

Provider licence consultation notice: Part A

27 October 2022

Please note: This statutory notice is made up of three documents:

Part A outlines the proposed modifications to the standard conditions of the NHS provider licence, the effect of the changes and reasons for the proposals. It starts on page 2.

Part B is the proposed NHS provider licence pending consultation response.

Part C contains the impact assessment

A six-week consultation period will be held from 28 October 2022 to 9 December 2022. Representations can be made to NHS England at [LINK](#).

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Part A of this statutory consultation notice published by NHS England under section 100 of the Health and Social Care Act 2012 (the 2012 Act) gives notice of proposed modifications to the standard conditions of the NHS provider licence, the effect of the changes and reasons for the proposals. It should be read in conjunction with the draft licence (part B) which is a supporting document. An impact assessment has been completed for these changes and can be found in part C. A six week consultation period will be held from 28 October 2022 to 9 December 2022. Representations can be made to NHS England at [LINK](#).

1. Introduction

Background: The NHS provider licence

The NHS provider licence was first introduced in 2013 and is held by all NHS foundation trusts as well as independent sector providers unless exempt. NHS trusts are currently exempt, but recent statutory changes will require them to be licenced with a date to be confirmed post consultation, likely April 2023. A separate licence for NHS Controlled Providers was introduced in 2018.

The current licence consists of six sections, each containing high level conditions that providers must meet. The first four sections contain conditions that apply to all licence holders and cover general conditions, pricing, integrated care and patient choice and competition. Additional conditions then apply to providers of Commissioner Requested Services (CRS) to ensure they continue to provide services should they get into financial difficulty. Finally, specific governance conditions apply to NHS foundation trusts.

The provider licence forms part of the oversight arrangements for NHS providers, serves as the legal mechanism for regulatory intervention, and underpins mandated support at our most challenged providers. The NHS Oversight Framework details the overall principles, responsibilities, and ways of working for oversight, the key metrics and factors we consider when determining support needs and the circumstances in which we consider formal regulatory intervention may be necessary to address particular issues in NHS trusts and foundation trusts.

The provider licence and related statutory enforcement powers provide the legal mechanism for any formal regulatory intervention and underpins mandated support at our most challenged providers. The NHS Provider Enforcement Guidance provides guidance on how we intend to use the statutory licence enforcement

powers and applies with some modifications to how NHS England will use the powers. The oversight arrangements for independent providers of NHS services are set out separately in the Risk Assessment Framework and Reporting Manual for Independent Sector Providers of NHS Services and are similarly underpinned by the provider licence.

Why we are proposing changes to the provider licence

Much has changed since the licence was first introduced in 2013. In particular, the current licence reflects a very different statutory and operating environment based around economic regulation and competition rather than system working and collaboration between providers. Our proposed changes will bring the licence up to date to reflect current statutory and policy requirements and support providers to work effectively as part of integrated care systems.

In addition, changes brought in under the Health and Care Act 2022 (“2022 Act”) mean that NHS trusts will no longer be exempt from holding a licence. While in recent years we have worked to align our approach to the oversight of NHS trusts and foundation trusts, including through operating a ‘shadow’ licence regime for NHS trusts, changes will need to be made to the licence before it can be issued to NHS trusts.

This consultation document should be read in conjunction with:

- our separate consultation on the Enforcement Guidance which sets out the processes NHS England will apply when using its licence enforcement powers due to launch this autumn.
- The current [Risk Assessment Framework and reporting manual for independent sector providers of NHS services](#). This document will be updated and a consultation held later this fiscal year to reflect our new approach to continuity of service requirements.

To note, none of the proposals in this consultation change our overall approach to NHS provider oversight as set out in the [NHS Oversight Framework 2022/23](#). As per the framework, NHS England remains committed to working constructively with systems and providers to agree necessary improvements without the need for licence enforcement wherever possible.

Overview of the proposed changes to the provider licence

We propose four categories of changes to the licence. These changes will support system working in the new statutory framework, enhance the oversight of key

services provided by the independent sector including our ability to address quality issues at independent providers of hard to replace services, reflect statutory requirements to address climate change and update technical/regulatory requirements.

1. Supporting system working

- Reflecting expectations around collaboration and co-operation
 - through a new licence condition outlining expectations of how NHS trusts, foundation trusts and NHS Controlled Providers should work together across the newly formed Integrated Care Systems to deliver core system objectives. This includes planning, service delivery, service improvement, delivering system financial objectives and agreeing and delivering system workforce plans.
- Reflecting the Triple aim and health inequalities
 - through a new licence condition that mirrors the expectations set out in the 2022 Act, for NHS trusts, foundation trusts and NHS Controlled Providers to consider the Triple Aim and health inequalities in their work
- Reflecting digital obligations to enable system working and promote digital maturity
 - through a new licence condition and a separate amendment to the governance conditions. These reflect expectations already set out in legislation and guidance.
- Reframing integrated care as a positive obligation to integrate service provision and reduce health inequalities
 - to encourage providers to actively participate in service integration to improve the quality of health care services, provide place-based integrated care, and reduce inequalities of access and outcomes.
- Reflecting the importance of personalised care
 - by expanding the patient choice condition
- Removing the competition condition
 - to reflect a shift in healthcare priorities from competition to collaboration and the fact that NHS England does not have statutory functions relating to competition oversight.

