



Response to NHS England's consultation on the provider licence

Introduction

NHS England issued a consultation¹ on its proposals to change the NHS provider licence on 28 October 2022 with responses due on 9 December 2022.

The proposed changes reflect new requirements set out in the Health and Care Act 2022 as well as changes made to the oversight arrangements in the healthcare provider sector since 2013. This licence will be applicable to NHS trusts as well as NHS foundation trusts and independent providers.

Responses

1 What is the name of your organisation.

Healthcare Financial Management Association

2 The organisation is a representative body.

A representative body

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

Yes

We agree that the current licence no longer reflects the legislative framework and regulatory oversight arrangements for the healthcare provider sector. As there is a statutory requirement in the Health and Social Care Act 2012 for providers to be licenced, then we agree that the licence should be reviewed and updated.

¹ NHS England, *Consultation for changes to the NHS provider licence*, October 2022



However, as the consultation itself states, most of the proposed changes reflect either statutory requirements or the way that the NHS is currently regulated. It is therefore not clear what role the licence plays in the current regulatory framework and what the consequences will be if one or more of the duties set out in the licence is not met. It would be helpful to understand how the changes to the licence link to the planned *NHS provider selection regime*² and whether the Care Quality Commission (CQC) will change its approach to assessing performance as a result of changes to the licence.

We note that the *Operating framework for NHS England*³ contains specific reference to the NHS provider licence but there is no indication as to how compliance will be monitored nor what action will be taken if the licence conditions are not complied with.

This is further underlined by the impact assessment which concluded that, in the most part, these proposed changes will have little or no impact on the day to day operations of an NHS or independent sector body.

A number of areas referred to, such as co-operation, having regard to health inequalities, net zero progress and digital maturity are both aspirational and difficult to measure. It is unclear how these will be assessed and what the impact will be if they are not fully achieved.

We are not convinced that adding, for example, the new condition on digital maturity will have any impact on the actions that NHS bodies take in relation to digital. NHS bodies understand that in order to transform services to meet increased demand and achieve financial stability, they will need to implement digital solutions. They also expect that if they fail to move towards digital maturity then their operational performance and financial position will not improve – which would mean that they would fail to meet their own objectives and may result in regulatory action through the oversight framework or the CQC review process. It is not clear what additional action will be taken by including this requirement in the licence.

4 To what extent do you agree/disagree with the proposed new co-operation licence condition for 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

Agree

We welcome the policy commitment to collaboration. As stated before, it is not clear how performance against this licence condition will be assessed.

This is particularly an issue in relation to system working as the licence is organisation specific, but the condition can only be met through working with other organisations. For example, if a system fails to meet its financial duty but there is disagreement between the system partners as to why this is the case. As integration is embedded and patient pathways cross organisational boundaries, it is expected that risks may arise in one part of the system with the benefits being realised in another – in this case, how will achievement of this licence condition be assessed?

One of our members tells us that the fact that they are currently in breach of their licence is hindering their ability to work collaboratively with neighbouring NHS bodies as they will not be able to enter into a transaction with them until the breach is resolved in some way. This will involve taking legal advice adding to the cost of the transaction. The licence cannot become a barrier to achieving one of the objectives that it requires NHS bodies to meet.

As integrated care boards (ICBs) only became operational on 1 July 2022, there are wide ranges of maturity within systems and between systems. The provider role is changing as well as some are taking on commissioning as part of provider collaboratives. The licence condition does not take into account this range which may result in some providers being assessed against an impossible aim in the short term.

² NHS England, *NHS provider selection regime*, February 2022

³ NHS England, *NHS England operating framework*, October 2022

5 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

Agree

See the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

6 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

Agree

Workforce issues are challenging at the moment and moving to a system wide workforce position will take time. There will need to be engagement with staff as well as all of the other human resources requirements to meet, support for organisational development and change as well as changes to working arrangements and systems.

See also the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

7 Are there elements of this proposed co-operation condition that should be extended to independent sector providers? Please explain your answer

Yes.

If an integrated service for patients/ users is the objective, then independent sector providers will need to be part of the solution. However, the same comments apply about how performance against the licence condition will be demonstrated and assessed and the consequences of not meeting the licence conditions.

It also needs to be recognised that independent sector providers will be bound by the terms of their contract to provide NHS services but that they may have other contracts that they are equally bound to deliver. If meeting the requirements of any of these other contracts is incompatible with working on an NHS system basis then the status of the licence needs to be clear about the NHS requirements and the consequences if these are breached.

8 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

Neutral

It is not clear what the addition of this requirement to the licence will add as this is a statutory duty set out in the Health and Care Act 2022. See also the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

9 Are there elements of this proposed Triple Aim condition that should be extended to independent sector providers? Please explain your answer

Yes

Subject to contractual requirements and commercial considerations.

While each organisation will have its own licence that reflects the type of organisation it is, it would be helpful if there was a document available to all that clearly sets out the differences between the conditions for NHS trusts, NHS foundation trusts, NHS controlled providers and independent sector providers.

10 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

Neutral

See the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

NHS bodies understand that complying with digital information standards and achieving digital maturity is necessary to achieve financial and operational sustainability in the long term. It is an important aspiration, but it is unclear what effect its inclusion in the licence is expected to have.

As with system working, NHS bodies are at varying levels of digital maturity at the moment. It is not clear how that will be reflected in the licence or assessment of performance against the licence conditions.

