Proposed modification of the NHS provider licence standard conditions: Condition G4 (fit and proper persons)

Consultation notice

22 February 2021

# About this document

1. This statutory consultation notice published by Monitor under section 100 of the Health and Social Care Act 2012 (the 2012 Act) gives notice of a proposed modification to the standard conditions of the NHS provider licence. It should be read in conjunction with the annexes which are supporting documents.
2. Monitor and the NHS Trust Development Authority operate as an integrated organisation known as NHS Improvement. In this document references to ‘NHS Improvement’ should be read as references to Monitor and/or the Trust Development Authority as appropriate to the context. References to ‘directors’, even where expressly stated, include all those performing equivalent or similar functions.

## Background

1. Providers of healthcare services for the NHS must ensure that their directors (or directors and governors in the case of NHS foundation trusts) satisfy specified requirements. In particular, directors must meet the fit and proper person test set out in regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (the FPP Regulations). A copy of regulation 5 of the FPP Regulations can be found at Annex B.
2. NHS foundation trusts and most independent providers of health care services for the NHS must be licensed by Monitor. NHS trusts are not required to hold a licence but are bound by most of the standard conditions of the provider licence, including condition G4. Condition G4 makes provision about fit and proper persons, and therefore applies to NHS foundation trusts, NHS trusts and all licensed independent providers of health services for the NHS.
3. The proposed amendments to condition G4 would provide for consistency with the FPP Regulations.

# Proposed modification to condition G4

1. NHS Improvement proposes modifying standard condition G4 of the provider licence: Fit and proper persons as Governors and Directors (also applicable to those performing equivalent or similar functions). A copy of condition G4 in its current form can be found at Annex A. Our proposal is largely a technical amendment designed to align condition G4 with the fit and proper persons requirements set out in the FPP Regulations.

## Reason for the proposed modification

1. Licence condition G4 applies to all providers holding an NHS provider licence and, by way of directions, also applies to NHS trusts. It requires that providers ensure that their directors and governors meet appropriate standards of personal behaviours and technical competence. The objective is to prevent an unfit person from holding office as a director or governor.
2. Since publication of the NHS provider licence, regulation 5 of the FPP Regulations has come into force. Regulation 5 sets out a fit and proper person’s test (the FPP test) which applies to directors of all NHS providers registered with the Care Quality Commission, which includes all licence holders and other organisations to which licence conditions apply.
3. To ensure consistency of approach with the FPP Regulations, we propose making some technical amendments to condition G4.
4. Although the FPP Regulations do not apply to governors of NHS foundation trusts, we also propose updating the provisions of condition G4 relating to governors to reflect current practices.

## Effect of the proposed modification

### Provisions relating to directors

1. While the proposed modification (as it applies to directors) is a technical amendment, it would have the effect of extending the scope of the fit and proper person test as set out in the licence to include:
   1. qualifications, competence, skills, experience and ability to properly perform the functions of a director
   2. issues of serious misconduct or mismanagement and
   3. disbarment in relation to safeguarding vulnerable groups and disqualification from office.
2. In practice, licence holders are already required to comply with these requirements under the FPP Regulations. The effect of the modification is therefore simply to ensure consistency of approach in the provider licence.
3. The modification also removes the requirement for licence holders to ensure that there are contractual arrangements in place for dealing with directors who are unfit. These provisions are no longer necessary since the introduction of the FPP Regulations prohibits licence holders from appointing, or having in office, an unfit director.
4. The effect of the modification is also to remove provisions which have become redundant and brings provisions in line with current working practices, details of which are set out in paragraphs 15 to 18 below.

### Provisions relating to governors

1. The FPP Regulations do not apply to governors of NHS foundation trusts. The effect of the proposed modification (as it applies to governors) would be limited to bringing the provisions in line with current working practices, as set out in paragraphs 16 to 18 below, and to make minor changes to the wording to provide greater clarity.