2. Enhancing the oversight of key services provided by the independent sector

- Broadening the range of providers where continuity of services (CoS) conditions will apply to include hard to replace providers

- Expanding the scope of CoS conditions to include quality governance standards to enhance risk mitigation and co-operation with NHS England in the event that an independent sector provider is experiencing serious quality issues which threaten service delivery. Mechanisms already exist to address quality concerns in NHS trusts and foundation trusts.
3. Addressing climate change
- Tackling climate change and delivering Net Zero
 - by reflecting expectations set out in the 2022 Act for NHS trusts and foundation trusts and in guidance around net zero and climate change ambitions in the governance conditions.
4. Technical amendments
- Modifying costing conditions and separating them from the other pricing conditions
 - reflecting wider role understanding costs plays in supporting integration and improvement as well as the pricing NHS services.
 - Amending the pricing conditions to reflect changes to national policy and pricing legislation
 - by referencing the National payment scheme and removing the condition related to local modifications
 - Streamlining reporting requirements
 - by removing requirements around self-certification for NHS trusts and foundation trusts due to duplication with annual reporting requirements and to reduce regulatory burdens.
 - Applying existing core conditions on all licensees and foundation trusts to NHS trusts and updating language to reflect the current statutory framework
 - including inserting references to NHS trusts and reflecting the change of Monitor to NHS England as the regulatory body for the provider licence.
 - Removing obsolete conditions
 - including those setting out the payment of fees to NHS England.
 - Amending the Fit and Proper Persons condition
 - in line with the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 and as per the statutory consultation conducted in 2021.

These proposed changes have been co-developed and refined through early engagement with providers, system leaders and key representative groups.

The draft modified NHS Provider Licence reflecting these proposals are in Part B of this notice. To note, this merges what were previously two separate licences for providers of NHS services and for NHS controlled providers. NHS controlled providers are providers who are not NHS trusts or foundation trusts but are ultimately controlled by one or more NHS trust and/or foundation trust and required to hold a licence.

Responding to the consultation

The proposals to change the NHS provider licence are subject to a statutory requirement to consult existing licence holders, the Secretary of State, ICBs and CQC and its Healthwatch England Committee. In addition, we are keen to hear from NHS trusts and from other bodies with an interest in the provision of NHS healthcare in England. Those wishing to respond should complete the questionnaire.

The consultation ends on December 9, 2022.

The estimated timeline for finalising the modified licence, and the issuing of licences to new providers including NHS trusts, will be communicated as part of the consultation response. Existing arrangements will be maintained until such time as the modified licence takes effect, including the shadow licence approach currently used with NHS trusts.

Proposed amendments reflect existing expectations set out in legislation and national policy. We remain committed to a proportionate enforcement response and recognise that these proposed changes reflected in the statutory notice of consultation and the draft modified licence may require new systems and processes to be established.

Question for consultation

- Do you agree that the NHS provider licence needs to be reviewed and updated?

2. Supporting system working

Overview of changes

System working and collaboration between providers are key to delivering NHS objectives. The success of individual NHS trusts and foundation trusts will increasingly be judged against their contribution to the objectives of their integrated care systems, in addition to their existing duties to deliver safe, effective care, and effective use of resources.

Many of the changes we propose to the provider licence reflect these national expectations on how providers will work collaboratively within systems (including at place, and via provider collaboratives) to improve outcomes, tackle inequalities, ensure value for money, and support broader social and economic development.

2.1 Reflecting expectations around collaboration and co-operation

Proposals – conditions for NHS trusts and foundation trusts and NHS Controlled Providers only

To introduce a new condition on co-operation that reflects existing expectations on NHS trusts and foundation trusts to consistently co-operate with other NHS organisations/organisations that deliver NHS care, ICBs and Local Authorities for the purposes of:

- Developing and delivering system plans
- Delivering NHS services
- Improving NHS services

To reflect requirements on NHS trusts and foundation trusts to consistently co-operate with other NHS organisations/organisations that deliver NHS care and the ICBs they are partners of for the purposes of delivering system financial plans

To reflect expectations on NHS trusts and foundation trusts to consistently co-operate in the delivery of agreed system workforce plans.

Full proposed text in draft licence section 2: NHS trusts and foundation trusts working in systems WS1: Co-operation condition

About this proposal

We propose a new co-operation condition for NHS trusts and foundation trusts to clarify our expectations on NHS trusts and foundation trusts around collaborative working. This condition aligns with the revised duty on NHS bodies and local authorities to co-operate as set out in sections 72 and 82 of the NHS Act 2006 and with expectations around collaboration set out in the Long Term Plan and the *Guidance on good governance and collaboration*.

The use of the terms 'co-operation' in legislation and 'collaboration' in our Long Term Plan and guidance are synonymous. As such we use the terms collaboration and co-operation interchangeably.

We do not propose to include independent providers within the scope of this condition as the condition and associated guidance reflects expectations on statutory NHS bodies to co-operate. We are exploring aspects of the condition and associated guidance that are transferable to independent providers and welcome feedback on this as part of the consultation.

We also propose to place this requirement onto NHS controlled providers to be consistent with the requirements on their parent NHS trust and/or foundation trust.

Collaboration and co-operation to develop and deliver system plans and service improvements

We propose a new condition in the licence for NHS trusts, foundation trusts and NHS Controlled Providers to consistently co-operate with organisations providing NHS services, ICBs, and where relevant, local authorities, for the purposes of developing and delivering system plans, delivering NHS services, and driving through system improvements.

