



# Health and Social Care Act 2012

## 2012 CHAPTER 7

### PART 3

#### REGULATION OF HEALTH AND ADULT SOCIAL CARE SERVICES

### CHAPTER 3

#### LICENSING

#### *Enforcement*

#### **104 Power to require documents and information**

- (1) Monitor may require a person mentioned in subsection (2) to provide it with any information, documents, records or other items which it considers it necessary or expedient to have for the purposes of any of its regulatory functions.
- (2) The persons are—
  - (a) an applicant for a licence under this Chapter,
  - (b) a licence holder,
  - (c) a person who has provided, or is providing, a health care service for the purposes of the NHS in accordance with an exemption by virtue of section 83 from the requirement to hold a licence under this Chapter,
  - (d) a person who has provided, or is providing, a health care service for the purposes of the NHS in breach of that requirement,
  - (e) the National Health Service Commissioning Board, and
  - (f) a clinical commissioning group.
- (3) The power in subsection (1) includes, in relation to information, documents or records kept by means of a computer, power to require the provision of the information, documents or records in legible form.

- (4) For the purposes of subsection (1) Monitor’s regulatory functions are its functions under—
- (a) this Chapter,
  - (b) Chapters 4 to 6,
  - (c) Chapter 5 of Part 2 of the National Health Service Act 2006 (NHS foundation trusts), and
  - (d) Chapter 5A of that Part of that Act (trust special administration).

## **105 Discretionary requirements**

- (1) Monitor may impose one or more discretionary requirements on a person if Monitor is satisfied that the person—
- (a) has provided, or is providing, a health care service for the purposes of the NHS in breach of the requirement to hold a licence under this Chapter (see section 81),
  - (b) is a licence holder who has provided, or is providing, a health care service for the purposes of the NHS in breach of a condition of the licence, or
  - (c) is in breach of a requirement imposed by Monitor under section 104.
- (2) In this Chapter, “discretionary requirement” means—
- (a) a requirement to pay a monetary penalty to Monitor of such amount as Monitor may determine (referred to in this Chapter as a “variable monetary penalty”),
  - (b) a requirement to take such steps within such period as Monitor may specify, to secure that the breach in question does not continue or recur (referred to in this Chapter as a “compliance requirement”), or
  - (c) a requirement to take such steps within such period as Monitor may specify, to secure that the position is, so far as possible, restored to what it would have been if the breach in question was not occurring or had not occurred (referred to in this Chapter as a “restoration requirement”).
- (3) Monitor must not impose discretionary requirements on a person on more than one occasion in relation to the same breach.
- (4) A variable monetary penalty must not exceed 10% of the turnover in England of the person on whom it is imposed, such amount to be calculated in the prescribed manner.
- (5) If the whole or any part of a variable monetary penalty is not paid by the time it is required to be paid, the unpaid balance from time to time carries interest at the rate for the time being specified in section 17 of the Judgments Act 1838; but the total interest must not exceed the amount of the penalty.

## **106 Enforcement undertakings**

- (1) Monitor may accept an enforcement undertaking from a person if Monitor has reasonable grounds to suspect that the person—
- (a) has provided, or is providing, a health care service for the purposes of the NHS in breach of the requirement to hold a licence under this Chapter,
  - (b) is a licence holder who has provided, or is providing, a health care service for the purposes of the NHS in breach of a condition of the licence, or
  - (c) is in breach of a requirement imposed by Monitor under section 104.

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- (2) In this Chapter, “enforcement undertaking” means an undertaking from a person to take such action of a kind mentioned in subsection (3) as may be specified in the undertaking within such period as may be so specified.
- (3) The specified action must be—
  - (a) action to secure that the breach in question does not continue or recur,
  - (b) action to secure that the position is, so far as possible, restored to what it would have been if the breach in question was not occurring or had not occurred,
  - (c) action (including the payment of a sum of money) to benefit—
    - (i) any other licence holder affected by the breach, or
    - (ii) any commissioner of health care services for the purposes of the NHS which is affected by the breach, or
  - (d) action of such a description as may be prescribed.
- (4) Where Monitor accepts an enforcement undertaking then, unless the person from whom the undertaking is accepted has failed to comply with the undertaking or any part of it—
  - (a) Monitor may not impose on that person any discretionary requirement which it would otherwise have power to impose by virtue of section 105 in respect of the breach to which the undertaking relates, and
  - (b) if the breach to which the undertaking relates falls within subsection (1)(b), Monitor may not revoke that person’s licence under section 89(b).
- (5) Where a person from whom Monitor has accepted an enforcement undertaking has failed to comply fully with the undertaking but has complied with part of it, Monitor must take the partial compliance into account in deciding whether—
  - (a) to impose a discretionary requirement on the person in respect of the breach to which the undertaking relates, or
  - (b) if the breach to which the undertaking relates falls within subsection (1)(b), to revoke the person’s licence under section 89(b).

## **107 Further provision about enforcement powers**

Schedule 11 (Part 1 of which makes further provision about discretionary requirements and Part 2 of which makes further provision about enforcement undertakings) has effect.

## **108 Guidance as to use of enforcement powers**

- (1) Monitor must publish guidance about how it intends to exercise its functions under sections 105 and 106 and Schedule 11.
- (2) Monitor may revise the guidance and, if it does so, must publish the guidance as revised.
- (3) Monitor must consult such persons as it considers appropriate before publishing or revising the guidance.
- (4) Guidance relating to Monitor’s functions under section 105 must include information about—
  - (a) the circumstances in which Monitor is likely to impose a discretionary requirement,

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- (b) the circumstances in which Monitor may not impose a discretionary requirement,
  - (c) the matters likely to be taken into account by Monitor in determining the amount of any variable monetary penalty to be imposed (including, where relevant, any discounts for voluntary reporting of breaches in respect of which a penalty may be imposed), and
  - (d) rights to make representations and rights of appeal.
- (5) Monitor must have regard to the guidance or (as the case may be) revised guidance in exercising its functions under sections 105 and 106 and Schedule 11.

### **109 Publication of enforcement action**

- (1) Monitor must include information about the following in its annual report—
- (a) the cases in which a discretionary requirement has been imposed during the financial year to which the report relates, and
  - (b) the cases in which an enforcement undertaking has been accepted during that financial year.
- (2) But Monitor must not include information which it is satisfied is—
- (a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the person to whom it relates;
  - (b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person’s interests.
- (3) The reference in subsection (1)(a) to cases in which a discretionary requirement has been imposed does not include a reference to a case where a discretionary requirement has been imposed but overturned on appeal.

### **110 Notification of enforcement action**

- (1) As soon as reasonably practicable after imposing a discretionary requirement or accepting an enforcement undertaking Monitor must notify the following of that fact—
- (a) the National Health Service Commissioning Board,
  - (b) such clinical commissioning groups as are likely to be affected by the imposition of the requirement or the acceptance of the undertaking, and
  - (c) any person exercising regulatory functions in relation to the person on whom the discretionary requirement was imposed or from whom the enforcement undertaking was accepted.
- (2) In subsection (1) “regulatory functions” has the same meaning as in the Legislative and Regulatory Reform Act 2006 (see section 32 of that Act).