

# Initial evaluation of the feasibility of prohibition order schemes for unregulated health and care workers in the UK

Advice to the Secretary of State for Health

December 2016

## About the Professional Standards Authority

The Professional Standards Authority for Health and Social Care<sup>1</sup> promotes the health, safety and wellbeing of patients, service users and the public by raising standards of regulation and voluntary registration of people working in health and care. We are an independent body, accountable to the UK Parliament.

We oversee the work of nine statutory bodies that regulate health professionals in the UK and social workers in England. We review the regulators' performance and audit and scrutinise their decisions about whether people on their registers are fit to practise.

We also set standards for organisations holding voluntary registers for people in unregulated health and care occupations and accredit those organisations that meet our standards.

To encourage improvement we share good practice and knowledge, conduct research and introduce new ideas including our concept of right-touch regulation.<sup>2</sup> We monitor policy developments in the UK and internationally and provide advice to governments and others on matters relating to people working in health and care. We also undertake some international commissions to extend our understanding of regulation and to promote safety in the mobility of the health and care workforce.

We are committed to being independent, impartial, fair, accessible and consistent. More information about our work and the approach we take is available at [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

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<sup>1</sup> The Professional Standards Authority for Health and Social Care was previously known as the Council for Healthcare Regulatory Excellence

<sup>2</sup> The Professional Standards Authority. 2015. *Right-touch regulation – revised* [Online] Available at: <http://www.professionalstandards.org.uk/policy-and-research/right-touch-regulation> [Accessed: 31/10/2016]

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# 1. Introduction

## Project overview

- 1.1 This paper sets out our advice to the Secretary of State for Health, under section 26A of the National Health Service Reform and Health Care Professions Act 2002. It provides an initial evaluation of the feasibility and potential benefits and limitations of prohibition order schemes for unregulated health and care workers, as requested in the commissioning letter (see Annex A). The letter stressed that it was ‘preliminary work focusing on evidence gathering’ in the form of an ‘introductory/contextual piece’.<sup>3</sup>
- 1.2 The letter explained that:
- ‘The Department of Health is currently exploring alternatives to statutory regulation in the UK for the parts of the health and social care workforce which (i) can be shown to present a risk to the public and (ii) cannot effectively be controlled by existing means. The policy intent is to provide a proportionate solution to the risks posed to patient safety that would prevent individuals who posed a risk from working in a similar role in the health and social care sectors.*
- Accredited registers provide one alternative but are only available to groups who have formed a voluntary register and wish to be accredited.’*
- 1.3 Examples of issues that prohibition orders may be expected to address include the difficulty employers have in knowing if a health or care worker is unsafe to practise, people coming off statutory registers and working as support staff, and people being dismissed by one employer and being able to find employment elsewhere.
- 1.4 We have not been asked to provide a view on the use of prohibition order schemes for a particular group or occupation. Therefore, our assessment of the feasibility and potential benefits and disadvantages of this regulatory tool is necessarily theoretical. We have not assessed their cost effectiveness in relation to other regulatory interventions. We are not in a position therefore to express a view on the desirability of introducing such a scheme in the absence of clarity about the context or people to which it might apply.
- 1.5 Our conclusions are intended for the attention of the Secretary of State for Health. However, we hope the research and analysis presented may be of interest to anyone considering the range of models of assurance that are available for the registration and regulation of health and social care workers, and who wishes to take a risk-based, proportionate approach to protecting the public.
- 1.6 The current system of professional regulation requires specified professions to be regulated by one of nine statutory regulators and to be listed on the register relevant to their profession. However, this does not include all of the

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<sup>3</sup> With this in mind, and taking into account the short timescale, we did not consult the regulators we oversee as part of this project – contrary to what we would normally do with Commissions of this type.

health and care workforce. Practitioners in a number of other occupations are members of voluntary registers held by professional bodies. Twenty-three such registers are accredited by the Professional Standards Authority through the Accredited Registers Programme, established under the Health and Social Care Act (2012) and supported by UK Governments.<sup>4</sup>

- 1.7 In addition, some groups are not regulated, are not members of accredited registers, and are not covered by a voluntary scheme. There has been debate around alternative methods of ensuring public protection for groups that are not covered by statutory regulation, primarily focused on those who also do not fall under an accredited register. For example, a quarter of NHS staff in England are 'unregulated support workers',<sup>5</sup> the adult social care workforce in England is estimated at 1.5 million.<sup>6</sup>
- 1.8 Prohibition order schemes, also referred to as 'barring schemes' or 'negative registers' have been referenced in various different contexts and for different occupations as an alternative approach. Sir Robert Francis, in his report on the Mid-Staffordshire inquiry, recommended that board-level leaders and managers within the NHS found not to be 'fit and proper' to hold such a position should effectively be placed on a barred list, preventing them from holding such a position in the future.<sup>7</sup> In addition, the Health and Care Professions Council, in its 2014 accountability hearing with the Commons Health Committee, outlined its desire to obtain the powers to establish a negative registration scheme for social care workers.<sup>8</sup>
- 1.9 Most recently, the Government has responded to the 2014 recommendation by the Law Commission that the Government should bring in powers to introduce barring schemes run by the regulators, with their view that prohibition orders, '*could be a useful tool in areas of risk where the introduction of a full statutory regime would not be appropriate*'.<sup>9</sup>
- 1.10 Prohibition order schemes offer a potential alternative to statutory regulation as a means of preventing unfit individuals from working in certain occupations or carrying out certain activities. This advice reviews the information available about schemes currently in operation, and considers

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<sup>4</sup> Professional Standards Authority, *Our work with accredited registers* [Online]. Available at: <http://www.professionalstandards.org.uk/what-we-do/accredited-registers>. [Accessed 27/10/2016]

<sup>5</sup> Health Foundation, March 2016. *Fit for Purpose?* Pg. 22 [Online], Available at: <http://www.health.org.uk/publication/fit-purpose> [Accessed 31/03/2016]

<sup>6</sup> Skills for Care, September 2015. *The size and structure of the adult social care sector and workforce in England, 2015* [Online]. Available at: <http://www.skillsforcare.org.uk/Documents/NMDS-SC-and-intelligence/NMDS-SC/Analysis-pages/The-size-and-structure-Report-2015.pdf>. [Accessed: 27/10/2016.]

<sup>7</sup> *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, chaired by Robert Francis QC* 2013. Pg.108. [Online] Available at <http://www.midstaffpublicinquiry.com/report> [Accessed 10/09/2013]

<sup>8</sup> Health Committee, *First Report, 2014 Accountability hearing with the Health and Care Professions Council*. [Online] Available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhealth/339/33902.htm> [Accessed: 31/03/2016]

<sup>9</sup> Department of Health, 2015. *Regulation of Health Care Professionals Regulation of Social Care Professionals in England*, Pg.30. [Online] Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399020/Response\\_Cm\\_89\\_95.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_89_95.pdf) [Accessed: 31/10/2016]

the feasibility, benefits and disadvantages of the introduction of a prohibition order scheme.

1.11 This advice is based on evidence and information from a number of sources including:

- Research into prohibition order schemes currently in operation in the UK and internationally, using publicly available information from sources including government and regulatory body websites
- Legal advice obtained by the Authority on the implications of key aspects of such a scheme
- A review of published stakeholder views on the subject.

### Our current thinking

1.12 The Authority's *Right-touch regulation* paper offers a useful framework for considering prohibition orders in the UK health and social care environment.<sup>10</sup> We have used many of the principles of this paper for our analysis, for example we have focused on regulatory outcomes, and on the quantification of risks.

1.13 We recommend that any consideration of how to provide assurance in relation to a specific group of workers or practitioners follows the principles of *Right-touch regulation*:

- Identify the problem before the solution
- Quantify and qualify the risks
- Get as close to the problem as possible
- Focus on the outcome
- Use regulation only when necessary
- Keep it simple
- Check for unintended consequences
- Review and respond to change.

1.14 Further, in our recent publication *Regulation rethought*,<sup>11</sup> we recommended that all health and care occupations should over time be placed on a single register, and conform to a common standard, in addition to occupation-specific standards. The requirements for registration and licensing would vary from one group to another, depending on the level of risk presented by that group. We suggested in this report that:

*‘a wider part of the workforce such as care assistants could be registered, signing up to the statement of professional practice in a similar way to the*

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<sup>10</sup> Professional Standards Authority, October 2015. *Right-touch regulation* [Online]. Available at: <http://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-regulation-2015.pdf?sfvrsn=10> [Accessed 31/03/2016]

<sup>11</sup> Professional Standards Authority, September 2016. *Regulation rethought*. [Online] Available at: <http://www.professionalstandards.org.uk/publications/detail/regulation-rethought>. [Accessed 27/10/2016]

*employers' code of conduct for such groups used in Scotland. Registration and deregistration could be linked to the Disclosure and Barring Service.'*

- 1.15 If our recommendation of a single register were to be implemented, prohibition order schemes like that operated by the Disclosure and Barring Service, or perhaps more occupation-specific ones, could become a means of deregistering unregulated workers.

## 2. What are prohibition orders?

### Definitions

- 2.1 A prohibition order scheme, also referred to in different contexts as a 'negative registration scheme' or a 'barring scheme' allows individuals to be barred from practising a specified profession or from carrying out specific activities, through the use of prohibition or barring orders.
- 2.2 To create such a scheme, legislation would usually be passed to specify certain standards of behaviour required of a certain occupation or group of occupations. Where a breach of the standards by a practitioner causes harm or places the public at risk of harm, the relevant investigatory body would issue a prohibition order that may prohibit or restrict the practitioner from providing certain services or carrying out a certain role. Individuals may then be placed on a list as a result of this breach; this enables those who are not fit to practise to be identified by whomever the list is made available to.
- 2.3 A breach of a prohibition order can be a punishable offence and employers may be required to check the register of those issued with prohibition orders before offering a relevant role to an individual.
- 2.4 This is in contrast to 'positive registration', including both statutory and voluntary registration of professionals and practitioners. Under these regimes, individuals are first vetted for their suitability to be registered, are placed on a list of registrants who are deemed fit to practise a particular occupation, and may then be removed from the list if they are found to have breached the standards of practice or conduct required. With statutory regulation, professionals who have been removed can be prevented from practising through protection of title and/or function legislation. The bar for removal is high, but regulators have other, less severe sanctions such as suspension and conditions of registration, at their disposal.
- 2.5 There are a number of examples of prohibition order schemes operational in the UK which shed light on how a health and social care worker scheme could operate. To our knowledge, there is only one prohibition order scheme in the health and care sector (in New South Wales), which has been included in the core examples in this paper. The core examples which we describe below are: the Disclosure and Barring Service, Financial Conduct Authority, National College for Teaching and Leadership, and the Health Care Complaints Commission (New South Wales).
- 2.6 In addition, we have outlined at Annex B some ancillary examples from the UK and the rest of the world, which we consider to offer some useful insights.

## Core Examples

### *Disclosure and Barring Service – barred lists (England, Wales and Northern Ireland)<sup>12</sup>*

- 2.7 The Disclosure and Barring Service (DBS) is designed to help employers make safer recruitment decisions and prevent unsuitable people from working with vulnerable groups. It replaced the Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA).<sup>13</sup> The DBS fulfils two functions:
- disclosing to certain employers a person’s criminal records background<sup>14</sup> (England and Wales)
  - maintaining a list of people who are ‘barred’ from working in particular activities with children or vulnerable adults<sup>15</sup> (England, Wales and Northern Ireland).
- 2.8 For the purposes of this review, we are more interested in the second of these two functions, although the two are closely linked. The barred lists contain names of people who have been found unsuitable to work in ‘regulated activities’ with either children or adults. These activities are defined in the legislation. For work with children, they are summarised as:
- ‘unsupervised activities: teach, train, instruct, care for or supervise children, or provide advice/guidance on wellbeing, or drive a vehicle only for children;
  - work for a limited range of establishments (‘specified places’), with opportunity for contact: e.g. schools, children’s homes, childcare premises. Not work by supervised volunteers.’<sup>16</sup>
- 2.9 For work with adults, these activities are described broadly as follows:
- providing health care
  - providing personal care
  - providing social work
  - assistance with general household matters
  - assistance in the conduct of a person’s own affairs

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<sup>12</sup> Disclosure Scotland is the equivalent body for Scotland. See [www.disclosurescotland.co.uk](http://www.disclosurescotland.co.uk).

<sup>13</sup> Disclosure and Barring Service, *About us* [Online]. Available at: <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about> [Accessed 02/02/16]

<sup>14</sup> Disclosure and Barring Service, *Overview* [Online]. Available at: <https://www.gov.uk/disclosure-barring-service-check/overview> [Accessed 02/03/16]

<sup>15</sup> Disclosure and Barring Service, *DBS barred lists* [Online]. Available at: <https://www.gov.uk/disclosure-barring-service-check/dbs-barred-lists> [Accessed 02/03/16]

<sup>16</sup> Department for Education (UK) and Department of Health, Social Services and Public Safety (Northern Ireland), June 2012. *Regulated Activity in relation to Children: scope, Factual note by HM Government* [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316179/Regulated\\_Activity\\_in\\_relation\\_to\\_Children\\_DfE\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316179/Regulated_Activity_in_relation_to_Children_DfE_.pdf). [Accessed 02/03/16]

- conveying.<sup>17</sup>
- 2.10 An individual is either barred or not barred, and it is a criminal offence for a barred person to seek to work, or work in, activities from which they are barred. It is also a criminal offence for employers or voluntary organisations to knowingly employ a barred person in regulated activity.<sup>18</sup>
- 2.11 There is no code of conduct against which individuals are assessed. Instead individuals are deemed unsuitable to work within a regulated activity based on:
- their having received a caution for or having been convicted of a specific criminal offence ('autobar offences'), resulting in automatic consideration by the DBS of whether they should be barred. For less serious offences, individuals have a right to make written representations
  - other evidence that the person presents a safeguarding risk either to children or to vulnerable adults ('discretionary barring'). In these circumstances, individuals have the opportunity to make representations.<sup>19</sup>
- 2.12 Employers must by law refer a person to the DBS if:
- the employer dismissed them because they harmed someone
  - the employer dismissed them or removed them from a regulated activity because they might have harmed someone
  - the employer planned to dismiss them for either of these reasons, but they resigned first.<sup>20</sup>
- 2.13 The regulators we oversee are required to refer professionals to the DBS where they consider that the referral criteria are met. We understand that it is not always clear to them where the threshold for barring sits in relation to their own threshold for striking off.<sup>21</sup>

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<sup>17</sup> Department of Health, 2011. *Regulated activity (adults): The definition of 'regulated activity' (adults) as defined by the Safeguarding Vulnerable Groups Act 2006 from 10th September 2012*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216900/Regulated-Activity-Adults-Dec-2012.pdf) [Accessed: 31/10/2016]

<sup>18</sup> Department of Health, 2012. *New disclosure and barring services*. [Online]. Available at: <https://www.gov.uk/government/publications/new-disclosure-and-barring-services> [Accessed 02/03/2016]

<sup>19</sup> Disclosure and Barring Service, *DBS referrals guide: referral and decision making process*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/535151/DBS\\_referrals\\_guide\\_referral\\_and\\_decision\\_making\\_process\\_v3.2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535151/DBS_referrals_guide_referral_and_decision_making_process_v3.2.pdf) [Accessed: 31/10/2016]

<sup>20</sup> Disclosure and Barring Service. *Referral guide for employers and volunteer managers*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/434769/DBS\\_referral\\_guide\\_for\\_employers\\_and\\_volunteer\\_managers\\_v3.1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434769/DBS_referral_guide_for_employers_and_volunteer_managers_v3.1.pdf) [Accessed: 02/03/16]

<sup>21</sup> From an HCPC policy statement: 'We make referrals to the DBS as part of our existing remit where we consider they meet the referral criteria and to date only 36 per cent of our referrals have resulted in a barring decision being made. Cases where a decision not to bar has been reached have included serious cases involving sexual assault of patients and inappropriate sexual relationships with vulnerable service users. This illustrates the differences in thresholds which would be applied and the necessity for an approach which would ensure that effective action was taken in relation to those who are unsuitable to work in adult social care in England.' Excerpt from the Health and Care Professions Council Policy statement, *Proposal for regulating adult social care workers in England*. [Online]. Available at:

2.14 Decisions about whether or not to bar someone are made by DBS caseworkers, and barring decisions are for life.<sup>22,23</sup> If a person breaches it by seeking or offering to engage in, or by actually engaging in an activity they are barred from, they are liable to a fine, imprisonment for a maximum of five years, or both.<sup>24</sup> However, barred individuals can ask for a review of a barring decision after a specified length of time varying from one to ten years depending on the age of the person when the decision was made. In addition, they can apply to appeal a barring decision to the Upper Tribunal in England and Wales.<sup>25</sup>

2.15 The lists of barred individuals are not published, nor are they made available in any form to employers. The only information that is released is on request to employers carrying out regulated activities, and must relate to a person who is either employed or seeking employment with that employer.

