

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 3 - Regulation of Health and Adult Social Care Services**

##### *Chapter 3 – Licensing*

##### **Licence conditions**

774. These sections make provision in relation to the two types of licence conditions that Monitor may set. Standard conditions will apply to all providers, or to all providers of a certain type (based on their nature, the services they provide, or the areas where they provide the services). Special conditions set individual requirements for individual providers. Creating different types of conditions gives potential providers some certainty over what a licence will entail (standard conditions), whilst enabling Monitor to tailor licences as appropriate (special conditions).

##### *Section 94 - Standard conditions*

775. This section requires Monitor to set and publish the standard licence conditions. Standard conditions might include basic requirements necessary to support the regulator in exercising its functions, such as submitting the information about service provision that Monitor needs to set prices effectively.

776. Before determining the first set of standard conditions, Monitor must publish its draft standard conditions and consult the persons listed in *subsection (8)*.

777. *Subsections (2) to (6)* allow Monitor to set different standard conditions for different types of licences by reference to the nature of the provider, the services provided or the geographical area in which services are provided. Monitor could use this power to set additional licence conditions to apply to certain providers to ensure the continuity of certain services provided by them. For example, Monitor may set particular requirements on foundation trusts to ensure they are well governed, consistent with foundation trusts' duty to exercise their functions effectively, efficiently and economically, as necessary conditions of their continued ability to provide NHS services (see section 164). The intention is to enable Monitor to differentiate standard licence conditions, where necessary, to protect and promote patients' interests and to reflect particular statutory requirements as they may apply to foundation trusts and other types of healthcare provider. In addition, by differentiating standard licence conditions appropriately, Monitor may seek to achieve a fair playing field for providers.

778. *Subsections (4) to (6)* impose constraints on Monitor's ability to set different licence conditions relating to the nature of the provider. Subsection (5) allows for different standard licence conditions to be imposed in relation to governance to take account of differences in the status of different licence holders. Subsection (6) allows for different standard licence conditions to be imposed so as to achieve an equivalent regulatory burden on providers as a result of the licence, for example, where different standard

licence conditions are appropriate to take account of differences in the burdens to which different types of provider are subject.

779. The Secretary of State is given the power in *subsection (10)* to reject Monitor's proposed first set of standard conditions, as a whole rather than as individual conditions.

### ***Section 95 - Special conditions***

780. The power to include special licence conditions under *subsection (1)* is designed to address issues specific to particular licence holders, in situations where it would be problematic to define a description of relevant licences and applicable conditions, and hence to use standard licence conditions alone. For example, Monitor could use this provision to set licence conditions for a provider to secure continuity of NHS services in particular circumstances that Monitor considered were not captured within the standard licence conditions. Also by way of example, Monitor may set special licence conditions for a foundation trust (or other provider) which it considered were necessary in response to risks it identified; or to set special conditions prospectively so that those conditions would come into effect when interventions to secure the continuity of those services were required.
781. Monitor is able to include a special condition (or modify an existing one) if the applicant or licence holder consents. If that party does not agree and Monitor still wants the special condition or modification to be included in the licence, it may under section 101, make a reference to the Competition Commission, which will then investigate the appropriateness of including the special condition or making the modification.
782. Before including a special condition, or modifying one, Monitor must to comply with the notice requirements in *subsections (2) to (5)*.

### ***Section 96 - Limits on Monitor's functions to set or modify licence conditions***

783. This section specifies the purposes for which Monitor can set or modify licence conditions. Monitor would only be able to set licence conditions for the purposes specified in *subsection (2)*. For example, Monitor may use its licensing powers to support commissioners in securing continuity of services or to enable integration of services and co-operation between providers.
784. *Subsection (4)* provides that Monitor must not exercise its powers to set or modify conditions so as to unfairly advantage or disadvantage providers as a result of their having a particular status, including whether they are in the public or private sector.

