



Department
of Health

THE NATIONAL HEALTH SERVICE (LICENCE EXEMPTIONS, ETC) AMENDMENT REGULATIONS 2015

Summary of the Responses to the
Consultation on the Monitor Licensing
Regime and Social Care Organisations

9 January 2015

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| <p>Author: Finance & NHS Directorate/ NHS Group Economic Regulation Unit cost centre</p> |
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Summary of the Responses to the Consultation on the Monitor Licensing Regime and Social Care Organisations

Prepared by

The Department of Health

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1. Introduction

Proposals on the extension of licence exemption of nursing care

- 1.1 Providers of adult social care services are currently not regulated by Monitor and do not require a licence to provide social care services. Under Regulation 6 of the National Health Service (Licence Exemptions, etc.) Regulations 2013, providers of only NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC)¹ services are exempt from the requirement to hold a licence until 1 April 2015, unless the services are designated as Commissioner Requested Services (CRS).² However, where a care provider provides other NHS services, a licence will be required unless another exemption applies.
- 1.2 Commissioner Requested Services are those services which commissioners consider would need to continue if a provider became financially unsustainable because removal of the services would cause harm to patients, and there are no alternative providers. Providers of Commissioner Requested Services are subject to Monitor's licence conditions that secure continuity of services.
- 1.3 Between 6 June and 15 August 2014, the Department of Health consulted on proposals regarding the extension of the licence exemption for nursing care. This was included as annex B to a wider consultation on The Care Act 2014.
- 1.4 The Department consulted on whether or not to continue with the existing licence exemption and if to extend the exemption by removing the ability of commissioners to designate nursing care services as CRS. This option would allow CQC to have sole and focussed financial oversight over these providers, liaising with Monitor where necessary.
- 1.5 The two questions in annex B of the consultation were:
 - Q83. Do you think that providers of NHS Continuing Healthcare and NHS-funded nursing care should continue to be exempt from the requirement to hold a licence from Monitor?

¹ NHS Continuing Healthcare means a package of care arranged and funded solely through by the NHS where the individual has been assessed as having a "primary health need". Such care is provided to an individual aged 18 or over, to meet physical or mental health needs which have arisen as a result of disability, accident or illness.

NHS-funded nursing care is the funding provided by the NHS to homes providing nursing to support the provision of nursing care by a registered nurse. Nursing care by a registered nurse has the same meaning as in section 49(2) of the Health and Social Care Act 2001.

- Q84. Should providers NHS Continuing Healthcare and NHS-funded nursing care services be subject to those services being designated CRS?

2. Notice of Intent to Make Regulations

- 2.1 This document summarises the responses to that consultation and details the content of the National Health Service (Licence Exemptions, etc.) Amendment Regulations 2015 that the Secretary of State now intends to make, which will come into force on 1 April 2015. It includes the proposed effect of those regulations and the Secretary of State's reasons for them. As such, this document also constitutes a notice under section 83(4) of the Health and Social Care Act 2012. As required by the Act, it has been sent directly to the NHS Commissioning Board, Monitor, the Care Quality Commission and its Healthwatch England committee, and has been published on the DH website.
- 2.2 Representations about the intentions contained in this document can be made to:

licence.exemptions@dh.gsi.gov.uk

Any such representations must be made no later than 5.00 pm on Friday 6 February 2015.

3. Responses to the Consultation

- 3.1 The Department received 49 responses to the consultation from a range of organisations. Their responses have been analysed and they have contributed to the Department's policy development on the licence exemption for nursing care. A full list of respondents is at Annex A.

Should providers of NHS Continuing Healthcare and NHS-funded nursing care continue to be exempt from the requirement to hold a licence from Monitor?