### Provisions relating to directors and governors

1. The proposed modification would remove two provisions which are either redundant or have limited application.
2. The first of these provisions is the reference to Monitor’s discretion to authorise any general exception to the fit and proper person requirements for NHS foundation trust directors and governors. This power has limited application because it applies only to fit and proper person requirements that an NHS foundation trust has included in its constitution and which go beyond the legislative requirements. In practice the power has never been used so the modification would simply remove a provision that is already effectively redundant.
3. The second is the prohibition on holding office as a director or governor for any person disqualified from holding office as a director under the Company Directors’ Disqualification Act 1986. As this provision expressly relates to directors’ fitness and goes beyond the legislative framework for governors, it is proposed that it is removed in relation to governors. For directors, the provision can be removed as it is already covered by the FPP test under the FPP Regulations, which would be incorporated into the licence by the proposed modifications.

## Form of the proposed modification to licence condition G4

1. The proposed modification to condition G4 is in the form set out below:

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| **PROVIDER LICENCE**  **Licence Condition G4**  **Condition G4 – Fit and proper persons as Governors and Directors (also applicable to those performing the functions of, or functions equivalent or similar to the functions of, a director)**  1. The Licensee must ensure that a person may not become or continue as a Governor of the Licensee if that person is:   1. a person who has been made bankrupt or whose estate has been sequestrated and (in either case) has not been discharged; 2. a person in relation to whom a moratorium period under a debt relief order applies (under Part 7A of the Insolvency Act 1986); 3. a person who has made a composition or arrangement with, or granted a trust deed for, that person’s creditors and has not been discharged in respect of it; 4. a person who within the preceding five years has been convicted in the British Islands of any offence if a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on that person.   2. The Licensee must not appoint or have in place a person as a Director of the Licensee who is not fit and proper.  3. For the purposes of paragraph 2, a person is not fit and proper if that person is:   1. an individual who does not satisfy all the requirements as set out in paragraph (3) and referenced in paragraph (4) of regulation 5 (fit and proper persons: directors) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (S.I. 2014/2936); or 2. an organisation which is a body corporate, or a body corporate with a parent body corporate:    * 1. where one or more of the Directors of the body corporate or of its parent body corporate is an individual who does not meet the requirements referred to in sub-paragraph (a);      2. in relation to which a voluntary arrangement is proposed, or has effect, under section 1 of the Insolvency Act 1986;      3. which has a receiver (including an administrative receiver within the meaning of section 29(2) of the 1986 Act) appointed for the whole or any material part of its assets or undertaking;      4. which has an administrator appointed to manage its affairs, business and property in accordance with Schedule B1 to the 1986 Act;      5. which passes any resolution for winding up;      6. which becomes subject to an order of a Court for winding up; or      7. the estate of which has been sequestrated under Part 1 of the Bankruptcy (Scotland) Act 1985.   4. In assessing whether a person satisfies the requirements referred to in paragraph 3(a), the Licensee must take into account any guidance published by the Care Quality Commission. |

# The consultation process

## Statutory consultation and objection process

1. Any proposals to modify the standard conditions of the NHS provider licence are subject to a statutory consultation process under the 2012 Act. This provides an opportunity for licence holders to express their views on, and to object to, the proposals. Further information on the statutory consultation and objection process can be found in Annex C.
2. The 2012 Act sets out the statutory process for challenging a proposed modification to the NHS provider licence. If licence holders object to the proposal, and the number of objections reaches a certain threshold, NHS Improvement may not progress with the proposed modification without a reference to the Competition and Markets Authority or further statutory consultation.

## Who can object to the proposed modifications?

1. While responses from stakeholders other than licence holders will inform any decision about the proposed modification, only objections from licence holders will count towards the objection threshold.