### **Care Quality Commission – Fit and proper persons test**

2.16 The Care Quality Commission (CQC) is the regulator of health and adult social care in England. It monitors, inspects and regulates health and care services to ensure they meet standards of quality and safety. Its statutory powers include registering health and care services, monitoring and inspecting services, investigating issues where they occur, taking enforcement action against services which fail to meet standards, and reporting on the quality of health and care services to the public.<sup>26</sup>

2.17 Alongside their other powers the CQC was given powers under the Health and Social Care Act 2008<sup>27</sup> to require health and care providers to ensure anyone who has director level responsibility for the quality and safety of health and care services meets the fundamental standards for fulfilling this role through the 'fit and proper persons test'.<sup>28</sup> This test requires providers to ensure that:

- 'the individual is of good character

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[http://www.hcpc-uk.org/assets/documents/100049BFHCPCPolicystatement-RegulatingtheadultsocialcareworkforceinEngland\(Nov2014\).pdf](http://www.hcpc-uk.org/assets/documents/100049BFHCPCPolicystatement-RegulatingtheadultsocialcareworkforceinEngland(Nov2014).pdf) [Accessed 27/10/2016]

<sup>22</sup> Disclosure and Barring Service, *DBS barring referral guidance*. [Online]. Available at: <https://www.gov.uk/government/collections/dbs-referrals-guidance--2#barring-decision-templates> [Accessed 02/03/2016]

<sup>23</sup> Disclosure and Barring Service, *Referral Guidance: Frequently asked questions*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/143692/dbs-referral-faq.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/143692/dbs-referral-faq.pdf) [Accessed: 31/03/2016]

<sup>24</sup> *Safeguarding Vulnerable Groups Act, 2006, Section 7*. [Online]. Available at: <http://www.legislation.gov.uk/ukpga/2006/47/section/7> [Accessed: 12/10/2016]

<sup>25</sup> Disclosure and Barring Service, *Appeals and disputes*. [Online]. Available at: <https://www.gov.uk/disclosure-barring-service-check/appeals-and-disputes> [Accessed 02/03/16]

<sup>26</sup> Care Quality Commission, *Who we are*, [Online]. Available at: <http://www.cqc.org.uk/content/who-we-are> [Accessed: 31/10/2016]

<sup>27</sup> *Health and Social Care Act 2008, Schedule 1, Regulated Activities*. [Online]. Available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111117613/schedule/1> [Accessed: 31/10/2016]

<sup>28</sup> Care Quality Commission, *Regulation 5: Fit and proper person: directors, Information for NHS bodies*. [Online]. Available at: [http://www.cqc.org.uk/sites/default/files/20150327\\_fppr\\_provider\\_guidance.pdf](http://www.cqc.org.uk/sites/default/files/20150327_fppr_provider_guidance.pdf) [Accessed: 31/03/2016]

- the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed
- the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed
- the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and
- none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.<sup>29</sup>

2.18 In assessing whether an individual is of 'good character', providers must consider:

- 'Whether the person has been convicted in the United Kingdom of any offence or been convicted elsewhere of any offence which, if committed in any part of the United Kingdom, would constitute an offence
- Whether the person has been erased, removed or struck off a register of professionals maintained by a regulator of health care or social work professionals.<sup>30</sup>

2.19 The grounds for unfitness are also set out in legislation, and are as follows:

- 'The person is an undischarged bankrupt or a person whose estate has had sequestration awarded in respect of it and who has not been discharged
- The person is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order or an order to like effect made in Scotland or Northern Ireland
- The person is a person to whom a moratorium period under a debt relief order applies under Part VIIA (debt relief orders) of the Insolvency Act 1986
- The person has made a composition or arrangement with, or granted a trust deed for, creditors and not been discharged in respect of it
- The person is included in the children's barred list or the adults' barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006, or in any corresponding list maintained under an equivalent enactment in force in Scotland or Northern Ireland

<sup>29</sup> Care Quality Commission, *Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 5*. [Online]. Available at: <https://www.cqc.org.uk/content/regulation-5-fit-and-proper-persons-directors#full-regulation>. [Accessed: 21/10/2016]

<sup>30</sup> *The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Schedule 4, Part 2*. [Online]. Available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111117613/schedule/4> [Accessed: 31/10/2016]

- The person is prohibited from holding the relevant office or position, or in the case of an individual from carrying on the regulated activity, by or under any enactment.’<sup>31</sup>
- 2.20 This regulation applies to all providers that are not individuals or partnerships (other than limited liability partnerships) who carry on a regulated activity. Individuals and partnerships are governed by the existing Regulation 4. For example, adult social care providers run as small enterprises by individuals who are not limited companies or GP practices run by traditional GP partnerships will not be covered by the Fit and Proper Person Requirement, however, the registered provider or partners of the registered provider will be subject to similar requirements and will have to supply the CQC with documents that confirm their suitability.<sup>32</sup>
- 2.21 The ultimate responsibility for ensuring that requirements are met falls to the chair of the provider in question. To meet the requirements the provider must:
- demonstrate that they have appropriate systems in place to ensure that new and existing directors meet the requirements
  - make reasonable effort to assure itself about individuals
  - make information available to the CQC about directors when necessary, be aware of guidelines and best practice
  - where a Director no longer meets the fit and proper persons requirement and that individual is registered with a health or social care professional regulator, inform the regulator in question and take action to ensure the position is held by a person meeting the requirements.
- 2.22 The CQC can take regulatory action against a service provider who fails to carry out adequate checks that a person meets the requirements although the CQC has also committed to work alongside other regulators to share best practice and information and use enforcement proportionally. Providers can appeal to the First-tier Tribunal against a decision by the CQC to take enforcement action or may also challenge by way of judicial review if they consider that a decision breaches public law principles such as being unreasonable, irrational and unfair.<sup>33</sup>

### ***Financial Conduct Authority, UK***

- 2.23 The Financial Conduct Authority (FCA) regulates financial firms providing services to consumers and maintains the integrity of the UK’s financial markets. It is independent of Government, and financed by fees paid by the

<sup>31</sup> *The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, Schedule 4, Part 1.* [Online]. Available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111117613/schedule/4> [Accessed: 31/10/2016]

<sup>32</sup> Care Quality Commission, *Regulation 4: Requirements where the service provider is an individual or partnership.* [Online]. Available at: <https://www.cqc.org.uk/content/regulation-4-requirements-where-service-provider-individual-or-partnership> [Accessed: 31/10/2016]

<sup>33</sup> Care Quality Commission, *Regulation 5: Fit and proper persons: directors - Information for providers of adult social care, primary medical and dental care, and independent healthcare.* [Online]. Available at: [https://www.cqc.org.uk/sites/default/files/20150327\\_fppr\\_non\\_nhs\\_provider\\_guidance.pdf](https://www.cqc.org.uk/sites/default/files/20150327_fppr_non_nhs_provider_guidance.pdf) [Accessed:31/10/2016]

firms it regulates.<sup>34</sup> Under the Financial Services and Markets Act 2000, the FCA can prohibit any individual from ‘performing a specified function, any function falling within a specified description or any function’.<sup>35, 36</sup> In 2014 and 2015, prohibition orders were issued to 25 and 27 individuals respectively. This is a ‘sharp decline’ from the 72 that were issued in 2010.

The FCA handbook explains that in making decisions relating to prohibition, the FCA will consider in each case whether its statutory objectives can be achieved adequately by imposing disciplinary sanctions.<sup>37</sup> Decisions can take into account a number of circumstances, such as whether a person has the correct qualification, whether they meet standards of fitness and propriety, or the ‘severity of the risk which the individual poses to consumers and to confidence in the financial system’.<sup>38</sup> These are based on general rules set by the FCA, and its legislation, but there is no single code of conduct against which these decisions are made. The handbook provides examples of the types of behaviour that have in the past resulted in prohibition:

*‘(1) Providing false or misleading information to the FCA; including information relating to identity, ability to work in the United Kingdom, and business arrangements;*

*(2) Failure to disclose material considerations on application forms, such as details of County Court Judgments, criminal convictions and dismissal from employment for regulatory or criminal breaches. The nature of the information not disclosed can also be relevant;*

*(3) Severe acts of dishonesty, e.g. which may have resulted in financial crime;*

*(4) Serious lack of competence’<sup>39</sup>*

2.24 The FCA may issue a prohibition order if the cumulative effect of multiple factors means an individual is not fit and proper to work (even if one fact in isolation is not sufficient to show lack of fitness to practise).<sup>40</sup> Decisions about prohibition are made by FCA staff.

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<sup>34</sup> Financial Conduct Authority, *About Us*. [Online]. Available at: <http://www.fca.org.uk/about> [Accessed: 18/02/2016]

<sup>35</sup> Financial Conduct Authority, *FCA Handbook*. [Online]. Available at: <https://www.handbook.fca.org.uk/handbook/glossary/G917.html> [Accessed 09/02/2016]

<sup>36</sup> These prohibition orders fit our description for this report only in as far as they relate to individuals who are not also ‘approved persons’. Approved persons are approved by the FCA to hold a position of responsibility in a firm it regulates. They are therefore on a form of ‘positive’ register.

<sup>37</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (3.1). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>38</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (3.2). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>39</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (3.5). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>40</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (3.3). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

- 2.25 Prohibition orders can take a number of different forms. Depending on the nature and severity of the misconduct, the FCA can issue orders to prohibit a registrant from performing a specific function or class of functions, or even prohibit a person from being employed by a firm or type of firm.<sup>41</sup> The FCA explains that ‘the scope of a prohibition order will depend on the range of functions which the individual concerned performs in relation to regulated activities, the reasons why he is not fit and proper, and the severity of risk that he/she poses to consumers or the market generally’.<sup>42</sup> Individuals prohibited from activity can be found on an online register available to all.<sup>43</sup> If an individual breaches a prohibition order, the FCA may take disciplinary action against a firm which hired the individual.<sup>44</sup>
- 2.26 Any individual who has received a prohibition order can apply for it to be revoked or varied. When considering an application, the FCA will consider whether the proposed variation [will result] in a reoccurrence of the risk to consumers or confidence in the financial system that resulted in the order being made; and the individual is fit to perform functions in relation to regulated activities generally, or to those specific regulated activities in relation to which the individual has been prohibited.<sup>45</sup> When the FCA issues a prohibition order, it can indicate if the FCA may be ‘minded to revoke the order of the individual in the future’ and after what period of time that would occur.<sup>46</sup> If an application to the FCA to revoke a prohibition order is unsuccessful, an individual may appeal to the Upper Tribunal. There have been cases where this has been successful and the FCA has withdrawn a prohibition order: for example in 2015 the Upper Tribunal reversed an FCA prohibition order decision and halved the fine incurred by the registrant.<sup>47</sup>

### ***National College for Teaching and Leadership***

- 2.27 Teachers in England are regulated by the Secretary of State for Education. This function is carried out by an executive agency sponsored by the Department for Education, known as the National College for Teaching and

<sup>41</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9.3. [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>42</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (2.3). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>43</sup> Financial Conduct Authority, *Financial Services Register*. [Online]. Available at: [https://register.fca.org.uk/shpo\\_searchresultspage?preDefined=PI&TOKEN=5zq3mgf0d8gk](https://register.fca.org.uk/shpo_searchresultspage?preDefined=PI&TOKEN=5zq3mgf0d8gk) [Accessed 12/10/2016]

<sup>44</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (8 and 9). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>45</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (6.4). [Online] (Updated October 2016). Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed 12/10/2016]

<sup>46</sup> Financial Conduct Authority, *Enforcement Guide 2014*, Section 9 (2.4). [Online] (Updated October 2016) Available at: <https://www.handbook.fca.org.uk/handbook/EG/9/?view=chapter> [Accessed: 12/10/2016]

<sup>47</sup> Kingsley Napley, *Successful Challenge to FCA Prohibition Order*, 2015. [Online]. Available at: <http://www.lexology.com/library/detail.aspx?g=6edf9562-cf0e-4b08-a6da-a8667c2147de>. [Accessed: 12/10/2016]

Leadership (NCTL).<sup>48</sup> The NCTL only considers cases of misconduct, and does not consider competence issues.<sup>49</sup>

- 2.28 Under the Education Act 2011, the NCTL holds a register of education professionals prohibited from teaching.<sup>50</sup> After an initial investigation process to determine if the alleged offence is serious enough to warrant a prohibition order, a hearing will take place. An interim prohibition order can be imposed on an individual if the allegation is deemed serious enough, however a teacher on an interim prohibition may be allowed to teach under supervision<sup>51,52</sup> A Professional Conduct Panel will then decide whether or not to recommend a prohibition order to the Secretary of State.
- 2.29 Each Panel is composed of three members who are recruited through a public appointments process and will include a teacher (or someone who has been a teacher in the previous five years), and a layperson (specifically not from the teaching profession). It may also include a former teacher (but who does not meet the first panellist's requirements). One of the panellists will be appointed as chair by the NCTL. A legal adviser who is not part of the Department of Education or the decision-making process is also present.<sup>53</sup> The panel will make a decision on a prohibition order based on the guidance laid out in *Teacher misconduct: The prohibition of teachers Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession*.<sup>54</sup>
- 2.30 There is no code of conduct for teachers. Panels have to answer 'yes' to the following three questions in order to recommend prohibition:
- Is the panel satisfied that the facts of the case have been proved?

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<sup>48</sup> National College for Teaching and Leadership, *What We Do*. [Online]. Available at: <https://www.gov.uk/government/organisations/national-college-for-teaching-and-leadership> [Accessed: 31/03/2016]

<sup>49</sup> National College for Teaching and Leadership, *Teacher misconduct: regulating the teaching profession*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession> [Accessed: 31/3/2016]

<sup>50</sup> National College for Teaching and Leadership, *Teacher misconduct: The Prohibition of Teachers* [Online], Pg.27, Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495028/Teacher\\_Misconduct\\_The\\_Prohibition\\_of\\_Teachers\\_advice\\_updated\\_26\\_Jan\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495028/Teacher_Misconduct_The_Prohibition_of_Teachers_advice_updated_26_Jan_2016.pdf) [Accessed: 31/03/2016]

<sup>51</sup> National College for Teaching and Leadership, *Teacher misconduct: regulating the teaching profession*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession#professional-conduct-panels> [Accessed: 12/10/2016]

<sup>52</sup> Gilligan, A, 2015. *Banned staff revealed to be teaching at Trojan horse school*. Telegraph, 26 July. [Online]. Available at: <http://www.telegraph.co.uk/education/educationnews/11763319/Banned-staff-revealed-to-be-teaching-at-Trojan-horse-school.html> [Accessed: 13/10/2016]

<sup>53</sup> National College for Teaching and Leadership, *Teacher misconduct: regulating the teaching profession*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession#professional-conduct-panels> [Accessed: 12/10/2016]

<sup>54</sup> National College for Teaching and Leadership, 2015. *Teacher misconduct: The prohibition of teachers Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession* [Online] Pg.12. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495028/Teacher\\_Misconduct\\_The\\_Prohibition\\_of\\_Teachers\\_advice\\_updated\\_26\\_Jan\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495028/Teacher_Misconduct_The_Prohibition_of_Teachers_advice_updated_26_Jan_2016.pdf) [Accessed: 13/10/2016]

- Has there been: a) ‘unacceptable professional conduct’; b) ‘conduct that may bring the profession into disrepute’; or c) ‘conviction, at any time of a relevant offence’?
  - Is a prohibition order appropriate?<sup>55</sup>
- 2.31 A prohibition order is likely to be imposed if it is necessary to protect pupils, to maintain public confidence in the profession, and to uphold professional standards. Panels must also decide whether such an outcome would be appropriate and proportionate.<sup>56</sup> If the panel does make a recommendation that a prohibition order be imposed and the Secretary of State agrees, then the teacher is added to a prohibition list.
- 2.32 A prohibition order bars the teacher from teaching for life,<sup>57</sup> though in certain cases, the subject of the order may apply for it to be reviewed after the minimum period specified in the order, which cannot be less than two years, has passed. Teachers can appeal against a prohibition order to the High Court within 28 days of the order being served.
- 2.33 The Department for Education website contains information about the disciplinary process and procedures and notices of upcoming hearings. It also provides details of all decisions made by the NCTL where there has been a finding of unacceptable professional conduct, conduct that may bring the profession into disrepute or conviction of a relevant offence. Employers, including schools, supply agencies and local authorities can also have online access to the NCTL’s Prohibited List.
- 2.34 Employers can therefore check sanctions as well as other miscellaneous details about an individual teacher’s record.<sup>58,59</sup> They can also access lists with details of teachers who have a current restriction against them in relation to teaching in England. These lists include:
- Teachers who have failed to successfully complete their induction or probation period
  - Teachers who are the subject of a suspension or conditional order imposed by the General Teaching Council for England (prior to abolition) that is still current, and

<sup>55</sup> National College for Teaching and Leadership, *Teacher misconduct: regulating the teaching profession*. [Online] Available at: <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession#professional-conduct-panels> [Accessed: 12/10/2016]

<sup>56</sup> National College for Teaching and Leadership, *Teacher misconduct: regulating the teaching profession*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-misconduct-regulating-the-teaching-profession#professional-conduct-panels> [Accessed: 12/10/2016]

<sup>57</sup> National College for Teaching and Leadership, 2015. *Teacher misconduct: The prohibition of teachers Advice on factors relating to decisions leading to the prohibition of teachers from the teaching profession*. [Online]. Pg.12. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/495028/Teacher\\_Misconduct\\_The\\_Prohibition\\_of\\_Teachers\\_advice\\_updated\\_26\\_Jan\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/495028/Teacher_Misconduct_The_Prohibition_of_Teachers_advice_updated_26_Jan_2016.pdf) [Accessed: 13/10/2016]

<sup>58</sup> National College for Teaching and Leadership, *Teacher status checks: information for employers* [Online]. Available at: <https://www.gov.uk/guidance/teacher-status-checks-information-for-employers> [Accessed: 09/02/2016]

<sup>59</sup> The following details can be found about a teacher: teacher’s personal details, initial teacher training qualifications, qualified teacher status, induction status, supplementary qualifications and details of any active sanctions.

