



# Health and Social Care Act 2012

## 2012 CHAPTER 7

### PART 3

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

### CHAPTER 3

#### LICENSING

#### *Licence conditions*

#### 94 Standard conditions

- (1) Monitor must determine and publish the conditions to be included in each licence under this Chapter (referred to in this Chapter as “the standard conditions”).
- (2) Different standard conditions may be determined for different descriptions of licences.
- (3) For the purposes of subsection (2) a description of licences may, in particular, be framed wholly or partly by reference to—
  - (a) the nature of the licence holder,
  - (b) the services provided under the licence, or
  - (c) the areas in which those services are provided.
- (4) But different standard conditions must not be determined for different descriptions of licences to the extent that the description is framed by reference to the nature of the licence holder unless Monitor considers that at least one of requirements 1 and 2 is met.
- (5) Requirement 1 is that—
  - (a) the standard conditions in question relate to the governance of licence holders, and
  - (b) it is necessary to determine different standard conditions in order to take account of differences in the status of different licence holders.

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- (6) Requirement 2 is that it is necessary to determine different standard conditions for the purpose of ensuring that the burdens to which different licence holders are subject as a result of holding a licence are broadly consistent.
- (7) Before determining the first set of the standard conditions Monitor must consult the persons mentioned in subsection (8) on the conditions it is proposing to determine (“the draft standard conditions”).
- (8) Those persons are—
  - (a) the Secretary of State,
  - (b) the NHS Commissioning Board Authority,
  - (c) every Primary Care Trust,
  - (d) the Care Quality Commission, and
  - (e) such other persons as are likely to be affected by the inclusion of the conditions in licences under this Chapter as Monitor considers appropriate.
- (9) Monitor must also publish the draft standard conditions.
- (10) The Secretary of State may direct Monitor not to determine that the standard conditions will be the draft standard conditions.
- (11) If, at the time Monitor discharges the function under subsection (7), the day specified by the Secretary of State for the purposes of section 14A of the National Health Service Act 2006 has passed or section 9 or 181 has come into force—
  - (a) in the case of section 14A of the National Health Service Act 2006, the reference in subsection (8)(c) to every Primary Care Trust is to be read as a reference to every clinical commissioning group;
  - (b) in the case of section 9, the reference in subsection (8)(b) to the NHS Commissioning Board Authority is to be read as a reference to the National Health Service Commissioning Board;
  - (c) in the case of section 181, the reference in subsection (8)(d) to the Care Quality Commission is to be read as including a reference to its Healthwatch England committee.

## **95 Special conditions**

- (1) Monitor may—
  - (a) with the consent of the applicant, include a special condition in a licence under this Chapter, and
  - (b) with the consent of the licence holder, modify a special condition of a licence.
- (2) Before including a special condition or making such modifications Monitor must give notice to—
  - (a) the applicant or the licence holder (as the case may be),
  - (b) the Secretary of State,
  - (c) the National Health Service Commissioning Board,
  - (d) such clinical commissioning groups as are likely to be affected by the proposed inclusion or modifications, and
  - (e) the Care Quality Commission and its Healthwatch England committee.
- (3) Monitor must also publish the notice under subsection (2).

- (4) The notice under subsection (2) must—
  - (a) state that Monitor proposes to include the special condition or make the modifications and set out its or their proposed effect,
  - (b) set out Monitor’s reasons for the proposal, and
  - (c) specify the period (“the notice period”) within which representations with respect to the proposal may be made to Monitor.
- (5) The notice period must be not less than 28 days beginning with the day after that on which the notice is published under subsection (3).
- (6) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

