



Department
of Health

The performers lists and suspension

A paper for consultation

31 July 2014

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The performers lists and suspension

A paper for consultation

Prepared by the Professional Standards Branch of the Department of Health in collaboration with the Quality Levers Team of NHS England.

Contents

A paper for consultation	3
Contents	4
Note	5
Executive summary	6
Chapter one: Introduction.....	8
Chapter two: Consultation questions.....	14
Chapter three: Responding to this Consultation	16

Note

The consultation on the amendments to the National Health Service (Performers Lists) Regulations 2013 will last for eight weeks closing on 25 September 2014.

Executive summary

Medical, dental and ophthalmic performers may not perform NHS primary care services in England unless they are included on a performers list managed by NHS England. The performers lists framework provides NHS England with powers over admission, suspension and removal from its lists and the maintenance of the performers lists. The aim is to enable NHS England to assure itself of the suitability of all general practice doctors, dentists, optometrists and ophthalmic medical practitioners who undertake NHS primary care services. The legislative framework in England is set out in the National Health Service (Performers Lists) Regulations 2013.

The 2013 Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004. In April 2013, much of the Health and Social Care Act 2012 came into force. The changes to the health service included the abolition of Primary Care Trusts (PCTs), which had been responsible for the management of the performers lists. From April 2013, the responsibility for the management of the lists transferred to NHS England. The 2013 Regulations were primarily made to reflect this change.

The professional regulators may make interim orders for suspension where a concern has been raised about a professional. These suspension orders are designed as short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels, or other committees who make interim orders, do not make findings of fact and their orders are not intended to punish.

The 2013 Regulations require NHS England to remove practitioners from a performers list where they have been suspended by their professional regulator. This includes interim orders for suspension. Under the 2004 Regulations, PCTs were not required to take any action where a performer was made the subject of an interim order for suspension.

The Department of Health has reviewed the 2013 Regulations and considers the impact of this change is disproportionate and, as the imposition of an interim suspension order is a neutral act (i.e. it is not intended to punish), this should not result in removal from the performers lists. The Department has discussed this with NHS England, which agrees an amendment should be made to the 2013 Regulations so a performer is not removed from the performers list when subject to an interim suspension order by their regulator. In addition, the Department considers that where practitioners have been suspended by their professional regulator, automatic suspension from the performers lists would be a more proportionate response.

The draft amendment regulations attached to this document amend the 2013 Regulations so that if a medical, dental, or ophthalmic performer is the subject of an interim suspension order, NHS England does not have to remove the practitioner from the performers list (Regulations 9, 10 and 12). The option for automatic suspension is covered by Regulations 5 and 6.

There is also an amendment to provide that a person applying for inclusion in a performers list need not disclose a protected caution or protected conviction. This change has been made as a

consequence of amendments made to the Rehabilitation of Offenders Act 1974 (Exceptions Order) 1975 following a Court of Appeal judgment in 2013¹.

Because of extensive work already undertaken with NHS England, the consultation will run for eight weeks instead of the usual 12. Therefore, the deadline for responses to this consultation is 25 September 2014. Once the responses have been received, we shall collate and analyse the information. We plan to publish a formal response to this consultation process in autumn 2014. The information received will assist in producing the amendment regulations, which, subject to Ministerial approval, we intend to lay before Parliament in late autumn 2014.

¹ A protected caution or protected conviction is one which is not 'listed' and, in respect of a person who was under 18 years at the date of the caution or conviction two years have passed from the date of the caution or five years and six months have passed in the case of a conviction. Where the person concerned was 18 years or above at the date of the caution or conviction, six years have passed from the date of the caution or 11 years have passed in the case of a conviction. In addition, a conviction will be protected only if no custodial sentence was imposed and only if the person has no other convictions. (see article 2A of the Rehabilitation of Offender Act 1974 (Exceptions) Order 1975 (S.I. 1975/1023)): <http://www.legislation.gov.uk/ukdsi/2013/9780111537718/article/4>.

Chapter one: Introduction

Introduction

- 1.1. The consultation concerns amendments to the National Health Service (Performers Lists) Regulations 2013 (“the 2013 Regulations”). The 2013 Regulations only apply in England. Consequently, this consultation only extends to England.
- 1.2. **This chapter** sets out the background to the performers lists. It considers the issues being addressed and the options under consideration.
- 1.3. **Chapter two** outlines the consultation questions on NHS England’s options for action where a practitioner becomes the subject of an interim order for suspension.
- 1.4. **Chapter three** details how you can respond to the consultation, including the criteria for consultation and the confidentiality of information.
- 1.5. A draft of the amending instrument is annexed to this consultation document.

