medical practitioners is, however, important for the reasons which I have mentioned and ***to ensure the continued trust of the public in the medical profession; one of the fundamental purposes inherent in the relevant sections of the Act of 2007.****(emphasis added)...*

12. Having taken the principles that I have referred to into account, and having considered the role that sanctions against medical practitioners fits within the scheme of complaint enquiry, finding and response inherent in the Act of 2007, I have to come to the view that the High Court, considering an appeal under s. 75 of the Act, is deliberately vested by the Oireachtas with powers of such an amplitude that it is required to exercise its own analysis of whatever evidence as to sanction is put before it. The Medical Council retains the burden of proving that the sanction was correct. The Court, in considering whether to cancel the relevant decision, to replace it with a different decision or to impose no sanction on the practitioner, is obliged to assess what is appropriate in light of the findings of fact which led to the imposition of the sanction by the Medical Council in the first instance. That decision, and the reasoning underpinning it, should not be ignored. Rather, that decision and the justification contained within the document imposing the sanction is the primary material under appeal and on which the hearing is based. In considering the question of the sanction, the Court's focus should be both on the conduct underpinning the sanction and the reasoning of the Medical Council in arriving at its decision. Because of the relatively greater experience of the Medical Council in imposing sanctions, its knowledge as to relevant precedents and the expert nature of the task undertaken, the High Court, on an appeal as to sanction, should treat the decisions of the Medical Council with respect. An independent view

should be taken as to what ought to be done. Where an error has been made in the context of a sanction which is otherwise appropriate, then it should be corrected. If, however, the level of sanction is one which is justified by the material before the Medical Council, then the Court would need to find a specific reason for altering it on the evidence presented on the appeal."

Dr Hermann, a gynaecologist, had had findings of poor professional performance and professional misconduct made against her by a Professional Practices Committee in the context of her clinical care and treatment of three patients (allegations arising from her care of five others had been dismissed). Charleton J concluded that the Medical Council had, by evidence, discharged the onus on it of satisfying him that its choice of sanction, (suspension for one year followed by extensive conditions to the Dr Hermann's registration for a minimum of three years after that) had (with one small modification) been the correct sanction and not disproportionate, having regard to the professional misconduct and poor professional performance which he found to have been in the most serious category. The Court did not define proportionality but analysed the available sanctions by reference to the increasingly severe sanctions, starting with the mildest infraction and sanction.

Further considerations of Proportionality.

A useful test of proportionality is to be found in the judgement of Lord Clyde in *De Freitas v Permanent Secretary*[7]:

"Whether

1. *The legislative objective is sufficiently important to justify limiting a fundamental right;*
2. *The measures designed to meet the legislative objective are rationally connected to it;*
3. *The means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

The second and third of these are relevant for our purposes. There is useful further treatment of the topic in Harris: *Disciplinary and Regulatory: Proceedings*[8] and in Mills et al*: Disciplinary Proceedings in the Statutory Professions* [9]

Can there be a sanction without an adverse finding?

7 [1999] 1 AC 69
8 7th edition (2013) pp 279-280.
9 Paras 8.14, 8.15.

The answer is "yes" but the legislative trend is away from such provisions. Acts in which the Regulator, without a prior adverse finding, may decide on sanctions in the nature of advice, admonishment, censure, warning or the attachment of conditions to registration include the Veterinary Practice Act 2005 (advice, warning or censure)[10], The Dentists Act 1985 (advice admonishment, censure, conditions)[11] and the Nurses Act 1985[12] (advice, admonishment, censure, conditions, repealed and not replicated by the 2011 Act but still applicable to certain ongoing cases under transitional provisions).

Casey v Medical Council[13] a decision to attach conditions to a doctor's registration after he had been cleared of allegations of professional misconduct was the subject of a Judicial Review on the basis that it was *ultra vires* the powers conferred on the Council under the Medical Practitioners Act, 1978 and, in effect, amounted to an attempt by the Council to reverse the findings of the Fitness to Practise Committee. The Court rejected both arguments, finding the wording of the Act did not require an adverse finding against a practitioner as a condition precedent to the attachment of conditions and the court was not entitled to read such words into the relevant sections of the Act. Moreover, the power of the Committee to include matters in its report over and above its findings on the allegations meant that the Committee was entitled and obliged to draw attention to anything that came to its notice with implications for the protection of the public or the public interest, something the Council also must be concerned with. The power to attach conditions in such circumstances was consistent with the scheme of the Act and could be achieved without undermining the practitioner's rights to good name under Article 40.3(2) of the Constitution.

This common sense measure to protect the public and maintain confidence in the professions has been an important sanction available to Regulators, which makes its abolition hard to fathom.

Conditions – practical considerations.

The widespread use of conditions as a sanction to effectively protect the public and assist the practitioner to address his or her shortcomings or disability is hardly surprising. Properly used, they can serve to protect the public and send the necessary and appropriate message to the practitioner, the rest of the profession and the general public. The element of clemency is incorporated in the decision but not in a way that exposes the public to any risk or undermines its confidence in the

10 Section 81(1).
11 Sections 40(1) and 41(1).
12 Sections 40(1) and 41(1).
13 [1999] 2 IR 534 *(per Kelly J)*

profession as a whole. All of these considerations should be uppermost in the minds of regulators considering conditions.

