Performers List Regulations 2013

Consultation Document

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Contact Details	Michael Wright NHS Medical Directorate 602A Skipton House 80 London Road London SE1 6LH 0207 972 1323
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Performers List Regulations 2013

Consultation Document

Prepared by the Clinical Governance Team

Contents

Executive Summary

Medical, dental and ophthalmic performers may not perform NHS primary care services in England unless they are included on a performers list held by a Primary Care Trust (PCT). The performers list system provides primary care organisations – in England, PCTs – with powers to manage admission, suspension and removal from their lists. The legislative framework in England is set out in the Performers List Regulations 2004 and subsequent amendments[1].

The performers list system enables PCTs to assure the suitability of all general practice doctors, dentists and ophthalmic practitioners who undertake primary care services in their area. The list system thus provides protection for patients from any performer who is not suitable, or whose efficiency to perform those services may be impaired. A relevant review[2] of performers lists concluded that the system was useful and effective.

The Health and Social Care Act 2012 received Royal Assent on 27 March 2012. The Act abolishes PCTs from April 2013 and creates the NHS Commissioning Board (NHS CB) and Clinical Commissioning Groups (CCGs). It transfers the duties and powers of PCTs in relation to performers lists to the NHS CB. The Secretary of State has decided that national performers lists (medical, dental and optical) held by the NHS CB will replace the current system of separate PCT lists. This will ensure alignment with the NHS CB's responsibility for commissioning primary care services.

The NHS CB will have approximately 3,500 staff when it takes on its functions in April 2013.[3] The majority will be based within the Operations Directorate in 27 Local Area Teams. Local Area Teams will have a clinical lead and will form part of one of four regional areas led by a regional director. The clinical leads will report to their relevant regional director. It is anticipated that the Operations Directorate will be responsible for day-to-day management of the national performers lists. The development of the systems, policies and guidance that those operating the new national performers lists will require is being undertaken by the NHS CB implementation team. These arrangements lie outside the scope of this consultation.

These proposed changes do not come in isolation from other work relating to the performers lists. The Performers List Review[4] and the GP Out-of-Hours Service Review[5] made a number of recommendations for improvements to the performers list system. Recommendations that

[1] The National Health Services (Performers Lists) Regulations 2004 (as amended) (SI 2004 No.585), http://www.legislation.gov.uk/uksi/2004/585/contents/made

[2] Clinical Governance Team, Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future, Department of Health, 2009 http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_096487.pdf

[3] Design of the NHS Commissioning Board; NHS Commissioning Board SpHA, February 2012, https://www.wp.dh.gov.uk/commissioningboard/files/2012/01/NHSCBA-02-2012-5-Organisational-Design-Recommendations-Final.pdf

[4] Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future (n 2, above)

[5] Colin-Thomé, D and Field, S, General Practice Out-of-Hours Services: Project to consider and assess current arrangements, Department of Health, 2010, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_111892

were not dependent on legislation have largely been overtaken by the decision to create the NHS CB and national lists. We will use this opportunity to implement those recommendations requiring changes to legislation. These include giving the NHS CB power to issue performers with immediate suspensions.

The link between the medical performers list system and the role of the responsible officer is an important one. The Department has consulted on changes to the Medical Profession (Responsible Officer) Regulations 2010 to reflect the changes to health architecture contained in the Health and Social Care Act 2012. We are proposing that, in England, responsible officers will continue to manage admission to the medical performers list on behalf of the NHS CB.

The purpose of this consultation is to seek views on proposed changes to the Performers List Regulations. The proposals have already been discussed with a wide range of stakeholders including those responsible for the day-to-day management of the lists, PCT medical directors, the Royal College of GPs, the BMA General Practice Committee and others. Draft regulations are provided in Annex A to this document.

Because of the extensive work already undertaken the consultation will run **for 8 weeks**. The deadline for responses to this consultation is 14 December 2012. Once the responses have been received, we shall collate and analyse the information. We plan to publish a formal response to this consultation process early in 2013. The information received will assist in producing the new regulations, which, subject to Ministerial approval, we intend to lay before Parliament in early 2013.

Chapter one

Introduction

Chapter one provides an overview of the consultation and the contents of this document. It explains the background to the performers list system and explains the reasons for amending the Performers List Regulations.

The consultation

1.1 This consultation is being held under the Cabinet Office's Consultation Principles. The criteria for the consultation are reproduced in chapter four. The consultation period will run from 19 October 2012 and will close on 14 December 2012. Details of how to respond are also set out in chapter four.

The document

1.2 This document applies to England only.

1.3 Chapter two sets out the main proposed changes to the Regulations which will apply to all performers lists.

1.4 Chapter three considers the proposed changes to the Regulations that are specific to each list (medical, dental and ophthalmic).

1.5 Chapter four asks about the impact of the proposals on equality and explains how to respond to this consultation.

1.6 Annex A provides a copy of the draft regulations incorporating the proposed changes.

1.7 Annex B lists the primary and secondary legislation on the performers list system.

1.8 Annex C provides a summary of the recommendations of the Performers List Review.

1.9 Annex D provides a hard copy of the consultation questionnaire which can be found and completed online at www.dh.gov.uk/liveconsultations.

Background

1.10 The current Performers List Regulations[6] came into force on 1 April 2004 and provide PCTs with a framework for managing medical, dental and ophthalmic performers undertaking clinical services in their area.

