

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 - Regulation of Health and Adult Social Care Services

Chapter 1 – Monitor

639. Monitor is currently the Independent Regulator of NHS foundation trusts. It is responsible for determining whether NHS trusts are ready to become NHS foundation trusts, ensuring foundation trusts comply with the conditions of their authorisations, and supporting their development. Monitor would continue to exist under this Act but would become the regulator for all health care services. Monitor's overarching duty will be to protect and promote the interests of people who use those services, by promoting provision of health care services which is economic, efficient and effective and which maintains or improves the quality of services. Monitor will address anti-competitive or potentially anti-competitive behaviour in the provision of health care services, set or regulate prices and support commissioners in ensuring the continuity of services. To enable it to deliver these functions, Monitor will have the power to licence providers of NHS-funded care. Monitor will also have concurrent powers with the Office of Fair Trading, in relation to healthcare services.
640. The Act allows for Monitor's functions to be extended so that they are exercisable in relation to the provision of adult social care services in England.
641. [Schedule 8](#) provides for the structure and governance of Monitor, which will remain as a non-Departmental public body. The provisions are designed, as far as is practicable, to be consistent with the other non-Departmental public bodies in the health sector.

Section 61 - Monitor

642. Monitor's current title is the 'Independent Regulator of Foundation Trusts'. This section provides that Monitor continues to exist. The organisation's legal title will become 'Monitor' and it will carry out the duties and additional functions specified in later sections. This section also gives effect to the Schedule described below.

Schedule 8 - Monitor

643. This Schedule provides for Monitor's governance arrangements. It includes details of the membership of Monitor and the process for appointments, including the appointment of the chief executive.
644. [Paragraphs 1](#) and [2](#) detail the membership and appointment of the chair, chief executive and other members of Monitor. The chair and at least four other members must be appointed by the Secretary of State. The chief executive and other executive members are appointed by the non-executive members, with the consent of the Secretary of State. The number of non-executive members must be equal to or exceed the number of executive members and no more than five executive members could be appointed without the consent of the Secretary of State. This is intended to ensure that Monitor's

board remains at an appropriate size and to ensure that appointment of any additional members is justified.

645. Paragraphs 3 to 5 make provision for arrangements for the office of non-executive members. Under these paragraphs, tenure of office is in accordance with the terms and conditions of appointment but cannot be for more than four years. The Secretary of State may suspend or remove a non-executive member from office, on the grounds of incapacity, misbehaviour, or failure to carry out duties. Where a non-executive member is suspended from office, the Secretary of State must follow the procedures set out in paragraph 4. The Secretary of State must provide the individual with notice of the suspension, and there is a process for review of the suspension. There is also provision for the Secretary of State to appoint an interim chair when a chair is suspended (see paragraph 5).
646. The suspension must be for an initial period of not more than six months. It may be reviewed by the Secretary of State at any time and must be reviewed if the person suspended requests it.
647. Paragraph 6 requires that Monitor must pay to non-executive members such remuneration and allowances as the Secretary of State may determine. It also provides for Monitor to make arrangements for pensions, allowances and gratuities to be paid to non-executive members or former non-executive members. These arrangements would be for Monitor to determine with the approval of the Secretary of State.
648. Paragraph 7 provides Monitor with powers to employ staff on such pay, terms and conditions as it may determine, following Secretary of State approval of its policy on the remuneration, pensions etc of employees.
649. Paragraph 8 makes provision about pension arrangements for the person appointed as chair of Monitor. Where that person is a member of a public sector pension scheme under section 1 of the Superannuation Act 1972, the Minister for the Civil Service can decide whether time as chair of Monitor can count as years of service for that pension scheme. This paragraph also makes provision for employment with Monitor to be included among the kinds of employment to which such a pension schemes may apply.
650. Paragraph 9 gives Monitor the power to appoint committees and sub-committees, and to pay remuneration and allowances to committee members if they are not members or employees of Monitor.
651. Paragraph 10 allows Monitor to regulate its own procedure and states that any vacancy amongst the members does not affect the validity of its actions.
652. Paragraph 11 requires Monitor to act effectively, efficiently and economically in exercising its functions and provides power to arrange for any of its functions to be exercised on its behalf by certain persons.
653. Paragraph 12 enables Monitor to engage and pay individuals to contribute to particular cases or types of cases. This will enable Monitor to have access to people with specialist skills during its consideration of such cases.
654. Paragraph 13 gives Monitor the power to temporarily borrow money by overdraft with the consent of the Secretary of State. Other than this arrangement and powers to borrow money in relation to financial mechanisms to support continuity of services, Monitor is not allowed to borrow money.
655. Paragraph 14 allows Monitor to obtain and compile information in order to be able to take informed decisions in exercising its functions. This could include the commissioning or supporting of research.
656. Paragraph 15 gives Monitor the power to do anything it needs to in order to exercise its functions.

