

Council meeting, 7 July 2010

The HPC Register – suspended and struck off registrants

Executive summary and recommendations

Introduction

At its meeting on 20 May 2010 the Council considered a paper which discussed the Council for Healthcare Regulatory Excellence (CHRE) report 'Health professional regulators registers: Maximising their contribution to public protection and patient safety'.

The Council requested a further paper from the Executive on the question of whether suspended and struck off registrants should appear in the public-facing Register.

Decision

The Council is invited to discuss and agree the decisions outlined in paragraph 4.1 of the paper.

Background information

Council meeting, 20 May 2010: 'CHRE – Health professional regulators' registers'

[http://www.hpc-](http://www.hpc-uk.org/aboutus/council/councilmeetings_archive/index.asp?id=499)

[uk.org/aboutus/council/councilmeetings_archive/index.asp?id=499](http://www.hpc-uk.org/aboutus/council/councilmeetings_archive/index.asp?id=499) (click on enclosure 5)

Council for Healthcare Regulatory Excellence, 'Health professional regulator' registers: Maximising their contribution to public protection and patient safety'.

<https://www.chre.org.uk/satellite/146/>

Resource implications

- There would be some resource implications related to the inclusion of suspended registrants in the online Register. The extent of these implications is unclear at this stage but is discussed in section 4 of the paper.

Financial implications

- There would be a financial implication should inclusion of suspended registrants in the online Register require enhancements to the registration system. This would be accounted for within the project prioritisation process for 2011/12. This is discussed in section 4 of the paper.

Appendices

Legal advice from Jonathan Bracken, Bircham Dyson Bell, HPC Solicitor (Memorandum dated 3 June 2010, received by email).

Date of paper

24 June 2010

The HPC Register – suspended and struck-off registrants

1. Introduction

- 1.1 At its meeting on 20 May 2010 the Council considered a paper which discussed the Council for Healthcare Regulatory Excellence (CHRE) report 'Health professional regulators registers: Maximising their contribution to public protection and patient safety'.
- 1.2 The CHRE report made three main recommendations discussed by the Council at its last meeting:
- The regulators should provide information about registrants who are suspended or struck off or subject to interim sanctions in their online registers. Struck off registrants should appear for at least five years.
 - The regulators should provide fitness to practise histories (i.e. information about sanctions which are no longer in force) in their online registers.
 - The regulators should explore ways of improving the accessibility and functionality of their online registers. For example, a 'sounds like' search function.

('Online register' is used in this paper to refer to the Register which is accessible to the public.)

- 1.3 The Council agreed, as a point of principle, that fitness to practise histories should not be included in the online register. Overall the Council was concerned that such an approach would be disproportionate and out of step with the HPC's fitness to practise process and its focus on public protection rather than punishment.
- 1.4 The Council agreed that the Executive should continue to consider ways in which the accessibility and functionality of the Register might be improved and this will be taken forward for consideration as part of the project prioritisation process for 2011/12 and in Departmental activities.
- 1.5 The Council did not make any final conclusions about whether suspended and/or struck off registrants should appear in the Register and sought clarity as to the legal implications of such a change.

2. Suspended and struck off registrants

- 2.1 The points made in the previous paper regarding inclusion of suspended and struck off registrations in the online register are summarised below.
- There is variation in practice across the regulators. 7 out of the 9 regulators either do not list suspended or struck off registrants in their online registers or only list suspended registrants.

- The CHRE argues that change was necessary to meet public expectations – the public expect suspended registrants to appear in the Register and do not now how to interpret the absence of a registrant in the Register.
- The Executive advanced that there are two separate issues – the public availability of fitness to practise information; and the extent to which that information should be available in the registers maintained by the regulators.
- The Executive advanced the view that including suspended and struck off registrants in the Register might be confusing as it would run counter to the purpose of the Register. The Register is a Register of health professionals (i.e. a Register of individuals who are able to practise using the protected title(s) for their profession.)
- The CHRE argued that including suspended and struck off registrants in the Register would help mitigate risk to the public caused by registrants who are struck off but who might continue in practice under another professional title.
- The Executive argued that it was unclear how including struck off registrants in the Register would help mitigate this risk. For example, if someone was indeed practising under an alternative professional title which does not relate to one of the HPC regulated professions a member of the public is unlikely to know to check the HPC Register.