This condition reflects the core elements of collaboration outlined in the *Guidance on good governance and collaboration* which was consulted on earlier this year and which sits under the current licence. Feedback from the consultation was overwhelmingly positive: 90% agreed with aims of guidance and 80% agreed with characteristics/ expectations. All respondents were supportive of the three aims of collaboration.

Early engagement- including feedback on our guidance- suggests that stakeholders welcome the inclusion of an explicit licence condition signalling the importance of collaboration and co-operation for the NHS but raised concerns around the ways that this condition could be enforced. Foundation trusts (and NHS trusts once formally licensed) will already be required to have due regard to the published

guidance via current expectations set out in licence condition on governance arrangements¹.

We recognise that providers are working in different local contexts for collaboration, and as set out in the NHS Oversight Framework 2022/23 we are committed to working constructively with systems and providers to agree necessary improvements without the need for licence enforcement wherever possible. Further details on our expectations around good collaboration and how we will look to apply this guidance proportionately is described in the associated *Guidance*.

Co-operation for the delivery of system financial plans

We also propose to reflect expectations on NHS trusts, foundation trusts and NHS Controlled Providers to consistently co-operate in the delivery of agreed system financial plans. This reflects new statutory duties on ICBs and partner NHS trusts and foundation trusts to manage collective financial resources and deliver joint financial objectives in line with NHS England directions and financial requirements².

These financial considerations are underpinned by [Guidance on the management of NHS resources by Integrated Care Boards](#) and the [2022/23 financial planning guidance](#), under which NHS trusts and foundation trusts are expected to develop and agree system financial plans with their ICBs to collectively deliver a balanced financial position across the system. We believe it is important to set out these expectations explicitly in this proposed co-operation condition to ensure internal coherence across our policy and regulatory frameworks.

Reflecting this requirement in the licence makes clear the individual and collective accountability on NHS trusts and foundation trusts to contribute to delivering agreed system financial goals. In practice, it means that each provider will be expected, in each year, to deliver the financial position agreed with the ICB and with other system partners – even if that position represents a deficit but has been agreed as part of an overall system financial position.

¹ FT4 licence condition in the 2013 NHS provider licence. Guidance will be updated to refer to this new licence conditions once the modified licence has been confirmed.

² Foundation trusts are accountable to the ICB they are a partner of for contributing to achieving agreed system financial objectives. Under the 2022 Act, NHS England has the power to give financial directions to ICBs and NHS trusts, and to set limits on their use of revenue and capital resources in each financial year, but only to set financial directions over capital resource use for foundation trusts.

It creates mutual accountability between providers for delivering collective goals, while not holding any individual provider responsible for collective system underperformance.

This condition also reflects a clear expectation that each provider will not use more than their fair share of NHS resources, as allocated by and agreed with the ICB, which should reflect the relative need of the local population.

Co-operation for the delivery of system workforce plans

Providers are expected to contribute to system workforce plans, as outlined in the [guidance on the ICS People Function](#) and the [operational planning guidance 22/23](#). These guidance documents outline expectations that systems prioritise investment in our workforce, new ways of working and to strengthen compassionate and inclusive cultures. We propose reinforcing these expectations for providers to contribute to these system workforce plans and the development of the “one workforce” through the new co-operation condition.

This condition therefore reflects the importance of workforce capacity assessment and planning for service continuity and the importance of joined-up system-level co-operation across people and workforce, service, and finances.

Questions for consultation

Changes to the licence condition set out in draft licence section 2: NHS trusts and foundation trusts and NHS controlled providers working in systems WS1: Co-operation condition

To what extent do you agree/disagree with the proposed new co-operation licence condition found in the purposes of developing and delivering system plans, delivering NHS services and improving NHS services?

- Please explain your answer including any feedback on the wording of this condition

To what extent do you agree/disagree with the inclusion in this proposed licence condition of the requirement to consistently co-operate for the purpose of delivering system financial plans?

- Please explain your answer including any feedback on the wording of this condition

To what extent do you agree/disagree with the inclusion in this proposed licence condition of the requirement to consistently co-operate for the purpose of delivering system workforce plans?

- Please explain your answer including any feedback on the wording of this condition

Are there elements of this proposed co-operation condition that should be extended to independent sector providers?

- Please explain your answer

2.2 Reflecting the Triple Aim duty and having regard to health inequalities

Proposal – condition for NHS trusts and foundation trusts and NHS Controlled Providers only:

- To introduce a new condition in NHS trusts, FTs and NHS Controlled Providers to have regard to the Triple Aim and comply with their duty to consider the likely effects of their decisions on:
 - a) the health and wellbeing of the people of England (including inequalities in that health and wellbeing)
 - b) the quality of services provided or arranged by both themselves and other relevant bodies (including reducing inequalities in benefits from those services)
 - c) the sustainable and efficient use of resources by both themselves and other relevant bodies
- For the licensee to have regard to guidance concerning the Triple Aim

Full proposed text in draft licence section 2: NHS trusts and foundation trusts working in systems WS2: Triple Aim condition

About this proposal

We are proposing to add a new condition for NHS trusts, foundation trusts and NHS Controlled Providers that requires them to have regard to and comply with the Triple Aim duty as set out in the 2022 Act. This requires NHS statutory bodies to have regard to the wider effects of their decisions on health and wellbeing of the population, quality of services, and efficient and sustainable use of resources,

including, in relation to health and wellbeing and quality of services, the effects on health inequalities.