1.11 Performers are required to be named on a list in order to perform NHS primary care services. The performers list framework provides PCTs with powers over admission, suspension and removal from its lists. The powers are used to ensure that performers are suitable to undertake clinical services and protect patients from any performers who are not suitable, or whose efficiency to perform those services may be impaired. The

[6] See n1, above.

framework enables PCTs to intervene at an early stage and provide support and remediation for practitioners whose performance is beginning to fall away from the required standards.

1.12 The proposed amendments to the Performers Lists Regulations are intended to reflect changes and recommendations arising from:

- the creation of the NHS CB and the establishment of national performers lists;
- recommendations made by the Performers List Review; and
- recommendations made by the Out-of-Hours Services Review.

Options, costs and benefits

1.13 In developing the Regulations we considered three broad options:

- Option 1: do nothing; this option would have the effect of abolishing a system that protects patients from unsuitable performers and could have huge costs in terms of patient safety.

- Option 2: amend regulations to reflect 2012 Act only; or

- Option 3: (the preffered option) builds on option 2 and will reflect recommendations of previous reviews.

Option 2

1.14 Option 2 represents an adaptation of the current legislation to the new structure of the NHS. Currently, it is PCTs who hold performers lists. Since, under the Health and Social Care Act 2012, PCTs will be abolished, performers lists will need to be handed over to another NHS organisation in order to maintain the current policy under the new structures.

1.15 This option would make consequential changes to ensure that patients continue to be protected from unsuitable performers in the new NHS structure. It therefore represents a consequential update of the performers lists to the new NHS structure. The economic costs and benefits of this option have been assessed with the impact assessment for the Health and Social Care Act 2012. However, it should be noted that this option would fail to take an opportunity to make suggested improvements to legislation that has been in place since 2004.

1.16 The organisation in the new NHS architecture that seems best placed for this is the NHS CB, as the commissioner of primary care services (a prior responsibility of PCTs). Several changes are necessary in order to adapt the regulations to the NHS CB to ensure the system continues to work in the new structure: establishment of the minimum service to remain on a performers list, and national disqualification.

1.17 The costs and benefits of these changes are therefore considered to be consequential to the changes introduced in the NHS by the Health and Social Care Act 2012. As such, they are covered by the Impact Assessment of the Act.

1.18 Aditionally, Option 2 also includes updating the regulations to reflect changes to the Vetting and Barring Scheme. The Protection of Freedoms Act 2012 (PoFA), which

received Royal Assent in May this year, amends the Safeguarding Vulnerable Groups Act 2006 (SVGA), which is the legislation that underpins the Vetting and Barring Scheme. Any costs and benefits from this change are considered to be consequential on the changes to the Vetting and Barring Scheme.

Option 3

1.19 Option 3 builds on Option 2 to strengthen the regulations to reflect recommendations of a number of reviews that are appropriate, including those recommendations made by the Performers List Review and the Out-of-Hours Review.

1.20 These changes represent mainly process changes that have been suggested by these reviews. They are expected to improve the effectiveness of the Regulations. This includes a specific recommendation made by the Performers List Review that suggested changes to the suspension process. It recommended that PCTs (the NHS CB in the new regulations) should be able to suspend a performer immediately without having to give 24 hours' notice as required in the current Regulations. It was considered that a performer's conduct could create serious risks to the public if they continue to see their patients while the NHS CB are waiting for the 24 hours' notice to elapse. The costs of this are expected to be negligible. However, setting this requirement out in the regulation will have benefits as it will improve consistency and decrease uncertainty in the process.

Options, costs and benefits: conclusion

1.21 Our preffered option is Option 3. We have assessed the additional costs of this option. We concluded that there is no impact on the private sector or civil society organisations and additional costs of this option have been assessed as negligible. Therefore an impact assessment is not required.

Further background

The NHS Commissioning Board and National Lists

1.22 The White Paper, *Equity and Excellence: Liberating the NHS,*[7] set out the Government's vision for health services. It described a new commissioning architecture for the NHS. Responsibility for local commissioning of the majority of secondary care services will rest with Clinical Commissioning Groups (CCGs) supported and overseen by the NHS CB. The NHS CB will hold CCGs to account.

1.23 The Health and Social Care Act 2012 implements this new structure. The Act abolishes Pimary Care Trusts (PCTs) and Strategic Health Authorities from April 2013. These bodies have already been clustered together into larger geographical groups to provide more cost effective services and stability through the transition to the new structure. At the heart of the new commissioning structure are CCGs that will build on the role GPs and other front line professionals play in ensuring quality care for their patients. The CCGs will have the power and responsibility for commissioning secondary care medical services and other local services required to contribute to integrated patient care.

[7] Equity and excellence: Liberating the NHS, Department of Health, July 2010 http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_117794.pdf

1.24 The NHS CB's central role is to ensure that the NHS delivers better outcomes for patients within its available resources. The NHS CB will also commission primary care and some other services. The publication, *Design of the NHS Commissioning Board,*[8] sets out a structure for the NHS CB with a workforce of about 3,500, with approximately two thirds of staff working locally. It describes an organisation that has a medical director and a number of clinical and professional leads supported by small clinical advisory teams. A subsequent paper[9] sets out a structure with 27 Local Area Teams. Local Area Teams will have a clinical lead and will work closely with the local Clinical Senates, local Health and Wellbeing Boards and local CCGs. They will be grouped into four regions, each headed by a regional director. The clinical leads for the area teams will report to the regional director. It is anticipated that the local area teams will undertake the day-to-day management of the national performers lists.