- Teachers who have been prohibited from teaching.<sup>60</sup>
- 2.35 If a teacher has a DBS restriction, this information will be displayed on their individual teacher record, when conducting a search of the teacher. However, the DBS recommends that employers check with them for criminal records, identity checks and barred teachers.<sup>61</sup>
- 2.36 As both the NCTL scheme and the DBS consider issues relating to behaviour only (neither scheme considers matters of competence), it is important for there to be clarity about how the two interact. Any person barred by the DBS will automatically be put on the NCTL's prohibition list. However, a person may be subject to a NCTL prohibition order but not be barred under the DBS scheme.
- 2.37 There are no penalties for breaching a prohibition order. We were told by the NCTL that anyone who is aware of a teacher breaching their prohibition order should notify the school, Local Authority/chair of governors in charge of the school and the NCTL. Once The NCTL has received such notice, it would re-issue a Prohibition Letter directly to the teacher, as a reminder of their prohibition.
- 2.38 The NCTL also told us that it is expected that schools give due consideration to best employment practices and they have a duty to undertake relevant checks before making appointments. Schools have a responsibility not to employ as a teacher anyone who appears on the NCTL's Prohibited List. Employers should also obtain references from former employers, which would disclose why previous employment ended, and they must carry out any pre-employment checks required.
- 2.39 Under this system, any teacher prohibited for misconduct (or prohibited by the General Teaching Council for England (GTCE) for either misconduct or incompetence) would not be able to undertake unsupervised teaching work at a relevant institution. This would not prevent them from applying to be a member of school support staff, though this would be at the discretion of the head teacher who would need to be satisfied as to the person's suitability for the post – and employers must do an enhanced check which would show any criminal record.

### ***Health Care Complaints Commission, New South Wales, Australia***

- 2.40 Unregistered healthcare practitioners in New South Wales<sup>62</sup> who breach a code of conduct can be prohibited from working by the Health Care

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<sup>60</sup> National College for Teaching and Leadership, *Teacher status checks: information for employers*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-status-checks-information-for-employers> [Accessed: 09/02/2016]

<sup>61</sup> National College for Teaching and Leadership, *Teacher status checks: information for employers*. [Online]. Available at: <https://www.gov.uk/guidance/teacher-status-checks-information-for-employers> Accessed: 31/10/2016

<sup>62</sup> Population approximately 7.7 million. Australian Bureau of Statistics, *Australian Demographic Statistics, Mar 2016*. [Online]. Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0> [Accessed: 31/10/2016]

Complaints Commission (HCCC). A statutory code of conduct is published and registrants' performance can be assessed against the Code.<sup>63,64</sup>

- 2.41 The HCCC have 60 days to complete an investigation of a complaint from when it is received. Investigators have broad powers, including being able to pose as a patient in order to gather evidence about a practitioner.<sup>65</sup> The HCCC also has memoranda of understanding with the New South Wales Police and other regulatory agencies in order to expedite evidence-gathering.<sup>66</sup> Registrants are legally required to cooperate with an investigation by the HCCC.
- 2.42 The conditions required for a prohibition order to be imposed are:
- the health practitioner has breached the Code of Conduct, or has been convicted of a relevant offence, and
  - the Commissioner believes that the health practitioner poses a risk to the health or safety of members of the public.<sup>67</sup>
- 2.43 Hearings are held by the HCCC Commissioner in private, with a legal officer present. The registrant can be legally represented and hearings can involve up to three or four witnesses, with durations of four to five hours. The procedure is inquisitorial rather than adversarial, with the respondent and witnesses usually questioned separately by the Commissioner.<sup>68</sup>
- 2.44 The HCCC can issue a prohibition order, either banning or restricting the person's practice. It can also issue public warnings about practitioners who have breached the Code. It is a criminal offence for a person to practise in breach of a prohibition order.
- 2.45 The prohibition orders issued by the NSW HCCC are published on the website of the HCCC. Registrants who are subject to a prohibition order are allowed up to 28 days to appeal the ruling. The maximum penalty for breach of a prohibition order is \$22,000 (Australian dollars) or imprisonment for 12

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<sup>63</sup> *Code of Conduct for Unregistered Health Practitioners*. [Online] Available at: [http://www.health.nsw.gov.au/phact/Documents/Code\\_of\\_Conduct\\_unregistered\\_health\\_practitioners\\_-\\_poster\\_-\\_2012\\_Regulation.pdf](http://www.health.nsw.gov.au/phact/Documents/Code_of_Conduct_unregistered_health_practitioners_-_poster_-_2012_Regulation.pdf) [Accessed: 14/10/2016]

<sup>64</sup> Similar schemes operate in South Australia and Queensland, as described here: Australian Health Ministers' Advisory Council, *Final Report: A National Code of Conduct for health care workers*. [Online]. Available here: <http://www.pacfa.org.au/wp-content/uploads/2015/05/Final-Report-A-National-Code-of-Conduct-for-health-care-workers-2.pdf>. [Accessed: 31/10/2016] The Australian Government agreed in April 2015 to implement a Code of Conduct nationwide, and that prohibition orders should be recognised across the country. The remaining states/territories are in the process of implementing this: <http://www.health.vic.gov.au/pracreg/options-for-regulation-of-unregistered-health-practitioners>.

<sup>65</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Para 5.1. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf> [Accessed 31/10/2016]

<sup>66</sup> Australian Health Ministers' Advisory Council, *Options for regulation of unregistered health practitioners*. [Online]. Pg. 27. Available at: <http://ris.dpmc.gov.au/2011/06/10/options-for-the-regulation-of-unregistered-health-practitioners-coag-consultation-regulation-impact-statement-australian-health-ministers%E2%80%99-advisory-council/> [Accessed 31/03/2016]

<sup>67</sup> Australian Health Ministers' Advisory Council, *Final Report: A National Code of Conduct for health care workers*. [Online]. Available here: <http://www.pacfa.org.au/wp-content/uploads/2015/05/Final-Report-A-National-Code-of-Conduct-for-health-care-workers-2.pdf>. [Accessed: 31/10/2016]

<sup>68</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Para 5.1. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf> [Accessed 31/10/2016]

months or both. There are also offences for failing to inform a prospective patient or their guardian prior to treatment of the terms of the order that applies, and failing to include details of the order in any advertising. The penalty for each of these offences is \$11,000, or imprisonment for six months or both.<sup>69</sup>

- 2.46 In 2014, a prohibition order was breached by a naturopath. He was fined \$6,000 for each time he contravened the prohibition order and sentenced to two years of a Good Behaviour Bond.<sup>70</sup>
- 2.47 The Health Care Professions Council, who undertook a review of the scheme, observed that: 'criminal investigations and convictions do interact with the Scheme, but the police operate a higher standard of proof and generally do not pursue cases concerning poor care'. It was observed that the scheme was '*designed to set the minimum threshold, or to 'catch the worst' according to one member of the legal team who drafted the code.*'<sup>71</sup>

### Summary table

- 2.48 The table below summarises some of the key aspects of the schemes considered in this report (including those in Annex B).

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<sup>69</sup> Australian Health Ministers' Advisory Council, *Final Report: A National Code of Conduct for health care workers*. [Online]. Available here: <http://www.pacfa.org.au/wp-content/uploads/2015/05/Final-Report-A-National-Code-of-Conduct-for-health-care-workers-2.pdf>. [Accessed: 31/10/2016]

<sup>70</sup> Health Care Complaints Commission, *Mr Robert Jarvis - convicted for breach of prohibition order*. [Online]. Available at: <https://www.hccc.nsw.gov.au/Publications/Media-releases/2014/Mr-Robert-Jarvis--convicted-for-breach-of-prohibition-order> [Accessed 04/04/2016]

<sup>71</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Para 5.1. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf> [Accessed 31/10/2016]

**Table 1: Key features of different prohibition order schemes**

System/list	Body that holds code (if relevant)	Enforcement body	Type of code or legislation	Who is covered?	How system is funded?	Register publicly available?	Range of sanctions
<b>Disclosure and Barring Service barred lists</b>		The Disclosure and Barring Service – England, Wales and Northern Ireland	Legislation – Safeguarding Vulnerable Groups Act 2006.	Anyone working in a regulated activity with children or vulnerable adults	Self-funded by fees charged for disclosure services	No – information only available to employers in regulated activities, and on request about an individual	Inclusion on either of the DBS barred lists is the only sanction for carrying out or having received a caution for or having been convicted of a specific criminal offence or other evidence that the person presents a safeguarding risk either to children or to vulnerable adults. Inclusion on either of the barred lists means the individual is prohibited from working in 'regulated activities' with either children or adults.
<b>Care Quality Commission Fit and Proper Person Test</b>		Employers, checked by CQC – England	Legislation – Health and Social Care Act 2008; Health and Social Care Act 2008 (Regulated Activities) Regulations 2014	Employees with director-level responsibility in health and social care	Funded by Government and by fees levied on registered providers	Decisions are made and enforced by the employer – no central register	An individual who does not meet the requirements of the Fit and Proper Persons test should not be employed in a director level position with an NHS health or care provider. The CQC can take regulatory action against a service provider who fails to carry out adequate checks that a person meets the requirements.
<b>Register of unregulated healthcare practitioners with prohibition orders</b>	New South Wales Government	Health Care Complaints Commission (HCCC) – New South Wales	Code of Conduct underpinned by regulations – Code for unregistered healthcare practitioners	All otherwise unregulated healthcare practitioners (list in Code)	Government	Yes – the register is available on the HCCC website	A range of sanctions from prohibition from carrying out all healthcare related activities to specific bans and restrictions. Different time periods for orders.

System/list	Body that holds code (if relevant)	Enforcement body	Type of code or legislation	Who is covered?	How system is funded?	Register publicly available?	Range of sanctions
<b>Register of those prohibited from providing financial services in Guernsey</b>	Guernsey Financial Services Commission, UK	Guernsey Financial Services Commission, UK	Legislation – Protection of Investors Law, 1987, The Insurance Business Law, 2002, The Insurance Managers and Insurance Intermediaries Law, 2002 and Banking Supervision Law, 1994 and The Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. Law, 2000	Anyone working in financial services carrying out a regulated activity	Funded by levy on businesses authorised by the GFSC	Yes – the register is available on the GFSC website	Registrants can be prohibited from carrying out a range of industry functions.
<b>Register of persons prohibited from acting as a pension scheme trustee</b>	Pensions Regulator, UK	Pensions Regulator, UK	Pensions Act 1995 as amended by the Pensions Act 2004 and the Pensions Northern Ireland Order 1995	Anyone who has been a pension scheme trustee	Government (recoverable from a levy on pension schemes for activities relating to the Pensions Act 2004, Pensions Act 1995 and the Pensions Act 2008)	No – available on request at Pensions Regulator office in Brighton	A prohibition order prevents a person from acting as a trustee of a particular trust scheme, a particular description of trust schemes or trust schemes in general. The register of prohibited trustees is kept by the regulator in accordance with the legislation.
<b>Register of persons prohibited from working in regulated financial services activity in the UK</b>		Financial Conduct Authority	Legislation – Financial Services and Markets Act 2000	Anyone working in financial services carrying out a regulated activity	Financed by charging fees of firms who are authorised by the FCA and some other bodies such as recognised investment exchanges or registered firms	Register available online	Range of fines and ban depending on transgression.
<b>Register of persons prohibited from working in regulated financial services activity in Singapore</b>		Monetary Authority Singapore, Singapore	Securities and Futures Act 2001 (as amended 2006), Financial Advisers Act 2001 (as amended 2007), Insurance Act 1966 (as amended 2002)	Anyone working in financial services carrying out a regulated activity	Financed by charging fees of financial services firms authorised by MAS	Yes – searchable register on website	Range of fines and ban depending on transgression.

System/list	Body that holds code (if relevant)	Enforcement body	Type of code or legislation	Who is covered?	How system is funded?	Register publicly available?	Range of sanctions
<b>Register of educational professionals prohibited from teaching</b>		National College for Teaching and Leadership (on behalf of Secretary of State), England	Education Act 2011	All teachers <sup>72</sup>	Government	Outcomes are published online. Employers can access the full list on request	Once a referral for a prohibition order is received NCTL will decide if an interim order is necessary. A prohibition order is a lifetime ban, though in some circumstances the teacher may be able to make a request to have it reviewed after a specified period of time.
<b>Register of food based operators prohibited from managing any food business</b>		Local Authorities (court) on behalf of FSA	Food Safety Act 1990	All food-based operators	Government and industry	No – other local authority units notified by authority imposing the order	The FSA has a range of sanctions at its disposal: written warnings, seizure, detention & surrender, suspension/revocation of approval or licence, hygiene emergency prohibition notice, simple caution, hygiene improvement notice, remedial action and detention notices, and prosecutions.
<b>Register of estate agents prohibited from operating</b>		Powys County Council	Estate Agents Act 1979	All estate agents selling but not letting property	Government	Yes – publicly available online	NTSEAT can issue warnings and prohibition orders. Prohibition orders can ban someone from all, or some aspect of, estate agency work.

<sup>72</sup> NCTL's regulatory function covers anyone who is employed or engaged to carry out teaching work at:

- a school in England (including academies, free schools and independent schools)
- a sixth form college in England
- relevant youth accommodation in England
- a children's home in England
- a 16-19 academy

National College for Teaching and Leadership, *Teacher Misconduct: Information for Teachers – A guide for teachers subject to teacher regulation disciplinary procedures*. [Online]. Pg. 3-4. Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/541216/TM\\_info\\_for\\_teachers\\_updated\\_July\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541216/TM_info_for_teachers_updated_July_2016.pdf) [Accessed: 31/10/2016]

System/list	Body that holds code (if relevant)	Enforcement body	Type of code or legislation	Who is covered?	How system is funded?	Register publicly available?	Range of sanctions
<b>Register of prohibited directors</b>		Registrar of Companies and the Financial Markets Authority New Zealand	Companies Act 1993	All directors	Government	Yes – publicly available online	The Registrar's power of prohibition is for a period not exceeding ten years, and prevents a prohibited person from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of a company.

## Roles and responsibilities in prohibition order schemes

2.49 Our research into existing prohibition order schemes shows that there are a number of models available.

### *Bodies involved in a prohibition order scheme*

2.50 Typically, the functions required to operate a prohibition order scheme are:

- holding or ‘owning’ the code itself (where there is no code, criteria for prohibition are usually described in regulations)
- investigating breaches of the code/regulations and making decisions on whether to issue a prohibition order
- holding a list of barred individuals and enforcing the code/regulations i.e. issuing a prohibition order where an individual has breached the code/failed to comply.

2.51 Sometimes, all the main functions are fulfilled by the same body, such as the DBS (although it has no code), or The Pensions Regulator. In New South Wales, the HCCC enforces a statutory Code of Conduct through its prohibition order, publication, and enforcement powers. The Code itself is set out in primary legislation,<sup>73</sup> and therefore ‘owned’ not by the HCCC but by the Government of New South Wales. The functions of the National Trading Standards Estate Agency Team (NTSEAT) sit with Powys County Council, which acts as the UK’s regulator on behalf of the National Trading Standards Board. In these examples, the relevant bodies are responsible for issuing prohibition orders. By way of contrast, the National College for Teaching and Leadership holds the register of educational professionals prohibited from teaching, but the power to issue prohibition orders sit with the Secretary of State for Education.

2.52 The CQC role is somewhat different from the other schemes considered, in that it enforces the regulations setting out what employers must do to ensure that directors are Fit and Proper. The CQC is therefore one step removed from the implementation of the Fit and Proper requirements, and employers play a more important role than in the other schemes.

### *The role of codes and regulations*

2.53 Three of the schemes highlighted in the previous section operate on the basis of enforcement of codes of practice: the HCCC, TPR, and GFSC. In this context a code could be defined as:

*A published document setting out the minimum standards of conduct and/or competence that all members of an occupation or designated group are expected to meet. The code can be used to assess suitability to practice as a member of this group or occupation.*

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<sup>73</sup> *Public Health Regulation 2012 - Schedule 3 Code of conduct*. [Online] Available at: <http://www.legislation.nsw.gov.au/#/view/regulation/2012/311/sch3>. [Accessed: 27/10/2016]

- 2.54 Some bodies are given broad powers in statute to issue codes, while for others, the code itself is set out in legislation. For example, the Pensions Regulator has the power, through the Pensions Act 2004, to bar individuals from becoming trustees of pension funds ‘if they are satisfied that he is not a fit and proper person to be a trustee of the scheme or schemes to which the order relates’. The Act outlines in broad terms the knowledge and understanding required to fill the role of a pension fund trustee. However, under the Pensions Act, the Pensions Regulator also has broad powers to develop codes of practice including ‘to provide guidance regarding the standards of conduct and practice expected from those who exercise such functions’.<sup>74</sup> For example, it has published a Code of Conduct on Trustee Knowledge and Understanding requirements, which is intended to ‘*provide practical guidelines on the requirements of pensions legislation and set out the standards of conduct and practice expected of those who must meet these requirements*’.<sup>75</sup> It has also published additional guidance on the scope of the trustee knowledge and understanding requirements.<sup>76</sup> Whilst such codes are not themselves set out in statute, they are used by the Regulator in applying these powers. They are admissible as evidence in any legal proceedings and the Pensions Act states they should be taken into account if they have relevance.
- 2.55 In contrast, in New South Wales, the powers to issue prohibition orders to unregistered healthcare practitioners who breach the code of practice fall under the Public Health Act 2010, and the code of conduct for unregistered health care workers is laid out in full in the Public Health Regulations 2012. The legislation therefore needs to be formally amended in order to make any changes to the code. The code lays out relevant definitions, its scope of application, including occupations covered, and the behaviours expected of practitioners subject to the code.
- 2.56 However, seven of the eleven prohibition order schemes we consider in this report operate without a code. The Care Quality Commission’s (CQC) ‘fit and proper person’ test is one example. In this scheme, there is no code but a list of requirements laid out in the regulations that individuals must meet in order to pass the test. The CQC have also developed guidance for providers on how they should assess whether someone meets the relevant requirements. Other examples of prohibition order schemes that do not have an explicit code of practice are:

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<sup>74</sup> *Pensions Act 2004, Section 90, Codes of practice*, [Online], Available at: <http://www.legislation.gov.uk/ukpga/2004/35/section/90> [Accessed: 26/10/16]

<sup>75</sup> The Pensions Regulator, *Code of Conduct*. [Online]. Available at: <http://www.thepensionsregulator.gov.uk/docs/code-07-trustee-knowledge-understanding.pdf> [Accessed: 31/03/2016]

<sup>76</sup> The Pensions Regulator, *Revised guidance on the scope of the TKU requirements*. [Online]. Available at: <http://www.thepensionsregulator.gov.uk/docs/tku-scope-for-db-with-dc-2009.pdf> [Accessed: 26/10/2016]

- Disclosure and Barring Service barred lists: barring decisions are based on lists of offences that lead to automatic barring, or on consideration of whether the person presents a risk of harm to children or adults<sup>77</sup>
- Financial Conduct Authority prohibition orders scheme: the criteria for issuing a prohibition order are set out in the legislation and rules set by the FCA
- Food Standards Agency: the criteria for issuing a prohibition order are set out in the legislation and food safety regulations.<sup>78</sup>

2.57 Regardless of whether they are set out in codes, legislation, or guidance, the standards against which prohibition decisions are made can cover different aspects of required behaviours ranging from conduct to minimum standards of competence. In New South Wales, the code of conduct for unregistered health practitioners covers both conduct and competence and as well as providing a set of minimum standards for practitioners is also intended to, *'[inform] consumers what they can expect from practitioners and the mechanisms by which they may complain about the conduct of, or services provided by, an unregistered health service provider'*.<sup>79</sup> Under the Pensions Act, the Pensions Regulator can consider capability and financial soundness as well as honesty, integrity, and competence when considering whether a trustee is a 'fit and proper person'.