The duty applies to NHS trusts and foundation trusts and means they should consider the effect of their decisions on other NHS bodies and the wider health system as well as their own organisation and services, and to do so through the lens of health inequalities as defined by the NHS England Core20PLUS5 approach.³

We also propose to place this requirement onto NHS controlled providers to be consistent with the requirements on their parent NHS trust and/or foundation trust.

Early engagement suggests that this condition will be welcomed by NHS trusts and foundation trusts for putting patients and health inequalities into the heart of decision making and for recognising the interrelation between better care, better health and sustainability, and the shared effort required to deliver on this.

We do not propose to include independent providers within the scope of the conditions as the Triple Aim is defined for statutory NHS organisations under legislation.

Questions for consultation

Changes to licence set out in draft licence section 2: NHS trusts and foundation trusts working in systems WS2: Triple Aim condition

To what extent do you agree/disagree with the proposed inclusion of the Triple Aim, as set out in the 2022 Act, in a new licence condition for NHS trusts and foundation trusts and NHS controlled providers?

- Please explain your answer including any feedback on the wording of this condition

Are there elements of this proposed Triple Aim condition that should be extended to independent sector providers?

- Please explain your answer

³ The Core20PLUS5 approach aims to reduce inequalities within the most deprived 20% of the national population plus specific groups which experience deprivation and 5 clinical target groups who are at higher risk of experiencing health inequalities (maternity, severe mental illness, chronic respiratory disease, cancer and hypertension).

2.3 Reflecting digital obligations to enable system working and promote digital maturity

Proposal – conditions for NHS trusts and NHS foundation trusts and NHS Controlled Providers only

- To introduce a new condition on NHS trusts and foundation trusts to comply with information standards published under s250 of the Health and Social Care Act 2012 as they pertain to co-operation and the Triple Aim and to comply with required levels of digital maturity as set out in guidance published by NHS England
- To add additional requirements for the Licensee to have appropriate systems and processes in place to meet guidance on digital maturity

Full proposed text in draft licence:

- New condition on digital: section 2: NHS trusts and foundation trusts working in systems WS3: Digital condition
- Additional governance requirements:
 - section 4: NHS provider conditions NHS2: Governance arrangements Paragraph 3(b) (for NHS trusts/foundation trusts)
 - section 5: NHS Controlled Providers Conditions CP1 Paragraph 3(b) (for NHS controlled providers)

About this proposal

We propose two changes to the provider licence to reflect digital capability expectations that are necessary enablers of safe and effective system working and care delivery.

Information standards as published under s250 of the 2012 Act (as updated by the 2022 Act) reflect digital ‘must-dos’ essential for healthcare providers; non-compliance can have significant implications on patient care. A key example is interoperability, where failure to conform to the relevant information standards inhibits organisations’ ability to provide seamless, safe, and effective care for patients.

Reflecting these legal obligations to comply with standards into the licence provides a signal on expectations around minimum standards and allows NHS England to support compliance and intervene where non-compliance persists in line with our

broader proportionate response. NHS England expects to publish supporting information and guidance to the information standards by April 2023.

Wider digital transformation and maturity is also key to delivering safe, effective and efficient care. We propose that adherence to digital maturity requirements, as set out in the [What Good Looks Like](#) guidance and planned digital maturity assessments, is part of good system working and corporate governance.

Important drivers for digital maturity are, for example, sharing of best practice and optimising use of digital functions as an enabler for efficient use of resources, but it also constitutes baseline capabilities that are critical to care delivery, such as having a functional Electronic Patient Record (EPR) and cybersecurity protection. We will also include our expectations of digital transformation as part of wider NHS oversight arrangements.

Early engagement raised concerns regarding the potential costs borne by providers to comply with digital expectations. It is important that organisations are able to prioritise resourcing of digital capabilities to support compliance with standards. NHS England is simplifying access to national digital funding in line with [Who Pays for What](#) and are launching support offers to help boards prioritise digital needs and make beneficial investments.

We also understand that compliance with some information standards requires provider and vendor co-operation, this will be taken into consideration by NHS England when considering support needs.

We propose to place this requirement onto NHS controlled providers via amendments to the controlled provider condition CP1 to be consistent with the requirements on their parent NHS trust and/or foundation trust.

We propose that this condition should not apply to the independent sector. Independent providers are not subject to the working in systems and governance conditions, and they already have other legal obligations with regards to the s250 standards.

Questions for consultation

Changes to the licence condition set out in section 2: NHS trusts and foundation trusts working in systems WS3: Digital condition

To what extent do you agree/disagree with a proposed new licence condition reflecting compliance with relevant digital information standards and digital maturity for the purposes of co-operation and meeting the Triple Aim?

- Please explain your answer including any feedback on the wording of this condition

To what extent do you agree/disagree with the proposed amendment to the NHS governance condition NHS2 and the NHS Controlled provider condition reflecting the need for systems and processes to meet digital maturity expectations?

- Please explain your answer including any feedback on the wording of this additional requirement

Are there elements of these proposed digital conditions that should be extended to independent sector providers?