The role of the performers lists

- 1.6. In order to provide NHS primary care services in England GPs, dentists and ophthalmic practitioners² must be on a performers list managed by NHS England. The National Health Service (Performers Lists) (England) Regulations 2013 (“the 2013 Regulations”)³ set out the procedures to manage the admission to the lists, and also mechanisms to impose conditions, suspend and remove practitioners from the list. They also set out appeal procedures.
- 1.7. The performers list system is intended to provide an extra reassurance for the public that GPs, Dentists and Opticians who practise in the NHS are suitably qualified, have up to date training, have appropriate English language skills and have passed other relevant checks such as with the Disclosure and Barring Service and the NHS Litigation Authority. It does this by giving NHS England powers over admission, suspension and removal from its lists and the maintenance of the performers lists.
- 1.8. Although NHS England has no employment relationship with these practitioners, it does have contractual relationships with the practitioners who are providing NHS primary care services. The performers lists are an important mechanism for NHS England in this respect, assuring it that the services it is commissioning are safe. The lists also support NHS England in its compliance with its duty to seek continuous improvement in the quality of health services (see Section 13E of the Health and Social Care Act 2012⁴).

² Defined as: registered optometrist or ophthalmic medical practitioner (see regulation 36 of the Performers List Regulations 2013)

³ SI 2013 No.335, available from: <http://www.legislation.gov.uk/uksi/2013/335/made>

⁴ Health and Social Care Act 2012, Part 1, Section 23, Chapter A1, <http://www.legislation.gov.uk/ukpga/2012/7/section/23/enacted>

The Health and Social Care Act 2012

- 1.9. In October 2012, the Department of Health conducted a consultation on the changes to the performers lists entitled, *Performers Lists Regulations 2013: consultation document*.⁵ This document set out the changes that needed to be made due to the Health and Social Care 2012 Act, primarily the transfer of the performers lists to NHS England and establishment of national lists. A number of additional changes were considered. These came from the report of the 2009 Tackling Concerns Locally review of the performers lists⁶ and also the 2010 report of the GP out-of-hours services review.⁷
- 1.10. The Department published its response to the consultation in February 2013 accompanied by a copy of the draft 2013 Regulations.⁸ The 2013 Regulations came into force on 1 April 2013, replacing the National Health Service (Performers Lists) Regulations 2004 (SI 2004 No.585) (“the 2004 Regulations”).⁹
- 1.11. In April 2013, much of the Health and Social Care Act 2012 came into force. Included within the changes to the health service was the abolition of Primary Care Trusts (“PCTs”). PCTs had been responsible for the management of the performers lists under the 2004 Regulations. From April 2013, the responsibility for the management of the lists transferred to NHS England.¹⁰ In practice, the responsibility for the day-to-day management of the national lists rests with NHS England’s 27 Area Teams.

The issue arising out of the 2013 Regulations

- 1.12. The 2013 Regulations require NHS England to remove practitioners from a performers list where they have been suspended by their professional regulator. This includes where the performer is the subject of an interim order for suspension. Under the 2004 Regulations, PCTs were not required to take any action where a performer was made the subject of an interim order for suspension.

⁵ Performers Lists Regulations 2013: consultation document, Department of Health, 2012
<http://consultations.dh.gov.uk/clinical-governance-nhs-medical-directorate/performers-lists-regulations-2013>

⁶ Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future, Department of Health, 2009
<http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/Managingyourorganisation/Workforce/Professionalsstandards/ProfessionalRegulationandPatientSafetyProgramme/TacklingConcernsLocally/PerformersList/index.htm>

⁷ Colin-Thomé, D and Field, S, General Practice Out-of-Hours Services: Project to consider and assess current arrangements, Department of Health, 2010,
http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_111892

⁸ Performers List Regulations 2013: response to the consultation document, Department of Health, 2013,
<https://www.gov.uk/government/publications/response-to-the-consultation-on-national-performers-lists-for-gps-dentists-and-ophthalmic-practitioners--2>

⁹ These remain available for references purposes only at:
<http://www.legislation.gov.uk/uksi/2004/585/contents/made>

¹⁰ NHS England is referred to as ‘the Board’ within the 2013 Regulations and was established by statute as the NHS Commissioning Board. NHS England is the corporate name adopted in March 2013.