## **96 Limits on Monitor’s functions to set or modify licence conditions**

- (1) This section applies to the following functions of Monitor—
  - (a) the duty to determine the standard conditions to be included in each licence under this Chapter or in licences of a particular description (see section 94);
  - (b) the powers to include a special condition in a licence and to modify such a condition (see section 95);
  - (c) the power to modify the standard conditions applicable to all licences, or to licences of a particular description (see section 100).
- (2) Monitor may only exercise a function to which this section applies—
  - (a) for the purpose of regulating the price payable for the provision of health care services for the purposes of the NHS;
  - (b) for the purpose of preventing anti-competitive behaviour in the provision of health care services for those purposes which is against the interests of people who use such services;
  - (c) for the purpose of protecting and promoting the right of patients to make choices with respect to treatment or other health care services provided for the purposes of the NHS;
  - (d) for the purpose of ensuring the continued provision of health care services for the purposes of the NHS;
  - (e) for the purpose of enabling health care services provided for the purposes of the NHS to be provided in an integrated way where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
  - (f) for the purpose of enabling the provision of health care services provided for the purposes of the NHS to be integrated with the provision of health-related services or social care services where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
  - (g) for the purpose of enabling co-operation between providers of health care services for the purposes of the NHS where Monitor considers that this would achieve one or more of the objectives referred to in subsection (3);
  - (h) for purposes connected with the governance of persons providing health care services for the purposes of the NHS;
  - (i) for purposes connected with Monitor’s functions in relation to the register of NHS foundation trusts required to be maintained under section 39 of the National Health Service Act 2006;

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- (j) for purposes connected with the operation of the licensing regime established by this Chapter;
  - (k) for such purposes as may be prescribed for the purpose of enabling Monitor to discharge its duties under section 62.
- (3) The objectives referred to in subsection (2)(e), (f) and (g) are—
- (a) improving the quality of health care services provided for the purposes of the NHS (including the outcomes that are achieved from their provision) or the efficiency of their provision,
  - (b) reducing inequalities between persons with respect to their ability to access those services, and
  - (c) reducing inequalities between persons with respect to the outcomes achieved for them by the provision of those services.
- (4) Monitor must not exercise a function to which this section applies in a way which it considers would result in a particular licence holder or holders of licences of a particular description being put at an unfair advantage or disadvantage in competing with others in the provision of health care services for the purposes of the NHS as a result of—
- (a) being in the public or (as the case may be) private sector, or
  - (b) some other aspect of its or their status.
- (5) In subsection (2)(f), “health-related services” and “social care services” each have the meaning given in section 62(11).

## 97 **Conditions: supplementary**

- (1) The standard or special conditions of a licence under this Chapter may, in particular, include conditions—
- (a) requiring the licence holder to pay to Monitor such fees of such amounts as Monitor may determine in respect of the exercise by Monitor of its functions under this Chapter,
  - (b) requiring the licence holder to comply with any requirement imposed on it by Monitor under Chapter 6 (financial assistance in special administration cases),
  - (c) requiring the licence holder to do, or not to do, specified things or things of a specified description (or to do, or not to do, any such things in a specified manner) within such period as may be specified in order to prevent anti-competitive behaviour in the provision of health care services for the purposes of the NHS which is against the interests of people who use such services,
  - (d) requiring the licence holder to give notice to the Office of Fair Trading before entering into an arrangement under which, or a transaction in consequence of which, the licence holder’s activities, and the activities of one or more other businesses, cease to be distinct activities,
  - (e) requiring the licence holder to provide Monitor with such information as Monitor considers necessary for the purposes of the exercise of its functions under this Part,
  - (f) requiring the licence holder to publish such information as may be specified or as Monitor may direct,
  - (g) requiring the licence holder to charge for the provision of health care services for the purposes of the NHS in accordance with the national tariff (see section 116),