### ***Section 97 - Conditions: supplementary***

785. *Subsection (1)* provides, by way of example, a non-exhaustive list of conditions that Monitor might include in licences. These include a requirement for licence holders to pay Monitor such fees as Monitor may determine in respect of the exercise of its licensing functions; a requirement that providers charge for services in accordance with the national tariff (see Chapter 4); and the conditions for securing the continued provision of NHS services. *Subsection (7)* gives Monitor the power to apply time restrictions to conditions, either by indicating when a condition should take effect or when it should end.
786. *Subsection (3)* specifies that Monitor must not use the powers it has under subsection (1) (c) to direct a licence holder to give access to its facilities to another provider.
787. *Subsection (4)(a)* provides that Monitor can require NHS foundation trusts and bodies which were former NHS trusts to notify the Office of Fair Trading if they intend to enter into a merger situation, being arrangements or transactions which would result in the trust's, or another business's, activities ceasing to be distinct. This provision is to ensure that the Office of Fair Trading has notice of mergers involving NHS foundation

trusts, or former NHS trusts. Subsection (4)(b) specifies that this requirement no longer applies after five years from the date on which the condition was included in the licence.

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

788. This section makes further provision about Monitor’s licensing powers to support commissioners in securing continuity of health care services for the purposes of the NHS. *Subsection (1)* provides that Monitor may, in particular (but not by way of limitation), set conditions under section 97(1)(i)(i) requiring a licence holder: to provide information to commissioners and other persons as directed by Monitor; to allow Monitor to enter and inspect its premises; and to co-operate with persons appointed by Monitor to assist in the management of the licence holder’s affairs, business and property. *Subsection (2)* requires commissioners to also co-operate with any such persons appointed by Monitor. Monitor may set such other licence conditions for the purposes of ensuring a provider continues to be able to provide NHS services under the terms of its licence as Monitor considers appropriate, subject to sections 94-96. This may include, for example, requirements relating to liquidity and, where appropriate, actions to ensure the provision of services is effective, efficient and economic in the long term.
789. Monitor could take a number of measures under licence conditions set under section 97(1)(i)(i) to protect the continuity of NHS services in the case of a provider in financial difficulties (in “distress”). For example, Monitor could direct a provider in distress to appoint a “turnaround team”, or require a provider to provide information and access to their records and premises to a continuity of service planning team appointed by Monitor. The aim of such measures would be, wherever possible, to return the provider to normal operation as soon as possible and ensure the continuity of services which required protection.
790. *Subsection (3)* requires Monitor to carry out an on-going assessment of the risks to the continued provision of services to which a licence condition under section 97(1)(i), (j) or (k) applies. This enables Monitor to intervene early to assist providers to reduce any unacceptable risk.
791. *Subsection (4)* requires Monitor to publish guidance for licence holders on the requirements placed on them via licence conditions under section 97(1)(i), (j) or (k) for ensuring the continuity of services. Monitor must also publish guidance for commissioners of services subject to such conditions on the exercise of their functions in connection with the licence holders who provide those services. This could include guidance on their role in the turnaround of licence holders in distress, or in taking steps to plan for possible unsustainability of a licence holder. Before publishing such guidance (whether initially or as revised), Monitor must obtain the approval of the NHS Commissioning Board and the Secretary of State. *Subsection (5)* requires commissioners of services which are subject to continuity of service conditions to have regard to such guidance.

***Section 99 – Notification of commissioners where continuity of services is at risk***

792. This section provides for action to be taken by Monitor as part of its ongoing assessment of risk to the continuity of NHS health care services. It obliges Monitor to notify the NHS Commissioning Board and CCGs where it identifies significant risks to the provision of services and is satisfied that this is attributable to the way in which services are configured. *Subsection (5)* requires the Board and CCGs to have regard to such notifications when arranging for the continued provision of NHS health care services. It would be for commissioners to decide how best to respond to notifications under this section and section 126.