Background

- 3.2 Between 6 June and 15 August 2014, the Department consulted on whether to allow the current nursing care licence exemption to expire.
- 3.3 At present and until 31 March 2015, the licence exemption applies to those providers of NHS services that include NHS Continuing Healthcare (CHC) and NHS funded nursing care (FNC). Consequently, the CHC and FNC elements of the provider's turnover is not included in determining an organisation's applicable turnover. Those with an applicable turnover below £10m are exempt from holding a provider licence unless any of its services are designated as a Commissioner Requested Services (CRS) by an NHS Commissioner. Those providers of CHC and FNC with services designated as CRS come under Monitor's licensing regime and those providers of CHC and FNC with services not designated as CRS come under the Care Quality Commission's (CQC) Market Oversight Regime.
- 3.4 NHS commissioners (Clinical Commissioning Groups and NHS England Area Teams) are responsible for planning and purchasing healthcare services for their local population and this includes deciding which services need the protection of the continuity of services provisions of the NHS provider licence. These are called 'commissioner requested services' (CRS). The current formula for determining a provider's applicable turnover excludes the vast majority of social care providers from Monitor's licensing regime, although some larger providers are required to hold a licence.
- 3.5 Therefore, by allowing the exemption to expire, this would require providers of nursing care whose total NHS turnover (including from CHC and FNC) exceeds the de minimis £10m threshold to hold a Monitor licence from 1 April 2015.

What you told us?

Q83 - Do you think that providers of NHS Continuing Healthcare and NHS-funded nursing care should continue to be exempt from the requirement to hold a licence from Monitor?

Yes 63%

No 25%

No comment/Not clear view 12%

In favour of maintaining the exemption

- 3.6 63% of those that responded were in favour of continuing the current exemption for nursing care providers from holding a Monitor licence after 1 April 2015.
- 3.7 Monitor and the Care Quality Commission (CQC) accept the proposals to retain the exclusion of NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) from the relevant turnover calculation and to retain the exemption of providers of only CHC and FNC from the requirement to hold an NHS provider licence. This is in line with the Department of Health's view.
- 3.8 The reason that some respondents provided for maintaining the exemption was that the current arrangement with oversight by CQC, in consultation with Monitor when appropriate, was adequate. They felt that it was clearer to have one organisation, the CQC, responsible for quality and standards. They did not see the need for introducing an additional regulatory system by Monitor which would duplicate work with the CQC and be burdensome to providers that may not have the resources to deal with requests from both Monitor and CQC. They said that small providers may need additional support and resources. We were informed that where CRS does not apply, the situation for social care providers would seem to be little different than that of a Monitor licensed provider of NHS services which would also be regulated by CQC for quality.
- 3.9 It may also lead to confusion, duplication and conflict between the two regulatory bodies as they both tried to regulate the same area. They did not see any additional benefit to patients, local authorities, NHS or providers from the additional intervention by Monitor to CQC.
- 3.10 It was also raised that the requirement of a Monitor licence and the additional layers of regulation would increase costs of nursing care that would be passed on to customers, local authorities and NHS bodies. It was mentioned that smaller nursing care providers may be disproportionately impacted by the introduction of licence conditions that could increase their unit costs.
- 3.11 It was explained that if there was over-regulation from the introduction of a licence then some small nursing care providers that supported people with CHC may be unable or unwilling to continue with this support.

- 3.12 It was raised that if the exemption expired it would mean an increase in the number of new nursing care providers would need to be licensed by Monitor, which would add to the volume and complexity of the current system.
- 3.13 They said that nursing care providers were likely to have a combination of patients that were NHS and local authority funded so if the exemption expired then there may be difficulties if they were expected to comply with different monitoring standards. The expiry of the exemption could also lead to a delay in the commissioning of an NHS service from a provider that did not currently have any NHS-funded patients nor a Monitor licence.

Against the exemption continuing

- 3.14 Some respondents said that there needed to be a proportionate response to this issue. They were in favour of introducing a licence if a provider had over 40 NHS funded care contracts or in excess of £1m NHS turnover. This would ensure that some safety was in place in the event of substantial provider failure.
- 3.15 Respondents argued that a licence may be beneficial in ensuring quality and protection for patients in the event of provider failure and that an exemption should only be maintained if there were valid reasons for its justification.
- 3.16 Others would like to see the exemption expire because nursing care providers would then be subject to the same vigorous process of oversight by Monitor as other NHS providers. They said that Monitor would regulate against financial and clinical failure to protect patients and also oversee the administrative process of those carers in financial difficulty or failure.
- 3.17 It was suggested that a Monitor licence may be better because the current arrangement by the Care Quality Commission (CQC) do not ensure that the care organisation's business plan and strategy are viable. They said that this means that NHS services may be commissioned for extremely vulnerable patients and then councils are expected to support failed providers by either moving patients or putting in staff to sustain the care provider.