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- (h) requiring the licence holder to comply with other rules published by Monitor about the charging for the provision of health care services for the purposes of the NHS,
  - (i) requiring the licence holder—
    - (i) to do, or not to do, specified things or things of a specified description (or to do, or not to do, any such things in a specified manner) within such period as may be specified in order to ensure the continued provision of one or more of the health care services that the licence holder provides for the purposes of the NHS,
    - (ii) to give Monitor notice (of such period as may be determined by or under the licence) of the licence holder’s intention to cease providing a health care service for the purposes of the NHS, and
    - (iii) if Monitor so directs, to continue providing that service for a period determined by Monitor,
  - (j) about the use or disposal by the licence holder of assets used in the provision of health care services for the purposes of the NHS in order to ensure the continued provision of one or more of the health care services that the licence holder provides for those purposes, and
  - (k) about the making by the licence holder of investment in relation to the provision of health care services for the purposes of the NHS in order to ensure the continued provision of one or more of the health care services that the licence holder provides for those purposes.
- (2) In subsection (1) “specified” means specified in a condition.
- (3) Monitor must not include a condition under subsection (1)(c) that requires the licence holder (A) to provide another licence holder with access to facilities of A.
- (4) A condition under subsection (1)(d)—
- (a) may be included only in the licence of an NHS foundation trust or a body which (or part of which) used to be an NHS trust established under section 25 of the National Health Service Act 2006, and
  - (b) ceases to have effect at the end of the period of five years beginning with the day on which it is included in the licence.
- (5) The references in subsection (1)(d) to the activities of a licence holder or other business include a reference to part of the activities concerned.
- (6) The references in subsections (1)(d) and (5) to the activities of a business include a reference to the activities of an NHS foundation trust in so far as its activities would not otherwise be the activities of a business.
- (7) A condition of a licence under this Chapter may provide that it is to have effect, or cease to have effect, at such times and in such circumstances as may be determined by or under the conditions.

## **98 Conditions relating to the continuation of the provision of services etc.**

- (1) The things which a licence holder may be required to do by a condition under section 97(1)(i)(i) include, in particular—
- (a) providing information to the commissioners of services to which the condition applies and to such other persons as Monitor may direct,

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- (b) allowing Monitor to enter premises owned or controlled by the licence holder and to inspect the premises and anything on them, and
  - (c) co-operating with such persons as Monitor may appoint to assist in the management of the licence holder's affairs, business and property.
- (2) A commissioner of services to which a condition under section 97(1)(i), (j) or (k) applies must co-operate with persons appointed under subsection (1)(c) in their provision of the assistance that they have been appointed to provide.
- (3) Where a licence includes a condition under section 97(1)(i), (j) or (k), Monitor must carry out an ongoing assessment of the risks to the continued provision of services to which the condition applies.
- (4) Monitor must publish guidance—
- (a) for commissioners of a service to which a condition under section 97(1)(i), (j) or (k) applies about the exercise of their functions in connection with the licence holders who provide the service, and
  - (b) for such licence holders about the conduct of their affairs, business and property at a time at which such a condition applies.
- (5) A commissioner of services to which a condition under section 97(1)(i), (j), or (k) applies must have regard to guidance under subsection (4)(a).
- (6) Monitor may revise guidance under subsection (4) and, if it does so, must publish the guidance as revised.
- (7) Before publishing guidance under subsection (4) or (6), Monitor must obtain the approval of—
- (a) the Secretary of State, and
  - (b) the National Health Service Commissioning Board.

## **99 Notification of commissioners where continuation of services at risk**

- (1) This section applies where Monitor—
- (a) takes action in the case of a licence holder in reliance on a condition in the licence under section 97(1)(i), (j) or (k), and
  - (b) does so because it is satisfied that the continued provision for the purposes of the NHS of health care services to which that condition applies is being put at significant risk by the configuration of certain health care services provided for those purposes.
- (2) In subsection (1), a reference to the provision of services is a reference to their provision by the licence holder or any other provider.
- (3) Monitor must as soon as reasonably practicable notify the National Health Service Commissioning Board and such clinical commissioning groups as Monitor considers appropriate—
- (a) of the action it has taken, and
  - (b) of its reasons for being satisfied as mentioned in subsection (1)(b).
- (4) Monitor must publish for each financial year a list of the notifications under this section that it has given during that year; and the list must include for each notification a summary of Monitor's reasons for being satisfied as mentioned in subsection (1)(b).

- (5) The Board and clinical commissioning groups, having received a notification under this section, must have regard to it in arranging for the provision of health care services for the purposes of the NHS.

