Garden Flat

17 York Road

Lytham St Annes

FY8 1HP

Criminal Cases Review Commission

5 St Philips Place

Birmingham

B3 2PW

Your ref: 00090/2018

4 March 2019

Dear Sirs

Thank you for reviewing my application to the Commission in respect of my prosecution and conviction by the Health and Care Professions Council. I have now carefully considered your decision not to refer the conviction to the appeal court.

Respectfully, I must disagree with your conclusion for the following reasons.

**1. The legislation and its *intention to deceive* element.**

“The issue of ‘intention to deceive’ was central to your trial and appeal. The CCRC does not consider this to be a new issue. Given the remit of our statutory function, this cannot therefore provide a reason for referring your case for a fresh appeal.”

Whilst I agree that the ITD element of the offences in the Health Professions Order 2001 was a central legal argument during my second prosecution and appeal, this related principally to its impact on permissible use of titles. I invited the Commission to consider whether this important information had been properly disclosed by the regulator prior to my prosecution and provided you with evidence that demonstrates *how* and *why* the HCPC deliberately concealed these matters from its registrants – and more importantly, myself as a defendant in a criminal trial, where a conviction is conditional on this element being met.

I appreciate that the Commission will be unfamiliar with the history surrounding this legislation – and in hindsight, I should have provided you with a brief summary of the facts. You reiterate the comments by the appeal Judge where she notes:

“With regard to whether or not you understood that the offence included an intention to deceive, the Court noted that you were intelligent and had a great deal of interest in the regulatory regime of your profession.”

My “interest” in professional regulation covers most of my life. My father was granted state-registration as a chiropodist when the [Professions Supplementary to Medicine Act](http://www.legislation.gov.uk/ukpga/Eliz2/8-9/66/section/6) became law a few months before I was born in 1961. When I qualified in 1983, Dad was Head of Service in Fife Health Board and we both practised under that legislation until it was superseded by the HPO 2001.

Consequently, I am quite familiar with the concept of protected titles and functions, and how they apply in statutory regulation, particularly within the health professions.

The PSM Act 1961 protected the use of ‘state registered’ and its derivatives when used with a professional title. Use of titles is determined by the scope of the offences, namely:

### Use of titles.

(1) A person who is registered shall be entitled to use the title of state registered chiropodist (and similarly for the other professions mentioned in section one of this Act) according to the profession in respect of which he is registered.

(2) Any person who—

(a) takes or uses either alone or in conjunction with any other words, the title of state registered chiropodist, state chiropodist or registered chiropodist (and similarly as respects the other professions mentioned in section one of this Act) when his name is not on the register established under this Act in respect of that profession; or

(b) takes or uses any name, title, addition or description falsely implying, or otherwise pretends, that his name is on a register established under this Act,

shall be liable on summary conviction to a fine not exceeding **[**fifty pounds**][**level 3 on the standard scale**]** and, in the case of a second or subsequent conviction, to a fine not exceeding **[**one hundred pounds**][**level 3 on the standard scale**]**.

It was, therefore, perfectly lawful for an individual to use a professional title, such as chiropodist or podiatrist, without registration, providing the individual did not claim or falsely imply they were state registered. That included individuals who had no formal training or recognised qualifications – and also those who had removed from the state register for misconduct or malpractice.

This weakness in the legislation was well known to the professions and government – and had been central during the consultations with all professional bodies before the present legislation was introduced. However, the government’s proposals for professional ‘closure’ were not without controversy, especially within my own profession.

Alongside measures for more stringent regulation were proposals to incorporate all the previously unregistered chiropodists onto the new register through a three-year programme of ‘grand-parenting’.

This was an essential prerequisite - if the titles were to be fully protected and their future use lawfully restricted to only those individuals on the statutory register. With some reluctance, the professional bodies and their members accepted these proposals and the new legislation came into effect in 2003 with the formation of the Health Professions Council. In the following three years, several thousand previously unregistered chiropodists were added to the register through the grandparenting process.