2.2 At the meeting the Council discussed these arguments but did not reach a final conclusion. In summary, the following arguments were made:

- The Register should not show struck off or suspended registrants. The argument was made that the Register is a Register of health professionals and that therefore those suspended or struck off should not be shown. It was questioned whether doing so would help mitigate the 'risk' of struck off registrants continuing to practice under an alternative title.
- The Register should show suspended registrants only. It was argued that registrants are suspended from practice but still within the regulatory remit of the HPC and therefore it would be helpful to the public to include these registrants in the Register but clearly marked. It was argued that this was clearly distinct from the status of a registrant 'struck off' the Register.
- The Register should show both struck off and suspended registrants. It was argued that this information was important to the public particularly in professions where it is more possible that a registrant could 'rebrand' and continue to practise under an alternative professional title.

- 2.3 The paper considered by the Council set out that if the Council was minded to agree with the recommendations about struck off and suspended registrants the Executive would, in any event, need to seek appropriate legal advice before implementation. At the meeting the Council particularly sought clarification around the status of someone who was suspended and therefore whether their name should appear in the online Register. The Executive has sought legal advice about inclusion of suspended and struck off registrants in the public-facing Register, the remaining issues where the Council had not yet reached a decision at the level of principle.

3. Legal advice

- 3.1 The legal advice sought is appended to this paper. The advice is briefly summarised below.

Suspended registrants

- 3.2 The legal advice is very clear in advising that suspended registrants should appear in the online register, particularly given the terms of Article 22 (8) of the Health Professions Order 2001 which in full reads:

‘Whilst the registration of a registrant is suspended by virtue of a suspension order or an interim suspension he shall be treated as not being registered notwithstanding that his name still appears in the register but this does not prevent action being taken in respect of such a person as appropriate under articles 22 to 32 of this Order.’

- 3.3 This does not prevent suspended registrants from being clearly marked in the online register to avoid any potential confusion between different registration statuses. (For example, by ‘greying out’ or using a different font colour.)

Struck off registrants

- 3.4 The legal advice is similarly unequivocal in advising that struck off registrants should not appear in the online register and that to do so would be inconsistent with the terms of the Order.
- 3.5 The advice concludes: ‘Given the language of the Order, whether construed on the basis of its meaning or some other more purposive approach, it would be ultra vires for the Council to purport to make rules requiring the register to include details of persons who have been struck off the register and thus are no longer members of a relevant profession.’
- 3.6 The CHRE report argues that the inclusion of struck off registrants in the Register is necessary in light of reported instances of registrants struck off by the regulators continuing to practise using an alternative professional title. However, the legal advice received argues that to include struck off registrants in the Register on this basis would be an improper exercise of

the Council's powers as the Council's remit does not extend to 'prohibiting or obstructing that person from engaging in lawful conduct which is both beyond the HPC's remit and not constrained by some other regulatory regime'.

4. Decision and implementation

- 4.1 In light of the legal advice received, the Council is invited to discuss and agree that:
- suspended and interim suspended registrants should appear in the public-facing HPC Register, albeit with the suspended status made very clear to differentiate from registrants in practice; and
 - struck off registrants should not appear in the public-facing HPC Register.
- 4.2 Suspended registrants do not currently appear in the online Register and the legal advice received advises that this situation should be 'promptly remedied'.
- 4.3 The Executive is currently exploring the implications for implementation, in particular, whether this change could be made in the near future or whether enhancements to the registration system are necessary to facilitate the change. The Executive will keep the Council informed of progress in this area.
- 4.4 There would be some additional implications for the Fitness to Practise Department in linking the records of currently suspended registrants to the panel's decision in their case. This would mean that there would be a direct link between the entry in the online register and the decision reached by a fitness to practise panel.
- 4.5 The Executive is in the process of making changes to the text available on the hpcheck.org portal so that the Register is more clearly explained with clear signposts given to information available elsewhere on the HPC website.

Memorandum

Date: 3rd June 2010
To: Michael Guthrie
From: Jonathan Bracken

The HPC Register – Suspension and Striking Off Orders

Michael,

You asked for my advice on the inclusion in the HPC register of the names of registrants who are the subject of a suspension order or striking off order.