657. [Paragraph 16](#) allows the Secretary of State to fund Monitor's activities to the extent that he considers appropriate.
658. [Paragraph 17](#) makes provision about NHS foundation trust accounts. Monitor is required to prepare a set of accounts in each financial year which consolidates the annual accounts of all foundation trusts. The Secretary of State may, with HM Treasury approval, direct Monitor to prepare a set of interim accounts which consolidates any interim accounts prepared by NHS foundation trusts. The Secretary of State may, also with HM Treasury approval, give directions which specify the content and form of the accounts and methods and principles by which the accounts should be prepared. This ensures that the Secretary of State would receive whatever information in respect of foundation trusts he required to permit him to fulfil his statutory duties in respect of the Department's own consolidated Resource Accounts.
659. Any consolidated accounts (both annual and interim) prepared by Monitor under this paragraph must be audited by the Comptroller and Auditor General where the Secretary of State directs. Monitor is also required to act with a view to securing that NHS foundation trusts comply promptly with requests from it or from the Secretary of State relating to accounts, and to facilitate the preparation of accounts by the Secretary of State.
660. Once the responsibility for preparing consolidated accounts for foundation trusts transfers from Monitor to the Secretary of State, this paragraph will no longer apply.
661. [Paragraphs 18 to 20](#) make provision about Monitor's accounts. Monitor is required, as a non-Departmental public body, to prepare its own annual accounts in the form and with the content, and using methods and principles, determined by the Secretary of State with HM Treasury's approval. Monitor must prepare annual accounts which must be sent to the Comptroller and Auditor General who is responsible for laying copies of the audited accounts (and his report on them) before Parliament.
662. The Secretary of State may require Monitor to produce interim accounts in addition to its annual accounts. The Secretary of State may direct that these accounts are sent to the Auditor General and Comptroller for audit. If they are, copies must be laid before Parliament along with the report on the accounts.
663. [Paragraph 21](#) provides that Monitor must publish an annual report on how it has exercised its functions. In particular, the report must set out how Monitor has promoted economy, efficiency and effectiveness and include statements of what it did to comply with its duties in sections 63(2) and 64(1)(h) (duties to have regard to Secretary of State guidance) . Monitor must lay a copy before Parliament and send a copy to the Secretary of State. Monitor is also required to provide further information about its own functions and any information that it holds about NHS foundation trusts to the Secretary of State as required.
664. [Paragraph 22](#) requires Monitor to respond to recommendations made by the Parliamentary Committees about the exercise of its functions.
665. [Paragraphs 23 and 24](#) concern the use of Monitor's seal and its non-Crown status. These provisions replicate those currently in the NHS Act.

Section 62 – General duties

666. This section provides for Monitor's principal overarching duty and certain other general duties. Monitor's main duty is to exercise its functions so as to protect and promote the interests of people who use health care services, by promoting the provision of health care services that are economic, efficient and effective and which maintain or improve the quality of services. It is intended that in 'protecting' interests Monitor will act to ensure that the interests of people who use health services are not diminished; whilst 'promote' is intended to mean furthering their interests. *Subsection (2)* provides that Monitor, in carrying out this duty, must consider the likely future demand for health

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services. These general duties will apply to the exercise of all of Monitor's functions, including those functions it will continue to exercise under the NHS Act.