From the outset, the regulator has claimed that [“titles are protected by law and that anyone using these titles must be registered with the HPC or they may be subject to prosecution and a fine of up to £5,000”.](https://web.archive.org/web/20040603155355/http%3A/www.hpc-uk.org/registrants/protected_titles.htm)

Subsequently, all published information and advisory notes to registrants and professional bodies supplemented and enforced that advice. This can be [summarised from the HPC website in 2005.](https://web.archive.org/web/20040617231401/http%3A//www.hpc-uk.org/registrants/benefits.htm)

**Protection of Title**

Protection of professional titles means that only those people meeting the legally recognised standards of your profession can practise in the United Kingdom and use your title. Before July 9th 2003 anyone in the UK could use a professional title like ‘paramedic’ and practise freely without any training or any professional standards. (State Registration was however necessary as part of your employment contract to work in the NHS and other areas such as Social Services).

Research undertaken independently on behalf of the Health Professions Council shows that the public expect their health professionals to be regulated, and that ‘paramedic’ is one of the common professional titles that is recognised and understood.

Now both the public and your profession are protected from unscrupulous practitioners fraudulently using your title. Those who use a professional title that they are not entitled to use can and will be prosecuted.

Every person who uses a professional title without the knowledge, qualifications and training to ensure their safe and effective practice, is undermining the reputation of your profession. The damage that can be done to the public’s perception of a profession by contact with just one person who does not uphold high standards, is potentially immense. Prosecuting those people who illegally use professional titles, and bringing fitness to practise proceedings against those very few registered professionals who do not keep to the HPC’s standards, does not just protect the public. It also protects the rest of the HPC’s registrants; it protects every registrant who practises safely and effectively; it protects all health professionals who uphold high standards of practise, by ensuring that their profession’s reputation is not tarnished.

You will note, at this point, that the *intention to deceive* element does not feature, either in the PSM Act (1960) legislation or any of the advisory notes or subsequently, information provided by the Health Professions Council, despite its inclusion in its primary legislation. This includes all correspondence between professional bodies, registrants together with supplementary public information, published on their website.

I was elected as a member of council for my professional body, the Society of Chiropodists and Podiatrists in 2004. One of the reasons I stood for election was over concerns I had regarding the implementation of the grandparenting programme and whether sufficient safeguards were in place to minimise the risk to the public. I had already given [evidence](https://archive.parliament.scot/business/committees/petitions/or-05/pu05-0102.htm) to the Health Committee and Scottish Parliament to that effect.

During my two years on council, I had responsibility for Legislative Affairs, which was completely focussed on the implementation of the Health Professions Order and its regulatory requirements. The *intent to deceive* element in the legislation was never discussed or featured in any correspondence between the regulator, Department of Health and the profession. Its implications concerning legitimate and lawful **unregistered** *use of title* were never explored or elucidated in any way whatsoever, indeed, it was not even mentioned on the regulator’s website or any professional correspondence until September 2016, following the crown appeal.

I fully accept that a principal objective of the HPO legislation was to restrict (or protect) the use of titles within a statutory legislative framework – and notwithstanding the concerns I had regarding its implementation – this was a measure I very much supported as it compelled a significant number of unregulated providers to register under the umbrella of statutory regulation, with all its attendant responsibilities.

I also agreed with the sentiments of the HPC’s **Protection of Title** explanation and despite aforementioned reservations, welcomed and supported the introduction of the new regulatory regime – for all the reasons offered in the final paragraph of their advisory statement.

The impression that the regulator sought to achieve throughout was that the use of titles specified in the legislation was conditional solely on concurrent registration. In other words, the offence was one of ‘strict liability’, where use of title without registration was unequivocally unlawful. Remaining silent on the impact that the ITD element creates on lawful unregistered use, simply reinforced the impression that the titles were fully ‘protected’. However, the CCRC states:

“You complain that the HCPC did not advertise, or give guidance about the full meaning of the ‘intent to deceive’ element of the offence. The CCRC does not consider that – even if true – this was necessary. It would clearly be sufficient for a regulatory body, when seeking to advise and educate, to highlight the fact that failing to register would prevent the use of a designated title, and further that unregistered use of same would potentially be a criminal offence.”

I disagree. Given its importance as *essential* ingredient of the offence and consequently its impact on permissible use of title without registration, I would argue that it was crucial for the regulator to fully disclose the scope and range of circumstances governing *use of title,* if for no other reason than to ensure compliance.