1.25 The current performers lists also support PCTs in meeting their statutory duty of quality and the underlying requirements of this duty, namely, assurance that the primary care services commissioned by PCTs are safe and effective. As the commissioner of primary care services, the NHS CB will need to assure itself that the services it is commissioning are safe and effective in order to comply with its own statutory duty to seek continuous improvement in the quality of services. The NHS CB is developing the administrative systems required to manage the national lists (medical, dental and optical) as one organisation with 27 Local Area Teams.

1.26 The Performers List Regulations will be amended to ensure that duties on PCTs are transferred to the NHS CB. This will ensure that the framework is able to function from April 2013.

The Performers List Review

1.27 The Performers List Review was conducted by a 'Tackling Concerns Locally' Working Group. The Working Group was one of seven working groups tasked with carrying forward implementation of the programme of reform of professional regulation proposed in the White Paper, *Trust, Assurance and Safety,*[10] in 2007. The Working Group's remit was *'…to advise on how local systems could be stengthened to enable healthcare organisations to identify and deal with those healthcare professionals whose performance, conduct or health could put patients at risk.'*[11]

1.28 The establishment of the Working Group followed a recommendation made by the then Chief Medical Officer (CMO) in the report, *Good doctors, safer patients,*[12] that the performers list framework should be reviewed. Both the CMO and the Shipman Inquiry[13]

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[8] Design of the NHS Commissioning Board, NHS Commissioning Board, February 2012 https://www.wp.dh.gov.uk/commissioningboard/files/2012/01/NHSCBA-02-2012-5-Organisational-Design-Recommendations-Final.pdf

[9] NHS Commissioning Board: Local Area Teams and Clinical Senates, NHS Commissioning Board SpHA, June 2012; https://www.wp.dh.gov.uk/commissioningboard/files/2012/06/lat-senates-pack.pdf

[10] Trust, Assurance and Safety – the Regulation of Health Professionals in the 21st Century, HMSO, 2007, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_065946

[11] NHS Medical Directorate, Tackling Concerns Locally: Report of the Working Group, Department of Health, 2009, page 1

[12] Chief Medical Officer, Good doctors, safer patients, Department of Health, 2006, http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_4137232

[13] Shipman Inquiry Fifth Report Safeguarding Patients: Lessons from the Past – Proposals

raised concerns over whether PCTs were using their powers under the Performers Lists Regulations effectively. The Performers List Review Report[14] also noted that there had been criticism in the courts over the manner in which PCTs had managed their lists.

1.29 The report concluded that the performers list system should continue for the forseeable future. However, it made a number of recommendations as to how the system could be improved. Chapters two and three discuss proposals for implementing those of the 73 recommendations that require changes to legislation. Implementation of many of the recommendations has been overtaken by the creation of the NHS CB and the decision that it will hold national lists. Annex C sets out the Performers List Review recommendations and provides an explanation of what action has been taken, or what action we propose to take, in respect of each recommendation. It also provides an explanation against any recommendations that we are not proposing to take forward.

The GP Out-of-Hours Service Review

1.30 In late 2009, Ministers asked Dr David Colin-Thomé, formerly the Department of Health's National Director for Primary Care, and Professor Steve Field, Immediate Past Chair of Council, Royal College of General Practitioners (RCGP), to perform a review of GP out-of-hours services. This followed the release of an interim statement in October 2009 by the Care Quality Commission relating to their investigation into the unlawful death of Mr David Gray. Mr Gray died in February 2008 as a result of being administered 100mg of diamorphine by Dr Daniel Ubani, who was working as a locum for a GP out-of-hours services provider.

1.31 The Review made a number of recommendations and observations on good practice in their report,[15] released in January 2010, some of which are relevant to the Performers List Regulations. The majority related to the operation of lists locally. The outstanding recommendation, to ensure that the requirements within the Regulations are suitable for GP Registrars, has been incorporated into the proposed draft regulations (see Annex A).

for the Future, TSO, December 2004, http://www.shipman-inquiry.org.uk/fifthreport.asp

[14] Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future (n 2, above)

[15] Colin-Thomé, D and Field, S, General Practice Out-of-Hours Services: Project to consider and assess current arrangements, Department of Health, 2010 (n 5, above).

Chapter two

Overarching amendments to the regulations

Chapter two outlines the main changes to the general provisions of the Performers List Regulations. These include the changes consequent on the abolition of PCTs in the Health and Social Care Act 2012 and the changes recommended by the Performers List Review.

NHS Commissioning Board

2.1 As outlined in chapter one, with the abolition of PCTs the NHS CB will be given the function of holding and maintaining national performers lists. The NHS CB is a national body and will hold national lists in respect of primary care medical, dental and ophthalmic performers. Performers will need to make an application for entry onto the list and the NHS CB will not only have powers to refuse entry onto its lists, but also powers to suspend performers and remove performers from its lists. Performers will continue to have rights to hearings and rights to have a decision reviewed. Furthermore, they will continue to be able to appeal against decisions to the First-tier Tribunal.[16] The draft regulations at Annex A incorporate the necessary amendments.