#### **100 Modification of standard conditions**

- (1) Monitor may, subject to the requirements of this section, modify the standard conditions applicable to all licences under this Chapter or to licences of a particular description.
- (2) Before making any such modifications Monitor must give notice to—
- (a) each relevant licence holder,
  - (b) the Secretary of State,
  - (c) the National Health Service Commissioning Board,
  - (d) every clinical commissioning group, and
  - (e) the Care Quality Commission and its Healthwatch England committee.
- (3) Monitor must also publish the notice under subsection (2).
- (4) The notice under subsection (2) must—
- (a) state that Monitor proposes to make the modifications,
  - (b) set out the proposed effect of the modifications,
  - (c) set out Monitor’s reasons for the proposal, and
  - (d) specify the period (“the notice period”) within which representations with respect to the proposal may be made to Monitor.
- (5) The notice period must be not less than 28 days beginning with the day after that on which the notice is published under subsection (3).
- (6) Monitor may not make any modifications under this section unless—
- (a) no relevant licence holder has made an objection to Monitor about the proposal within the notice period, or
  - (b) subsection (7) applies to the case.
- (7) This subsection applies where—
- (a) one or more relevant licence holders make an objection to Monitor about the proposal within the notice period,
  - (b) the objection percentage is less than the percentage prescribed for the purposes of this paragraph, and
  - (c) the share of supply percentage is less than the percentage prescribed for the purposes of this paragraph.
- (8) In subsection (7)—
- (a) the “objection percentage” is the proportion (expressed as a percentage) of the relevant licence holders who objected to the proposals;
  - (b) the “share of supply percentage” is the proportion (expressed as a percentage) of the relevant licence holders who objected to the proposals, weighted according to their share of the supply in England of such services as may be prescribed.

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- (9) Regulations prescribing a percentage for the purposes of subsection (7)(c) may include provision prescribing the method to be used for determining a licence holder's share of the supply in England of the services concerned.
- (10) Where Monitor modifies the standard conditions applicable to all licences or (as the case may be) to licences of a particular description under this section, Monitor—
- (a) may also make such incidental or consequential modifications as it considers necessary or expedient of any other conditions of a licence which is affected by the modifications,
  - (b) must make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
  - (c) must publish the modifications.
- (11) In this section and section 101, “relevant licence holder”—
- (a) in relation to proposed modifications of the standard conditions applicable to all licences, means any licence holder, and
  - (b) in relation to proposed modifications of the standard conditions applicable to licences of a particular description, means a holder of a licence of that description.
- (12) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

## **101 Modification references to the Competition Commission**

- (1) Subsection (2) applies where—
- (a) Monitor has given notice under section 95(2) of a proposal to include a special condition in a licence or modify such a condition, and
  - (b) the applicant or (as the case may be) licence holder concerned has refused consent to the inclusion of the condition or the making of the modifications.
- (2) Monitor may make a reference to the Competition Commission which is so framed as to require the Commission to investigate and report on the questions—
- (a) whether any matters which relate to the provision, or proposed provision, of a health care service for the purposes of the NHS by the applicant or (as the case may be) licence holder concerned and which are specified in the reference, operate, or may be expected to operate, against the public interest, and
  - (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by the inclusion of a special condition in the applicant's licence or by modifications of a special condition of the licence holder's licence.
- (3) Subsection (4) applies where—
- (a) Monitor has given notice under section 100(2) of a proposal to make modifications to the standard conditions applicable to all licences under this Chapter, or to licences of a particular description, and
  - (b) section 100 operates to prevent Monitor from making the modifications.
- (4) Monitor may make a reference to the Competition Commission which is so framed as to require the Commission to investigate and report on the questions—



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- (a) whether any matters which relate to the provision of health care services for the purposes of the NHS by the relevant licence holders, and which are specified in the reference, operate, or may be expected to operate, against the public interest, and
  - (b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the standard conditions applicable to all licences under this Chapter, or to licences of a particular description.
- (5) Schedule 10 (which makes further provision about references to the Competition Commission) has effect in relation to a reference under subsection (2) or (4); and, for that purpose, the relevant persons are—
- (a) in paragraphs 3, 6(6) and 7(6)—
    - (i) the applicant or licence holder concerned or (as the case may be) relevant licence holders,
    - (ii) the National Health Service Commissioning Board, and
    - (iii) such clinical commissioning groups as are likely to be affected by matters to which the reference relates,
  - (b) in paragraph 5(6), the applicant or licence holder concerned or (as the case may be) relevant licence holders, and
  - (c) in paragraph 8(10)—
    - (i) the applicant or licence holder concerned or (as the case may be) relevant licence holders,
    - (ii) Monitor,
    - (iii) the National Health Service Commissioning Board, and
    - (iv) such clinical commissioning groups as are likely to be affected by the proposal concerned.
- (6) In investigating the question under subsection (2)(a) or (4)(a) the Competition Commission must have regard to—
- (a) the matters in respect of which Monitor has duties under section 62, and
  - (b) the matters to which Monitor must have regard by virtue of section 66.
- (7) Where the standard conditions applicable to all licences or (as the case may be) to licences of a particular description are modified pursuant to a reference made under subsection (4), Monitor—
- (a) may also make such incidental or consequential modifications as it considers necessary or expedient of any other conditions of a licence which is affected by the modifications,
  - (b) must make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
  - (c) must publish any modifications made under this subsection.
- (8) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