The ITD element was a novel inclusion in our professional regulation, with significant implications for registrants and public safeguarding. That there are no advisory notes, guidance or policy statements that explains its function and provisions governing use of title, is instructive.

However, despite my assertion that the regulator at should have disclosed these provisions, I can understand *why* the HCPC and government were silent on this matter.

I refer to the Witness Statement of Ralph Graham provided in the original application.

In 2007 I was elected as Vice Chair of the Allied Health Professions Federation (AHPF) and in 2008 elected as Chairman until 2010. The AHPF is federation of all the Health Professions regulated by the HCPC at its inception.

In my duties for the posts described I found it necessary to create a Legislative Affairs Committee, which I chaired, to deal with the numerous documents and consultations with the Department of Health (DOH) in respect of the Health Professions Orders. I was therefore a part of the scrutiny of these Orders for the Profession and the effect on my members. The SCP represented just under 10,000 chiropodists and podiatrists.

Part of those discussions related to protection of title. The profession was obliged to admit as equals on the new register several thousand previously unregistered chiropodists. These had not been eligible under CPSM rules because they had not attended fulltime education. They were to be “grandfathered” on to the new HCPC register during a three year window if they were in full time practice on the date the HCPC came into existence.

This was considered a great price by those already on the register following 3-year degree courses and was unpopular among the profession. After the grandfather process was closed the only way onto the register would be via University degrees. The only attraction to this process was that the Health Professions Orders gave protection of title. We were assured the named titles would be reserved for those registered with the HCPC and **‘that it would be an offence to use such a title without being on the HCPC register’**. I have no recollection whatsoever of the requirement ‘intent to deceive’ ever being mentioned.

I have provided HCPC documents for the court and these make no mention of any requirement to intend to deceive. I also have provided documents from a review of the regulatory process by the Council for Healthcare Regulatory Excellence (CHRE), which again in examining cases against unregistered persons for misuse of protected titles makes no mention of any requirement to show ‘intent to deceive’.

I have spoken with a colleague who was appointed (as Chair) to the first HCPC Council who confirms that my understanding of the position and hers are the same, that the offence is simply to use one of the designated (protected) titles (without registration).

I now understand that the Health Professions Orders require intent to deceive thus it would be possible to use a designated title in combination with a statement such ‘not registered with the HCPC’ to evade the intention of the Orders. If this had been apparent in 2003 it is highly likely that the profession would have been persuaded by those arguing to refuse to register with the HCPC.

As the witness explains, a significant majority in the profession would not have subscribed to statutory regulation, had the provisions in the legislation been fully disclosed. In addition, several thousand unregistered practitioners, who were compelled to register to retain use of their title, would also have refused registration. Taken across all the professions, this would have resulted in a significant loss of income from registrant fees.

More importantly, disclosure, I suggest, would have fatally undermined the HCPC and government’s claim of effective public safeguarding under this legislation. In his letter to the Chair of the Health Committee, Dr Sarah Wollaston, the Registrar of the HCPC wrote in response to this question on 29 October 2015:

*Q: “If a practitioner were deregistered and made it clear they were not registered, but continued to use the title “chiropodist”, for instance, would they commit an offence?”*

A: “To take one example, if the person concerned had resigned (or been removed) from the HCPC register but was continuing to practice from premises where his or her services as a chiropodist were still advertised prominently, but only informed patients in a fairly minimal way that he or she was no longer on the HCPC register, we would regard that as evidence of an offence.”

A clearer, less ambiguous determination was made by the Court during the Crown Appeal on 2 October 2015. The Judge invited the Prosecution to consider.

“If a chiropodist de-registered and continued to use the title “chiropodist”, but made it clear that they were no longer registered in a publicly accessible document, such as a notice in their waiting room or on the internet, would that constitute an offence?”

The Prosecution agreed that it did not. Therefore it follows that there is an entirely possible scenario, where a registrant who has been struck-off for serious misconduct, can legitimately and lawfully continue to practice under a designated title, providing they take appropriate steps to inform their patients and public they are no longer registered. There circumstances are completely incongruous to any claims of public safeguarding by the regulator or government as the risk of harm to the public could not be more obvious.