Minimum service to remain on a performers list

2.2 PCTs may currently remove a performer from their lists where a performer has not provided services within the PCT's area of responsibility for 12 months. Our work with stakeholders suggests that PCTs think this is an important power to protect patients and ensure the efficiency of services. With national lists, performers will be able to move around the country without local area teams of the NHS CB being able to consider the impact on local primary care services.

2.3 It has been suggested that the existing provisions should be replaced with a provision whereby the NHS CB could remove a performer if he or she had not undertaken a minimum of primary care services in a year. This would enable the NHS CB to consider all the circumstances before reaching a decision. We have met with key stakeholders including the Royal College of General Practitioners (RCGP), the General Practice Committee of the British Medical Association and those operating and advising on the lists currently to consider this issue. In general, stakeholders have been supportive although they have highlighted some practical difficulties they foresee with implementation. The following paragraphs discuss some of those issues.

2.4 There is evidence about the impact on quality and safety of the number of cases seen by clinicians. There is also evidence that skills deteriorate after training without reinforcement.[17] However, we have found no evidence of any specific effects in relation to primary care performers (GPs, dentists and ophthalmic practitioners). It seems

[16] For more information about the First-tier Tribunal (Primary Health Lists) please see: http://www.justice.gov.uk/tribunals/primary-health-lists

[17] Laparoscopic simulation training: Testing for skill acquisition and retention. Surgery. 2012 Jul;152(1):12-20; Quantitative evaluation of retention of surgical skills learned in simulation. J Surg Educ. 2010 Nov-Dec;67(6):421-6.

reasonable, however, to expect a more rapid deterioration where performers are not practising full-time.

2.5 Revalidation is the process by which doctors will demonstrate they are up to date and fit to practise. The RCGP recommends that GPs should undertake a minimum of 200 sessions (half-days) of clinical activity over a five-year revalidation cycle to be able to gather sufficient evidence to demonstrate they are up to date and fit to practise. This does not suggest that a doctor working less than this is not safe; a doctor may have other ways of maintaining their skills, for example, they may provide other services outside of general practice.

2.6 While the evidence is insufficient to say that a doctor working for a small number of sessions each year is unsafe, we have spoken to a number of senior doctors who think that they would be unable to provide a safe or effective service if they only worked half a day a week. They thought that they would not be able to provide a complete service to their patients and might be unable to diagnose the less common ailments.

2.7 Professor Steve Field has said *"At the heart of general practice is the relationship GPs have with patients. We provide them with lifelong care. Patients want personalised care from a GP they know and who knows them. This is the best, most cost-effective way to deliver health services"*.[18] It is difficult to argue that the relationship Professor Field refers to can be developed with doctors that only work for a very limited time.

2.8 This does seem to raise questions about what are the benefits to patients and the efficiency of the service of allowing a performer to continue to be able to provide primary care services if that person is providing only a very minimum service.

2.9 The issues for dental and ophthalmic practitioners may be different because the amount of NHS work is generally much less. At the same time, they are normally carrying out similar procedures in the private sector and thus keeping their skills up to date. A similar requirement for dentists and ophthalmic practitioners may not therefore be appropriate but we want to seek views.

2.10 We think that there is a case for replacing the current provisions which allow a PCT to remove a performer who has not provided services in a 12 month period with a similar provision that would allow them to remove a performer who has only provided a minimum service. If it is decided not to implement a minimum practice provision the current 'failure to provide service' in 12 months provisions would be retained.

2.11 For doctors, a minimum amount of practice could be based on the RCGP's recommendation of 200 sessions over five years. The views of some of the doctors we spoke to suggested that a minimum service could also be based on one session (half a day) per week.

2.12 There are some groups where doctors are not providing primary care services but are practising in other areas. For example GPs with Special Interest (GPwSI), forensic medical examiners (previously police surgeons) and prison doctors.

[18] Leading the Way High Quality Care for all through General Practice: A Manifesto for Patient Care 2010, RCGP, March 2010

2.13 While 'sessions' are a recognised measure of GP activity they do not apply to the other professions. Therefore, it is likely that each set of performers will require their own minimum level of primary care service.

Question 2.1a: Do you think that the power to remove a performer where they have not provided a minimum service should replace the existing power to remove a performer where they have not provided services within 12 months? If not, please explain why not.

Question 2.1b: If you agree that this power should be provided, do you think that:

a) it should apply the same to all groups of performers (medical, dental and ophthalmic); or
b) different measures should be in place for each group of performers?

Question 2.2: Please explain what you think are appropriate minimum level(s) of primary care services.

2.14 There may be a risk that imposing a requirement to provide a minimum primary care service could impact differently on particular groups of people. For example, women intending to take maternity leave, those taking career breaks, part-time workers and also those who may have to take longer periods of leave from work due to illness or disability. The current regulations provide for an exemption for doctors who are working in the armed forces. In order to ensure that the regulations do not impact unequally on specific groups we propose to provide similar exclusions where appropriate. For instance, we are considering whether exclusions should be included for performers on maternity/paternity leave.

Question 2.3: What groups do you consider should be subject to an exemption and what other measures do you think should be taken to ensure that this proposal does not impact unequally on specific groups?

