

Agenda Item 6

Enclosure 4

Paper RC 4 / 02

REGISTRATION COMMITTEE

MEMORANDUM FROM MR. J. BRACKEN

From : Secretary to the Committee

Memorandum

To: Marc Seale, Health Professions Council

From: Jonathan Bracken

Date: 18 April 2002

Re: **Transitional registration arrangements ("grandparenting"), protection of common title and related issues.**

Grandparenting

In introducing or extending statutory regulation for a particular profession which includes some form of transitional registration arrangements are provided for (as is the case here), there is a presumption that as many of those existing but unregistered practitioners as possible will be brought within the new arrangements without the need to meet the strict requirements which will apply to future candidates for admission.

Consequently, in determining the procedures it will apply to applicants seeking "grandparenting", the HPC needs to be aware that it:

- cannot apply to grandparenting candidates the strict standards which previously applied to state registered practitioners or which will apply in the future, as to do either would undermine the whole purpose of the transitional provisions;
- cannot, without a compelling public interest reason which is consistent with its obligation to safeguard the health and well being of patients, apply the transitional provisions in a manner which would leave most unregistered practitioners outside of the new arrangements. This is particularly so if they could continue to practice under some other title or description, as it would negate the whole purpose of seeking to regulate those practitioners;
- cannot impose competence tests or additional training requirements which by their nature, extent or duration are so onerous that they amount to an unreasonable barrier to entry;
- must act in a manner which is consistent with Article 1 to the First Protocol of the Convention rights protected by the Human Rights Act 1998. That provision prevents interference by a public authority with a person's property rights – which includes regulatory and similar decisions which affect their livelihood – except where that interference is "in the public interest and subject to the conditions provided for by law".

In considering its policy on grandparenting arrangements the HPC should have regard to the minister's comments during the debate on the draft Health Professions Order :

"Article 13 of the order provides a transitional pathway to registration which is open to those who can demonstrate that they have been practising safely and effectively or that their qualifications and experience are comparable to the current requirements for registration. In that context, perhaps I may make it clear that in either case the HPC may, but need not, require them to pass a test of competence."

Lords Hansard 13th December 2001

In relation to the decisions reached on applications for grandparenting, the minister added:

"Reasoned decisions must be given. Applicants have a right of appeal, first, to council and to the courts. It has to be a careful process. We must uphold the public interest. However, equally we must ensure that those people who do have the relevant qualifications, or can obtain them, or have the relevant experience, are given as much opportunity as possible to enable them to be registered by the council."

Lords Hansard 13th December 2001

Article 13

The transitional registration arrangements are set out in Article 13 of the Health Professions Order 2001 and, in essence, provide that a person who:

1. is not and never has been state registered (ie under the 1960 PSM Act), and
2. does not possess the formal qualifications normally required for registration (ie registration by the HPC)

may be exempt from the need to possess the educational qualification normally required for entry to the profession in question if; they have lawfully, safely and effectively practised that profession full time for three out of the last five years or its part time equivalent. A candidate who meets those requirements may be required to undertake a competence test.

In addition, a candidate who does not meet that level of prior experience (ie full time practice for three out of the last five years or its part time equivalent) may also be exempted from the educational requirement subject to their undergoing additional training or experience, in addition to any test of competence.

Whatever grandparenting arrangements are agreed by the HPC must adhere to these basic requirements.

It should be noted that the prior experience required by Art. 13 is "lawful, safe and effective practice" whereas elsewhere in the 2001 Order references are only to "safe and effective practice". The requirement for the prior experience to be lawful would enable the HPC to disregard prior experience which has been gained unlawfully, for example, by a person falsely claiming to be state registered or to hold qualifications required for a particular post.

Although the principles to be applied are relevant across all of the professions regulated by the HPC, it is likely that “core competences” will need to be established for each profession, against which a person’s claim to have practised that profession may be judged.