***Section 100 - Modification of standard conditions***

793. This section makes provision for modification of standard licence conditions in all providers' licences or in licences of a particular description. Before making such a modification, Monitor must comply with the notice requirements set out in *subsections (2) to (5)*. These require Monitor to notify its intention to modify standard licence conditions and create the opportunity for those notified about the proposed modification to make representations.
794. Under *subsection (6)(a)* Monitor may make the modification if it received no objections from licence holders who would be affected by the change (relevant licence holders).
795. Where Monitor does receive representations from relevant licence holders, it may nonetheless make the modification if the proportion of licence holders objecting were below proportions specified by the Secretary of State in regulations made under *subsection (7)*. These regulations are subject to the affirmative Parliamentary procedure. Regulations must specify two proportions for these purposes. The first is the proportion of relevant licence holders who objected, expressed as a percentage of all relevant licence holders affected (the "objection percentage"). The second proportion is the number of relevant licence holders who objected, weighted according to their share of the supply of such services as may be prescribed (the "share of supply percentage"). This process is designed to enable Monitor to change standard licence conditions, but only where providers collectively do not have substantial objections to the proposed change. Where the objection percentage and/or the share of supply percentage exceed those specified in the regulations, Monitor may only make the proposed change in accordance with section 101.
796. Other provisions of section 100 deal with situations where Monitor modifies the standard licence conditions. *Subsection (10)* provides that Monitor must publish the modifications. It also gives Monitor the power to make modifications to other conditions in a licence that might be required as a consequence. Thirdly, Monitor is also required to make the same modifications to future licences, where that is appropriate. The latter two requirements are to ensure consistency across licences.

***Section 101 – Modification references to the Competition Commission***

797. Under *subsection (2)* Monitor may make a reference to the Competition Commission when the applicant or licence holder refused to accept a proposal to include, modify or omit a special licence condition. Under *subsection (4)* a reference may also be made where Monitor is unable to modify the standard licence conditions because the number of licence holders objecting to the change exceeded one or both of the proportions set out in regulations made under section 100(7).
798. The Competition Commission is required to investigate and report on the matters contained in the reference from Monitor. Subsections (2) and (4) set the parameters for the Commission's investigations and reports under this section. In all cases, the Commission must consider whether any of the matters specified in the reference and which relate to the provision (or potential provision in the case of special licence conditions) of healthcare services are operating, or could be expected to operate, against the public interest. The Commission could not, therefore, consider references in terms of the impact on competition as an end in itself. Where a reference is made under subsection (2) and hence follows the refusal by an applicant or licence holder to include, modify or omit a special licence condition, the Commission must also investigate and report on whether the inclusion, modification or omission of a special condition in a licence would remedy or prevent the detriment to the public interest. Where a reference is made under subsection (4) and hence following objections from licence holders to proposals for standard licence conditions, the Commission must also investigate and report on whether the inclusion, modification or omission of standard licence conditions (applicable to all or a group of providers) would remedy or prevent the detriment to the public interest. Hence, in considering references from Monitor under this section, the

Competition Commission's prime concern is whether the proposed licence condition or modifications would be in the public interest.

799. *Subsection (5)* gives effect to Schedule 10, which makes provision about investigations by the Competition Commission. Paragraph 7(2) of Schedule 10 requires Monitor to make changes to licence conditions in line with reports by the Commission following these investigations.
800. *Subsection (7)* enables Monitor to make incidental or consequential changes to the other conditions in a licence, where one or more conditions in the licence is changed following a reference to the Competition Commission under this section. Monitor must also modify the conditions in licences it issued in future, so that these conditions, as they would apply to all providers or all providers of a particular description, are the same. This provision avoids the need for Monitor to give notice and consult where it modifies standard licence conditions following a report by the Competition Commission under this section.

### ***Schedule 10 - References by Monitor to the Competition Commission***

801. Under paragraph 1, where Monitor makes a reference to the Competition Commission Monitor is able to change what is included in that reference by giving notice to the Commission. The Commission is obliged to accept the variation.
802. The intention of paragraph 2 is to enable Monitor to assist the Competition Commission by identifying in a reference or variation of a reference, any aspects of the referred matter that might have an adverse effect on the public interest, and by suggesting any alterations to licence conditions to avoid or remedy these effects. Paragraph 3 requires Monitor to publish any reference, or variation to a reference, and to send notice of a reference or variation to relevant applicants, licence holders and CCGs and to the NHS Commissioning Board (section 101(5)(a) refers).
803. **Paragraph 4** requires Monitor to provide relevant information and assistance to the Competition Commission and the Commission to take information supplied into account.
804. Under paragraph 5, a reference to the Competition Commission must specify a period – not longer than six months from the date of the reference – within which the Commission must report. The Commission's report only has effect if it is made before the expiry of the period stated in the reference or at the end of an extended period. An extended period applies where the Commission sought this from Monitor and where Monitor is content that special reasons for extending the period existed. An extension may be for no more than six months and Monitor may grant only one extension. Monitor must send notice of the extension to the relevant persons, and publish the notice.
805. **Paragraph 6** requires the Commission, when reporting on a reference, to present definite conclusions, including details of any aspects it concludes might have negative impacts on the public interest. There must also be explanations as to how the inclusion, modification or omission of licence conditions could remedy or prevent those impacts.
806. This paragraph also requires that a conclusion in a report must have the agreement of at least two thirds of the group assigned to the investigation by the Competition Commission. If a member of the group disagreed with a conclusion, they may require the inclusion in the report of a statement of their disagreement and the reasons for it.
807. The Commission must ensure a copy of its report on a reference is sent to Monitor, who is then required to send a copy to the Secretary of State. Not less than 14 days after the Secretary of State received the copy under paragraph 6(6), Monitor is required to send a copy to applicants or licence holders affected by the conclusions in the report, the NHS Commissioning Board and CCGs likely to be affected by the matters to which the report relates. Monitor is required to publish the report within 24 hours of complying with this requirement.