- Please explain your answer

2.4 Reframing the integrated care condition as a positive obligation to integrate service provision and reduce health inequalities

Proposal – for all licensees

- To reframe the Integrated Care Condition as a positive obligation – the licensee shall act in the interests of the people who use health care services by ensuring that its provision of NHS services is integrated and enable co-operation with other providers of health care services with a view to:
 - a) Improving the quality of health care services provided or the efficiency of their provision
 - b) Reducing inequalities of access
 - c) Reducing inequalities with respect to the outcomes achieved for them by the provision of those services

Full proposed text in draft licence section 1: Integrated Care 1C1: Provision of integrated care

About this proposal

We propose placing a positive obligation onto all licence holders including NHS trusts, foundation trusts, NHS Controlled Providers and independent providers to act in the interests of the patients through collaboration and integrated care to reduce inequalities and increase person-centred health and care. The existing licence condition which we are proposing to amend, is currently phrased as a broadly defined prohibition to not act in ways which would undermine the potential of delivering integrated care.

Our understanding of how to promote integrated care- and what integration looks like at place and system level- has increased over the past decade and has culminated in the creation of integrated care systems and guidance to support care at place and across systems, with national and regional support for system development. We also have clear guidance around health inequalities through NHS England's Core20PLUS5. We believe it is consistent with this shift in national focus and support to reframe our expectations around integrated care more positively.

This proposed condition will apply to all licensees. Independent providers will not be held to account for being unable to participate in any system roles where they may be precluded to do so by law or legitimate commercial considerations.

Questions for consultation

Changes to the licence set out in licence section 1: Integrated Care 1C1: Provision of integrated care

To what extent do you agree/disagree with the reframing of the Integrated Care condition as a positive obligation, on all licence holders?

- Please explain your answer, including any feedback on the wording of this condition

2.5 Reflecting personalised care in patient choice

Proposal – for all licensees

- To expand the patient choice condition into IC2: Personalised Care and Patient Choice through the addition of requirements for providers to support the implementation and delivery of personalised care by:
 - Having due regard to the guidance on personalised care and comply with legislation
 - Ensuring that people who use services are offered control to manage their own health and wellbeing to best meet their circumstances, needs and preferences, working in partnership with other services where required.
 - Retaining patient choice

Full proposed text in draft licence section 1: Integrated Care 1C2: Personalised Care and Patient Choice

About this proposal

We propose reflecting personalised care in the provider licence via additions to the existing patient choice condition.

Personalised care is increasingly important for ensuring that people have choices and control over the way their care is planned and delivered. As outlined in [guidance](#), providers should be delivering on six interlinked components of personalised care:

- shared decision making
- personalised care and support planning
- choice, social prescribing
- supported self-management
- personal health budgets
- integrated personal budgets.

We believe that reflecting these in the provider licence will clarify expectations and provide consistent messaging to providers around expectations in this area.

Questions for consultation

Changes to the licence set out in licence condition 1: Integrated Care 1C2: Personalised Care and Patient Choice

To what extent do you agree/disagree with the expansion of the patient choice condition to include requirements around personalised care?

- Please explain your answer, including any feedback on the wording of this condition

2.6 Removing the competition condition

Proposal – for all licensees:

- To remove Choice and Competition Condition 2: Competition Oversight which states that the Licensee shall not:
 - a) enter into or maintain any agreement or other arrangement which has the object or which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS, or
 - b) engage in any other conduct which has (or would be likely to have) the effect of preventing, restricting or distorting competition in the provision of health care services for the purposes of the NHS

About this proposal

We propose removing this condition from the licence to reflect the shift in healthcare priorities from competition to collaboration and that NHS England does not hold statutory responsibility for competition oversight. General competition law will continue to apply where relevant.

Questions for consultation

To what extent do you agree/disagree that the choice and competition condition 2: competition oversight should be removed from the provider licence?

- Please explain your answer

3. Enhancing the oversight of key services provided by the independent sector

3.1 Broadening the range of providers where Continuity of Services conditions will apply

Proposals:

- To amend General Condition 9 in the current licence to remove now redundant clauses related to creation of Commissioner Requested Services (CRS) for foundation trusts on 1 April 2013.
- To add a process for NHS England to determine Hard to Replace Providers and as such apply the Continuity of Service Conditions of the Licence to those providers.
- To amend Cos6 (Co-operation in the event of financial stress) and CoS7 (Availability of resources) to reference Hard to Replace Providers as well as providers of CRS

Full proposed text in draft licence section 3: General conditions G8: Application of section 5 (Continuity of service) and section 6: Continuity of services CoS6: Co-operation in the event of financial or quality stress and CoS7: availability of resources.

About this proposal

We are proposing to expand our oversight related to continuity of services beyond the narrow definition of Commissioner Requested Services (CRS), to providers who deliver services that are considered Hard to Replace. Extending oversight to this group will allow us to spot and intervene when the loss of a provider might result in a loss of service availability.

NHS England already holds broader powers for oversight over foundation trusts and NHS trusts via the trust governance conditions (formerly “Foundation Trust conditions”) therefore we anticipate that this proposal will predominantly impact independent providers.

Oversight of this policy will be based on existing mechanisms used for providers of CRS via the Risk Assessment Framework and Reporting Manual for Independent

Sector Providers of NHS Services. We propose that the requirements within Continuity of Service Condition 1 will continue to apply to CRS only.

Hard to Replace providers will be defined based on qualitative and quantitative measures. These are likely to include, but may not be limited to:

- The scale of service provision nationally, regionally;
- The market share of the provider;
- Likelihood of a rapid 'market response' to a provider failure
- Whether there are known fragilities or operating pressures in the sector in which the provider operates.

A list of providers subject to the CoS conditions will be published by NHS England and will be reviewed periodically and in response to market or service changes.