2.58 Neither the Disclosure and Barring Service barred lists nor the NCTL, on the other hand, has a remit to consider competence – and the DBS is concerned exclusively with safeguarding risks.

### **Available sanctions and enforcement**

2.59 Within existing prohibition order schemes, there are different models both in terms of the range of 'sanctions' available for a breach of a code or regulations, and of the means available for enforcing the provisions of the code of conduct or regulations.

2.60 In some of our examples, prohibition from practice is the only option available where a person is found to have fallen short of established standards or requirements. For example, the Pensions Regulator only has the power to issue a blanket ban on an individual becoming a pension scheme trustee. The DBS scheme is another example that has only one option. In other schemes, the enforcement body can impose less severe measures, such as

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<sup>77</sup> Disclosure and Barring Service, *DBS referrals guide: referral and decision making process*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/535151/DBS\\_referrals\\_guide\\_referral\\_and\\_decision\\_making\\_process\\_v3.2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535151/DBS_referrals_guide_referral_and_decision_making_process_v3.2.pdf) [Accessed: 31/10/16]

<sup>78</sup> Foods Standards Agency, *Food Law Code of Practice, Chapter 6 - Enforcement Sanctions and Penalties*. [Online]. Available at: <https://www.food.gov.uk/enforcement/codes-of-practice/food-law-code-of-practice-2015/6-2-formal-sanctions#toc-4>. [Accessed: 20/10/2016]

<sup>79</sup> Health Care Complaints Commission, *Information for unregistered health practitioners, Code of Conduct*. [Online]. Available at: <http://www.hccc.nsw.gov.au/Information/Information-for-Unregistered-Practitioners> [Accessed: 26/10/2016]

conditions or temporary suspension of practice to deal with less serious offences. An example is the Financial Conduct Authority, which has the power to tailor a prohibition order to prevent an individual from carrying out specific functions within finance or even to prevent them from working for a particular company or type of company. The New South Wales model for healthcare practitioners allows for conditions to be imposed or for a warning to be issued, alongside full prohibition.

- 2.61 In the majority of schemes examined, there is an onus on the employer to check whether an individual is subject to a prohibition order, or meets the criteria to fulfil the role in question. Under the CQC ‘fit and proper person’ model, regulated bodies must ensure that the person meets the requirements of the test, and also that they are not listed on the Disclosure and Barring Scheme barred lists. The DBS check is standard for many occupations within the health and care service.
- 2.62 There is also wide variation in enforcement powers relating to breaches of prohibition orders. Some schemes, such as the NCTL have none. For others, such a breach is an offence, punishable by a fine or even imprisonment. This is the case in New South Wales, where breaches of a prohibition order are punishable by imprisonment, a fine, or both.<sup>80</sup> In the UK, as well as being an offence for employers to employ someone on a DBS barred list, it is also an offence for barred individuals to work in protected activities.

### Key findings

- 2.63 As can be seen from the schemes examined in this section, there is a range of models of prohibition order schemes in existence. They vary in the amount of regulatory force they use – and therefore in the level of risk they can address. They also cover a wider range of regulatory powers, which means that they can address different types of risk, and solve different problems.
- 2.64 Of the eleven models we found for this report:
- Only three operate with a code of conduct or practice (NSW, TPR, and GFSC)
  - Just two were in health and social care exclusively (CQC and NSW)<sup>81</sup>
  - Only one applies specifically to health or care workers on the front line (NSW)
  - The DBS barring lists and CQC ‘fit and proper person test’ are the two that apply in health and social care in the UK.

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<sup>80</sup> Australian Health Ministers’ Advisory Council, *Final Report: A National Code of Conduct for health care workers*. [Online]. Available here: <http://www.pacfa.org.au/wp-content/uploads/2015/05/Final-Report-A-National-Code-of-Conduct-for-health-care-workers-2.pdf>. [Accessed: 31/10/2016]

<sup>81</sup> The DBS applies to anyone undertaking a regulated activity with children or adults, which covers a wide range of settings and jobs across different. For example it applies to anyone working in a school. It also covers health and care workers.

2.65 The examples described in this report suggest the following possible configurations:

**Table 2: Bodies involved in prohibition order schemes**

Code/ regulations	Investigations/ recommendations	Prohibition decisions	Enforcement	Prohibitions published	Comments
Regulations developed and maintained by Government	Executive or independent agency (e.g. NCTL)	Secretary of State for Education	Employers	Executive or independent agency (e.g. NCTL)	Decisions could be seen to lack independence
Statutory Code developed and maintained by Government	Existing executive or independent agency (e.g. HCCC)	Existing executive or independent agency (e.g. HCCC)	Existing executive or independent agency (e.g. HCCC)	Existing executive or independent agency (e.g. HCCC)	
Regulations developed and maintained by Government	Executive or independent agency (e.g. DBS)	Executive or independent agency (e.g. DBS)	Executive or independent agency (e.g. DBS and employers)	Executive or independent agency (e.g. DBS)	
Regulations developed and maintained by Government (e.g. CQC Fit and Proper)	Employers	Employers	Employers	N/A	The CQC assesses whether employers are applying the regulations adequately

2.66 This is not an exhaustive list, and permutations of the above options would no doubt be possible. In addition, it is theoretically possible that a professional regulator, such as the HCPC could be empowered to operate a prohibition order scheme. We note however that all options considered are on a statutory footing, and would require legislative change.

2.67 If it was decided that a prohibition order scheme might be required to address an identified risk, the decision about which model might be applied would depend on:

- The problem it was intended to address, including consideration of the level and type of risks presented by the group in question
- The existing institutional and regulatory landscape (for example there may be specific organisations that lend themselves to taking on one or more of the above functions based on existing affiliations with the groups in question)
- The context in which the scheme would operate (for example if employers could be relied upon to implement any of the functions)
- Operational costs (for example setting up an entirely new body to run a prohibition scheme may be less cost-effective than using an existing one)
- Willingness and capacity of existing body/bodies to take on new functions

- Proportionality and cost/benefit
  - Unintended consequences
  - Resources required to implement legislative change.
- 2.68 We note that the majority of the schemes covered in this report (seven of 11) operate without a code. The two examples that relate to healthcare are quite different: the New South Wales model applies to healthcare practitioners, and is based around a statutory code of practice. The CQC ‘fit and proper’ model for directors in health and social care is based on regulations and sets a higher bar for exclusion.
- 2.69 Whether a code should be used for currently unregulated health or care workers in the UK will depend on the problem that the scheme is being set up to solve. If its purpose includes raising standards, a code might be more appropriate as it sets a minimum level of acceptable practice with which all should comply, and which all should be aware of. Regulations on the other hand, tend to list actions or behaviours that are prohibited, thereby setting the bar for exclusion higher. Most practitioners would feel unaffected by such a prohibition scheme provided they were not engaging in any of the banned activities. If however, the sole purpose of the scheme was to identify and prevent from practising individuals whose behaviour has been deemed wholly unacceptable for specific reasons, a rules-based approach may be more appropriate – although it would be limited to transgressions that can be defined in legislation.
- 2.70 A code also makes clear to the public what is expected of a practitioner. We note from conducting this review that for a number of the schemes where barring decisions are based on legislation, information about the criteria for making these decisions was not easy to find or understand. This may be appropriate in some settings where members of the public are not involved, but for health and care workers who have direct contact with the public we suggest that greater clarity and transparency would be needed.
- 2.71 Finally, as with previous aspects discussed, the shape that a scheme might take in relation to the range of sanctions, and the means of enforcing breaches would most likely depend primarily on the purpose of the scheme being developed and on the risks presented by the occupations in question. A scheme that was based on a code – and therefore had a focus on raising standards – might need to have the option of imposing conditions to reflect the more nuanced approach that a code of practice or conduct, unlike regulations, would require. Having lesser sanctions available also lowers the threshold for action against an individual. It does however increase the complexity – and costs – of the scheme, as compliance with conditions would need to be monitored or checked. Overall, the means available under any scheme for responding to breaches should reflect the severity and likelihood of the risks of such breaches.
- 2.72 In the absence of clarity about which groups might be being considered, perhaps the most helpful precedent for the purposes of this report is the New

South Wales model based on a statutory Code of Conduct, and a statutory body (the HCCC), with broad powers to investigate and issue prohibition orders and conditions orders to individuals who breach the code, and to publish warnings about them. It is however also necessary to consider more closely the existing institutional and regulatory landscape in the UK, to understand where a new prohibition order scheme might fit.

## 3. Prohibition orders in the UK health and care context

### The current regulatory landscape

- 3.1 Under the current regulatory framework, some health and care occupations are regulated by statute, while others are not. Health professionals in the UK, and social workers in England, are regulated by the statutory regulatory bodies overseen by the Professional Standards Authority, and appear on the register relevant to their profession. This is a declaration that they are fit to practise.
- 3.2 Most health and care professions currently regulated by statute come under UK-wide legislation.<sup>82</sup> However, for professions that were not regulated when the Scotland Act 1998 came into force, regulation is devolved to the Scottish Parliament – although four-country working agreements have meant that any such groups are regulated UK-wide.
- 3.3 The majority of statutory regulators cover the whole of the UK with the exception of the General Pharmaceutical Council (GPhC) which excludes Northern Ireland – pharmacists here are covered by the Pharmaceutical Society of Northern Ireland (PSNI). In addition social workers in Northern Ireland, Scotland and Wales are regulated by separate bodies: respectively the Northern Ireland Social Care Council, the Scottish Social Services Council and the Care Council for Wales.
- 3.4 Other occupations in the health and care sector are:
- listed voluntarily on registers held by bodies accredited by the Professional Standards Authority<sup>83</sup>
  - listed voluntarily on registers held by membership bodies not accredited by the Authority, or
  - not covered by either of the above.

### Statutory regulation

- 3.5 There are nine statutory professional regulators<sup>84</sup> who cover a total of 34 professions. A list of regulated health and care professions is available at Annex C. Each regulator maintains a list of registered professionals, and all of those practising in these professions are required to register with the relevant regulatory body and abide by their standards of practice.

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<sup>82</sup> With the exception of pharmacists and pharmacy technicians, for whom regulation is devolved to Northern Ireland.

<sup>83</sup> Professional Standards Authority, *Our work with Accredited Registers*. [Online]. Available at: <http://www.professionalstandards.org.uk/what-we-do/accredited-registers> [Accessed: 31/10/2016]

<sup>84</sup> General Chiropractic Council, General Dental Council, General Medical Council, General Optical Council, General Osteopathic Council, General Pharmaceutical Council, Health and Care Professions Council, Nursing and Midwifery Council, Pharmaceutical Society of Northern Ireland.

- 3.6 The role of the statutory regulators is to protect patients by setting standards for professional practice and conduct, maintaining a register of professionals who meet these standards, and taking action when standards are not met. They also quality assure the provision of qualifying education.
- 3.7 All the regulators handle complaints made by service users, employers and others about health and care professionals. The most serious cases which pose a risk to the public, or where there is a wider public interest in taking action, are referred to formal hearings in front of fitness to practise panels. Professionals whose fitness to practise are deemed to be impaired can be struck off the register, and prevented practising in the future<sup>85</sup> or face a range of other sanctions including temporary suspension from the register, conditions of practice, or warnings.

### ***Accredited registers***

- 3.8 A number of other health and care occupations that are not statutorily regulated have membership bodies, which hold registers of practitioners who meet their standards. Unlike statutory regulation, there may be more than one register for a single occupation. The Professional Standards Authority accredits these membership bodies as register holders under the accredited registers programme (23 registers are currently accredited)<sup>86</sup>.
- 3.9 Registers that have received accreditation from the Authority must comply with a set of standards, including providing clear information to the public, setting standards for education and training for practitioners and having a clear and transparent complaints process. This helps to ensure public safety by enabling members of the public to choose a practitioner who is registered with an accredited body. A list of the organisations currently accredited by the Authority and the professions which they cover is available at Annex C.

### ***Health and care occupations not covered by statutory regulation or accredited registers***

- 3.10 Around 88 occupations<sup>87</sup> are either covered by statutory regulation and therefore are required by law to register, or are within scope of an accredited register.
- 3.11 For a small number of occupations, those in advanced practice are statutorily regulated, while those practising at a lower level of qualification are not. For example, at advanced level (Masters), Audiologists are regulated by law by the Health and Care Professions Council. However they are able to practise before becoming qualified to this level, and at this point they can register

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<sup>85</sup> Although they can apply to return to the register after a period of time specified in legislation, usually five years.

<sup>86</sup> Professional Standards Authority, *Find an Accredited Registers*. [Online]. Available at: <http://www.professionalstandards.org.uk/what-we-do/accredited-registers/find-a-register> [Accessed: 31/10/2016]

<sup>87</sup> There are 34 professions covered by the statutory regulators and approximately 54 occupations which are covered by an accredited register, however this is an estimate based on current information available from the Accredited Registers and may be subject to change.

voluntarily with the Academy for Healthcare Science, which holds an accredited register for Healthcare Science Practitioners.

- 3.12 There are a number health and care occupations that are currently covered by neither statutory regulation nor the accredited registers programme. These occupations may be listed on a register held by an organisation that is not accredited by the Professional Standards Authority, or may not currently be represented by a membership body. A non-exhaustive list of membership bodies that hold a register but are not accredited by the Authority is available at Annex C.
- 3.13 A list of occupations that are currently unregulated and not covered by an accredited register is available at Annex C.<sup>88</sup> We have grouped them into four main categories and given examples of some of the occupations within these groups:
- **Physical health** – occupations include physician associates, health care assistants, nursing associates (new role being developed), complementary therapist practitioners not covered by accredited registers
  - **Mental health and wellbeing** – psychological therapy practitioners and counsellors not covered by relevant accredited registers
  - **Social work and care** – Including care workers/care assistants, home care workers, personal assistants
  - **Health science, promotion and protection** – health records and patient information, clinical management, public health.
- 3.14 Some of the above roles are being developed, such as the nursing associate role, which Health Education England is due to start piloting shortly.

### *Where would a prohibition order scheme fit?*

#### *A continuum of assurance*

- 3.15 Until relatively recently, discussions about regulating new groups tended to focus on just two options for Government: regulate by statute, or do nothing. The UK Government took a big step forward in 2011 when it published its endorsement of a new accredited registers scheme, which provides an option for groups that do not require statutory regulation.<sup>89</sup> We continue to believe that it is important when thinking about assurance for a particular group to consider the full range of options available. We have developed an understanding of the range of possible options in health and care from our work both in the UK and abroad. By way of illustration, the following list of

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<sup>88</sup> This is intended to be illustrative and not exhaustive, as new roles are regularly emerging, and the accredited registers programme continues to attract new registers on a regular basis.

<sup>89</sup> Department of Health 2011, *Enabling Excellence: Autonomy and Accountability for Healthcare Workers, Social Workers and Social Care Workers*. [Online]. Available at: <https://www.gov.uk/government/publications/enabling-excellence-autonomy-and-accountability-for-health-and-social-care-staff> [Accessed: 31/10/2016]

options was developed for a project on the registration of Personal Support Workers in Ontario<sup>90</sup>:

- Compulsory registration or licensing of all workers in a certain occupation, overseen by an existing statutory body
- Compulsory registration or licensing of all workers in a certain occupation, overseen by a new statutory body
- A statutory code of conduct and system of prohibition orders
- Use of the existing system of voluntary registration, under the accredited registers programme, perhaps with additional requirements for providers to use only registered practitioners in NHS settings, and to form part of commissioning contracts for providers across publicly-funded health and care
- An employer-led code of practice and minimum training standards (similar to the model in place in NHS Scotland for Healthcare Support Workers)<sup>91</sup>
- An inspection-based model requiring all care providers to have a named person responsible for ensuring that practitioners are adequately qualified and suitable to perform the role in question
- A standardised mandatory exam (certification). This may be combined with a requirement on employers to only employ practitioners with the relevant qualification
- Government-backed insurance/compensation scheme.