National Performers Lists

2.15 The current Regulations permit a PCT to remove a performer from its list, or refuse permission for a performer to enter onto its list. Following removal or refusal, the PCT can apply to the First-tier Tribunal for the national disqualification of a performer. Until the First-tier Tribunal has imposed a national disqualification, a performer may apply to join another PCT's list. The effect of national disqualification is to prevent the performer from entering any primary care performers list.

2.16 While provision for national disqualification by the First-tier Tribunal will be retained under the Act, a consequence of replacing the individual lists held by PCTs with national lists held by the NHS CB is that a decision by the NHS CB to remove a performer from a list, or refuse entry onto a list, will in itself prevent a performer from undertaking primary care services in England. Depending on other actions, the performer may still be able to perform non-NHS services or perform NHS services in another country of the UK.

2.17 Performers will continue to be able to appeal against decisions to remove, or to refuse to admit a performer to the new national list, to an independent body, the First-tier Tribunal.

Question 2.4: We consider that it is appropriate to set up national performers lists for England. Do you agree?

Establishment of the Disclosure and Barring Service

2.18 The Coalition committed to scaling back the Vetting and Barring Scheme to common sense levels. The Protection of Freedoms Act 2012 (PoFA), which received Royal Assent in May this year, amends the Safeguarding Vulnerable Groups Act 2006 (SVGA), which is the legislation that underpinned the Vetting and Barring Scheme.

2.19 PoFA scales back the scope of the barring regime, enables the introduction of the criminal records certificate 'Update Service' in early 2013 and enables the merging of the Criminal Records Bureau and the Independent Safeguarding Authority into the Disclosure and Barring Service planned for December 2012. As the PoFA is implemented, we will need to consider amendments to the regulations relating to criminal records checks. For information about the changes to Disclosure and Barring services please see: http://www.dh.gov.uk/health/2012/08/new-disclosure-and-barring-services-definition-of-regulated-activity/

2.20 The Disclosure and Barring Service will continue the functions of both the Criminal Records Bureau and the Independent Safeguarding Authority; it will continue to issue criminal record certificates and make independent decisions to bar individuals from working in 'regulated activity', as defined in the SVGA. The PoFA amends the SVGA to define regulated activity to include the provision of health care[19] by a regulated healthcare professional.[20] There is currently, and will continue to be, eligibility for a health care professional providing health care to obtain an Enhanced Criminal Record Certificate (ECRC) with barring information (i.e. whether that person is barred from engaging in a regulated activity).

2.21 Regulation 4 of the existing Performers List Regulations requires that an ECRC must be obtained each time a person applies to be included on a performers list, incurring the associated costs, as currently the ECRC cannot be updated.

2.22 The Update Service, due to be available in early 2013, will mean that criminal records checks can be updated. This will give the NHS CB greater flexibility in how it accesses criminal records and barring list information. In future, the NHS CB could request a new ECRC with a barred list check on each application, as PCTs do currently. Alternatively, the NHS CB will be able to check only the barred list through a stand alone service which is in development.

2.23 The Update Service will be a subscriber service with a small annual fee. The applicant, once subscribed, can give permission for organisations to undertake a free, instant, online 'update check' of their certificate. If the check shows that there is a change in the

[19] 'Health care' includes 'all forms of health care provided for individuals, whether relating to physical or mental health and also includes palliative care and procedures that are similar to forms of medical or surgical care but are not provided in connection with a medical condition': paragraph 7(2) of Schedule 4 to the SVGA.
[20] 'Health care professional' means 'a person who is a member of a profession regulated by a body mentioned in section 25(3) of the National Health Service Reform and Health Care Professions Act 2002': paragraph 7(3) of Schedule 4 to the SVGA.

person's status then the organisation can request a new certificate which will show the changes.

2.24 Over 90% of individuals who apply for a criminal records check never have any information on their certificate. The Update Service will therefore mean that people whose criminal record and/or barred status has not changed, and who subscribe to the Update Service, will be able to 'reuse' their certificate, saving time and costs.

2.25 In the future, the NHS CB would still be able to obtain an ECRC with barring information to ensure that a person is not barred before permitting them to provide health care services, but it might not consider it necessary to request a new criminal records check for every applicant. Instead, the NHS CB could consider a previously issued certificate in isolation and decide on the balance of risks that a new check is not needed, or undertake a free 'update check' on a previously obtained ECRC with a barred list check if the professional is a subscriber to the Update Service. These changes make the practice of requiring a new ECRC on every occasion unnecessary and incurring costs needlessly.

2.26 We are therefore proposing to remove the blanket requirement in the Regulations for an ECRC with each application for admission to a list. Removing the requirement will allow for more flexibility for the NHS CB with the potential to save time and money. To ensure that there is no loss of public protection we intend to provide guidance for the NHS on the operation of the new system.

Question 2.5: Do you agree that the requirement to undertake a criminal records check in every application should be removed from the Performers Lists Regulations? This would mean that the NHS CB could undertake these checks but would not be under a blanket duty to do so in every case. If you do not agree, please explain why.

Changes arising from recommendations of the Performers List Review

2.27 As discussed in chapter one, the Performers List Review made 73 recommendations in total, many of which will be given effect as a result of the introduction of national lists. Annex C sets out the Performers List Review recommendations and provides an explanation of what action has been taken, or what action we propose to take, in respect of each recommendation. The following presents a discussion of some of the recommendations and action, which require greater explanation.