It should also be noted that “grandparenting” merely exempts the candidate from the educational requirements of Art. 9(2)(a). Candidates would still need to meet the health and good character standards set by the HPC.

The Register

The division of the register must be approved by the Privy Council but Art. 6 of the 2001 Order gives the HPC a broad discretion as to how the register is divided. The key factors to be taken into account in doing so are that the parts need to correspond to the professions regulated by the HPC and that division needs to be consistent with the objective to safeguard health and well being of patients. On this last point it would be important for the HPC to consider, before putting certain information or categories of information on the register, whether doing so advances that objective or the HPC’s other objectives.

A part of the register can relate to more than one of the titles linked to the same profession (e.g. chiropodist and podiatrist) and include categories which indicate levels of education, training or professional competence. This will be of particular importance in relation to grandparenting.

Unlike some other regulatory enactments, the 2001 does not provide for separate registers to be maintained for currently unregistered practitioners (e.g. the Veterinary Surgeons Act 1966 provided for the profession to be divided into “veterinary surgeons” and “veterinary practitioners”, the latter being the grandparented practitioners who were placed on a supplementary register). Equally it does provide for any form of conditional or provisional registration (e.g. as found in the Chiropractors Act 1994). Therefore practitioners in the same field will need to be included in the same part of the register, whether they are existing state registered practitioners, those admitted under the grandparenting arrangements or those who are registered under the new HPC procedures.

This is an important point to note as any attempt to divide the register in a manner which put the existing state registered practitioners into a separate part of the register from their currently unregistered counterparts would undoubtedly be *ultra vires* and leave the HPC open to challenge by way of judicial review.

What the 2001 Order will allow is for the register to reflect differing levels of competence within a particular profession, such as the possession of additional qualifications, special or advanced skills, competence in procedures not used by all practitioners – for example invasive techniques or the use of prescription only medicines - and so on. This will be of significance where small elements of a particular profession need to be identified because they perform functions or possess skills not common to the profession as a whole and to resolve any common skills shortfall on the part of grandparented professionals.

If an unregistered profession as a whole tends not to have training or skills in a particular area, practitioners could be placed on the register subject to a practice limitation which the register identifies and which would only be removed if the individual concerned undertook

further training. Although Art. 13 only permits unregistered practitioners with the requisite experience to be subject to a competence test, registration subject to an appropriate practice limitation which could only be removed by further training is consistent with that Article. Obviously, a registrant who acted beyond his or her competence and in breach of a practice limitation would be guilty of misconduct.

Common Title

Art. 6 of the 2001 Order enable the HPC to determine which titles are to be protected and “closed” for each profession and Art. 39 then provides for criminal offences in relation to the use of those titles by persons other than registrants. As Art. 39 is a criminal law provision, the rules of statutory construction require that it is strictly construed by the courts in favour of a defendant. Therefore HPC should not assume that any extension of the offence can be “read into” that Article. Of course, the list of titles protected under Art. 6(2) should be drawn as widely as possible. For example, the Chiropractors Act 1994 protects not only “chiropractor” but also “chiropractic practitioner”, “chiropractitioner” and “chiropractic physician”.

In this regard it should be noted that, unlike the 1960 PSM Act, the 2001 Order does not make it an offence to use a title “whether alone or in conjunction with other words” and so some difficulty may occur in seeking to deal with unregistered practitioners who used titles as part of a business name (for example, assuming “physical therapist” is a protected title, it may be difficult to prosecute someone who runs the “physical therapy centre”).

That same difficulty would not apply if any of those involved in the business is a registered physiotherapist because practising in conjunction with unqualified practitioners under a protected title could be made a misconduct issue.

Competence in English

Where an applicant is required to demonstrate knowledge of English, the standard which HPC would need to apply is whether the candidate’s knowledge of English is sufficient in the interests of patients and of the applicant for the practice of the relevant profession in the United Kingdom.

Any test of competence would need to encompass both oral and written skills as the latter will invariably be relevant given the need for practitioners to be able to read, write and understand case notes etc.