- 1.13. Interim suspension orders are designed as short-term measures to protect members of the public, patients, the practitioner and the service in general while the facts around an issue are investigated. Interim orders panels do not make findings of fact and their orders are not intended to punish. Thus, where NHS England is required to remove a performer subject to an interim suspension order from its list, this appears to be at odds with the intention behind such an order. By removing a practitioner from the list, NHS England is, in effect, imposing a sanction. This is punitive, requiring the practitioner to reapply for inclusion when the interim suspension order ends.
- 1.14. By virtue of a Determination made under the 2004 Regulations, where a practitioner was suspended from the performers list (but was not subject to a final suspension order by the regulator) the PCT had discretion to make payments to that practitioner. Under the 2013 Regulations, because automatic removal of the practitioner from the performers list also removes NHS England's discretion to suspend, such practitioners are not eligible for payments under the Determination.
- 1.15. The Department of Health has reviewed the 2013 Regulations and considers their impact is disproportionate. Because the imposition of an interim suspension order is intended to be a neutral act, this should not result in removal from the performers lists. The Department has discussed this with NHS England, which agrees the 2013 Regulations should be amended to remove the requirement to remove a practitioner from the performers list when an interim suspension order is in place and favours reverting to the position under the 2004 Regulations.
- 1.16. Maintaining the current position, where NHS England is required to remove practitioners from a performers list when subject to an interim suspension order by the regulator, is likely to be problematic. There is a greater risk of litigation as the removal is automatic. It does not give the practitioner the right to make representations, or NHS England to consider the facts before making a final decision. We think this would be unfair and we consider removal from the performers lists is a disproportionate response in the circumstances.
- 1.17. There is little impact on patient safety, because the practitioner is not permitted to practise when suspended by a regulator. However, practitioners subject to this procedure would have to reapply to join the list, which would cause a delay to their returning to practise following a suspension ceasing.
- 1.18. Two Determinations made by the Secretary of State under the 2013 Regulations set out the circumstances where NHS England may make payments to doctors and dentists suspended from a performers lists. Maintaining the current position also precludes payments being made to practitioners under the Determinations, because the practitioner will have to be removed from the performers lists.
- 1.19. Maintaining this position is not feasible or desirable.

The options under consideration

- 1.20. There are two options under consideration as part of this consultation process. These are Option 1: Revert to the 2004 Regulations and Option 2: Automatically suspend under the 2013 Regulations.

Option 1: Revert to the position under the 2004 Regulations

- 1.21. Option 1 would seek to amend the 2013 Regulations to return them to the position that existed under the 2004 Regulations. Regulations 9, 10 and 12 of the draft amendment regulations make this change. The 2004 Regulations required PCTs to remove practitioners where they were suspended by a regulator in a fitness to practise case of the General Medical Council, the General Dental Council, or the General Optical Council. These suspensions are made after a full investigation and finding of fact that justifies a severe penalty.
- 1.22. Conversely, the 2004 Regulations did not require any specific action in a case where a practitioner had become subject to an interim order for suspension. PCTs had discretion to remove a practitioner in certain circumstances or to suspend a practitioner from the list. They would be in the position where they could assess whether any action would be required. The practitioner would be prevented from practising by virtue of the regulator's suspension, so there would be no risk to patient safety whilst this was in place. Under the 2004 Regulations a PCT could decide to suspend a practitioner, impose conditions or remove, or alternatively, simply wait for the outcome of the regulator's investigation.
- 1.23. This option enables NHS England to consider the facts and circumstances before making a decision about a practitioner's fitness for purpose (i.e. whether the practitioner is capable of performing competently in the specific role with regards the employers' additional requirements). At the same time, the regulator will be considering whether to take action on their fitness to practise (i.e. whether, among other things, the practitioner meets the standards of competence, care and conduct expected of their profession). This would reduce the risk of practitioners being removed from the performers list before their case had been fully considered by the regulator and reduce any consequent risk of litigation. It provides NHS England with the discretion to take such action as it considers appropriate in each case. If NHS England decides to suspend a practitioner, those who are could continue to be paid under the Determination.¹¹

Option 2: Automatically suspend from the performers list

- 1.24. This option would seek to amend the 2013 Regulations to **require** NHS England to suspend practitioners from the performers lists where they become the subject of an interim order for suspension by their regulator. Regulations 5 and 6 of the draft amendment regulations make this change. As noted in option 1, the practitioner would be prevented from practising by virtue of the regulator's interim order for suspension, so there would be no risk to patient safety whilst this was in place. However, the Department believes suspension from the performers list in a case where an interim suspension order is in place is more aligned to the decision made by interim orders panels, providing consistency between the regulator and NHS England, until the regulator makes a full judgment. Either the practitioner's suspension can be lifted or they will be removed from the performers list accordingly.