Warnings

2.28 The Performers List Review recommended that PCTs should have the power to issue formal warnings to performers. This followed a recommendation by the Shipman Inquiry that PCTs should have a power to issue formal warnings and the Performers List Review's conclusion that warnings are now an essential tool in employment practice.[21]

2.29 The Performers List Review observed that informal warnings were already used by some PCTs, for example, where a PCT writes to a performer indicating that repeat

[21] Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future (n 2, above) pages 33-35 citing Shipman Inquiry 5th Report, Safeguarding patients: lessons from the past – proposals for the future (TSO December 2004) Recommendation 19.

behaviour could lead to further action being taken. It recommended that warnings could be used where an investigation revealed that the performer's conduct did not justify suspension or removal. However, the Review recommended that a PCT should only issue a warning at a disciplinary hearing at which the performer would be able to make representations. The performer would also have a right to have the decision to issue a warning reviewed.

2.30 We do not think we have sufficient powers in the primary legislation to implement a system of formal warning in the Regulations. We think that warnings are a useful tool, in appropriate circumstances, to make performers aware of conduct, behaviour or performance that is becoming unacceptable. We will work with the NHS CB to achieve the outcome intended by the Performers List Review through the policies and procedures of the NHS CB.

Suspension

2.31 The Performers List Review recommended that PCTs should be able to suspend a performer immediately without having to give 24 hours' notice where it appears that a performer's conduct creates a serious risk to the public. Where a performer is suspended in such circumstances, the Review recommended that the PCT should confirm the decision at a hearing within 24 or 48 hours. **We are proposing to implement this recommendation in the amended Performers List Regulations.** This is set out in Annex A at Regulation 12(3) and (4)(a).

Question 2.6: Do you agree with our proposal to implement the recommendation to enable immediate suspension where it appears that a performer's conduct creates a serious risk to the public? If not, please explain why not.

2.32 The recommendations included a proposal for a duty on the PCT to consider the impact of any proposed suspension on the performer and that the PCT should have a duty to provide support during the suspension. Although we envisage that support could entail provision of mentoring, counselling and other appropriate forms of advice, we do not think the details of what support is provided should be set out in the Regulations because each performer will have different support needs. We therefore propose to set it out in guidance.

Question 2.7: Do you agree that guidance is the best way of setting out the range of support that the NHS CB should consider providing to suspended performers? If not, please explain why not.

2.33 The Performers List Review recommended that PCTs should have additional options at suspension hearings. These included confirming or imposing suspension, or allowing the performer to resume practice subject to interim conditions, pending the completion of the investigation and any subsequent full hearing. **We are proposing to implement this recommendation in the amended Performers List Regulations.** This is set out in Annex A at Regulation 12(6)(b).

Question 2.8: Do you agree with our proposal to implement the recommendation to have additional options at suspension hearings? If not, please explain why not.

2.34 Currently, the performer can request a review of a decision to suspend. The Performers List Review recommended the introduction of a right to appeal against decisions to impose or confirm suspension. The appeal would be to the Secretary of State (in practice, the NHS Litigation Authority) and would be limited to consideration of the papers. There would be no right to an oral hearing and the appeal would only consider whether the risk to the public meant that suspension was necessary**.** We believe that the current regulations (modified to provide for the reviews to be held by the NHS CB) will permit sufficient review of suspension decisions. Suspension is intended to be an interim measure imposed whilst an investigation is ongoing. Including a separate appeal at this stage would add delay and further cost when the measure is only intended to be temporary for the protection of the public. **Therefore, we do not propose to adopt this recommendation in the amended Performers List Regulations.**

Question 2.9: Do you agree that the current arrangements for reviewing suspensions (modified to provide for reviews to be held by the NHS CB) are an adequate and cost effective measure? If not, please explain why not.

2.35 The Performers List Review also recommended that the power to suspend should be widened with the introduction of enforcement powers for performers who fail to comply with undertakings they have given. The Review recommended that where the suspension is a result of the performer failing to comply with the undertakings they have given, suspension could be imposed without financial recompense. Some of the stakeholders we discussed this recommendation with considered that the proposed widening of suspension to include enforcement powers would detract from the position that suspension is a neutral act. We think that failure to comply with undertakings is best addressed by working with the performers to ensure they understand the implications of their actions and by clearly setting out the consequences. **Therefore, we do not propose to take this recommendation forward in regulations but will work with the NHS CB to develop their policies and procedures.**

Question 2.10: Do you agree with the proposal not to take forward the recommendation of the Performers List Review to widen the powers to suspend performers? If not, please explain why not.

2.36 The following summarises our proposals relating to the main remaining Performers List Review recommendations.

Criminal Convictions

2.37 The current regulations require a PCT to refuse admission to a list, or remove a performer from its list, where they have been convicted of an offence and been sentenced to more than six months' imprisonment. The Performers List Review considered that these requirements were inflexible. We are proposing to amend the Performers List Regulations to provide the flexibility for the NHS CB to decide if removal in these circumstances is appropriate on a case-by-case basis. **This is set out in the draft regulation 14(1) and (3) at Annex A.**

Information checks and obligations

2.38 The Performers List Review recommended the introduction of an additional positive duty upon PCTs to take reasonable steps to identify relevant healthcare organisations that require notifying of certain decisions, such as suspension. The additional bodies would

be those that have in the past, are currently, or are planning to, use the performer's services. It is our view that the majority of those bodies would be other PCTs. The abolition of PCTs and the creation of national lists held by the NHS CB removes the need for this power. **We have decided that in the light of these developments not to proceed with this recommendation.**

Indemnity/Insurance

2.39 The Performers List Review recommended that performers should be required to demonstrate that they hold appropriate indemnities and insurance relating to their professional practice. We understand that there is already a similar requirement within the GMS/PMS contractual framework, which could result in breach of contract if there is a failure to comply. It is not clear whether this contract provision is being used and monitored. **We have therefore included the provision in regulation 4(2)(h) and (3)(c) of the draft Performers List Regulations.**

Question 2.11: Do you agree that the requirement to demonstrate adequate indemnity or insurance arrangements should be incorporated into the draft regulations? If not, please explain why not.