667. *Subsection (3)* provides that Monitor must exercise its functions with a view to preventing anti-competitive behaviour in the provision of NHS health care services, where such behaviour is against the interests of NHS patients. For example, if providers colluded to fix prices or to restrict the range of services available to commissioners (eg. to restrict provision of care in patients' homes rather than in a clinic or hospital setting), against the interests of patients, then such behaviour may be anti-competitive.
668. *Subsections (4) to (6)* concern the integration of NHS healthcare services, and between health and social care services. Subsections (4) and (5) require Monitor to exercise its functions with a view to enabling the integration of health care services or the integration of health care services with other health-related services or social care services, provided it considers certain conditions are met. These are that the integration of services would:
- improve the outcomes from or other aspects of the quality of services,
 - improve the efficiency with which they are provided,
 - reduce inequalities in access to services,
 - reduce inequalities between patients in the outcomes services achieved.
669. An example of a health-related service in this context could be a pharmaceutical service.
670. *Subsection (6)* should ensure that, in enabling the integration of services, Monitor works effectively with, and where appropriate takes its lead from, commissioners. The subsection requires Monitor, when enabling the integration of services, to have regard to the duties on the NHS Commissioning Board and on commissioners to promote the integration of services.
671. *Subsection (7)* requires Monitor to make proper provision for the involvement of patients and the wider public in its work. It would be for Monitor to decide what arrangements for patient and public involvement would be appropriate to particular aspects of its work and how to secure that involvement. The subsection excludes decisions that Monitor makes in individual cases (such as whether or not to award a licence to a particular provider). There is specific provision elsewhere in the Act for Monitor to consult particular organisations and people when exercising certain functions, for example under section 118 (consultation on proposals for the national tariff).
672. *Subsection (8)* requires Monitor, as appropriate, to secure professional clinical and public health advice to help it to discharge its functions effectively. It would be for Monitor to decide what clinical and public health advice would be appropriate to particular aspects of its work and how to secure that advice.
673. The Secretary of State has a duty under section 1(1) of the NHS Act to promote a comprehensive health service, and *subsection (9)* requires Monitor to exercise its functions in a manner consistent with the Secretary of State's performance of that duty.
674. *Subsection (10)* is intended to ensure that Monitor does not, exercise its function for the purpose of causing any variation in the proportion of NHS health care services that are delivered by a particular description of provider, where that description is by reference to whether the provider is public or private sector or some other aspect of their status. The Act provides for similar duties on the Secretary of State and the NHS Commissioning Board.

Section 63 – Secretary of State’s guidance on duty under section 62(9)

675. This section provides the Secretary of State a power to publish guidance for the purposes of assisting Monitor to comply with its duty under section 62(9) to exercise its functions in a manner consistent with the Secretary of State’s duty to promote a comprehensive health service in England.
676. *Subsection (1)* provides that the guidance would address-
- a) the objectives specified in the mandate published under section 13A of the NHS Act which the Secretary of State considers to be relevant to Monitor’s exercise of its functions, and
 - b) the Secretary of State’s reasons for considering those objectives to be relevant to Monitor’s exercise of its functions.
677. *Subsection (2)* requires that in exercising its functions, Monitor must have regard to any such guidance.
678. *Subsection (3)* provides that where the Secretary of State publishes guidance under subsection (1), the Secretary of State must lay a copy of the published guidance before Parliament.

Section 64 - General duties: supplementary

679. This section makes provision that applies to Part 3 including several definitions. In particular, it provides in *subsection (6)* that Monitor’s duties relate only to the supply of services, not goods supplied to services providers. However, Monitor’s duties would apply where the goods supplied are an integral part of healthcare services provided. This means, for example, that Monitor’s duties extend to the supply to the NHS of the entirety of a hip replacement service, including the replacement joint and necessary drugs. However, the duties would not cover the supply of the joints and drugs from the manufacturers to the supplier of the hip replacement service, which would be commercial matters.