3.16 In previous publications, we have developed the idea of a continuum of assurance in which the amount of regulatory force applied is proportionate to the level of risk presented by an occupation.<sup>92</sup> On our continuum, prohibition order schemes with statutory underpinning would involve less regulatory force than full statutory regulation, although legislation would still be required to enforce the provisions of such a system.

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<sup>90</sup> Report to be published on [www.professionalstandards.org.uk](http://www.professionalstandards.org.uk).

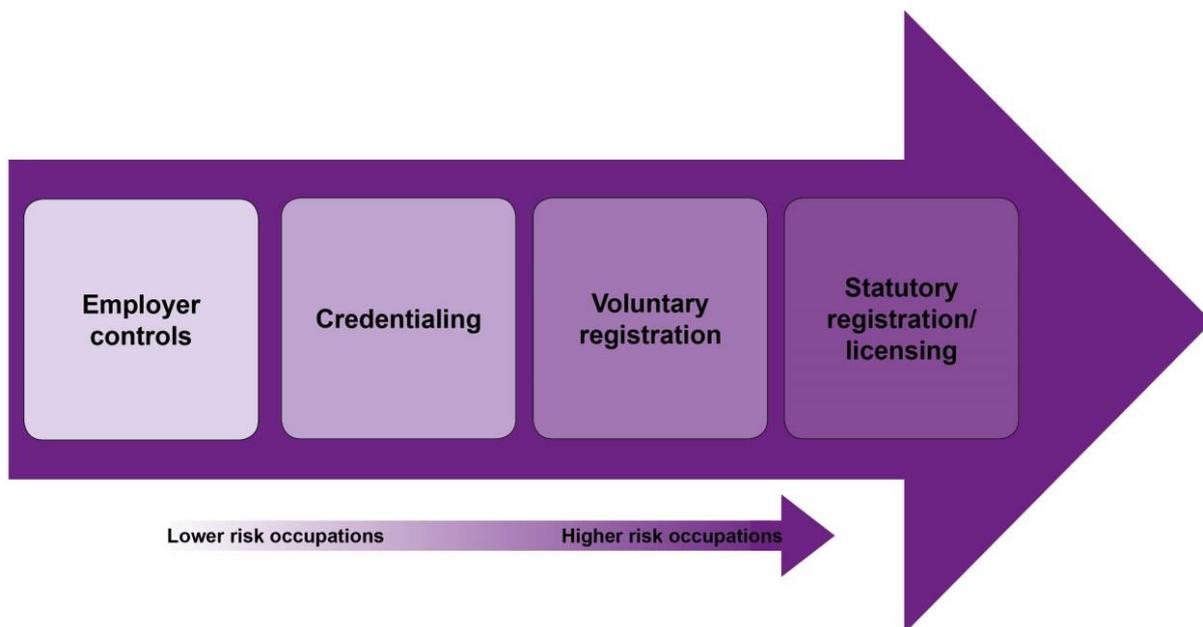
<sup>91</sup> NHS Education for Scotland, *HCSW Standards and Codes*. [Online].

<http://www.hcswtoolkit.nes.scot.nhs.uk/resources/hcsw-standards-and-codes/> [Accessed: 31/10/2016]

<sup>92</sup> Professional Standards Authority, 2015. *Right-touch regulation*. [Online]. Available at:

<http://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/right-touch-regulation-2015.pdf> [Accessed: 24/10/2016]

Figure 1: the continuum of assurance<sup>93</sup>



- 3.17 A prohibition order scheme could apply to a specific group, such as social care workers, or cover a number of otherwise unregulated occupations, as per the model in New South Wales.

### Legislation<sup>94</sup>

#### *What the legislation should cover*

- 3.18 The set-up of a new prohibition order scheme would almost certainly require new legislation. The Law Commissions noted that Prohibition Order schemes fell within the scope of Section 60 of the Health Act 1999.<sup>95</sup> In addition, the legal advice that we have taken highlights that Section 60 allows provisions to be made for regulation of some health and care professions not currently regulated, such as social care workers. For those falling within these groups, a scheme could be introduced without the need for new primary legislation.

<sup>93</sup> A prohibition order scheme could sit alongside employer controls, credentialing and voluntary registration.

<sup>94</sup> As part of this commission we sought legal advice on the following questions:

a. What legislation would need to be enacted or amended to enable such a mechanism to come into force?

b. What would be the legal implications of holding and publishing what might in effect be a 'blacklist', in particular in terms of human rights, data protection and information-sharing?

c. What would be the requirements, if any, for an appeals process against decisions made?

This advice, which we are not able to publish but which has been shared with the Department as part of this commission, provides more detail on some of the matters considered in this section.

<sup>95</sup> Law Commissions, 2014, *Regulation of Health Care Professionals Regulation of Social Care Professionals in England*. [Online]. Available at: [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf). [Accessed 25/10/2016]

- 3.19 However, Section 60 does not extend to all of those working unregulated in the sector, such as healthcare assistants in England. Accordingly, new primary legislation would be required to establish a prohibition order scheme to capture that group. If it was decided that the scheme should sit within one of the existing health and social care regulators, it would be necessary to amend existing legislation.
- 3.20 Based on the legal advice that we have taken, we understand that, regardless of how any new scheme might be enacted, the legislation would need to include the following:
- Mechanisms which define either titles or activities which can only be used or undertaken by those who have not been prohibited. This is similar to the way in which requirements to be registered with regulatory bodies are developed, but in the latter case, the definitions lead to a registration requirement. For prohibition orders, they simply require an individual not to be prohibited
  - Clarity as to what a ‘prohibited person’ may not do (and for how long)
  - A process for a body to determine whether someone should be prohibited. This would require the legislation to give power (vires) to a body and to be clear as to the decision-maker and key parameters of the decision making process (which might be further defined in secondary legislation/regulations/rules)
  - The threshold or standard or proof for taking regulatory action, i.e. the civil standard (‘on the balance of probabilities’) or the criminal standard (‘beyond reasonable doubt’)
  - Clarity over the procedural aspects of a prohibition order scheme – whether there would be the ability to impose interim orders (with or without a hearing); whether final decisions would be made after a hearing or whether they could be made and then be subject to appeal; any further powers to appeal or seek review
  - Core obligations in relation to the keeping and publication of a list of those subject to a barring/prohibition order (to ensure any defence on human rights grounds)
  - Sanctions for breach of a prohibition order.
- 3.21 Through this legislation, it would need to establish its relationship or fit with existing regulatory bodies such as the DBS and professional regulators – this is explored in more detail below.
- 3.22 As previously mentioned, a prohibition order scheme may also incorporate a statutory Code of Conduct, which defines a minimum level of acceptable practice. Such a Code may need to be amended or modified from time to time. In the primary legislation, an obligation to create such a Code could be placed on the overseeing body. This would be a departure from the New South Wales model.

- 3.23 In addition, the legislation could incorporate a legal duty on individuals and/or organisations to report breaches of the Code – although our legal advice suggests this could be disproportionate and draw valuable resources away from responding to the breaches themselves. Our lawyers offered similar advice in relation to reporting breaches of prohibition orders, suggesting that a more cooperative, encouraging approach with employers might be more appropriate.
- 3.24 Our legal advice outlines a number of other areas that would require consideration:
- Legal mechanisms for enforcing a barring decision – should it be a criminal or civil offence to engage in the activity defined or hold oneself out as having the title defined, if barred? Our legal advice suggests a preference for a criminal offence to break a prohibition order
  - Whether or not this is a public list or one that is only disclosed under specific circumstances and/or to particular people or organisations
  - If the barred list is to apply to a number of different professions or occupations, whether being barred from one profession or occupation would automatically bar an individual from another
  - How to ensure that Article 6 of the European Convention on Human Rights (ECHR) is taken account of from the point of view of hearings. According to our advice, it is a fundamental element of the right to a fair determination under Article 6 of the ECHR to allow an individual to make representations in advance of any determination which may be made
  - An appeals process which could follow the Civil Procedure Rules; these allow for an appeal to consider whether there have been any errors of fact or law
  - The nature of a review process – a prohibition scheme could bar an individual for life or allow for review after a period of time.
- 3.25 There would be challenges attached to some of these areas of legislation – for example, protection of title and/or function is a complex area. We note that a 2015 report for the Australian Government on a National Code of Conduct for health care workers includes extensive discussion of the term used to describe the group to whom the Code should apply, and of its definition. The report highlights the differences in the meaning of ‘health service’ across the states and territories, and the challenges this presents.<sup>96</sup> In addition, enforcing protection of title breaches is an ongoing challenge for the regulators we oversee – there may be lessons to be learned from their experiences in this area that would be applicable to a prohibition order scheme.

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<sup>96</sup> Australian Health Ministers’ Advisory Council, *Final Report: A National Code of Conduct for health care workers*. [Online]. Available here: <http://www.pacfa.org.au/wp-content/uploads/2015/05/Final-Report-A-National-Code-of-Conduct-for-health-care-workers-2.pdf>. [Accessed: 31/10/2016]

### *Four-country implications*

- 3.26 To ensure clarity and consistency of approach for patients and facilitate cross-border mobility of practitioners, it would be preferable for any prohibition order scheme to apply across the UK. However, as health and care is devolved in the UK, the Department would need to consider how such a scheme would work on a four-country basis. The legal advice that we have taken suggests that it would be possible for such a scheme to fit within existing frameworks, as long as there was four country buy-in and the legislation underpinning it reflected the needs of each country. However, there are a number of areas that would need to be considered:
- If the scheme were to apply across all four nations, engagement with the devolved administrations would need to begin as early as possible in the development of the scheme, as the process of handling the issues across four different jurisdictions and gaining the consent of devolved legislature may be long. There would need to be consideration of the time it could take for the four countries to approve/enact their own legislation depending on the nature of the scheme
  - While it would depend which occupation/s the scheme was intended to cover, there would also need to be careful consideration of how a scheme would fit with the statutory framework of the each of the four countries. This is particularly relevant to social care roles which are regulated differently in each country. Northern Ireland, Wales, and Scotland all regulate social work students and other social care occupations such as care assistants and support workers as well as social work professionals. This is not the case in England, where only social workers are regulated. This would need to be considered when developing the scope of such a scheme to avoid overlap with other forms of regulation for different groups in different countries
  - Defining roles (e.g. healthcare assistant) and contexts (e.g. healthcare) for the purposes of protection of title and/or function across four different health and social care contexts could present challenges (similar to what has been encountered in Australia – see paragraph 3.25 above).
  - If such a scheme was not adopted across the four countries, the enforceability of any barring order issued in one country in the other countries of the UK would need to be considered.
- 3.27 There would need to be a robust strategy for communicating the code and prohibition scheme to all workers who are covered by the code, but also, as it would be a complaints-led framework, to employers, patients and the public.

### *Relationship with existing prohibition schemes and professional regulators in the UK*

- 3.28 As previously highlighted, there are a number of other schemes to prevent those who are not fit to undertake a certain role from doing so, which are also used within the health and care sector. These include the Disclosure and Barring Service, and the Care Quality Commission's 'Fit and Proper' person

test. A DBS check is standard for most patient-facing health and care roles. Part of this check is to find out whether an individual has been barred from working with children or vulnerable adults.<sup>97</sup>

- 3.29 The Care Quality Commission was given powers under the Health and Social Care Act 2008<sup>98</sup> to require anyone who has director level responsibility for the quality and safety of health and care services to meet the fundamental standards for fulfilling this role through the 'fit and proper person test'. Providers are required to ensure that they have proper processes in place to ensure that all directors meet the requirements. The CQC can take regulatory action against a service provider who fails to carry out adequate checks that a person meets the requirements.<sup>99</sup>
- 3.30 In order to avoid duplication, any additional scheme would therefore need to consider what it adds beyond the protection already provided by these existing mechanisms. If the role/occupation under consideration is not currently required to have a DBS check then there may be merit in seeking to amend the legislation to bring it within scope of DBS checks as a first step. However, as the legal advice we have obtained notes, a DBS check cannot be obtained by individuals or organisations that require fewer than 100 checks per year. The DBS process of issuing certificates confirming whether or not the individual is on a barred list is tightly controlled and in the case of adults, it will only specify whether an individual is barred from working with vulnerable adults. DBS checks also only cover conduct that is seen to present a safeguarding risk – rather than broader conduct issues, or competence issues in any form.
- 3.31 In relation to the potential for duplication or contradiction of existing schemes, some other issues were raised in our legal advice:
- Consideration of whether being barred from working in a regulated profession would prevent an individual from working in an unregistered practitioner role in the same or similar setting. For example, if an individual has been struck off by the Nursing and Midwifery Council, would they then also be prevented from working in a nursing support or health care assistant role. Similarly, if an individual has been given a prohibition order, would this mean they are also prohibited from working as a registered professional
  - The desirability of seeking to place people on a barred list where their physical or mental health renders them 'unsuitable' to carry out a role or function. This would be contrary to the approach taken by the statutory

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<sup>97</sup> Disclosure and Barring Service, *DBS barred lists*. [Online] <https://www.gov.uk/disclosure-barring-service-check/dbs-barred-lists> [Accessed: 02/03/16]

<sup>98</sup> *Health and Social Care Act 2008, Schedule 1, Regulated Activities*. [Online] <http://www.legislation.gov.uk/ukdsi/2014/9780111117613/schedule/1> [Accessed: 31/10/2016]

<sup>99</sup> Care Quality Commission, *Regulation 5: Fit and proper person: directors, Information for NHS bodies* [Online], Available at: [http://www.cqc.org.uk/sites/default/files/20150327\\_fppr\\_provider\\_guidance.pdf](http://www.cqc.org.uk/sites/default/files/20150327_fppr_provider_guidance.pdf) [Accessed 31/03/2016]

professional regulators who generally don't seek to sanction individuals solely on the basis of a health condition

- Consideration of the standard of proof required for a barring decision and whether it would be necessary for it to mirror the standard used in the professional regulators' fitness to practise processes, as well as employment tribunals, child protection cases and police disciplinary proceedings (i.e. the civil standard).

### Funding the scheme

- 3.32 The funding of a prohibition order scheme poses a particular challenge: unlike registers of practising practitioners, which can be funded by their registrants' fees, prohibition orders have no such revenue stream. We found no examples of self-funded, standalone prohibition order schemes, but our review of existing schemes found three funding options (as outlined in Table 1):
- funded by other revenue streams within the register holding organisations (a number of these organisations also hold 'positive' registers), or
  - funded by government (can be recoverable through a levy), or
  - jointly funded by government and fees.
- 3.33 The Guernsey Financial Services Commission and the Financial Conduct Authority of the UK are both examples of the first model of funding. Prohibition orders powers are not the primary function of these organisations, which also run registers for which they charge a fee. It is primarily these fees that subsidise the prohibition order schemes. The DBS is another example: the barring function is entirely funded by the revenue generated by the disclosure function for which it charges a fee.<sup>100</sup>
- 3.34 The second method of funding a prohibition order scheme is via government funding. The National College for Teaching and Leadership is funded by the Department for Education<sup>101</sup> and Powys County Council receive an annual grant from the Department for Business, Energy and Industrial Strategy for operating NTSEAT<sup>102</sup>. The Pensions Regulator (an executive non-departmental public body) is sponsored by a grant from the Department for Work and Pensions, however costs connected to activities relating to the

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<sup>100</sup> Disclosure and Barring Service, *Annual Report 2014-2015*. [Online]. Pg. 68. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445917/DBS\\_annual\\_report\\_and\\_accounts\\_2014\\_to\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445917/DBS_annual_report_and_accounts_2014_to_2015.pdf) [Accessed: 31/03/2016]

<sup>101</sup> National College for Teaching and Leadership, *Annual report and accounts for the year ended 31 March 2015*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446611/nctl-annual-report-and-accounts-2014-to-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446611/nctl-annual-report-and-accounts-2014-to-2015.pdf) [Accessed: 24/10/2016]

<sup>102</sup> National Trading Standards Estate Agents Team annual budget. *National Trading Standards Annual Report 2015-2016*. [Online]. Pg. 83. Available at: <http://www.nationaltradingstandards.uk/uploads/2015-16%20annual%20report%20FINAL%2024.5.pdf> [Accessed: 01/11/2016]

Pensions Act 2004, Pensions Act 1995 and the Pensions Act 2008 are recoverable from a levy on pension schemes.<sup>103</sup>

- 3.35 An example we have of the third funding model is the Care Quality Commission, which is required over time to increase the share of its operating costs that are covered by fees.<sup>104</sup>
- 3.36 Figures relating to the costs of running a prohibition order scheme are difficult to obtain. Many of the organisations that operate these schemes undertake other activities as part of their remit, making it difficult to isolate the operational costs devoted to prohibition orders.
- 3.37 We have not been commissioned to carry out any analysis of the cost-effectiveness of different schemes, but we note that costs and scale of activity vary hugely. This is no doubt in large part dependent on the number of people covered by the scheme.
- 3.38 Powys County Council delivers a prohibition scheme on behalf of the NTSB for £178,000 a year as part of a three year contract. In 2015-16, it received 171 complaints, and issued 12 prohibition orders and three warning orders.<sup>105</sup> We have not been able to identify the actual costs of running the scheme for unregulated healthcare workers in New South Wales, as operating costs are not broken down in this way in the HCCC annual reports. It was however estimated that the scheme would cost approximately £330,000 per year to run.<sup>106,107</sup> In 2014-15, the HCCC received 102 complaints about unregulated healthcare practitioners, and took prohibition action in six cases.<sup>108</sup> On a different scale altogether, the UK Disclosure and Barring Service spends £10,457,000 a year on barring operations. In 2014-15, it received 6,531 discretionary referrals, 24,404 potential automatic barring cases and 483,983 referrals of information released on Enhanced criminal record certificates. It placed 2,848 individuals on the barred lists (children and adults).<sup>109</sup>

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<sup>103</sup> The Pensions Regulator, Annual Report and Accounts 2015-16. [Online]. Pg. 80. Available at: <http://www.thepensionsregulator.gov.uk/docs/annual-report-and-accounts-2015-2016.pdf> [Accessed: 31/10/2016]

<sup>104</sup> Care Quality Commission, *CQC announces changes in regulatory fees for providers*. [Online]. Available at: <http://www.cqc.org.uk/content/cqc-announces-changes-regulatory-fees-providers-0> , [Accessed: 27/10/2016]

<sup>105</sup> National Trading Standards, *Annual report 2015-2016*. [Online]. Available at: <http://www.nationaltradingstandards.uk/uploads/2015-16%20annual%20report%20FINAL%2024.5.pdf>. [Accessed: 25/10/2016].

