

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND)
REGULATIONS 2013

2013 No. 335

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to ensure the performers list system set out in the National Health Service (Performers Lists) Regulations 2004¹ (“the 2004 Regulations”) continues to operate in the light of changes to the NHS arising from the Health and Social Care Act 2012² (“the Act”). It also implements recommendations for improvements to the system.

2.2 The Act abolishes PCTs and creates the NHS Commissioning Board (“the Board”) and Clinical Commissioning Groups (“CCGs”). Under these Regulations, the current performers list system of separate PCT lists will be replaced by the introduction of national performers lists (medical, dental and ophthalmic). The Board will be given the power to manage admission, suspension and removal from the lists.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The instrument reflects the new NHS structures introduced by the Act and transfers the duties and powers of PCTs in relation to performers lists to the Board.

4.2 There is a close relationship between these Regulations and the Medical Profession (Responsible Officer) Regulations 2010³. The Responsible Officer Regulations are also being amended to reflect the changes to health architecture contained in the Act. From April 2013, the Board will have to nominate or appoint responsible officers whose duties will include managing admission to the medical performers list.

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

² The Health and Social Care Act 2012
<http://www.legislation.gov.uk/ukpga/2012/7/contents>

³ The Medical Profession (Responsible Officers) Regulations 2010
<http://www.legislation.gov.uk/ukxi/2010/2841/contents/made>

5. Territorial Extent and Application

5.1 This instrument applies to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

The 2004 Regulations and the Health and Social Care Act 2012

7.1 The 2004 Regulations came into force on 1 April 2004 and provide PCTs with a framework for managing medical, dental and ophthalmic practitioners undertaking primary care services in their area.

7.2 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 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.

7.3 The White Paper, *Equity and Excellence: Liberating the NHS*,⁴ set out the Government's vision for health services. It described a new commissioning architecture for the NHS where responsibility for local commissioning of the majority of secondary care services would rest with CCGs supported and overseen by the Board. The Board would hold CCGs to account. The Act implements this new structure and abolishes PCTs and Strategic Health Authorities from April 2013. The Board's central role is to ensure that the NHS delivers better outcomes for patients within its available resources.

7.6 The current performers lists provide assurance that the primary care services commissioned by PCTs are safe and effective. As the new commissioner of primary care services, the Board 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.

7.7 The intention of these Regulations is to transfer the responsibilities for the performers lists from PCTs to the Board, from April 2013.

The Performers List Review

⁴ 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

7.8 The report, *Good doctors, safer patients*,⁵ and the Shipman Inquiry⁶ raised concerns over whether PCTs were using their powers under the Performers Lists Regulations effectively. The Performers List Review Report⁷ noted that there had been criticism in the courts over the manner in which PCTs had managed their lists.

7.9 The report concluded that the performers list system should continue for the foreseeable future. However, it made 73 recommendations as to how the system could be improved. This instrument implements a number of those recommendations requiring legislative changes.

The Out-of-Hours Services Review

7.11 The report of a review of GP out of hours services,⁸ made a number of recommendations and observations on good practice on the management of performers lists. This instrument implements the recommendation to ensure that the requirements within the Regulations are suitable for GP Registrars.

Key changes

The following lists key changes the instrument makes:

- the Board will become responsible for the performers list and their management;
- national lists will be introduced to help facilitate information sharing and reduce bureaucracy;
- the current provisions of “conditional inclusion” and “contingent removal” have been merged and simplified to provide for conditions on inclusion in the list in certain circumstances;
- changes have been made to the power to suspend performers on the list. This includes an ability to immediately suspend a performer from the list where it is necessary to do so for the protection of patients or the public;
- performers will need to demonstrate appropriate indemnity or insurance arrangements relating to their professional practice;
- performers will need to provide appraisal information (if it is available), ensuring the Board has all relevant information on applicants when they apply to join a list;
- performers will be required to inform the Board when they are called before an inquest which is likely to be critical of their conduct;

⁵ Chief Medical Officer, *Good doctors, safer patients*, Department of Health, 2006, http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_4137232

⁶ Shipman Inquiry Fifth Report Safeguarding Patients: Lessons from the Past – Proposals for the Future, TSO, December 2004, <http://www.shipman-inquiry.org.uk/fifthreport.asp>

⁷ Clinical Governance Team, *Tackling Concerns Locally: the Performers List System – A review of current arrangements and recommendations for the future*, Department of Health, 2009

⁸ 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

- introduce discretion as to whether to refuse entry to the list or remove a performer from the list in the case of practitioners who has been subject to imprisonment of over 6 months;
- changes related to GP Registrars include a longer period to make enhanced Disclosure and Barring Service checks (now 3 months) and making clear that they do not have to reapply to join the performers list following completion of their training.

8. Consultation outcome

8.1 The Department of Health held a public consultation on draft regulations between 19 October 2012 and 14 December 2012. The consultation audience included the Board, regulatory bodies, PCTs, Royal Colleges, Responsible Officers, the Tribunals Service and individual doctors. There were 107 responses to the consultation and the Department has made a number of changes based on the key issues raised.

8.2 Two key changes to proposals as a result of consultation are as follows.

8.3 The Department of Health consulted on a proposal to allow the Board to remove a performer from a list if they have not undertaken a minimum service. The consultation document made some suggestions as to what 'minimum service' could mean. Although respondents were supportive of the proposal, they highlighted the difficulty in defining what constituted minimum service and how it would impact differently on particular groups of people (for example, women intending to take maternity leave, part-time workers, locum doctors amongst other groups). Therefore, the proposal is not being taken forward in these Regulations.

8.4 The Department consulted on a proposal to not require an Enhanced Criminal Records Check for all applications to the performers lists but to retain a discretion to request one, in anticipation of the Update Service which is expected to be introduced in 2013. However, following consideration of consultation responses and further information about the expected operation of the Update Service, the Regulations continue to require a full check for all applications.

8.5 The Department's full response to the consultation will be made available on the Department's website.

9. Guidance

9.1 The Board will prepare guidance for its officers in the management of the lists (for example, admission, suspension and removal of performers from national). The guidance will also be of interest to the relevant performers, regulatory bodies and other organisations providing assistance or advice to performers.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument. The Impact Assessment for the Health and Social Care Act 2012 as a whole is available at

www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_123583. (The annex most relevant to the consequential changes made by these Regulations is A.) Revised estimates of the figures involved are given in: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121018/wms-text/121018m0001.htm#12101829000017>

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Department of Health and the NHS Commissioning Board will monitor the implementation of the Regulations and the need for future amendments to take account of developments.

13. Contact

Michael Wright at the Department of Health (Tel: 0207 972 1323 or e-mail: michael.wright@dh.gsi.gov.uk) can answer any queries regarding the instrument.