Care must also be taken to ensure that the conditions are capable of enforcement, with clear and straightforward requirements for review, supervision, treatment and ongoing inspection as the case requires so that in the event of anything going wrong it can be addressed immediately, primarily the public interest. The same cautious approach is also essential when considering removal or relaxation of conditions.

Sanctions – a punitive element.

Punishment may be inherent in a sanction but it is not the primary objective. The approach of the High Court in this context is neatly summarised in the judgment of Morris P in *Re Burke & Burke and the Solicitors Act, 1954*[14] in these terms:

"My attention has been drawn to the decision of the Master of the Rolls in "Application No 6 of 1983" heard in England on the 4 November 1983. In the course of his Judgment the Master of the Rolls Sir John Donaldson as he then was, says the following: "But the problem is this. The striking off of a Solicitor can have a punitive element, it can have an element of protection for the public but it always has an element of protecting the good name of the Solicitor's profession and the good name of the profession must be paramount. If maintaining the good name of the profession ultimately does some injustice to individuals who have broken the rules of that profession, and if that injustice is unavoidable, if the good name of the profession is to be maintained, that is something which I am afraid must be accepted.

With great respect to the Learned Judge I am not prepared to accept that an injustice to an Applicant is acceptable if it constitutes an element of any judgment. I prefer to consider the issues that arise in applications of this nature in the following way:

At the outset it must be accepted that the Applicant has an entitlement to work and to practice his profession as a Solicitor. This right he forfeits if it is demonstrated to the satisfaction of the court that circumstances arise in which it is proper that his name be removed from the Roll of Solicitors. That position remains so unless and until an application under Section 10 of the Act of 1960 is made to the court. In circumstances other than those provided for in Subsection 4 of Section 10 it

14 [1999] IEHC 257

would appear to be that the court is at large to consider the case in general. However, in circumstances in which Subsection 4 applies, that is to say where the Applicant's name has been removed from the Roll because of an act or acts of dishonesty on the part of the Applicant arising from his former practice as a Solicitor then restrictions are placed on the court and the court may not restore the Applicant's name to the Roll "unless it is satisfied that, having regard to all the evidence, the Applicant is a fit and proper person to practice as a Solicitor and that the restoration of the Applicant to the Roll would not adversely affect public confidence in the Solicitor's profession as a whole or in the administration of justice."

Publication and Costs.

Increasingly, Regulators have statutory obligations to report their decisions to specified authorities or persons. In some instances they have a discretion to notify others, including the public at large. In addition, many regulators or Inquiry Committees have the power to direct the CEO's legal costs to be paid by the practitioner, with a right of appeal to the District Court.

Publication of findings and sanction and decisions on costs are not, strictly speaking, sanctions and for practical reasons I will not deal with them here. However, such measures can involve an enormous toll on the practitioner in terms of reputation and expense and the importance of considering these powers early in the process should therefore be emphasised.

Representing a practitioner - practical considerations regrading sanctions.

What follows is certainly not a comprehensive guide to representing a person facing or who may be facing a sanction from his or her regulator, merely some practical suggestions in no particular order.

Remorse and addressing the problem early.

If mitigation of sanction is the only issue or the main issue then the earlier the practitioner demonstrates remorse, remedial steps taken or in train to address the problems underlying the complaint and apologises the better. In practice, dealing with these matters early and comprehensively can make a significant difference to the ultimate sanction.

Independent support .

Support in the form of testimonials, peer support and supporting evidence generally also has high mitigating value.

Mediation, informal means of resolving complaints, settlement.

Even if issues are disputed, a conciliatory approach may still be valuable. In this context, many regulatory statutes include provision for resolution of complaints by mediation or other informal means. These should be carefully reviewed. Invoking these process is generally not favoured by CEO's of regulators. Some have restrictive guidelines or no guidelines. This should not deter the practitioner form demonstrating his or her wish to address the complaint by such means, which is almost certainly a statutory right, subject to the agreement of the complainant. Even if the complainant declines or such means of alternative dispute resolution are unavailable for other reasons, being able to demonstrate goodwill and desire to resolve matters in a less confrontational manner will be relevant to any properly considered sanction decision. CARB, the Chartered Accountants Regulatory Body, have settlement procedures and such approaches are more common in the Financial Sector. In all cases such measures should at least be considered at an early stage.

Undertakings.

Many of the relevant statutes contain provisions enabling the inquiry committee to seek and accept an undertaking from the practitioner not to repeat the conduct complained of and to submit to a censure or admonishment. It can be an attractive option when facing a long or complex Inquiry, particularly with an uncertain outcome. In practice, if this is invoked and agreed to, there is no adverse finding. There is no reason why this course cannot be raised and considered by a practitioner willing to deal with the process in this way. Again, it should be considered early the process, although it is likely that the Inquiry will be under way before the opportunity arises.

The Regulator's guidelines and policies on sanctioning, publication and costs.

Such material may be routinely furnished to practitioners facing the process but this is not always the case. Some regulators have extensive information on their websites. For example, the Medical Council has detailed guidelines on sanctions, setting out actual sanction decisions and their context. The Pharmaceutical Society of Ireland also has well written and very useful information in this context, including lists of aggravating and mitigating features, as does CARB. Much of this published information is of general application in all disciplinary processes before bodies other than the one to which it specifically relates.

If such information is not supplied or readily available, consider asking for it and whether prosecuting authority or the regulator has policies when it comes to sanctions, publication and costs and what, if any, submission will be made to the decision-maker in this context.