11 To what extent do you agree/disagree with the proposed amendment to the NHS governance condition 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

Neutral

It is not clear what the addition of this requirement to the licence will add as this is a statutory duty set out in the Health and Care Act 2022. See also the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

12 Are there elements of these proposed digital conditions that should be extended to independent sector providers? Please explain your answer

Yes

Section 250 of the Health and Social Care Act 2012 as amended, applies to any organisation that is required to be registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the carrying on of a regulated activity. Both independent sector bodies and their NHS counter parts will have to comply with information governance requirements so it may be that this aspiration cannot be achieved in practice. It is difficult to see what the addition of this requirement to the licence will change.

13 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

Agree

We agree that it is important the licence should reflect the aims of the Health and Care Act 2022 to move away from competition towards collaboration and integration. However, we remain concerned about how performance against this licence condition will be assessed.

14 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

Agree

We note that the licence refers to legislation and guidance rather than the specific legislative requirement. In other instances, for example, in relation to information standards the exact legislation is referenced. It would be helpful if the licence could clearly reference the legislation in all instances.

We understand that personalised care improves outcomes for patients and is usually financially beneficial. It is therefore important that all providers understand its importance and offer personalised care where appropriate. As with other conditions, we are not clear how including it in the licence will change operational practice.

15 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

Agree.

The licence needs to be consistent with the current legislation which requires organisations to cooperate and integrate health and care services.

16 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

Agree.

Consideration needs to be given to whether this proposal could impact on whether independent providers will want to continue to work with the NHS.

17 Do you agree that NHS England should have the ability to determine who is a Hard to Replace Provider? Please explain your answer

Yes

It will be important that there is a clear pre-determined rationale for assessing which providers are 'hard to replace' and under 'quality stress' and that the assessment will be transparent and takes local views into account. We welcome further consultation on these definitions.

18 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 ?conditions

Agree

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

Neutral

It is not clear what the addition of this requirement to the licence will add as this is a statutory duty set out in the Health and Care Act 2022. See also the concerns raised in our answer to question 4 about how performance against this licence condition will be assessed.

20 Are there elements of this proposed condition that should be extended to independent sector providers? Please explain your answer

No.

Independent sector providers will be required to meet certain conditions by their contracts with NHS bodies and by statute – these do not need to be extended by the provider licence.

21 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

Strongly agree

The HFMA welcomes the move to having costing conditions as a standalone element of the licence. We also agree that a national submission of costed data against an agreed set of standards is a vital prerequisite for ensuring that the data is appropriate for its wider role in supporting integration and improvement.

However as noted in our briefing, *What does good look like for costing in the NHS?* (September 2021) the requirements of the *Approved costing guidance* need to be proportionate, achievable and easy to understand. Research for the briefing indicated that costing teams spend the majority of their time on the annual national cost collection, with little time to support clinical teams to use the cost

data to improve value. We remain concerned that without changes to the level of detail and complexity of the guidance, this licence condition will further reduce the ability of costing professionals to support local integration and improvement. This would be a major lost opportunity to exploit the insights NHS bodies can gain from costing data.

We suggest that this condition should refer, as the others do, to the statutory requirement or the relevant guidance without including the detail of that requirement.

22 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

Neutral

The production of good quality costing information should be the responsibility of each NHS body and, on this basis, we support the inclusion. This is because it is the NHS body and the systems within which they work that will primarily use and benefit from that information.

However, the work that NHS bodies are required to undertake to assure themselves of the accuracy of costing information should be proportionate and reasonable. Where NHS England develop tools or other information to support the assurance process these need to be provided in a timely manner and should be easy to use without putting significant additional burden on costing or informatics teams.

Our members who work in costing have already raised issues that they have with the approved costing guidance with NHS England, as documented in the response to question 21. Specifically related to assurance, our members have expressed concerns about reference to the 'accuracy and completeness of coded and costed activity data', as finance departments should not be held to account for the availability of quality activity data that is not already collected through other mandated sources.

It is noticeable that the conditions relating to costing are much more detailed than any other licence conditions – but there is still no reference to how meeting the requirement will be assessed and what the consequences of not meeting the licence requirement might be. The detail on what assurance processes may include would be better included in the costing guidance itself rather than the licence which, in all other cases, simply refers to the legislative requirement.

23 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

Agree

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

Agree

25 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

Agree

26 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

Agree

27 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

Agree

The practical differences between NHS trusts and NHS foundation trusts are so few now that we agree that this licence should apply to both.

Having different conditions/governance regimes operating over NHS providers delivering the same services is an unhelpful complexity, and anything which simplifies this position is welcome.

28 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

Agree

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

Agree

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

Agree

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

Agree

32 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

Not applicable

33 Do you disagree with any parts of the provider licence that we are proposing to retain? Subject to our earlier comments about the role of the licence will be and the consequences of failing to meet its conditions, we do not disagree..

About the HFMA

The Healthcare Financial Management Association (HFMA) is the professional body for finance staff in healthcare. For over 70 years, it has provided independent and objective advice to its members and the wider healthcare community. It is a charitable organisation that promotes best practice and innovation in financial management and governance across the UK health economy through its local and national networks.

The association also analyses and responds to national policy and aims to exert influence in shaping the wider healthcare agenda. It has particular interest in promoting the highest professional standards in financial management and governance and is keen to work with other organisations to promote approaches that really are 'fit for purpose' and effective.

The HFMA offers a range of qualifications in healthcare business and finance at undergraduate and postgraduate level and can provide a route to an MBA in healthcare finance. The qualifications are delivered through HFMA's Academy which was launched in 2017 and has already established strong learner and alumni networks.

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