## Impact assessment

1. Under section 69 of the 2012 Act, Monitor is required to carry out an impact assessment where proposals are likely to involve a major change in the standard conditions of the NHS provider licence. This proposal involves only minor and technical changes to the NHS provider licence which are necessary to bring the licence into line with existing legislative requirements. On that basis, an impact assessment is not required.
2. We have carried out an assessment of the equality and health inequalities impact of these proposals and have not identified any issues. We would welcome comments from consultees.

## Consultation questions

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| 1. **Do you object to the proposed technical amendment to modify condition G4 of the NHS provider licence? *\*All consultation responses will be taken into account but only objections from licence holders will count towards the objection threshold*** 2. **If so, what are your reasons?** 3. **Are there any equality issues that arise (positive or negative) in relation to this proposal? In particular, would this proposal have an impact on any groups of persons sharing a protected characteristic, as set out in the Equality Act 2010?** 4. **If yes, please outline any potential issues.** |

## Responding to the consultation

1. If you wish to respond to this consultation, please do so by **midnight on Monday 29 March 2021.** You may submit your response via our online survey: <https://www.engage.england.nhs.uk/survey/proposed-modification-of-the-nhs-provider-licence>, or by email to [nhsi.g4responses@nhs.net](mailto:nhsi.g4responses@nhs.net). The address for postal responses can be found at the end of this document.
2. If you are responding to this consultation on behalf on an organisation, please confirm that you are authorised to do so.
3. Please email nhsi.g4responses@nhs.net if you have any questions or any difficulty accessing the survey. Please let us know (by emailing nhsi.g4responses@nhs.net) if all or part of your response or identity is confidential so that we can exclude this from any published summary of responses. We will do our best to meet all requests for confidentiality but, because NHS Improvement is a public body subject to the Freedom of Information Act, we cannot guarantee that we will not be obliged to release your response (potentially including your identity) or part of it even if you say it is confidential.

# Annex A: NHS Provider Licence General Condition G4: Fit and Proper Persons as Governors and Directors

**The Provider Licence**

**Condition G4: Current form**

**Condition G4 – Fit and proper persons as Governors and Directors (also applicable to those performing equivalent or similar functions)**

1. The Licensee shall ensure that no person who is an unfit person may become or continue as a Governor, except with the approval in writing of Monitor.

2. The Licensee shall not appoint as a Director any person who is an unfit person, except with the approval in writing of Monitor.

3. The Licensee shall ensure that its contracts of service with its Directors contain a provision permitting summary termination in the event of a Director being or becoming an unfit person. The Licensee shall ensure that it enforces that provision promptly upon discovering any Director to be an unfit person, except with the approval in writing of Monitor.

4. If Monitor has given approval in relation to any person in accordance with paragraph 1, 2, or 3 of this condition the Licensee shall notify Monitor promptly in writing of any material change in the role required of or performed by that person.

5. In this Condition an unfit person is:

(a) an individual;

(i) who has been adjudged bankrupt or whose estate has been sequestrated and (in either case) has not been discharged; or

(ii) who has made a composition or arrangement with, or granted a trust deed for, his creditors and has not been discharged in respect of it; or

(iii) who within the preceding five years has been convicted in the British Islands of any offence and a sentence of imprisonment (whether suspended or not) for a period of not less than three months (without the option of a fine) was imposed on him; or

(iv) who is subject to an unexpired disqualification order made under the Company Directors’ Disqualification Act 1986; or

(b) a body corporate, or a body corporate with a parent body corporate

(i) where one or more of the Directors of the body corporate or of its parent body corporate is an unfit person under the provisions of sub-paragraph (a) of this paragraph, or

(ii) in relation to which a voluntary arrangement is proposed under section 1 of the Insolvency Act 1986, or

(iii) which has a receiver (including an administrative receiver within the meaning of section 29(2) of the 1986 Act) appointed for the whole or any material part of its assets or undertaking, or

(iv) which has an administrator appointed to manage its affairs, business and property in accordance with Schedule B1 to the 1986 Act, or

(v) which passes any resolution for winding up, or

(vi) which becomes subject to an order of a Court for winding up.