¹¹ It is the Department of Health's intention that the Determinations made under the 2013 Regulations will be amended to provide this.

1.25. This option would also ensure that all practitioners who are eligible could be paid under the Determination while they were the subject of an interim order for suspension. We intend to amend the Determinations to enable this.

Additional amendment

Declarations over criminal convictions and cautions

1.26. We have also amended the 2013 Regulations to provide that a person applying for inclusion in a performers list need not disclose a protected caution or protected conviction. Regulations 3 and 4 of the draft amendment regulations make this change. The 2013 Regulations include a requirement for applicants to the performers lists to disclose all cautions and convictions. An applicant also had to provide an enhanced criminal record certificate.

This was tested in 2013 in the Appeal Court in relation to the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975¹². The Court of Appeal held that, where the 1975 Order applied, the blanket disclosure of all convictions and cautions was a disproportionate means of achieving a legitimate aim of protecting employers, children and vulnerable adults and this might unjustly interfere with a person's rights under article 8 of the Human Rights Act.

Equality

1.27. The Department of Health and NHS England are covered by the Equality Act 2010, and, specifically, the Public Sector Equality Duty.

1.28. The Duty covers the following protected characteristics: age; disability; gender reassignment; pregnancy and maternity; race (includes ethnic or national origins, colour or nationality); marriage and civil partnership, religion or belief (includes lack of belief); sex and sexual orientation.

1.29. There are three parts to the Duty and public bodies must, in exercising their functions, have due regard to all of them. They are:

- the need to eliminate unlawful discrimination, harassment and victimisation;
- advance equality of opportunity between people who share a protected characteristic and people who do not; and
- promote good relations between people who share a protected characteristic and those who do not.

1.30. We have considered equality issues whilst producing the draft amendment regulations and our initial screening suggests that we do not think the proposed changes will have any impact on any of the equality 'protected characteristic' groups.

¹² R (on the application of) T -v- Chief Constable of Greater Manchester and others, <http://www.judiciary.gov.uk/judgments/r-t-chief-constable-greater-manchester-judgment-29012013/>

Economic impact assessment

- 1.31. The 2013 Regulations we are seeking to amend affect only those practitioners wishing to provide NHS primary care services. The measure therefore does not regulate, deregulate or concern the regulation of business. Consequently, the better regulation requirements (such as publication of an Impact Assessment or Reducing Regulation Committee approval) do not apply¹³.
- 1.32. The costs and benefits to the NHS were considered at the options stage. An analysis was made by NHS England of data from seven of its 27 area teams and from the NHS Litigation Authority. This showed the estimated cost to NHS England of reintroducing the option to suspend practitioners at its discretion, rather than requiring it to remove them from the performers lists, was around £6.9m per annum. It was estimated that the option of requiring NHS England to suspend practitioners, rather than allowing it discretion, would be an additional £2k per annum.

¹³ Flowchart A, page 6, Better Regulation Manual, available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf

Chapter two: Consultation questions

- 2.1. Chapter two sets out the questions the consultation is hoping to address in relation to the action NHS England should take when a practitioner is made the subject of an interim order for suspension.
- 2.2. There are six questions in total. Chapter three details how you can respond to the consultation.

Option 1

- 2.3. Option 1 would remove the requirement to remove a practitioner from the Performers List when they are subject to an interim suspension order. In practice, this reverts to the position that existed prior to 1 April 2013. NHS England would be able to consider the options open to it and act accordingly on a case-by-case basis. Patient safety will be maintained as, in any event, the practitioner has been suspended by virtue of an interim order for suspension by their regulator and is not permitted to practise. If NHS England has concerns in respect of a practitioner, it can consider whether action under the Regulations may be appropriate (such as a suspension or conditions). If NHS England decides to suspend a practitioner, those who are could continue to be paid under the Determination.¹⁴

Question1: Do you agree the 2013 Regulations should be amended so that NHS England is not required to remove practitioners from the performers list who are subject to suspension by an interim order? If not, please explain why.

Option 2

- 2.4. Option 2 would require NHS England to suspend practitioners from the performers lists, when they are subject to an interim orders suspension. The Department believes this is a more proportionate response, until the regulator makes a full judgment in a fitness to practise case. The practitioner can then either be fully reinstated or removed from the performers list accordingly. Practitioners who are eligible, could continue to be paid under the Determination while they were the subject of an interim order for suspension.