### **Changes following report**

808. [Paragraph 7](#) requires Monitor to act on relevant recommendations made by the Competition Commission. Before doing so, Monitor must send a notice of the proposed changes to licence conditions to the relevant persons, explaining why it is taking such action, and publish the notice. The notice must specify a period – of at least 28 days from the date of publication - within which comments on the changes may be made. Once Monitor had considered the responses, it must notify the Commission, specifying the changes it proposes to make in response to the Commission’s report.
809. There would then be a four-week period, during which the Commission may direct Monitor (under paragraph 8) not to make the changes set out in the notice, or not to make some of the changes. Insofar as the Commission does not issue such directions, Monitor is required (under paragraph 7(11)) to make the changes it has proposed in response to the Commission’s report.

### **Competition Commission’s power to veto changes**

810. Under paragraph 8, the Competition Commission may apply to the Secretary of State asking him to direct that the four-week period for it to veto Monitor’s proposed changes to licence conditions be extended by 14 days.
811. Where the Commission vetoes changes proposed by Monitor, it must give notice of the changes Monitor proposed and its reasons for directing Monitor not to make them. The Commission is required to make any changes to licence conditions that it considers necessary to address any adverse effects to the public interest identified in its report that it considers would not be remedied or prevented by the changes proposed by Monitor. The Commission must give Monitor and other relevant persons (section 101(5)(a) refers) 28 days’ notice of the changes it proposes to make, during which representations could be made. It must also publish the notice.
812. Once the changes had been made, the Commission must publish details of them and state why it had made them.

### **Disclosure**

813. [Paragraph 9](#) requires the Commission, before making a report or giving notice in relation to its power to veto Monitor’s proposed changes, to ensure that no information harmful to the public interest, no sensitive commercial information and no information which might significantly harm an individual’s interests is included.

### **Powers of investigation**

814. [Paragraph 10](#) provides that a number of investigative and enforcement powers under specified sections of Part 3 of the Enterprise Act 2002 apply, with specified modifications, for the purposes of references by Monitor to the Competition Commission.

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

815. This section provides that the Office of Fair Trading, the Competition Commission and the Secretary of State, as relevant authorities, can modify standard conditions or conditions of a particular licence, by an order made under various specified provisions of the Enterprise Act 2002. This provision is to ensure that the licensing regime is consistent with measures taken under that Act, or can be modified as part of remedies imposed under that Act. The inclusion of a provision of this type is consistent with other regulatory regimes.

***Section 103 – Standard condition as to transparency of certain criteria***

816. The effect of this section is to require that Monitor must include a standard condition in all licences, which requires licence holders to act transparently in the setting and application of criteria for determining patient eligibility for particular services, for accepting or rejecting referrals, or determining the manner in which services are provided to that person. This is intended to ensure that providers act transparently in determining clinically appropriate care for patients and do not discriminate on non-clinical grounds. Nothing in this section will affect a person's entitlement to a particular treatment under the NHS. This transparency requirement will only operate wherever those services are subject to patient choice of provider. This will enable Monitor to minimise the scope for providers to make extra profits by 'cherry picking' - i.e. delivering a service only in less complex cases – by requiring them to be transparent about these matters. *Subsection (3)* specifies that certain powers conferred on Monitor, the Secretary of State, the Office of Fair Trading, and the Competition Commission by sections 100, 101 and 102 and Schedule 10 to modify licence conditions may not be used to omit such a condition from licences.