<sup>106</sup> \$526,422 Australian Dollars converted into Pound Sterling at the market rate on: 25/10/2016.

<sup>107</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Para 7.2. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf> , Original figure was \$688,000, which was converted at market rate of 16/03/2016 [Accessed: 16/03/2016]

<sup>108</sup> Healthcare Complaints Commission, *Annual Report 2014-15*. [Online]. Available at: <http://www.hccc.nsw.gov.au/Publications/Annual-reports/Default> [Accessed: 25/10/2016]

<sup>109</sup> Disclosure and Barring Service, *Annual Report 2014-2015*. [Online]. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445917/DBS\\_annual\\_report\\_and\\_accounts\\_2014\\_to\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445917/DBS_annual_report_and_accounts_2014_to_2015.pdf) [Accessed: 31/03/2016]

- 3.39 Consideration should be made for costs which might not be accounted for in regular annual funding. For example, set-up costs of a prohibition order scheme may make it more expensive in the first years of its existence. In New South Wales, the cost of the scheme in its first year was projected to be significantly higher (£857,843) than the average annual operational costs.<sup>110</sup>
- 3.40 If a prohibition order scheme were set up, operational functions such as staff training and IT would need to be put in place. Additionally, non-operational functions like corporate and financial services would need to be accounted for. For example, in the DBS figure given in 3.38, ‘Corporate Services’ and ‘Financial & Commercial’ costs are not accounted for.<sup>111</sup> Giving the prohibition order to an existing body would mitigate initial set-up costs as its infrastructures (such as IT) would already be in place.
- 3.41 There would be an important financial incentive to ensuring that the scheme was set up on a sound legal basis, as legal challenges can be expensive, unpredictable and therefore hard to budget for.<sup>112</sup>

### Published stakeholder views

- 3.42 A number of UK bodies have expressed views on the creation of prohibition order schemes in the past:
- 3.43 In 2011, prompted by the Winterbourne View care scandal, the Department of Health announced it was considering the idea of a voluntary register for social care workers. In response, the Health and Care Professions Council (HCPC) explored the idea of a prohibition order scheme.<sup>113</sup> In February 2013, the HCPC stated:

*‘As a regulatory model, negative registration sits on a continuum of regulation between voluntary registration and full statutory regulation but is more targeted, less restrictive and less costly than the latter. It provides the regulator with the ability to remove those whose conduct makes them unsuitable to remain in the workforce, but without imposing an undue burden on the honest, ethical and competent majority. A negative registration scheme of this kind does not restrict entry to practice, but*

<sup>110</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Para 7.2. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf>. Original figure was \$ 1,626,422, which was converted at market rate of 16/03/2016. [Accessed: 16/03/2016]

<sup>111</sup> Disclosure and Barring Service, *Annual Report 2014-2015*. [Online] Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445917/DBS\\_annual\\_report\\_and\\_accounts\\_2014\\_to\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445917/DBS_annual_report_and_accounts_2014_to_2015.pdf) [Accessed 31/03/2016]

<sup>112</sup> The FCA faced such a scenario in 2015 when a registrant challenged a prohibition order in the Upper Tribunal (the order was successfully challenged). See: Kingsley Napley, *Successful challenge to FCA prohibition order*. [Online]. Available at: <https://www.kingsleynapley.co.uk/news-and-events/blogs/defending-professionals-law-blog/successful-challenge-to-fca-prohibition-order> [Accessed: 16/03/2016]

<sup>113</sup> Health and Care Professions Council, *Proposal for regulating adult social care workers in England*. [Online]. Available at: <https://www.hcpc-uk.org/assets/documents/10003F1AHPCPCpolicystatement-RegulatingadultsocialcareworkersinEngland.pdf> Accessed: 13/10/2016

*allows effective action to be taken against a person who fails to comply with proper standards of conduct’.*<sup>114</sup>

- 3.44 This opinion was reiterated in December 2013, when the HCPC submitted written evidence to the Health Select Committee. Here they argued that voluntary registers did not provide sufficient safeguards, and recommended a prohibition order scheme as an alternative.<sup>115</sup>
- 3.45 In 2014, the Health Select Committee recommended that the ‘*Government should publish plans for the implementation of the HCPC’s proposals for a negative register*’. It was also recommended that the HCPC work with the Government and the Professional Standards Authority to develop proposals.<sup>116117</sup>
- 3.46 The Professional Standards Authority for Health and Social Care responded to the HCPC’s proposals in 2014 observing that:
- vetting and barring schemes already existed
  - negative registers would not prevent misconduct as action can only be taken after an event
  - clarity would be required about how employers would be encouraged to make referrals to the negative register holder
  - negative registers would need to account for devolved nations’ set-ups
  - clarity would be needed about who would fund negative registers.
- 3.47 In addition it questioned whether service users would be prevented from using the services of a barred registrant.<sup>118</sup>
- 3.48 In 2015, the HCPC responded to the Welsh Government’s consultation on the Regulation and Inspection of Social Care (Wales) Bill saying that a prohibition order scheme can provide an ‘important ‘safety net’ and a system

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<sup>114</sup> Health and Care Professions Council, *Proposal for regulating adult social care workers in England*. [Online]. Pg. 4. Available at: <https://www.hcpc-uk.org/assets/documents/10003F1AHcpcpolicystatement-RegulatingadultsocialcareworkersinEngland.pdf> [Accessed: 31/03/2016]

<sup>115</sup> Hansard, *Written evidence to Health Select Committee*. [Online]. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/health-committee/health-and-care-professions-council/written/3867.html> [Accessed: 31/03/2016]

<sup>116</sup> Health and Care Professions Council, *Health Select Committee Report – HCPC 2014 Accountability Hearing*. [Online]. Pg.7. Available at: <https://www.hcpc-uk.org/assets/documents/100046FFEnc01-HealthSelectCommitteeReportHCPC2014AccountabilityHearing.pdf> [Accessed: 31/03/2016]

<sup>117</sup> Health Select Committee 2014, *Health Committee backs HCPC over regulation for social care workers*. [Online]. Available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/health-committee/news/14-06-17-hcpc-report/> [Accessed: 13/10/2016]

<sup>118</sup> Health Select Committee, *Accountability hearing with the Health and Care Professions Council - Regulation of social care workers*. [Online] Available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhealth/339/33906.htm> [Accessed: 31/10/2016]

of accountability similar to that of professional statutory regulation but in a more proportionate manner' for adult social care workers.<sup>119</sup>

- 3.49 The Law Commissions supported the concept of prohibition orders: in their 2014 review, they drafted legislation that would have given the Government regulation-making powers to establish prohibition order schemes, run by the health and care professional regulators. They recommended that before such a scheme was introduced, Government should be required to demonstrate to Parliament that it was necessary in order to protect the public. In their discussion, they asserted that 'the potential advantages of negative registers outweigh the drawbacks.'<sup>120</sup> They expressed a preference for a binary scheme (barred/not barred), and felt it should be a criminal offence for a prohibition order to be breached.
- 3.50 The UK Government published its response to the Law Commissions' reports in January 2015. It viewed prohibition orders as a 'useful tool in areas of risk where the introduction of a full statutory regime would not be proportionate'.<sup>121</sup> It explained that areas that were 'unregulated' or 'emerging areas of risk' would be suitable for the implementation of prohibition orders.<sup>122</sup> However, the anticipated draft bill was not included in the 2014 Queen's Speech and has not become law.
- 3.51 The UK Home Care Association (UKHCA) also responded to the HCPC's proposals. It considered statutory regulation a better tool for regulating social care workers than prohibition order schemes. The UKHCA believed a major drawback of prohibition order schemes was the emphasis on 'excluding a limited number of social care workers from practice, while missing the opportunity to recognise and value the entire workforce and encourage professional development'. The UKHCA added that creating a prohibition order scheme would duplicate the processes of the DBS, potentially resulting in confusion for employers about which list to check and which organisation

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<sup>119</sup> The Health and Care Professions Council, *Response to consultation on the Regulation and Inspection of Social Care (Wales) Bill 2015*. [Online]. Pg.2. Available at: [http://www.hcpc-uk.org/assets/documents/10004B52HCPCresponsetoconsultationonRegulationandInspectionofSocialCareBill\(Wales\)\\_Final010415.pdf](http://www.hcpc-uk.org/assets/documents/10004B52HCPCresponsetoconsultationonRegulationandInspectionofSocialCareBill(Wales)_Final010415.pdf) [Accessed: 12/10/2016]

<sup>120</sup> Law Commissions, 2014, *Regulation of Health Care Professionals Regulation of Social Care Professionals in England*. [Online]. Available at: [http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345\\_regulation\\_of\\_healthcare\\_professionals.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc345_regulation_of_healthcare_professionals.pdf). [Accessed 25/10/2016]

<sup>121</sup> Department of Health, *Response to the Law Commissions, Department of Health, January 2015, Regulation of Health Care Professionals Regulation of Social Care Professionals in England*. [Online]. Pg. 30, Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399020/Response\\_Cm\\_89\\_95.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_89_95.pdf) [Accessed: 31/03/2016]

<sup>122</sup> Department of Health, *Response to the Law Commissions, Department of Health, January 2015, Regulation of Health Care Professionals Regulation of Social Care Professionals in England*. [Online]. Pg. 41, Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399020/Response\\_Cm\\_89\\_95.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399020/Response_Cm_89_95.pdf) [Accessed: 31/03/2016]

to refer concerns to, and increased cost to the public as two similar lists would be run by different organisations.<sup>123</sup>

3.52

The Care Council for Wales deemed that prohibition order schemes would not 'provide a cost effective and practical alternative to positive registration'. The reasons they gave include:

- *'It provides no mechanism through which standards can be raised and maintained', as it 'will be unable to guarantee that the workforce affected has the right qualifications, training and experience'*
- Having a limited range of sanctions means there is a 'potential problem in terms of proportionality', as *'it may not be appropriate to prohibit an individual but the public interest may not be protected in the absence of any alternative sanction'*. In statutory regulation there are various methods at the disposal of regulators to create more proportionate responses to transgressions by registrants
- *'If the sanction of prohibition only is available, and this then results in it being reserved for the more serious cases of misconduct (i.e. the existence of a high threshold), then this may result in fewer prohibition orders being imposed, which may place service users at risk due to inappropriate workers being able to work in the sector'*
- It is unclear how negative registration would be able to incorporate some positive registration functions such as conditions of practice sanctions. Care Council for Wales observe: *'It is doubtful as to whether it is possible or practicable to operate a negative register system which offers any sanction incorporating, for example, training or conditions of practice. The key characteristic of a sanction such as conditions of practice is that it is a condition of registration (i.e. positive registration), and that the conditions will be monitored. It is unclear how such a sanction, and other such sanctions, could form part of a negative register, and therefore provide a result that protects the public and is proportionate'*
- Negative registration may duplicate the barring lists run by the DBS as a high threshold for a negative register and *'therefore fewer prohibition orders this could lead to fewer referrals to the DBS'*. This could *'lead to a reduction in the number of workers barred by the DBS from working with vulnerable children and/or adults in general'*
- It could be confusing if positive and negative registers were held by one organisation. It might be hard to explain the differences and interactions between the registers to 'the sector, the public, and service users and carers'
- There would be a 'two-tier system' if both negative and positive registers operated at the same time. Registrants on the 'positive' register could see *'their standards improved due to the provision of training and gaining of*

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<sup>123</sup> UK Home Care Association, *Registration of the Social Care Workforce*. [Online]. Available at: [http://www.ukhca.co.uk/\(S\(goday452pflmljita1fwkehz\)\)/pdfs/AnnavanderGaagandMarkSeale22082014.pdf](http://www.ukhca.co.uk/(S(goday452pflmljita1fwkehz))/pdfs/AnnavanderGaagandMarkSeale22082014.pdf) [Accessed 31/03/2016]

*qualifications [...] It may also be perceived that these groups are deemed to be 'worth more' than those subject to a negative registration system as more resources would be required to enable them to remain on the positive register [...] workers who are subject to a negative registration system would be demoralised and could lead to them leaving the sector'*

- There are few comparable environments in the UK where a negative register has been used and they have not been in place long enough for 'meaningful analysis'.<sup>124</sup>

3.53 Finally, the Professional Standards Authority put forward the view in its report for the Ontario Ministry of Health and Long-Term Care in 2015 that prohibition orders could provide some assurance that health workers with 'unsuitable character' would be prevented from practising. However, we went on to conclude that this would offer limited public protection as an incident would usually have happened prior to a worker being placed on a register.

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<sup>124</sup> Care Council for Wales, *Regulating the Social Care Workforce – a Negative Register*. [Online]. Available at: [http://www.ccwales.org.uk/uploads/Council\\_Members/Council\\_28.11.13/Item\\_8\\_-\\_Negative\\_Register.pdf](http://www.ccwales.org.uk/uploads/Council_Members/Council_28.11.13/Item_8_-_Negative_Register.pdf) [Accessed: 31/03/2016]

## 4. Findings and conclusions

- 4.1 Our research has highlighted that prohibition order schemes are in place in various forms across a number of sectors in the UK and abroad. However, schemes of this nature are not widely used in the health and care sector. Apart from the scheme for unregistered healthcare workers in New South Wales and the CQC Fit and Proper Person test, most examples are from other sectors, such as finance, and food safety. It is therefore difficult to draw clear parallels from systems already in place as few are directly comparable.
- 4.2 Our perusal of existing schemes suggests a number of key variables:
- How to define the scope of the scheme – Defining to whom it should apply, and the activities from which the scheme can prohibit them may present some challenges
  - Code of practice or regulations – A code of practice might allow for a more nuanced positive approach, as the code could set out expectations of what a practitioner should do, rather than focusing exclusively on what they should not. A code is also more transparent, and clear to members of the public
  - Which bodies to fulfil which functions – The Government, executive agencies, independent agencies, statutory regulators, and employers could all fulfil different functions (setting criteria for barring/codes; carrying out investigations; making prohibition decisions; publishing and enforcing prohibition decisions)
  - Which sanctions to use – Some schemes have a range of sanctions available, while others operate a binary barred/not barred process.

### Benefits and disadvantages

- 4.3 We have not conducted a systematic literature review, but in the course of our research, we have found little academic work assessing the value of prohibition order schemes.<sup>125</sup> We can nevertheless suggest the following theoretical benefits and disadvantages:

### Benefits

- 4.4 **Public protection** – An effective prohibition orders scheme would remove from the workforce individuals who present a risk to the public, provided it was effectively enforced.<sup>126</sup>
- 4.5 **Public confidence** – A scheme would provide the public with some reassurance that any workers from a given occupation about whom concerns had been reported and who had been identified as posing a threat to public

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<sup>125</sup> This is not unusual – there is also little research documenting the effectiveness of statutory regulation.

<sup>126</sup> If the scheme were extended to the self-employed or independent practitioners, it's possible that the onus would be on the patient or service user to check whether the practitioner is on the barred list or refer a practitioner to the scheme, if necessary.

safety were unable to practise. It would include a complaints procedure so that anyone, including employers and patients could raise a concern.

- 4.6 **Potential to cover multiple occupations** – The model has the potential to be applied to multiple groups of unregistered healthcare practitioners as per the established model in New South Wales.
- 4.7 **Less costly and complex than full statutory regulation** – A scheme would be likely to involve less cost and legislative complexity than full statutory regulation whilst still providing a mechanism to deal with severe cases of misconduct and remove those that may be a danger to the public from the workforce.