However, the CCRC aver:

“… it cannot be argued that any lack of knowledge of this element would constitute a valid defence”

Again I disagree. I gave formal notice of my intent to cease registration and to continue in practice using a designated title to the HCPC in September 2008. Had I been advised that an offence required an ‘intent to deceive’ and to lawfully comply with the legislation, I would be required to display a public notice stating I was no longer registered – then I would have been able to take the appropriate steps to ensure compliance thereafter.

“In any event, the point you make about non-disclosure of this information is a hypothetical one. The CCRC agrees with the appeal court, who found that the many letters sent to you by the HCPC explained fully the terms of the offence that you risked committing, including ‘intention to deceive’. Your argument that you were unaware of the nature of the offence is, therefore, without merit.”

I received two cease and desist notices and one letter from the HCPC’s agents that mentioned the *intent to deceive* element within the body of legislative text that frames the offences. The summons also included a copy of the primary legislation - the 2001 Order, which clearly displayed the relevant passage too.

However, despite being furnished with these documents containing the full text of the offences, my ­understanding of what this meant was simply that it was an offence to use a title without registration. No exceptions. I did not - and could not possibly have had any knowledge of the circumstances permitting unregistered use of title as a result of the ITD element.

In my reply to the HCPC’s solicitor’s letter that set out the offences in full – I stated that I had *“never intended to deceive anyone”.* The court suggested this was evidence that *“I must have known”* about its provisions. This is not true.

I was simply responding to the points in the solicitor’s letter and noted the ‘intent to deceive’ element quoted in the legislation they provided. Had I properly understood the provisions conferred by this element, I suggest my response to this letter would have been completely different – as I would have contested the allegation that I was committing an offence in the first place.

**2. Conduct**

My decision to cease registration in 2008 was taken after much consideration. I had been in practice as a registered clinician for 25 years. I have always been a strong advocate of effective regulation, standards and public safety – as every responsible clinician should be. After identifying a weakness in the current regulations, I raised my concerns with the regulator, but did not receive a satisfactory response and subsequently ceased registration in protest.

In doing so, I assumed I was breaking the law.

I had no intention of ceasing practice or using an unregulated title and I made my position clear to the HCPC, by letter, in September 2008.

Immediately after I notified the regulator, all reference to the HCPC and my registration number were removed from practice stationary and any promotional or advertising material. Over a few weeks, I informed my colleagues, professional body and others concerned with my practice, such as GPs and local consultants, of my decision and explained the reasons why.

More importantly, I informed most of my patients. Not everyone on my patient list – but the majority who had the capacity to understand, particularly those who were able to claim reimbursement of my fees through private insurance. I knew that they would be unable to do so in future – and it was important to me that they were aware of this in advance of any further treatment, so they could make a choice whether to continue with my care, without any reimbursement – or to seek treatment elsewhere.

I took these measures, not to avoid any *intent to deceive* requirement in the legislation, but because it was the only proper and responsible action to take. To cease registration then claim I was still registered would have been dishonest and fraudulent. I raised a concern about public safety and professional standards. The notion that any of these actions “were intended to deceive others (be they patients, GPs or insurance companies) so that you could continue to make a living from your profession” is absurd and without any foundation whatsoever.

I was able to make a living from my profession whatever title I chose to use – whether that was a designated title or not. There was a risk that I could lose income if patients decided to seek treatment elsewhere, but that did not transpire, not least because they were all fully supportive of the action I had taken. It would be completely unacceptable to me if anyone had been misled or deceived into believing I was still registered, in any way whatsoever. I thought I was breaking the law and therefore risked prosecution. In these circumstances, it was essential to inform my patients in advance. Trust and honesty are implicit in the relationship between patients and healthcare providers – and it would be inconceivable, grossly hypocritical and improper if I behaved dishonestly or deceitfully, be that implied or explicit in any way, with those who entrusted me with their care.

No witnesses were called to support the Prosecution’s allegation of an intent to deceive. No patients or members of the public gave evidence that they were misled or deceived at any time. Instead, the defence provided the court with numerous testimonies through witness statements from patients, GPs and colleagues, that I had fully informed them of my action and made my registration status perfectly clear.