Annex B: Relevant legislation: the fit and proper persons tests

**Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (FPP Regulations)**

5.—

1. This regulation applies where a service provider is a body other than a partnership.
2. Unless the individual satisfies all the requirements set out in paragraph (3), a service provider must not appoint or have in place an individual—
   1. as a director of the service provider, or
   2. performing the functions of, or functions equivalent or similar to the functions of a director.
3. The requirements referred to in paragraph (2) are that—
   1. the individual is of good character,
   2. the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,
   3. the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,
   4. the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and
   5. none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.
4. In assessing an individual's character for the purposes of paragraph (3)(a), the matters considered must include those listed in Part 2 of Schedule 4.
5. The following information must be available to be supplied to the Commission in relation to each individual who holds an office or position referred to in paragraph (2)(a) or —
   1. the information specified in Schedule 3, and
   2. such other information as is required to be kept by the service provider under any enactment which is relevant to that individual.
6. Where an individual who holds an office or position referred to in paragraph (2)(a) or (b) no longer meets the requirements in paragraph (3), the service provider must—
   1. take such action as is necessary and proportionate to ensure that the office or position in question is held by an individual who meets such requirements, and
   2. if the individual is a health care professional, social worker or other professional registered with a health care or social care regulator, inform the regulator in question.

**SCHEDULE 4**

**Good character and unfit person tests**

1. This schedule has no associated Explanatory Memorandum

**PART 1**

**Unfit person test**

**1.**  The person is an undischarged bankrupt or a person whose estate has had sequestration awarded in respect of it and who has not been discharged.

**2.**  The person is the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order or an order to like effect made in Scotland or Northern Ireland.

**3.**  The person is a person to whom a moratorium period under a debt relief order applies under Part VIIA (debt relief orders) of the Insolvency Act 1986.

**4.**  The person has made a composition or arrangement with, or granted a trust deed for, creditors and not been discharged in respect of it.

**5.**  The person is included in the children’s barred list or the adults’ barred list maintained under section 2 of the Safeguarding Vulnerable Groups Act 2006, or in any corresponding list maintained under an equivalent enactment in force in Scotland or Northern Ireland.

**6.**  The person is prohibited from holding the relevant office or position, or in the case of an individual from carrying on the regulated activity, by or under any enactment.

**PART 2**

**Good character**

**7.**  Whether the person has been convicted in the United Kingdom of any offence or been convicted elsewhere of any offence which, if committed in any part of the United Kingdom, would constitute an offence.

**8.**  Whether the person has been erased, removed or struck-off a register of professionals maintained by a regulator of health care or social work professionals.

Annex C: The statutory consultation process and objection threshold

**Consultation process**

The Health and Social Care Act 2012 specifies that Monitor must consult on any proposed modification to the standard conditions of the provider licence with:

* every licence holder
* the Secretary of State
* NHS England
* every CCG
* the CQC and its Healthwatch England Committee.

Monitor may only modify the standard conditions of the licence (without reference to the Competition and Markets Authority) if:

* 1. No objections are received from licence holders within the notice period (a minimum of 28 days); or
  2. Where one or more licence holders object within the notice period, the objection threshold and share of supply threshold are not met.

The objection threshold is met if 20% or more licence holders object to the proposals. The share of supply threshold is met if the percentage of licence holders, weighted according to share of supply is 20% or more.

## Who can object?

All responses to the consultation will be taken into account but only objections from licence holders will count towards the objection threshold and therefore determine whether NHS Improvement can make the proposed modification without further consultation or reference to the Competition and Markets Authority.

Any objection must be made by a person who is authorised to represent the licence holder. Providers should ensure that there are proper internal processes for managing this.

Licence holders should, if they object to the proposals, provide reasons. Failure to do so will not invalidate the objection but it may have an impact on our assessment of the objection.

Contact us:

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