### *Disadvantages*

- 4.8 **Little positive effect on professionalism and raising of standards** – A prohibition order scheme inherently focuses more on what practitioners should not do than on what they should do. It is therefore unlikely to raise standards of competence or foster professionalism in any meaningful way. The scheme would neither set standards nor quality-assure arrangements for qualifying education. There would be no post-registration requirements, and no suitability checks.
- 4.9 **Negative impact on the occupation's reputation and morale** – Prohibition orders focus on negative actions, and for the most part, the names of individuals whose conduct or performance has fallen short, are published. We do not believe that statutory regulation should be used as a means of enhancing the status or reputation of a profession. That said, it would be worth considering whether the introduction of a prohibition order scheme could have a negative effect on workforce morale, as a consequence of its focus on identifying people who have been removed from practice.<sup>127</sup> (We suggest that the introduction of a code of practice with some positive statements about conduct and competence might be one way of counteracting this.)
- 4.10 **Action taken under a scheme would always be reactive** – Schemes of this kind would only be able to deal with the worst cases of misconduct and only after harm has been caused. It would prevent future danger by removing the most harmful individuals from the workforce, however any deterrent effect on other individuals is difficult to assess.
- 4.11 **Cost and complexity of setting up such a scheme** – A scheme in the UK would require new legislation and regulations, which could be lengthy and costly, and create a rigid framework that is difficult to amend. The costs of setting up and maintaining a scheme would be borne by the taxpayer, as there would be no registrants as such to fund the scheme. If employers were

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<sup>127</sup> Welsh Government, *Domiciliary Care Workforce Improving the recruitment and retention of Domiciliary Care workers in Wales*. [Online]. Pg.30. Available at: <http://gov.wales/docs/dhss/consultation/160119document1en.pdf> [Accessed: 31/03/2016]

asked to contribute that would add another cost to an already financially vulnerable care sector.

- 4.12 **Need for effective communication** – There would need to be a robust strategy for communicating the code and prohibition scheme to all workers who are covered by it, but also, as it would be a complaints-led framework, to employers and patients. This could add to the cost of such a scheme.

### Feasibility

- 4.13 We found nothing to suggest that a prohibition order scheme would not be feasible in health and social care in the UK. Our legal advice did however identify some areas where the legislation would need to be carefully thought through:
- Protection of title and/or function and clarity about what a barred person may not do
  - Whether to criminalise breaches of prohibition orders
  - Ensuring that the duty to hold and publish a list of barred individuals is established in legislation to avoid legal challenge
  - Ensuring that the process for barring an individual is Article 6 compliant
  - Ensuring that a suitable appeals process is in place (to give greater effect to Article 6).
- 4.14 To ensure there was no overlap or conflict with existing mechanisms, in particular, with the DBS and statutory regulation, consideration would need to be given to:
- The standard of proof required to reach a barring decision
  - The threshold for barring
  - The areas covered by the barring criteria/regulations/code of practice: e.g. conduct, competence, health
  - Who would have access to a barred list and how it would be accessed
  - The interaction between the prohibition orders under this scheme, and decisions by the DBS and professional regulators.
- 4.15 The scheme would need to differentiate itself from the DBS in particular by its purpose, scope and threshold for action.
- 4.16 We were not specifically asked to consider the financial feasibility of the scheme, but any decision about whether to implement a scheme would need to consider its costs and benefits. With regard to the New South Wales scheme in particular, there is little direct evidence to draw on about the impact or effectiveness of the scheme. The HCPC review highlighted that consumer groups and regulated professions supported the scheme as they

perceived it as a 'safety net' to deal with serious breaches of conduct.<sup>128</sup> However, the number of complaints received by the Healthcare Complaints Commission in New South Wales about unregistered practitioners remains relatively low – 102 in 2014-15 – and has in fact gone down since 2012-2013, when it reached 134.<sup>129</sup> The number of prohibition orders issued is also low (six in 2014-15), and which, if it is taken as a measure of effectiveness, may not represent value for money. What this figure does not reflect however, is the potential broader deterrent effect the scheme could have overall – this effect is unfortunately notoriously difficult to measure.

- 4.17 Certainly a more in-depth analysis of the costs and benefits of a prohibition order schemes, and judgements about whether or not they are proportionate, should consider the ratio of prohibition orders issued to the total number of practitioners covered. In addition, it might be helpful to compare different schemes by calculating the total cost per prohibition order – i.e. dividing the annual operating costs by the number of orders issued in that year.

### Identifying the problem, risks, and possible solutions

- 4.18 In line with the principles of *Right-touch regulation*<sup>130</sup> and our recent publication *Right-touch assurance*,<sup>131</sup> we recommend that any decisions about implementing prohibition order schemes are made in the context of an open-minded enquiry about the best options for assurance. This enquiry should be based on an assessment of the risks presented by the groups under consideration.
- 4.19 Whether prohibition orders would be the most effective way of managing the risks presented by a group will depend in large part on the context in which the group works, and whether the risks could be managed in other ways.
- 4.20 For example, an accredited register coupled with robust employment practices could have the same effect as a prohibition order scheme, of preventing problematic practitioners from working in particular roles – without the need for legislation. This model would provide further benefits such as clear standards for entry to the register and continuing professional development requirements for all.
- 4.21 Whether or not this option would be feasible would depend on whether the group in question was, or could be on a voluntary register, and whether it

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<sup>128</sup> Health and Care Professions Council, *The regulation of unregistered health practitioners in New South Wales*. [Online]. Available at: <https://www.hcpc-uk.org/assets/documents/10003F73enc08-negativeregisterNSW.pdf> [Accessed: 31/03/2016]

<sup>129</sup> Healthcare Complaints Commission, *Annual Report 2014-15*. Available at: <http://www.hccc.nsw.gov.au/Publications/Annual-reports/Default>. Accessed 25/10/2016.

<sup>130</sup> Professional Standards Authority (2015) *Right-touch regulation*. [Online]. Available at: <http://www.professionalstandards.org.uk/publications/detail/right-touch-assurance-a-methodology-for-assessing-and-assuring-occupational-risk-of-harm> [Accessed: 31/10/2016]

<sup>131</sup> Professional Standards Authority (2016) *Right-touch assurance: a methodology for assessing and assuring occupational risk of harm*. [Online]. Available at: <http://www.professionalstandards.org.uk/what-we-do/improving-regulation/right-touch-regulation> [Accessed: 31/10/2016]

was possible in the specific employment setting to ensure that only registered practitioners were employed.

- 4.22 *Right-touch assurance* provides a framework for developing policy in this area. We caution against identifying a solution, such as prohibition orders, before a clear problem has been identified, and risks have been assessed. It is for this reason that we do not express a view in this paper on the desirability of implementing such schemes in the abstract. There may be a place for them in the regulatory framework for health and social care in the UK. Indeed, we encourage the exploration of all options for assurance, provided that final decisions about implementation are proportionate to the risks identified, and that options that make use of existing mechanisms are fully explored.

## Annex A: Commissioning letter

**Strategy and External Relations  
Directorate**  
Room 2N05  
Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

### **By Email**

Mr Harry Cayton CBE, OBE  
Chief Executive  
Professional Standards Authority  
157 -197 Buckingham Palace Road  
London  
SW1W 9SP

02 October 2015

Dear Harry,

### **Request for advice: prohibition orders**

The Department of Health is currently exploring alternatives to statutory regulation in the UK for the parts of the health and social care workforce which (i) can be shown to present a risk to the public and (ii) cannot effectively be controlled by existing means. The policy intent is to provide a proportionate solution to the risks posed to patient safety that would prevent individuals who posed a risk from working in a similar role in the health and social care sectors.

Accredited registers provide one alternative but are only available to groups who have formed a voluntary register and wish to be accredited. Prohibition orders (previously or otherwise known as barring schemes) have been mooted in different forms in the Francis Report (in relation to NHS leaders), in HCPC's 2014 Accountability hearing (in relation to social care workers) and in the Law Commissions' report.

The following recommendation was made by Sir Robert Francis (no. 219) as part of his report on the mid Staffordshire inquiry:

*“Serious non-compliance with the code, and in particular, non-compliance leading to actual or potential harm to patients, should render board-level leaders and managers liable to be found not to be fit and proper persons to hold such positions by a fair and proportionate procedure, with the effect of disqualifying them from holding such positions in future.”*

Prohibition order schemes could potentially offer a means (short of statutory regulation) of 'preventing' certain individuals from working in certain occupations or engaging in prohibited activities. Such schemes would only apply to individuals who are not required to register with one of the existing statutory health and social care professional regulators across the UK. In effect, what would be created would be a negative register which enables individuals who have been found unsuitable (against defined criteria) to hold a particular type of role or carry out a specific function to be barred from these roles or functions.

The Law Commissions concluded that the potential advantages of negative registers outweigh the drawbacks and were of the opinion that Government should have the ability to introduce barring schemes through regulations:

*Recommendation 31: The Government should have regulation-making powers to establish barring schemes, to be run by the regulators. Such a scheme could be introduced in respect of a prescribed health or social care profession, a specified field of activity, a role involving supervision or management, and prescribed title.*

In its response (para 3.12) to the Law Commissions report, Government agreed "that prohibition orders could be a useful tool in areas of risk where the introduction of a full statutory regime would not be proportionate...we would expect any such power to be exercisable by the Privy Council."

The Law Commissions concluded that if such a scheme were to be included in a Professional Accountability Bill the Government should be required to evidence (in a report) that the introduction of a scheme of prohibition is necessary in order to protect the public. They also concluded that the report must be laid before Parliament at the same time as any draft regulations introducing such a scheme. In their view this would help to establish an identity for the scheme, separate to statutory regulation; and would be similar to the approach taken to the use of the Government's proposed powers to abolish, merge or create a statutory regulator.

Therefore, in response to this recommendation, I am writing to ask the Authority to undertake an *initial* evaluation of the feasibility and potential benefits and disadvantages of prohibition orders.

This is very much preliminary work focusing on evidence gathering and should take the form of an introductory/contextual piece which could be extended if need be.

We ask that you provide a high-level overview of the implications of such a scheme, including (but not limited to) the following issues:

- The relationship with existing prohibition schemes relevant to health and social care in the UK, such as the fit and proper person test and disclosure and barring schemes;
- The relationship with current statutory regulation and accredited registers frameworks;

- The range of health and care occupations who are covered by neither statutory regulation nor accredited registers;
- The code(s) of conduct for groups brought into such a scheme i.e. who would develop and maintain them;
- The legal feasibility and implications of holding / publishing what might in effect be a “blacklist”;
- A review of published opinions from key stakeholders on such schemes; and
- Any relevant comparisons with existing schemes in other sectors or outside the UK

We envisage that the report will inform our advice to ministers and underpin any *future* decisions in this area, including the potential for further research.

We would welcome sight of the proposed plan (and costings) for delivery of this work at the earliest opportunity.

Yours sincerely

**Dr NICK P CLARKE**  
**Deputy Director**  
**Professional Standards**

## Annex B: Further examples of prohibition order schemes

### *Food Standards Agency, UK*

- 4.23 The Food Standards Agency is a non-ministerial government department responsible for food safety and food hygiene across the UK. It does this by working with local authorities and operating in UK meat plants. It is also responsible for labelling policy in Scotland, Wales and Northern Ireland, and for nutrition policy in Scotland and Northern Ireland. Under the Food Safety Act 1990, a magistrates' court can make a prohibition order under Section 11 of the Act, if a food based operator has been convicted of certain offences.<sup>132,133</sup> For example, a person may be served a prohibition order for repeated offences such as 'failure to clean, failure to maintain equipment, blatant disregard for health risks, or putting health at risk by knowingly using unsafe food'.<sup>134</sup>
- 4.24 All local authorities are notified of the prohibition order to prevent the person opening a business in a new area.<sup>135</sup> The authority originally issuing the prohibition order must notify the Chartered Institute of Environmental Health (CIEH) after a hygiene prohibition order has been made.<sup>136</sup>
- 4.25 In 2014/15, there were 105 prohibition orders served in England, three in Wales, one in Scotland and zero in Northern Ireland.<sup>137</sup> The FSA has a wide range of other sanctions at its disposal: written warnings, seizure, detention and surrender, suspension/revocation of approval or licence, hygiene emergency prohibition notice, simple caution, hygiene improvement notice, remedial action and detention notices, and prosecutions.

### *National Trading Standards Estate Agency Team, UK*

- 4.26 Estate agents are regulated under the 1979 Estate Agents Act by the National Trading Standards Estate Agency Team (NTSEAT). NTSEAT is a service commissioned by National Trading Standards, and run by Powys

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<sup>132</sup> Food Standards Agency, *Food Law Practice Guidance (England)*. [Online]. Pg.115. Available at: <http://www.food.gov.uk/sites/default/files/Food%20Law%20Practice%20Guidance%20October%202015%20-%20FINAL%20.pdf> [Accessed: 09/02/2016]

<sup>133</sup> As well as prohibiting proprietors, prohibition orders can also close food premises, prohibit premises from being used for particular kinds of food business prevent the use of a piece of equipment for any food business, or a particular food business prohibit a particular process.

<sup>134</sup> Food Standards Agency, *Food Law Practice Guidance (England)*. [Online]. Pg. 121. Available at: <https://www.food.gov.uk/sites/default/files/Food%20Law%20Practice%20Guidance%20October%202015%20-%20FINAL%20.pdf> [Accessed: 31/10/2016]

<sup>135</sup> Food Standards Agency, *Food Law Code of Practice*. [Online]. Para 6.2.6. <https://www.food.gov.uk/enforcement/codes-of-practice/food-law-code-of-practice-2015/6-2-formal-sanctions#toc-6> [Accessed: 09/02/2016]

<sup>136</sup> Food Standards Agency, *Food Law Code of Practice*. [Online]. Para 6.2.6. Available at: <https://www.food.gov.uk/enforcement/codes-of-practice/food-law-code-of-practice-2015/6-2-formal-sanctions#toc-6> [Accessed: 31/10/2016]

<sup>137</sup> Food Standards Agency, *Annual report on UK local authority food law enforcement 1 April 2014 to 31 March 2015*. [Online]. Pg. 20. <https://www.food.gov.uk/sites/default/files/laems-annual-report-2014-15.pdf> [Accessed: 31/03/2016]

- County Council, which is the lead enforcement authority for the whole of the UK.<sup>138</sup> The Council can issue warnings or prohibition orders against individuals, partnerships or companies, and anyone employed by them.<sup>139,140</sup>
- 4.27 Prior to implementation of a prohibition order, a 'Notice of Proposal' is issued, giving the affected person 21 days to respond. Once the order has been issued, an appeal can be lodged within 28 days.
- 4.28 A prohibition order can prevent someone from carrying out all or any aspect of estate agency work. The Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 list the regulations which need to be adhered to by estate agents. Guidance on how to navigate those regulations can be found on NTSEAT's website.<sup>141</sup>
- 4.29 Warning orders can be issued against an estate agent if they break the law in a number of specified ways. If a warning order is breached, a prohibition order could be made and an estate agent would be barred from working.<sup>142</sup> In addition to this, the reasons for which a prohibition order can be imposed include:
- Committing an offence of fraud or other dishonesty, or violence
  - Committing racial or sexual discrimination during your work as an estate agent
  - Committing certain specified offences
  - Committing certain offences under the Act
  - Breaching certain provisions of the Act
  - Engaging in a practice declared undesirable under the Act.

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<sup>138</sup> National Trading Standards, *Annual report 2015-2016*. [Online]. Available at: <http://www.nationaltradingstandards.uk/uploads/2015-16%20annual%20report%20FINAL%2024.5.pdf> [Accessed: 25/10/2016]

<sup>139</sup> Osborne, H, 2014, *Regulation of UK estate agents handed over to Powys county council*, The Guardian, 31 March. [Online]. Available at: <http://www.theguardian.com/money/2014/mar/31/regulation-uk-estate-agents-powys-council> [Accessed: 19/02/2016]

<sup>140</sup> National Trading Standards Estate Agency Team, *Guidance on Property Sales Compliance with the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008*. [Online]. Available at: [http://pstatic.powys.gov.uk/fileadmin/Docs/Estate\\_Agency/NTSEAT\\_guidance\\_on\\_property\\_sales\\_-\\_Sept\\_2015\\_en.pdf](http://pstatic.powys.gov.uk/fileadmin/Docs/Estate_Agency/NTSEAT_guidance_on_property_sales_-_Sept_2015_en.pdf) [Accessed: 15/02/2016]

<sup>141</sup> National Trading Standards Estate Agency Team, *Advice for estate agents*. [Online]. Available at: <http://www.powys.gov.uk/en/licensing-trading-standards/national-estate-agency-standards/advice-for-estate-agents/> [Accessed: 31/10/2016]

<sup>142</sup> National Trading Standards Estate Agency Team, *Advice for estate agents*. [Online]. Available at: <http://www.powys.gov.uk/en/licensing-trading-standards/national-estate-agency-standards/advice-for-estate-agents/> [Accessed: 31/10/2016]

- 4.30 The register showing those people against whom there is currently a prohibition or a warning order, is run by Powys County Council and can be viewed online.<sup>143</sup>
- 4.31 Anyone who does not comply with a prohibition order is committing a criminal offence, and could be fined.<sup>144</sup> For a fee of £2,500, people subject to a warning or prohibition order can apply to have it varied or revoked.