We have contacted the providers most likely to be impacted by this change to gather early feedback on these proposals. Potentially affected providers acknowledge the role they play nationally or regionally in delivering key services relied on by NHS patients. They have not raised notable concerns about increased oversight to date.

Questions for consultation

To what extent do you agree/disagree with the application of continuity of services conditions to Hard to Replace Providers and the modifications to licence conditions G8, CoS6 and CoS7

- Please explain your answer, including any feedback on the specific amendments to the related conditions

Do you agree that NHS England should have the ability to determine who is a Hard to Replace Provider?

- Please explain your answer

3.2 Expanding the scope of Continuity of Services conditions to include quality governance standards

Proposals:

- To introduce a requirement within CoS 3 for standards of Quality Governance which would reasonably be regarded as:
 - Suitable for a provider of Commissioner Requested Services
 - Suitable for a Hard to Replace Provider
 - Providing reasonable safeguards against the licensee being unable to deliver services due to 'quality stress'
- Within CoS6 introduce the concept of 'quality stress' as a quality equivalent to financial going concern risk, that creates a risk to the ongoing provision of services. Quality Stress may apply to specific services or all services'

Full proposed text in draft licence section 6: Continuity of services CoS3 Standards of corporate governance, financial management and quality governance and CoS6: Co-operation in the event of financial or quality stress

About this proposal

We propose introducing new requirements that would allow NHS England to take regulatory action over providers that are subject to the Continuity of Service Conditions (providers of CRS and, pending consultation, Hard to Replace Providers) where current system levers are not sufficient to address significant quality governance concerns.

This would be limited to situations where there is a risk to continuity of services and there is no alternative source of provision. This is in addition to the existing capability to take regulatory action over financial distress.

Quality governance in independent providers has historically been viewed as the responsibility of NEDs/trustees, directors and shareholders, who have a vested interest in the overall governance of a healthcare provider.

However, recent years have seen an increase in quality concerns in independent providers which threaten the survival of the entity or its ability to continue providing the services. Existing commissioning levers can drive some quality improvements, but these can be constrained by lack of alternative provider.

These proposals build on a range of quality oversight processes available, including commissioner contract monitoring and regional and national quality risk summits to consider more systemic quality concerns.

Currently some ad hoc support is available, such as via local Provider Collaboratives, but this relies on voluntary agreement with the independent providers concerned. Formal intervention is expected to represent a route of last resort where other courses of action have failed or are likely to.

Early engagement with impacted providers and relevant stakeholder groups are broadly supportive and understand the objectives of the changes. They have however raised concerns about duplication with the work of CQC, potential additional costs of oversight, and for non-profit providers the lack of access to NHS funded initiatives that support good quality care for patients.

We intend to work closely with CQC to reduce the burden of reporting by having a risk based approach that uses CQC intelligence.

Questions for consultation

To what extent do you agree/disagree with the proposed new requirements for quality governance for independent sector providers that are subject to the continuity of services conditions as drafted in licence condition 6 : Continuity of Services CoS3 and CoS6?

- Please explain your answer, including any feedback on the specific amendments to CoS 3 and CoS 6 conditions

4. Addressing climate change

4.1 Tackling climate change and delivering net zero

Proposal – for NHS trusts and foundation trusts and NHS Controlled Providers

- To add additional requirements to the trust governance condition (formerly FT4; CP1 for Controlled Providers) to ensure NHS trusts, foundation trusts and NHS Controlled Providers have regard to guidance on tackling climate change and delivering net zero emissions, and take all reasonable steps to minimise the adverse impact of climate change on health as outlined in the 2022 Act

Full proposed text in draft licence:

- section 4: NHS provider conditions NHS2: Governance arrangements Paragraph 3(b) (for NHS trusts and foundation trusts)
- section 5: NHS Controlled Provider condition CP1: Governance arrangements (for NHS-controlled providers)

About this proposal

This proposal reflects the requirements set out in the 2022 Act relating to the contribution of NHS trusts and foundation trusts to tackling climate change and delivering net zero emissions.

Transferring these requirements to the licence ensures coherence across our legislative, policy and regulatory frameworks, and consistency with associated messaging sent to the system surrounding the NHS' net zero ambitions. This provides formal regulatory status to the NHS' environmental responsibilities.

We propose that the adherence to guidance NHS England may publish on tackling climate change is part of good corporate governance and aligns with the governance requirements in the 2022/23 NHS Standard Contract, requiring boards to nominate a board-level net zero lead and deliver a green plan.

We also propose to place this requirement onto NHS controlled providers via amendments to the controlled provider condition CP1 to be consistent with the requirements on their parent NHS trust and/or foundation trust.

Questions for consultation

To what extent do you agree/disagree with this proposed addition of having regard to guidance on delivering net zero as a requirement of the governance condition 2 (previously FT4) and the NHS Controlled Provider condition 1?

- Please explain your answer including any feedback on the wording of this condition

Are there elements of this proposed condition that should be extended to independent sector providers?