2.40 We also aim to clarify the requirements in the current Regulations to make clear that performers have a duty to report clinical negligence claims that are brought against them at the stage that proceedings are issued or when the claim is settled. The requirement will be to report such claims to the NHS CB. **We are implementing these recommendations in regulation 9(2)(i) of the draft Performers List Regulations.**

Conditions

2.41 The Performers List Review considered that the distinction between contingent removal and conditional inclusion should be removed as the two categories are so similar, leading to confusion. The proposal is to replace the two categories with one single category of conditions. The NHS CB will be able to impose conditions in three different circumstances: these are when a performer is included on a performers list or at suspension or removal hearings. **This recommendation is implemented at regulation 10 of the draft Regulations.**

Question 2.12: The draft regulations incorporate changes recommended by the Performers List Review (see Annex C). Do you consider that these recommendations have been adequately incorporated into the draft regulations?

Question 2.13: If not, please say which recommendations you think have not been adequately addressed? Please explain why not.

Chapter three

Further amendments concerning the medical, dental or ophthalmic lists

3.1 In giving the responsible officers in PCTs in England the function of managing admission to the performers list we recognised there is a synergy between the role of the responsible officer in primary care and the performers list system. As discussed above, the changes resulting from the Health and Social Care Act 2012 require amendments to the Responsible Officer Regulations. In April 2012, we published a consultation setting out the proposed changes to the Responsible Officer Regulations. It included consideration of whether the role of the responsible officer should be clarified in respect of language checking of doctors. It is anticipated that the result of that consultation will be published in October alongside a consultation on draft amendment regulations.

Recommendations of the Performers List Review

3.2 The Performers List Review considered that performers should be required to submit their last appraisal as part of the evidence of their suitability to join a performers list. This may have been sensible when it was possible for performers to move between lists in England. The implementation of a national list has the effect that such a requirement would mainly affect performers joining the list from another country. These doctors are unlikely to have had an appraisal.

3.3 In our view, given that overseas doctors are less likely to have appraisals to submit, an absolute requirement is no longer a practical recommendation. We propose to require a performer to provide their most recent appraisal **if they have one**. This will avoid difficulties for performers who may not have participated in an appraisal process.

Question 3.1: Do you agree that performers should be required to submit their last appraisal, if they have one, when they apply to join the performers list? If not, please explain why not.

Inquests

3.4 We have been asked to consider a requirement for doctors to report when they are an 'interested person' at an inquest. We think the intention behind this is to ensure that any adverse comments made by a coroner at an inquest which concern the care that the doctor has provided to a patient are known about by those responsible for ensuring the quality of that care.

3.5 While we think the underlying intention is sensible, our understanding is that simply requiring those who are declared as an interested person may go too far because they could be an interested person either because they were giving evidence or simply because the deceased was a family member. Accordingly we have sought to exclude those cases where care is not provided as part of the performer/patient relationship.

Although the recommendation was made in respect of doctors alone, we think that it should apply to all performers who have provided care to a patient.

Question 3.2: Do you think regulation 9(2)(h), which requires a performer to report when they are a 'properly interested person' at an inquest (subject to the exceptions shown there), achieves the recommendation? If not, please explain why not.

Medical Performers Lists

Recommendations of the GP Out-of-Hours Review

3.6 The GP Out-of-Hours Review recommended that the Performers Lists Regulations be reviewed to determine whether they are appropriate for GP registrars. This seems to relate to the current regulations which permit a two month window for GP registrars to submit a CRB check. We understand that PCTs have found this period of time insufficient to complete the check, particularly where information is needed from police forces. We understand that improvements have been made to the CRB process, and the time required to receive a CRB check is reducing. Therefore, the draft regulations introduce a three month window for the checks. This amendment would obviously only be required if we decide not to remove the requirement for a CRB check (see paragraph 2.18).

3.7 Concerns have also been raised that the current regulations are unclear as to whether a GP registrar should make a new application once they complete their training. Although the regulations are not felt to require a fresh application, we have clarified this (see Regulation 26(5) and (6) at Annex A) to ensure that GP registrars are not required to withdraw from the performers list and that the NHS CB can simply amend the list to reflect the doctor's change of status once notified.

3.8 Apart from the above, the changes proposed to the Regulations in relation to medical performers are to update the provisions, including references to provisions in other legislation and in line with the changes made in respect of performers generally. These changes have been made to the draft Performers List Regulations, at Annex A.