Question 2: Do you agree the 2013 Regulations should be amended so that NHS England automatically suspends practitioners who are subject to an interim suspension order? If not, please explain why.

¹⁴ It is the Department of Health's intention that the Determinations made under the 2013 Regulations will be amended to provide this.

General questions

Equality

- 2.5. The Department of Health and NHS England are covered by the Equality Act 2010, and, specifically, the Public Sector Equality Duty. We have considered equality issues whilst producing the draft amendment regulations. From our initial screening we do not think the proposed changes will have any impact on any of the equality 'protected characteristic' groups.

Question 3: Do you think there are any additional equality issues that need to be considered? Are you able to assist us in providing evidence?

Costs and benefits

- 2.6. The costs and benefits were considered at the options stage. As the Regulations we are seeking to amend affect only those practitioners wishing to provide NHS primary care services, there will be no costs or savings for business, public or civil society organisations, regulators or consumers.
- 2.7. The estimated costs to NHS England of reintroducing the option to suspend practitioners from the performers lists is around £6.9m. Requiring NHS England to suspend rather than allowing it discretion will cost around £2k in addition to that. Both these options would remove the current administrative burden for both practitioners and NHS England of reapplying for inclusion when the interim suspension order ends.

Question 4: Do you have views or evidence as to the likely effect on costs or the administrative burden of the proposed changes?

Additional benefits

- 2.8. The costs and benefits were considered at the options stage. As the Regulations we are seeking to amend affect only those practitioners wishing to provide NHS primary care services, there will be no costs or savings for business, public or civil society.

Question 5: Do you think there are any benefits not already discussed relating to the proposed changes?

- 2.9. Attached to this consultation is a copy of the amendment regulations with drafting to show option one (Regulations 9, 10 and 12) and option two (Regulations 5 and 6).

Question 6: Do you have any comments on the draft amendment regulations themselves?

Chapter three: Responding to this Consultation

Consultation Process

This document launches a consultation on the amendments to the National Health Service (Performers Lists) Regulations 2013.

The consultation is being run, as far as is practical, in accordance with the Cabinet Office Code of Practice on Consultations (reproduced below). The consultation will run for eight weeks between 31 July 2014 and 25 September 2014.

There is a questionnaire on the Gov.UK website which can be printed and sent by post to: **Performers Lists Consultation, 2N10 Quarry House Quarry Hill, Leeds LS2 7UE.**

Alternatively, comments can be sent by e-mail to: **hrdlistening@dh.gsi.gov.uk**

You may also complete the online consultation response document at <http://consultations.dh.gov.uk>

It will help us to analyse the responses if respondents fill in the questionnaire, but responses that do not follow the structure of the questionnaire will be considered equally. It would also help if responses were sent in Word format, rather than pdf.

Criteria for consultation

This consultation follows the Government Code of Practice, in particular we aim to:

- Formally consult at a stage where there is scope to influence the policy outcome;
- Consult for a sufficient period;
- Be clear about the consultations process in the consultation documents, what is being proposed, the scope to influence and the expected costs and benefits of the proposals;
- Ensure the consultation exercise is designed to be accessible to, and clearly targeted at, those people it is intended to reach;
- Keep the burden of consultation to a minimum to ensure consultations are effective and to obtain consultees 'buy-in' to the process;
- Analyse responses carefully and give clear feedback to participants following the consultation;
- Ensure officials running consultations are guided in how to run an effective consultation exercise and share what they learn from the experience.

The full text of the code of practice is on the Better Regulation website at: www.bis.gov.uk/policies/better-regulation/consultation-guidance

Comments on the consultation process itself

If you have concerns or comments which you would like to make relating specifically to the consultation process itself please

contact Consultations Coordinator
Department of Health
2E26, Quarry House
Leeds
LS2 7UE

e-mail consultations.co-ordinator@dh.gsi.gov.uk

Please do not send consultation responses to this address.

Confidentiality of information

We manage the information you provide in response to this consultation in accordance with the Department of Health's Information Charter (www.dh.gov.uk/en/FreedomOfInformation/DH_088010).

Information we receive, including personal information, may be published or disclosed in accordance with the access to information regimes (primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) 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 FOIA, 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 DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

Summary of the consultation responses

A summary of the response to this consultation will be made available before or alongside any further action, such as laying legislation before Parliament, and will be placed on the Gov.UK website (www.gov.uk).