## **102 Modification of conditions by order under other enactments**

- (1) This section applies where the Office of Fair Trading, Competition Commission or Secretary of State (the “relevant authority”) makes a relevant order.

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- (2) A relevant order may modify—
  - (a) the conditions of a particular licence, or
  - (b) the standard conditions applicable to all licences under this Chapter or to licences of a particular description.
- (3) The modifications which may be made by a relevant order are those which the relevant authority considers necessary or expedient for the purpose of giving effect to, or taking account of, any provision made by the order.
- (4) In this section “relevant order” means—
  - (a) an order under section 75, 83 or 84 of, or paragraph 5, 10 or 11 of Schedule 7 to, the Enterprise Act 2002 where one or more of the enterprises which have, or may have, ceased to be distinct enterprises were engaged in the provision of health care services for the purposes of the NHS;
  - (b) an order under any of those provisions of that Act where one or more of the enterprises which will or may cease to be distinct enterprises is engaged in the provision of health care services for the purposes of the NHS;
  - (c) an order under section 160 or 161 of that Act where the feature, or combination of features, of the market in the United Kingdom for goods or services which prevents, restricts or distorts competition relates to—
    - (i) the commissioning by the National Health Service Commissioning Board or a clinical commissioning group of health care services for the purposes of the NHS, or
    - (ii) the provision of those services.
- (5) The modification under subsection (2)(a) of part of a standard condition of a licence does not prevent any other part of the condition from continuing to be regarded as a standard condition for the purposes of this Chapter.
- (6) Where the relevant authority modifies the standard conditions applicable to all licences or (as the case may be) to licences of a particular description under this section, the relevant authority—
  - (a) may, after consultation with Monitor, make such incidental or consequential modifications as the relevant authority considers necessary or expedient of any other conditions of any licence which is affected by the modifications,
  - (b) must also make (as nearly as may be) the same modifications of those conditions for the purposes of their inclusion in all licences or (as the case may be) licences of that description granted after that time, and
  - (c) must publish any modifications it makes under paragraph (b).
- (7) Expressions used in subsection (4) and in Part 3 or (as the case may be) Part 4 of the Enterprise Act 2002 have the same meaning in that subsection as in that Part.
- (8) In this section, a reference to modifying a condition includes a reference to amending, omitting or adding a condition.

### **103 Standard condition as to transparency of certain criteria**

- (1) The standard conditions applicable to any licence under this Chapter must include a condition requiring the licence holder to—
  - (a) set transparent eligibility and selection criteria, and

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- (b) apply those criteria in a transparent way to persons who, having a choice of persons from whom to receive health care services for the purposes of the NHS, choose to receive them from the licence holder.
- (2) “Eligibility and selection criteria”, in relation to a licence holder, means criteria for determining—
- (a) whether a person is eligible, or is to be selected, to receive health care services provided by the licence holder for the purposes of the NHS, and
  - (b) if the person is selected, the manner in which the services are provided to the person.
- (3) The following powers must not be exercised so as to omit the condition mentioned in subsection (1) from any licence under this Chapter—
- (a) the powers conferred on Monitor by sections 100, 101(7) and paragraph 7(2) of Schedule 10 to modify the standard conditions applicable to all licences, or to licences of a particular description,
  - (b) the power conferred on the Competition Commission by paragraph 8(5) of that Schedule to modify those conditions, and
  - (c) the powers conferred by section 102 on the Office of Fair Trading, Competition Commission and Secretary of State to modify those conditions or the conditions of a particular licence.