Dental Performers Lists

3.9 The changes proposed to the Regulations in relation to dental performers are to update the provisions, including references to provisions in other legislation and in line with the changes made in respect of performers generally, replace the term 'dental vocational training' with 'dental foundation training' and modify the provisions which make completion of foundation training a condition of entry to the dental performers list to allow persons with equivalent knowledge and experience. These changes have been made to the draft Performers List Regulations, at Annex A.

Ophthalmic Performers Lists

3.10 The changes proposed to the Regulations in relation to ophthalmic performers are to update the provisions, including references to provisions in other legislation and in line with the changes made in respect of performers generally, and to amend when students may apply to be included on a performers list in view of feedback about the operation of

current arrangements. These changes have been made to the draft Performers List Regulations, at Annex A.

General

Question 3.3: Do you have any other comments on the draft regulations or the policy changes described in this consultation document?

Chapter four

Equality

4.1 The Department of Health, like many other public bodies, has a legal duty, in the exercise of its functions, to have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

4.2 The protected characteristics recognised in the Equality Act 2010 are listed below:

- age,
- disability,
- gender reassignment,
- marriage and civil partnership,
- pregnancy and maternity,
- race,
- religions and beliefs,
- sex,
- sexual orientation.

Question 4.1: Do you consider that the proposed regulations will impact differently for different groups in relation to any of the protected characteristics under the Equality Act 2010?

Question 4.2: If you have answered 'yes' to question 4.1, are there any measures you would suggest that would address this? Please explain.

Responding to the consultation

Below we outline the consultation period, the deadline for submitting your responses and how to respond to the consultation.

There are three ways to respond: online, by e-mail or by post. It also includes a contact address if you have a complaint or wish to submit any comments about the consultation process.

The consultation runs from the 19 October 2012 and will close on 14 December 2012.

You can respond to this consultation on the web at www.dh.gov.uk/liveconsultations or in writing.

Responding on the web

If you wish to respond online the questionnaire can be found at:

www.dh.gov.uk/liveconsultations

The online questionnaire will be available from 19 October 2012:

Responding by e-mail
If you wish to respond by e-mail please use the questionnaire at the back of this document.

Once it is completed please e-mail to:

performerslists@dh.gsi.gov.uk

Responding in writing

If you wish to respond in writing it would be helpful if you could do so by completing the consultation response form and sending it to the address below. If you do not want to use the consultation response form or are unable to do so, then please write with your answers and comments to the address below.

Consultation on Performers List Regulations 2013
Department of Health
602A, Skipton House
80 London Road
London, SE1 6LH

Consultation principles

The consultation principles can be found on the Cabinet Office's website at:

http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

The principles inform Government departments of the considerations that should be made during consultation. These include consideration of the subjects of consultation, the timing of consultation, making information useful and accessible, and transparency and feedback.

We confirm that this consultation has been guided by these principles.

If you have any complaints or comments about the consultation process (but not responses to the consultation itself), please send them to:

Consultations Co-ordinator
Department of Health
Room 3E58, Quarry House, Quarry Hill
Leeds
LS2 7UE

E mail: consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address

Summary of the consultation

A summary of the response to this consultation will be made available within three months of the end of the live consultation period and will be placed on the Consultations website at:

http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/index.htm

Freedom of Information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter. For further details on the Information Charter, please see:

http://transparency.dh.gov.uk/dataprotection/information-charter/

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act 2000 there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the Data Protection Act 1998 and, in most circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A – Draft Regulations

Annex A provides the draft Performers List Regulations. The draft Regulations include the changes we have discussed in this consultation document.

Annex B – Legislation

Annex B provides a list of primary and secondary legisation that relates to the current Performers List Regulations. If the legislation no longer exists, this is indicated by including 'repealed'.

The Current Performers Lists Regulations

- The National Health Service (Performers Lists) Regulations 2004 (SI 2004 No.585)

Primary Legislation

- National Health Service Act 1977, Section 28x (repealed)
- Health and Social Care (Community Health and Standards) Act 2003, Section 179 (inserted Section 28x into the 1977 Act) (repealed)
- National Health Service (Consequential Provisions) Act 2006 (Repealed 1977 Act and Section 179 of 2003 Act)
- National Health Service Act 2006 (as amended), Section 91 (medical), Section 106 (dental), Section 123 (ophthalmic) and sections 151 to 159 inclusive
- Health and Social Care Act 2001
- Health and Social Care Act 2012

Secondary Legislation

- The National Health Service (Performers Lists) Amendment Regulations 2005 (SI 2005 No.3491)
- The National Health Service (Performers Lists) Amendment Regulations 2006 (SI 2006 No.1385)
- The National Health Service (Performers Lists) Amendment and Transitional Provisions Regulations 2008 (SI 2008 No.1187)
- The National Health Service (Performers Lists) Amendment Regulations 2010 (SI 2010 No.412)
- The National Health Service Litigation Authority And Primary Care Trust Directions 2005
- The Primary Care Trust Medical Services Directions 2009
- The National Health Service (Performers Lists) Directions 2010

Determinations

- The Secretary of State's 2004 Determination: Payments to Medical Practitioners Suspended from Medical Performers Lists

Annex C – Performers list review: summary of recommendations

Annex D – Consultation Questionnaire

Performers List Regulations 2013

Annex D provides a list of all the questions that we have asked in this consultation. If you need to look back at the main document, each question lists the chapter number followed by a second question number. The question number restarts at one at each chapter.

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