In contrast, the Prosecution’s conduct throughout has been less decorous.

Notwithstanding my argument that full disclosure of the provisions governing *use of title* should have been made at the earliest stage, the HCPC had numerous opportunities to properly inform me of the stipulations for unregistered use, but failed to do so.

When I ceased registration in September 2008 I advised the regulator of my intentions; that I would continue to practice using a designated title but I would remove all references to registration and not promote myself as such. In these circumstances, I would argue it is reasonable to have an expectation that the statutory authority with responsibility for compliance – would act honestly and in accordance with the full provision of the legislation. I could have been advised that I could practice lawfully without registration providing I took adequate measures to inform my patients and the public. But I wasn’t – and their position was reinforced by the numerous cease and desist notices subsequently received, alleging a breach of regulations.

When I met with the Prosecution barrister and solicitor at the initial court hearing on 22 May 2013, I informed them that I intended to plead not guilty – as within the summons, there were a number of items that suggested an element of dishonesty. These items were part of a malicious and vexatious complaint to the HCPC from a former business associate – and included copy invoices and letters that purported to include details of my registration during the period when I was unregistered. They documents were taken from practice records retained by this individual and altered to include my old registration details. I provided the Prosecution barrister with the original letters and invoices that demonstrated the forgery, together with statements from the two practice secretaries who had responsibility for my records.

I informed the Prosecution that whilst I fully accepted I’d practiced as a chiropodist without registration and was thus guilty of the offence, I was not prepared to plead guilty if there was any suggestion or evidence of impropriety or dishonesty in the summons. This was a public document and whilst I was prepared to plead guilty to an offence I *thought* I’d committed, I wasn’t prepared to countenance any suggestion of dishonesty.

The Prosecution agreed to remove all contested evidence on the basis that I would then lodge a guilty plea. This was subsequently carried out two weeks later and I then informed the court of a change in plea.

The *intent to deceive* element was never discussed with the Prosecution. You quote HHJ Pontius at the Central Criminal Court on 26 February 2014 where he states:

*“My finding is that the legislation is clear and that the legislation was drawn to his attention on repeated occasions in the weeks and months leading up to the trial. But I have also fond on a balance of probabilities that he had an idea in his head, mistaken that [sic] well have been, that the element of intent to deceive would not form part of the charge against him at court and that view, albeit mistaken up until that time, was reinforced by the way in which the charge was put to him by the clerk immediately before he entered his plea…”*

I have already explained why reading the *intent to deceive* text in correspondence did not illuminate the legislative provisions, given the steadfast impression created by the regulator through professional notices and policy statements for registrants. But HHJ Pontius’ assertion that I thought the ITD element would not form part of the charge suggests that there was some sort of agreement with the Prosecution to that effect. This is not the case. An *intention to deceive* was ­never mentioned in discussions and at no time was I informed that the Prosecution would require this element to be satisfied for the offence to have been committed.

Had I been so informed – I would have realised immediately the importance and implications of the disclosure – and this prosecution would not have progressed.

**3. Conclusions**

a) I was not aware of the importance and necessity of the *intent to deceive* element to the offence and consequently could not possibly have known of the circumstances conferred by this element that permit lawful unregistered use of title.

b) I did not engage in any behaviour or conduct that can be construed as dishonest, misleading or deceitful. I informed all relevant parties of my action – and in addition, published numerous articles in professional journals and online publicly accessible websites, that clearly states my circumstances, between ceasing registration and the start of my prosecution. In other words, given the direction of the court on 2October 2015, I was in full compliance with the legislation.

c) The Prosecution told the court during my evidence–in-chief in December 2015, that the HCPC did not mislead, obscure or were silent to the importance of the *intention to deceive* element. This is categorically untrue. No evidence was offered that demonstrated prior disclosure by way of advisory notes or publications, instead the only evidence provided was the inclusion of the ITD element in the final correspondence from the HCPC’s solicitors and two cease and desist notices, as noted previously.