- Please explain your answer

5. Technical amendments

5.1 Shifting the focus of the costing conditions to support integration and improvement

Proposal – for all licensees

- To update the expectations on all licence holders to record, submit and ensure completeness of costing data in line with the Approved Costing Guidance by:
 - Replacing pricing condition 1 with an updated costing condition which requires mandated providers (currently NHS trusts and foundation trusts in acute, mental health, ambulance, and community sectors) to record and submit costing mandated data consistent with the requirements of the Approved Costing Guidance.
 - Replacing pricing condition 2 with an updated costing condition which requires mandated providers to submit the mandated information outlined in Costing Condition 1 to NHS England.
 - Replacing pricing condition 3 with an updated costing condition which requires mandated providers to have processes in place to ensure the accuracy and completeness of costing and other relevant information collected and submitted to NHS England as per the Approved Costing Guidance

Full proposed text in Section 7: Costing of the draft provider licence

About these proposals

We propose to update the costing conditions and separate them from the other pricing conditions. This would reflect the wider role costing data plays in supporting integration and improvement as well as the pricing NHS services, with the aim of ensuring complete datasets to underpin decisions which can support the delivery of high-quality care for patients and of better value for the NHS.

The Approved Costing Guidance is currently mandated for NHS trusts and foundation trusts providing acute, ambulance, mental health and community services. Independent providers are encouraged to comply with the costing principles but are not currently required to submit costing data. The [guidance](#) notes that requirements may change in the future.

The proposed changes for conditions 1 and 2 are technical changes to refer to the Approved Costing Guidance. Proposed condition 3 is a substantial change that replaces the existing pricing condition 3. This amendment sets a formal responsibility onto mandated providers (as outlined in the guidance) to put in place processes to validate the accuracy and completeness of their coded and costed activity data. This would replace the existing Costing Assurance Programme (CAP). NHS England will support providers to meet these requirements via a suite of tools.

Questions for consultation

To what extent do you agree/disagree with the wording changes required to reposition pricing conditions 1 and 2 as the new costing conditions 1 and 2

- Please explain your answer including any feedback on the wording of this condition

To what extent do you agree/disagree with replacing pricing condition 3 with the new costing condition 3: assuring the accuracy of pricing and costing information

- Please explain your answer, including any feedback on the wording of this condition

5.2 Amending the pricing conditions to reflect changes to national policy

Proposals – for all licensees:

- To update the wording in the existing Pricing Condition 4 so that the licensee shall comply with the rules and apply the methods concerning charging for the provision of NHS services set out in the NHS Payment Scheme and renaming Pricing Condition 1
- To remove existing Pricing Condition 5 that requires constructive engagement with CCGs prior to appealing to Monitor for a local tariff modification

Full proposed text in section 8: Pricing of the draft provider licence

About this proposal

We propose replacing the existing Pricing Condition 4 which requires compliance with the national tariff, with a new expectation to comply with rules set out in the NHS Payment Scheme, reflected the new pricing provisions inserted into the Health

and Social Care Act 2012 by the 2022 Act. Those provisions are to come fully into force from April 2023. The NHS payment scheme will be a system of pricing rules, less focused on fixed prices than the national tariff, although prices will still be published.

We also propose removing pricing condition 5. The changes made by the 2022 Act remove the specific provision for local modifications, reflecting the move to systems working where concerns around capacity to provide services at price set in accordance with the national payment scheme should be resolved at system level. The former Monitor duties relating to local modifications will fall away once the relevant provisions of the 2022 Act are brought into force.

Questions for consultation

To what extent do you agree/disagree with the proposed wording change to Pricing Condition 4?

- Please explain your answer including any feedback on the wording of this condition

To what extent do you agree/disagree with the proposed removal of Pricing Condition 5 from the provider licence?

- Please explain your answer

5.3 Streamlining reporting requirements

Proposal – for all licensees

- To remove paragraphs 3 and 4 from the existing General Condition 6: Systems for compliance with licence conditions and related obligations
- To remove paragraph 8 from Foundation Trust Condition 4: Requirements for submit a Corporate Governance Statement and paragraph 8 from Controlled Provider Condition 1

About this proposal

We propose removing paragraphs 3 and 4 of General Condition 6 (G6), and paragraph 8 of Foundation Trust Condition 4 (FT4) to streamline reporting requirements and reduce burdens on providers. We also propose removing paragraph 8 from the Controlled Provider Licence condition 1 (CP1).

Paragraphs 3 and 4 of G6 require providers to submit and publish a certificate approved by Directors declaring that they have taken all necessary precautions to comply with the condition. This certificate must describe compliance in meeting expectations that providers have taken all reasonable precautions to comply with the conditions of the licence, the NHS Acts, and the NHS Constitution, and that licensees have established and implemented systems and processes to identify and guard against risks.

Similarly, Paragraph 8 of FT4 requires foundation trusts to submit a Corporate Governance Statement confirming compliance with the condition, anticipated compliance for the next financial year, and detailing risks to compliance and actions to mitigate such risks. This statement includes descriptions of how FT4 is met including applying systems, standards and principles of good corporate governance, having effective governance structures and systems in place, and monitoring and management of internal controls and risk.

Assessments of past compliance with FT4 is already captured in separate annual reporting processes and the Corporate Governance Statement is no longer collected by NHSE. The removal of this requirement would mean providers would no longer have to make statements on anticipated future compliance. Requirements for boards to routinely consider compliance via separate annual reporting processes remain, and evidence of compliance would continue to be considered as part of well-led assessments.

We have been told by the majority of providers we spoke with that this forward-looking assessment adds little value to their compliance processes, and that they would therefore support its removal- alongside that of G6 certificate- as a welcome reduction in duplication and regulatory burden. Some providers, however, noted they found the corporate governance statements beneficial in focusing organisational attention to compliance and governance processes. We are therefore keen to hear feedback from the sector on both proposals.