Section 65 - Power to give Monitor functions relating to adult social care services

680. This section allows the Secretary of State to make regulations enabling or requiring Monitor to exercise certain specified functions in relation to adult social care in England. .

Section 66 - Matters to have regard to in exercise of functions

681. This section provides a list of the considerations to which Monitor must have regard when carrying out its functions.
682. *Subsection (1)* provides that the need to maintain the safety of people who use health care services would be paramount amongst the matters that Monitor must have regard to in carrying out its functions.
683. *Subsection (2)(a)* concerns the need for continuous improvement in quality and efficiency in NHS services. The inclusion of continuous improvement in the quality of NHS healthcare services is to ensure that Monitor’s actions must not impede the Secretary of State, NHS Commissioning Board and CCGs in carrying out their duties with a view to improving quality.
684. *Subsection (2)(b) to (d)* concerns the need for commissioners to ensure fair access to services based on clinical need and make best use of resources in doing so. These provisions are intended to ensure that Monitor acts in concert with commissioners and does not impede them in the exercise of their duties.

685. *Subsection (2)(e)* concerns the desirability for providers of NHS health care services to cooperate with one another to improve the quality of such services. It complements the provision in subsections (4) to (6) of section 62 which place a duty on Monitor to act with a view to enabling integration. Subsection (2)(e) will be relevant in situations where services are integrated and, more generally, to ensure quality of care across organisational boundaries, for example, through appropriate sharing of information. For example, providers would need to cooperate to ensure that patients who are discharged from hospital to other care settings, including domiciliary care, experience a smooth transition and that appropriate information is shared across organisational boundaries to enable continuity and quality of care. Subsection (2)(e) is intended to ensure that in exercising its functions, Monitor has regard to the need for such cooperation.
686. *Subsections (2)(f) and (g)* require Monitor to have regard to the need to promote research into matters relevant to the NHS and to the need for high standards of education and training for healthcare professionals, in carrying out its functions.
687. *Subsection (2)(h)* provides that Monitor must have regard to any guidance the Secretary of State publishes on the parts of the document published for the purpose of section 13E of the NHS Act (improvement of quality of services) which the Secretary of State considers to be particularly relevant to the exercise of Monitor's functions. This may include, for example, guidance on national metrics for quality of care and health outcomes,

Section 67 - Conflicts between functions

688. This section places requirements on Monitor when it considers that conflicts arise between its general duties under sections 62 and 66. The requirements include resolving any such conflict in the manner Monitor considers best, and publishing statements of conflicts that have arisen that are of particular significance, how they have been resolved and the reasons for resolving them in the manner chosen. The guiding principle for Monitor in resolving any such conflicts would be its overarching duty to 'protect and promote patients' interests by promoting healthcare services which (a) is economic, efficient and effective, and (b) maintains or improves the quality of the services.
689. *Subsection (2)* requires that Monitor must carry out its functions so that there is not, and could not reasonably be regarded as being, any conflict between: (a) its exercise of the functions it has under the NHS Act and paragraph 17 of Schedule 8 to this Act, and its transitional functions under sections 111 and 113 of this Act, and (b) its exercise of any of its other functions.
690. *Subsection (3)* provides that Monitor must ignore any consideration of its transitional functions under sections 111 and 113 when exercising its competition functions, under Chapter 2, or its pricing functions under Chapter 4. For example, Monitor would need to establish "chinese walls" within its organisation so that any information relating to the exercise of its functions under sections 111 and 113 in individual cases could not influence the exercise of its competition and pricing functions .
691. *Subsections (4) and (5)* create additional requirements for Monitor to act transparently by publishing a statement on how it has resolved any conflict between its general duties that may arise in a particular case. Such a statement must set out: the nature of the conflict; the manner in which Monitor decided to resolve it; and, its reasons for deciding to resolve it in that manner. The cases to which these further requirements apply are ones, which either: involve a major change to Monitor's activities, including a major change to standard licence conditions under section 94; or are likely to have a significant impact upon persons who provide, or persons who use, NHS services, or the upon the general public in England (or a particular part of England); or, which, Monitor considers are otherwise of unusual importance.
692. Every year, Monitor must include in its annual report a statement setting out the arrangements it has made to avoid conflicts arising in the exercise of its functions, under

subsection (2), and a summary of how it has resolved any conflicts arising in particular cases under subsection (5).