d) Regarding prior disclosure through guidance notes, I ask you to consider the notice issued by the Nursing & Midwifery Council on 4 September 2013, shortly after my prosecution had commenced. The NHC’s legislation is synonymous with that of the HCPC’s and progressed through Parliament simultaneously. The update to their guidance for use of titles read:

*The NMC’s position regarding the use of qualifications after registration has lapsed is governed by article 44 of the Nursing and Midwifery Order 2001:
“44 – (1) A person commits an offence if, with intent to deceive (whether expressly or by implication):
(a) he falsely represents himself to be registered in the register, or a particular part of it or to be the subject of any entry in the register
(b) he uses a title referred to in article 6(2) to which he is not entitle
A person guilty of an offence under this article shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.”*

*Article 6(2) states:*

*“Each part shall have a designated title indicative of different qualifications and different kinds of education or training and a registrant is entitled to use the title corresponding to the part of the register in which he is registered.”*

*It is important, therefore, for nurses and midwives to distinguish between their qualifications and registration status.****Those who allow their registration to lapse can still refer to the fact that they are a qualified nurse, midwife or specialist community public health nurse but must not give the impression that they have current registration.***

 This updated advisory note from the NMC provides clear and unambiguous guidance for registrants whose registration has lapsed. It was not presented in evidence to the appeal court.

 The CCRC’s investigatory powers and practices are [detailed](https://ccrc.gov.uk/about-us/what-we-do/) on your website.

*To help us identify new evidence or legal argument we can use our special legal powers under section 17 of the Criminal Appeal Act 1995 to obtain information from public bodies such as the police, the Crown Prosecution Service, social services, local councils and so on. Under section 18A of the same Act, we can seek a Crown Court order to obtain material from a private individual or organisation. Our legal powers mean that we can often identify important evidence that would be impossible for others to find.*

 **Would it be possible for the CCRC to request from the HCPC, evidence of a published advisory notice as issued by the NMC for their registrants, that provides similar clear and unambiguous guidance on the same matter, together with evidence of issue date? If the HCPC can satisfy this simple request, then my argument is without foundation. If they cannot, I suggest it is irrefutable**.

e) On 10 October 2015, I wrote to Joanna Brown, Chief Executive of my professional body, the Society of Chiropodists and Podiatrists, and asked if they would confirm in writing – that my understanding of the legislation was consistent with the advice provided by the regulator. The Society declined to do so. I enclose this correspondence and subsequent emails for your consideration and in particular, the email of 4 December 2015, where she confirms:

*“In answer to your question, the significance of the intent to deceive clause was not apparent to me and I certainly do not recall any specific information on this point being sent to the Society.”*

I can provide the Court of Appeal and CCRC with similar statements from all professional bodies whose members are registrants with the HCPC.

f) When submitting this application to the Commission in January 2018, I asked if the CCRC would request the transcript for the Crown Appeal and the case-notes for both Prosecution and Defence. I was assured that it would. However, it is clear from the Commissioner’s statement of reasons, that these papers and the transcript were not available for consideration.

 The evidence heard during the Crown Appeal is vital to your deliberations, particularly the legal argument and agreement for use of titles on Friday 2 October 2015. The appeal Judge was erroneous in the written verdict and contradicted her findings from that session, regarding use of title whilst unregistered. I would also invite you to consider the evidence I gave in chief in December 2015, starting with the premise that I could not possibly have known about the provisions of the *intent to deceive* element and the circumstances it provides for unregistered use of title.

 When you do, I think you will find my evidence was not only credible and believable, but makes perfect sense in relation to the evidence before the court.

 May I request, to support this application, that you obtain a transcript of the Crown Appeal together with all the Prosecution and Defence case-notes, to include correspondence between the parties and the various skeleton arguments for each of the hearings?

Thank you for taking the time to consider these submissions and for the work you have already undertaken on this case. I do hope I have been able to provide you with sufficient grounds for further consideration in this unfortunate affair.

To state the obvious, I am not a legal expert, but I do understand the fundamental principles of honesty, truth and integrity in all aspects of public life and common law.

I therefore ask your advice and guidance on whether these submissions constitute new evidence that may provide grounds for a fresh appeal.

Yours sincerely

Mark Russell