Independent providers are not bound by the same additional reporting requirements on compliance with the licence. An equivalent self-certification requirement is expected to be added to the Risk Assessment Framework and reporting manual for independent sector providers of NHS services to ensure independent providers continue reporting their compliance against G6. Amendments to the Risk Assessment Framework and reporting manual for independent sector providers of NHS services will be consulted on separately.

Questions for consultation

To what extent do you agree/disagree with the removal of paragraphs 3 and 4 from General Condition 6 of the existing licence?

- Please explain your answer- including any risks or benefits you see related to the removal of these requirements

To what extent do you agree with the proposed removal of Paragraph 8: requirements to submit a Corporate Governance Statement within FT4 for NHS trusts and foundation trusts (renamed NHS2 in proposed draft licence) and CP1 for NHS Controlled Providers?

- Please explain your answer- including any risks or benefits you see related to the removal of these requirements

5.4 Applying conditions to NHS trusts and updating language to reflect the current statutory framework

Proposal – for all licensees

- To apply relevant existing conditions which apply to all licensees to NHS trusts, including the general conditions, integrated care conditions, costing and pricing conditions and continuity of service conditions (if applicable)
- To extend the foundation trust conditions to NHS trusts excluding specific legislative requirements which relate only to foundation trusts. We propose to rename this section NHS governance conditions. (which we propose to rename as NHS governance conditions)
- To remove all references to Monitor or NHS Commissioning Board and replace them with 'NHS England'
- To amend references to commissioning to reflect the new role of Integrated Care Boards and of bodies which may hold delegated commissioning functions.

About this proposal

We propose extending all licence conditions currently held by foundation trusts to NHS trusts upon commencement of legislation which requires them to hold licences (expected to be April 2023). NHS trusts will therefore be licenced and held to all conditions that are applicable to all licensees, any changes to the licence proposed

during this consultation, as well as the foundation trust condition (renamed NHS governance conditions in the draft modified licence).

This will formalise our approach to equivalent oversight approaches towards NHS trusts and Foundation Trusts, and the 'shadow' licensing regime that currently exists for NHS trusts.

We also propose wording changes to bring the licence up to date with the 2022 Act which has:

- Abolished Monitor and the NHS Trust Development Authority and transferred many of their statutory functions into NHS England, and renamed the NHS Commissioning Board NHS England
- Established Integrated Care Boards and abolished Clinical Commissioning Groups, transferring CCG responsibilities to those Boards.

Questions for consultation

To what extent do you agree/disagree to apply all core conditions to NHS trusts (including the general conditions, integrated care conditions, costing and pricing conditions and continuity of service conditions, if applicable) and to extend the foundation trust conditions to NHS trusts?

- Please explain your answer

To what extent do you agree/disagree with these proposed wording changes to ensure the provider licence accurately reflects the names of the statutory NHS organisations?

- Please explain your answer

5.5 Removing obsolete conditions

Proposal – for all licensees

To remove conditions that have never been used and/or where we have no intention to use them in the future:

- General Condition 3 that requires licence holders to pay annual fees to Monitor
- Foundation Trust Condition that obliges a FT licence holder to pay a fee to Monitor in respect of registration and related costs
- Foundation Trust Condition 3 to provide information to a governors advisory panel as defined in the 2006 Act

About this proposal

These conditions have never been used and we have no intention to use them in the future. The FT governors advisory panel no longer exists.

Questions for consultation

To what extent do you agree/disagree with the proposal to remove General Condition 3 from the provider licence?

- Please explain your answer

To what extent do you agree/disagree with the proposal to remove Foundation Trust Condition 2 from the provider licence?

- Please explain your answer

To what extent do you agree/disagree with the proposal to remove Foundation Trust Condition 3 from the provider licence?

- Please explain your answer

5.6 Amending the Fit and Proper Persons condition

Proposal – for all licensees

- To accept the changes to licence condition G4 as per the consultation run by Monitor in 2021 to align the condition with regulation 5 of the Fit and Proper Persons Regulations which set out a Fit and Proper Persons test.

About this proposal

Licence holders as well as NHS trusts were invited to respond to a consultation in 2021 to modify condition G4 to align with the current provisions of the Fit and Proper Persons Requirements (FPPR) which were brought into force under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.⁴

The responses demonstrated broad support for the proposal. During the period of consultation, from 22 February to 29 March 2021, there were 274 licence holders, of which only two objected. This represented 0.7% of all licence holders, which means the objection threshold was not met. The two licence holders who objected

⁴ The [consultation notice](#) describes the proposed changes in detail.

held 3% of the share of supply in England. As such, the ‘share of supply percentage’ threshold was also not met.⁵

We propose proceeding with the previously consulted upon amendments to condition G4 (G3 in draft licence), however would like to provide the opportunity to licensees who were first granted a licence after March 2021 to provide comments on this change which we will consider alongside the initial consultation response noted above.

Questions for consultation

For licensees who received their provider licence after March 2021: Do you agree/disagree with the previously consulted upon technical amendment to modify condition G4 to align it with Regulation 5 of the Fit and Proper Persons Regulations?

- Please explain your answer

6. Other questions for consultation

Are there other parts of the provider licence, not discussed in this consultation, that you feel should change?

- Please explain your answer

⁵ The objection and share of supply thresholds previously applied to licence modifications but have now been removed via the 2022 Act. These previously set the threshold where changes to the licence could be made without further consultation or reference to the Competition and Markets Authority for determination.

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