### *The Pensions Regulator, UK*

- 4.32 The Pensions Regulator (TPR) is the UK regulator of work-based pension schemes, working with trustees, employers, pension specialists and business advisers. TPR is an executive non-departmental public body, sponsored by the Department for Work and Pensions.<sup>145</sup>
- 4.33 The TPR derives its power to impose a prohibition order from section 3 of the Pensions Act 1995, as amended by the Pensions Act 2004 (in Great Britain). The corresponding power for Northern Ireland is found in Article 3 of the Pensions (Northern Ireland) Order 1995. A prohibition order prevents a person from acting as a trustee of a particular trust scheme, a particular description of trust schemes or trust schemes in general. The register of prohibited trustees is kept by the regulator in accordance with the legislation.<sup>146</sup>
- 4.34 If the regulator is considering issuing a prohibition order, it can issue a suspension order, temporarily suspending a person from acting as a trustee.<sup>147</sup>
- 4.35 To be served a prohibition order a trustee needs to be found to be not 'fit and proper' by a Determinations Panel. This can be as a result of a lapse in honesty and integrity, competence and capability, or financial soundness.
- 4.36 For **honesty and integrity**, Section 29 of the Pensions Act 1995 and Article 29 of the Pensions (Northern Ireland) Order 1995 state that a person is automatically disqualified from being a trustee on certain events, including where:
- any trustee has been convicted of any criminal offence involving dishonesty or deception (unless the conviction is spent)

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<sup>143</sup> The register is available on the Powys County Council website: *The Estate Agents Public Register*. [Online]. Available at: <http://www.powys.gov.uk/en/licensing-trading-standards/national-estate-agency-standards/> [Accessed: 20/10/2016]

<sup>144</sup> National Trading Standards Estate Agency Team, *Advice for Estate Agents*. [Online]. Available at: <http://www.powys.gov.uk/en/licensing-trading-standards/national-estate-agency-standards/advice-for-estate-agents/> [Accessed: 15/02/2016]

<sup>145</sup> Department for Work and Pensions, *The Pensions Regulator*. [Online]. Available at: <https://www.gov.uk/government/organisations/the-pensions-regulator> [Accessed: 18/02/2016]

<sup>146</sup> The Pensions Regulator, *Prohibition Orders Statement*. [Online]. Pg. 2. Available at: <http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-july-2016.pdf> [Accessed: 31/10/2016]

<sup>147</sup> The Pensions Regulator, *Prohibition Orders Statement*. [Online]. Pg. 3. Available at: <http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-july-2016.pdf> [Accessed: 31/10/2016]

- any company director has been disqualified from being such a director and
  - any person is subject to certain personal insolvency proceedings (eg an undischarged bankruptcy).<sup>148</sup>
- 4.37 For **competence and capability**, the Pensions Act 2004 (and corresponding Northern Ireland legislation) contains provisions concerning the level of trustee knowledge and understanding required of all trustees. Newly appointed trustees (other than professional trustees) have six months from their date of appointment to meet the requirements. The regulator has a code of practice about trustee knowledge and understanding.<sup>149,150</sup>
- 4.38 For **financial soundness**, matters such as a trustee's bankruptcy would be matters for disqualification under section 29 of the Pensions Act 1995 (or corresponding Northern Ireland provisions).<sup>151</sup>
- 4.39 The summary of the register of prohibited trustees can be found online. The full prohibition register is available for inspection at the regulator's offices.<sup>152</sup>

### **Guernsey Financial Services Commission**

- 4.40 The Guernsey Financial Services Commission (GFSC) regulates financial services in the Bailiwick<sup>153</sup> of Guernsey. It has a range of enforcement powers including disqualification and prohibition orders, which can be issued where individuals have contravened regulations or committed misconduct.<sup>154</sup> As well as enforcing compliance with legislation, the GFSC issues a number of codes of practice.<sup>155</sup> The register of people prohibited from providing financial services is available on the Commission's website. Licensees under specified laws are required to take 'reasonable care to ensure that none of their functions, in relation to the carrying on of a regulated activity, is performed by a person who is prohibited from doing so by a prohibition

<sup>148</sup> The Pensions Regulator, *Prohibition Orders Statement*. [Online]. Pg. 4. Available at: <http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-july-2016.pdf> [Accessed: 31/10/2016]

<sup>149</sup> The Pensions Regulator, *Prohibition Orders Statement*. [Online]. Pg. 6. Available at: <http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-july-2016.pdf> [Accessed: 31/10/2016]

<sup>150</sup> The Pensions Regulator, *Code of Conduct*. [Online], Available at: <http://www.thepensionsregulator.gov.uk/docs/code-07-trustee-knowledge-understanding.pdf> [Accessed: 31/03/2016]

<sup>151</sup> The Pensions Regulator, *Prohibition Orders Statement*. [Online]. Pg. 6. Available at: <http://www.thepensionsregulator.gov.uk/docs/statement-prohibition-orders-july-2016.pdf> [Accessed: 31/10/2016]

<sup>152</sup> The Pensions Regulator, *Prohibition of Trustees*. [Online]. Available at: <http://www.thepensionsregulator.gov.uk/regulate-and-enforce/prohibition-of-trustees> [Accessed 09/02/2016]

<sup>153</sup> Jurisdiction of a bailiff.

<sup>154</sup> Guernsey Financial Services Commission, *Enforcement powers*. [Online]. Available at: <https://www.gfsc.gg/commission/enforcement/enforcement-powers>. Accessed: 20/10/2016

<sup>155</sup> Guernsey Financial Services Commission, *Legislation and guidance*. [Online]. Available at: <https://www.gfsc.gg/commission/legislation-and-guidance> [Accessed: 31/10/2016]

order'.<sup>156</sup> A person who performs or who agrees to perform any function in breach of a prohibition order or disqualification order is guilty of a criminal offence. Powers and offences are listed in various laws.

- 4.41 The GFSC is funded by the fees levied on businesses.<sup>157,158</sup>

### ***Registrar of Companies Directors Prohibition, New Zealand***

- 4.42 Section 385 of the Companies Act 1993 gives the Registrar of Companies (the Registrar) and the Financial Markets Authority (FMA) the power to prohibit people who, within the previous five years, have been involved in the management of one or more companies that have failed due to mismanagement.
- 4.43 Prohibition is intended to provide 'protection for the public from directors and managers of companies who have been unscrupulous, incompetent or irresponsible by ensuring that, for the period of prohibition, the general partner, promoter or manager is not able to be involved in the management of a limited partnership.' Prohibition is intended to act also as a deterrent and 'to set appropriate standards of behaviour for directors and persons involved in the management of companies'. It is intended to 'remedy any wrongs done to shareholders or creditors and it will not result in the recovery of any money that may have been lost as a result of a director's or manager's actions'.<sup>159</sup>
- 4.44 Prohibition decisions hinge on a person's involvement in the failure of a company:

*'The test for prohibition of a director or manager varies depending on the number of failed companies that a person has been involved with in the previous five years:*

#### ***Persons who have only been involved with one failed company***

*The Registrar can prohibit only if satisfied that the manner in which the company was managed was at least partly responsible for its failure.*

#### ***Persons who have been involved in two or more failed companies***

*The Registrar may prohibit unless satisfied that:*

*the manner in which the companies, or all but one of the companies, was managed was not responsible for their failure or*

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<sup>156</sup> Guernsey Financial Services Commission, *Prohibitions*. [Online]. <http://www.gfsc.gg/The-Commission/WarningsProhibitionsPublicStatements/Prohibitions/Pages/default.aspx> [Accessed: 09/02/2016]

<sup>157</sup> Guernsey Financial Services Commission, *The Financial Services Commission (Fee) Regulations, 2014*. [Online]. Pg. 2. Available at: [http://www.gfsc.gg/The-Commission/Policy%20and%20Legislation/Financial%20Services%20Commission%20\(Fees\)%20Regulations,%202014.pdf](http://www.gfsc.gg/The-Commission/Policy%20and%20Legislation/Financial%20Services%20Commission%20(Fees)%20Regulations,%202014.pdf) [Accessed: 31/03/2016]

<sup>158</sup> Guernsey Financial Services Commission, *Registered Businesses Fees* [Online], Available at: <http://www.gfsc.gg/Registered/Fees/Pages/Fees.aspx> [Accessed: 31/03/2016]

<sup>159</sup> New Zealand Companies Office, *Registrar of Companies*. [Online]. Available at: <https://www.business.govt.nz/companies/about-us/enforcement/director-prohibitions> [Accessed 31/03/2016]

*it would not be just or equitable to prohibit.*<sup>160</sup>

- 4.45 Notice of a decision to prohibit is given to the person prohibited and published in the New Zealand Gazette. Prohibited individuals are also recorded in the Companies Office disqualified directors database. The register of prohibited persons is online and searchable.<sup>161</sup> The maximum length of a prohibition is ten years. The search shows the legislation under which a director has been 'disqualified' from work and any aliases they might hold.

### ***Monetary Authority Singapore, Singapore***

- 4.46 The Monetary Authority of Singapore (MAS) is the central bank of Singapore. As well as conducting the usual functions of a central bank (managing monetary policy, serving as banker and financial agent of the Singapore government, etc), MAS issues and enforces prohibition orders against individuals who display poor conduct in any regulated activity under the remit of Singaporean financial legislation. Penalties can be imposed for insider trading, employment of manipulative and deceptive devices, and other offences. Every institution approved by MAS pays a fee to the organisation.
- 4.47 Information on prohibition orders is displayed on the website. There is a search bar in which any user can search a name and find any articles relating to enforcement decisions against that person.<sup>162</sup> Information remains on the page for a period of five years from the date of publication except for prohibition orders which are still in force after the expiry of the five year period. Information on those prohibition orders remains on the page until they cease to be in force.

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<sup>160</sup> New Zealand Companies Office, *Registrar of Companies*. [Online]. Available at: <https://www.business.govt.nz/companies/about-us/enforcement/director-prohibitions> [Accessed: 31/03/2016]

<sup>161</sup> New Zealand Companies Office, *Search the New Zealand Companies Office Register* [Online], Available at: <https://www.business.govt.nz/companies/app/ui/pages/individual/search?roleType=DDIR> [Accessed: 31/03/2016]

<sup>162</sup> Monetary Authority of Singapore, *Enforcement Actions*. [Online]. Available at: <http://www.mas.gov.sg/news-and-publications/enforcement-actions.aspx> [Accessed 09/02/2016]

## Annex C: Statutorily regulated professions, accredited registers of occupations, and other

**Table 3: Occupations covered by regulators or accredited registers**

Type of assurance	Regulator	Occupation/other
Statutory	General Chiropractic Council	Chiropractors
	General Dental Council	Dentists Dental hygienists Dental therapists Clinical dental technicians Orthodontic therapists Dental nurses Dental technicians
	General Medical Council	Doctors
	General Optical Council	Dispensing opticians Optometrists <i>Students</i> <i>Optical businesses</i>
	General Osteopathic Council	Osteopaths
	General Pharmaceutical Council	Pharmacists Pharmacy technicians <i>Registered pharmacies</i>
	Health and Care Professions Council	Arts therapists Biomedical scientists Chiropodists Clinical scientists Dieticians Hearing aid dispensers Occupational therapists Operating department practitioners Orthoptists Orthotists Paramedics Physiotherapists Podiatrists Practitioner psychologists Prosthetists Radiographers

		Social workers in England Speech and language therapists
	Nursing and Midwifery Council	Nurses Midwives
	Pharmaceutical Society of Northern Ireland	Pharmacists <i>Registered pharmacies</i>
<p><b>Professional Standards Authority Accredited Registers programme</b><sup>163,164</sup></p> <p>NOTE – all of these registers are voluntary to join, meaning that it is not a requirement so some of the workforce in these occupations may choose not to join and therefore be unregulated. In addition there are a number of other voluntary registers that have either not yet gained or have not sought accreditation, however these are listed separately in the next table.</p>	Academy for Healthcare Science	Healthcare Science Practitioners working in a wide variety of disciplines, <i>including:</i> Physiological Sciences Microbiology Nuclear Medicine Life Sciences Health Informatics Physical Sciences Healthcare Science Haematology Biomedical Science Biomechanical Engineering Bioinformatics Audiology Anatomical Pathology Technologists Genetic Technologists Ophthalmic Science Practitioners Tissue Bankers
	Alliance of Private Sector Practitioners	<i>Including:</i> Foot Health Practitioners
	Association of Child Psychotherapists	<i>Including:</i>

<sup>163</sup> Please note that the occupations listed in this section of the table are not exhaustive for each accredited register, given the large number of modalities and disciplines in some areas.

<sup>164</sup> Two of the accredited registers (Save Face and Treatments You Can Trust) register only people who are also statutorily regulated.

		Psychoanalytic child psychotherapists Adolescent psychotherapists
	Association of Christian Counsellors	<i>Including:</i> Counsellors Psychotherapists
	British Acupuncture Council	<i>Including:</i> Acupuncturists
	British Association for Counselling & Psychotherapy	<i>Including:</i> Psychotherapists Counsellors
	British Association of Play Therapists	<i>Including:</i> Play Therapists Counsellors
	British Association of Sport Rehabilitators and Trainers	<i>Including:</i> Graduate Sport Rehabilitators
	British Psychoanalytic Council	<i>Including:</i> Psychotherapists Counsellors
	Complementary and Natural Healthcare Council	Complementary therapy practitioners working in a range of modalities <i>including:</i> Sports Therapists Nutritional Therapists Reflexologists Naturopaths Massage Therapists Hypnotherapists Acupuncturists Craniosacral Therapists Bowen Therapists Alexander Technique practitioners
	COSCA (Counselling & Psychotherapy in Scotland)	<i>Including:</i> Counsellors Psychoanalytic Psychotherapists

	Federation of Holistic Therapists	Complementary Healthcare Therapists working in a range of modalities <i>including</i> : Yoga Therapists Sports Therapists Shiatsu practitioners Reiki healers Reflexologists Nutritional Therapists Massage Therapists Naturopaths Kinesiologists Hypnotherapists Homeopaths Craniosacral Therapists Aromatherapists Bowen Therapists Acupuncturists Alexander Technique practitioners
	Genetic Counsellor Registration Board	<i>Including</i> : Genetic Counsellors
	Human Givens Institute	<i>Including</i> : Human givens psychotherapists Counsellors
	National Counselling Society	<i>Including</i> : Psychotherapists Counsellors
	National Hypnotherapy Society	<i>Including</i> : Hypnotherapists
	Play Therapy UK	<i>Including</i> : Play Therapists
	Register of Clinical Technologists	Clinical Technologists working in a variety of disciplines, <i>including</i> : Renal Technology Radiation Physics Rehabilitation Engineering Radiotherapy Physics Radiation Engineering

		Medical Engineering Clinical Technology Nuclear Medicine Healthcare Science Clinical Science
	Save Face	<i>Including:</i> Doctors Nurses Dentists
	Society of Homeopaths	<i>Including:</i> Homeopaths
	Treatments You Can Trust	<i>Including:</i> Doctors Nurses Dentists
	UK Council for Psychotherapy	<i>Including:</i> Counsellors Psychotherapists
	UK Public Health Register	<i>Including:</i> Public Health practitioners Public Health specialists Specialist registrars

**Table 4: Occupations covered by neither regulators nor accredited registers**

	Category	Roles
Currently unregulated occupations  NOTE – this is intended to be indicative only and not a comprehensive list as the status of different occupations is subject to change	Physical health	<i>Including:</i> Physicians associates Health care assistants Nursing associates (new role to be created) Complementary therapy practitioners not covered by relevant accredited registers
		<i>Including:</i>

	Health science, promotion and protection	Health records and patient information Clinical management Public health practitioners not covered by the relevant accredited register
	Mental health and wellbeing	<i>Including:</i> Psychological therapy practitioners and counsellors not covered by relevant accredited registers
	Social work and care	<i>Including:</i> Care workers/Care assistants Home care workers Personal Assistants

**Table 5: Further membership bodies**

	<b>Voluntary registers not accredited by the Professional Standards Authority</b>
NOTE – this is intended to be indicative only and not a comprehensive list as the status of different organisations and registers is subject to change	<p>Action for Advocacy</p> <p>The Acupuncture-Acuthery Council</p> <p>The Acupuncture Society</p> <p>Alliance of Registered Homeopaths</p> <p>Assistive Technology Practitioner Society</p> <p>Association of Cardiothoracic Surgical Assistants</p> <p>Association for Cognitive Analytic Therapy</p> <p>Association for Nutrition</p> <p>Association of Osteomyologists</p> <p>Association of Physicians' Assistants (Anaesthesia)</p> <p>Association of Systematic Kinesiology</p> <p>British Academy of Cosmetic Practice</p>

	<p>British Academy of Western Medical Acupuncture</p> <p>British Association of Aesthetic Plastic Surgeons</p> <p>British Association for Behavioural &amp; Cognitive Psychotherapies</p> <p>British Complementary Therapies Council</p> <p>British Psychological Society</p> <p>British Society of Clinical Hypnosis</p> <p>College of Sexual and Relationship Therapists</p> <p>Committee for the Accreditation of Medical Illustration Practitioners</p> <p>Complementary Therapists Association</p> <p>Council for Anthroposophic Health and Social Care</p> <p>Counsellors and Psychotherapists in Primary Care</p> <p>Counselling and Psychotherapy Central Awarding Body</p> <p>Craniosacral Therapy Association</p> <p>Crystal and Healing International</p> <p>General Council and Register of Naturopaths</p> <p>General Hypnotherapy Standards Council</p> <p>General Naturopathic Council</p> <p>General Regulatory Council for Complementary Therapies</p> <p>The Homeopathic Medical Association</p> <p>Independent Practitioners Network</p> <p>Institute for Complementary and Natural Medicine</p> <p>Institute of Biomedical Science</p>
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	<p>The Institute of Chiropodists and Podiatrists</p> <p>Institute of Commissioning Professionals</p> <p>Institute of Healthcare Management</p> <p>Institute of Remote Healthcare</p> <p>Integrity</p> <p>National Council of Psychotherapists</p> <p>PSTD Resolution</p> <p>Registration Council for Clinical Physiologists</p> <p>Society for Vascular Technology of Great Britain and Ireland</p> <p>Society of Chiropodists and Podiatrists</p> <p>Society of Clinical Perfusion Scientists of Great Britain &amp; Ireland</p> <p>Telopea Managed Services Ltd</p> <p>UK Association for Humanistic Psychology Practitioners</p> <p>UK Association of Physicians Assistants</p> <p>UK Board of Hospital Chaplains</p> <p>UK Council for Health Informatics Professions</p> <p>UK Reiki Federation</p> <p>Universities Psychotherapy and Counselling Association</p>
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