Section 68 - Duty to review regulatory burdens

693. This section requires Monitor to keep its exercise of functions under review to ensure that it does not impose or maintain unnecessary burdens, having regard to best regulatory practice. It is based on section 72 of the Regulatory Enforcement and Sanctions Act 2008. The purpose of *subsection (1)* is to ensure that Monitor only imposes regulation that is necessary and proportionate, and that this is reviewed over time. This means that where developments over time render a particular regulatory burden no longer necessary then Monitor should remove that burden.
694. The remainder of this section stipulates that Monitor is required to publish a statement, reporting upon its duty to review regulatory burdens over the previous year and setting out its plans for the following year. Monitor is then required to have regard to its statement when carrying out its functions. Monitor would be able to revise the statement, but must publish revisions as soon as practicable.

Section 69 - Duty to carry out impact assessments

695. This section requires Monitor to carry out and publish an impact assessment, or publish reasons for not carrying out such an assessment, before taking certain actions. Where Monitor carries out an impact assessment, it must allow representations on the proposal. The requirements apply in relation to anything Monitor intends to do that is likely to have a significant impact on patients, providers or the public, or involve either a major change in the activities Monitor undertakes or a major changes in the standard conditions for holding a licence. The section does not apply to the exercise by Monitor of its functions under Chapter 2 (competition), including when carrying out individual investigations.
696. *Subsections (5) and (6)* provide for what the impact assessment must contain and the form it should take. An impact assessment must set out how a particular action was intended to fulfil Monitor's general duties, including what the particular action was intended to achieve and explain why. Where relevant an impact assessment would need to explain why Monitor could not secure the desired outcome by exercising its powers under the Competition Act 1998 or the Enterprise Act 2002. Monitor may decide what else the assessment should include, taking account of general guidance on impact assessments as appropriate.
697. *Subsections (7) and (8)* provide for consultation on impact assessments. The impact assessment must specify a consultation period of not less than 28 days. Monitor cannot implement the proposed action until the consultation period has ended. *Subsection (9)* also makes it clear that the duty to consult under this section is in addition to any other obligations Monitor has to consult about a particular issue although the consultations may take place at the same time.
698. *Subsection (10)* stipulates the way in which Monitor would be required to report upon the assessments it had carried out in each financial year.

Section 70 - Information

699. This section stipulates that Monitor may use any of the information it collects from providers to support any of its regulatory functions. It must supply any information to the Secretary of State as requested for the exercise by him of a function under this Part.

Section 71 – Failure to perform functions

700. This section gives power to the Secretary of State to direct Monitor as to the performance of its functions, when he considers that Monitor is failing, or has

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failed, to perform its functions properly, or at all, and that the failure is significant. Failure to perform a function properly will include failure to perform that function consistently with what the Secretary of State considers to be in the interests of the health service (*subsection (6)(b)*). It is intended that this power would only be used in exceptional circumstances. Similar powers of intervention are included in the Act for other non-Departmental bodies including the Care Quality Commission and the NHS Commissioning Board. The Secretary of State can direct Monitor to perform those functions. When exercising that power, the Secretary of State must publish the reasons for doing so. However, the Secretary of State may not, under *subsection (2)*, intervene with regard to Monitor's performance of its functions in individual cases. Where Monitor fails to comply with such a direction, the Secretary of State may carry out the functions in question, or make arrangements for some other person to perform them on the Secretary of State's behalf.

701. This section does not apply to Monitor's functions under sections 72 and 73. This means that the Secretary of State cannot intervene to perform concurrent functions under the Competition Act 1998 or the Enterprise Act 2002, including undertaking investigations or enforcement action in individual cases.