Suspension

In relation to suspension orders the position is straightforward. Article 22(8) of the Health Professions Order 2001 (the **Order**) provides that (emphasis added):

“While the registration of a registrant is suspended by virtue of a suspension order... he shall be treated as not being registered **notwithstanding that his name still appears in the register...**”

Thus, there is clear and express provision in the Order that the name of a person who is suspended from the register should nonetheless continue to appear in that register. In order to protect the public, the fact that the person is suspended should be made evident on the face of the register (for example, by some form of marking or ‘greying out’) but it is quite clear that a registrant’s name should continue to appear in the register during any period of suspension.

The marking of names for this purpose is already permitted under Rule 3(4) of the Health Professions Council (Registration and Fees) Rules 2003 (as amended) which provides that:

“The Registrar may enter on the register any other information which is material to a registrant’s registration.”

Fairly obviously, the fact that a person’s name appears on the register but is not permitted to practise would fall within the definition of information which is “material” to that person’s registration.

Striking Off

In relation to striking off orders the matter is more complex. Article 29(5)(a) of the Order enables a practice Committee Panel to:

“make an order directing the Registrar to strike the person concerned off the register (a “striking-off order”)”

Appendix 1

Some other regulators' statutory powers use the slightly more euphemistic term of "erasure" but in either case the language is quite clear; intending that the names of those who have been prevented from practising a profession should be removed from the register in question (by being struck off or erased) so that the register continues to be a list only of those entitled to practise the profession concerned.

The phrase "striking off" is very direct language and is defined in the Oxford Dictionary (to which the courts have recourse) as removal with a stroke (presumably of a pen) or deletion from a list. It originates from the keeping of bound and handwritten registers and whilst it is true to say that such registers would have continued to show the name of a person who had been 'struck off' (albeit with a line through their name), in reality this only amounted to 'striking through' and was the best that could be achieved in keeping such registers. The more modern definition of 'deletion from a list' better reflects modern day practice of removing entries in their entirety where registers can be updated, are regularly re-published or are made available online.

The notion that 'striking off' means complete removal of a person's name from the register is supported by Articles 5(1) and (4) of the Order, which deal with the establishment and maintenance of the register and provide that (emphasis added):

"In accordance with the provisions of this Order the Council shall establish and maintain a register of **members of the relevant professions.**"

"The register shall show, **in relation to each registrant**, such... details as the Council may prescribe."

It is clear from these provisions that the register is intended only to include the names of persons who are entitled to be in practice and in prescribing (which means by making rules) the details which are to be included in the register, the Council must confine itself to acting in relation to registrants (a term defined in the Order only to include members of the relevant professions).

Given the language of the Order, whether construed on the basis of its ordinary meaning or some other more purposive approach, it would be *ultra vires* for the Council to purport to make rules requiring the register to include details of persons who have been struck off the register and thus are no longer members of a relevant profession.

Conclusion

The need for the names of registrants who are subject to a suspension order to continue to appear in the register is beyond doubt. If that is not already happening, then it should be promptly remedied.

In relation to the names of persons struck off the register, complete removal of those names from the register is both consistent with the HPC's statutory powers and accords with its obligation of protecting the public.

Appendix 1

If a person's name is not on the register then the public is aware that, for whatever reason, that person is not entitled to practise the profession concerned. Given that fact there is no proper public protection argument to justify keeping the names of struck off registrants on the register and doing so would be disproportionate.

On the latter point it might be argued that knowing a person has been struck off, as opposed to simply not being registered, is different and means that the public can avoid dealing with that person if he or she sets up in business in a similar but unregulated field. Although this argument is superficially attractive, it would be improper for the HPC to seek to exercise its statutory functions on that basis.

The purpose of a striking off order is to prevent a person from practising a profession which is subject to statutory regulation. The effect of such an order does not (and is not intended to) extend to prohibiting or obstructing that person from engaging in lawful conduct which is both beyond the HPC's remit and not constrained by some other regulatory regime. It would be a somewhat dubious exercise of its powers for the HPC to seek to use the published version of its register as a means to highlight the fact that a person had been struck off and thus to attempt to extend the reach of that striking off order and interfere in the right of the person concerned to engage in other lawful activities.

JKB