Intention

- 3.18 63% of respondents would like the existing exemption to remain in place. Therefore, the Department intends that providers of NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) will continue to be exempt from the requirement to hold a licence from Monitor and will introduce Licence Exemption Regulations to ensure this is achieved. The turnover from providing CHC and FNC will remain excluded from the

calculation of applicable turnover. Providers of NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) will remain exempt from the requirement to hold a licence, unless any of its services are designated a Commissioner Requested Service (CRS). If providers supply other NHS services, and their applicable turnover exceeds the £10 million threshold, they will be required to hold a licence unless other relevant exemptions apply.

Should providers of NHS Continuing Healthcare and NHS-funded nursing care services be subject to those services being designated CRS

Background

- 3.19 Between 6 June and 15 August 2014, the Department consulted on whether to continue with licence exemption for provider organisations that provide NHS CHC and NHS-FNC. Most care and support providers that provide these services will continue to be exempt unless any of their services are designated as a CRS and come under Monitor's oversight. The proposal also included removing the ability of commissioners to designate nursing care services as CRS. This option would allow the Care Quality Commission (CQC) to have sole and focussed financial oversight over these providers through their Market Oversight Regime, liaising with Monitor where necessary.
- 3.20 At present, the exemption of CHC and FNC from licensing (as described above) can be removed if a commissioner views some or all of the provider's services to be CRS. This is because the operation of the CRS regime requires the provider to hold an NHS provider licence.

What you told us?

Q84. Should providers of NHS Continuing Healthcare and NHS-funded nursing care services be subject to those services being designated CRS?

| | |
|----------------------------------|-----|
| Yes | 39% |
| No | 33% |
| No comment/Not clear view | 28% |

In favour of designating nursing care provider services as CRS (so against including CRS in licence exemption)

- 3.21 39% of respondents, including Monitor and the Care Quality Commission (CQC), were in favour of maintaining the ability of NHS commissioners to designate as Commissioner Requested Services (CRS) NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) where those are the only health care services provided by the relevant person, thereby requiring the relevant person to obtain an NHS provider licence. However, 33% of respondents were in favour of removing that ability, while 28% of respondents did not give a definitive response.
- 3.22 Monitor and the CQC disagree with the proposal from the Department of Health which would prevent commissioners being able to request that nursing care providers are designated as CRS, and ask for this proposed amendment to the regulations to be withdrawn. Monitor and the CQC argued that by removing this ability of commissioners would be unable to protect the continuity of certain essential services. They noted that the proposed removal would only apply to persons that were not already licensed and only relate to providers of only NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) services, and as such a person providing any other healthcare services could still be designated by commissioners for those other services. They also noted that the test for entry to the Market Oversight regime were unrelated to those for the CRS Regime, such that exclusion from one did not ensure inclusion in the other.
- 3.23 Monitor and the CQC also mention that not all providers of social care fall within the Market Oversight regime, so a blanket exemption of services from being designated a CRS might remove those services from any oversight altogether. They said that some large providers are not exempt from the requirement to hold a licence so the proposed change would have no impact on them within the CRS regime. The proposed change from Monitor and CQC allows for the CRS designation to over-ride the NHS Continuing Healthcare (CHC) / NHS-funded nursing care (FNC) exemption from licencing, so if one of these providers is licensed for other reasons they can still be covered by the CRS regime.
- 3.24 Monitor and CQC also said that for those group's providing a mix of social care and health care this proposal will not affect the overlap between CRS and Market Oversight regimes. While there would be an overlap between Monitor and the CQC in their respective CRS and Market Oversight regimes, the impact would be minimal, affecting few providers. It was agreed that such an overlap can be dealt with through their Memorandum of Understanding, setting out how both organisations will exercise their respective functions. The Department will publish updated exemption guidelines in March 2015.
- 3.25 Some respondents mentioned that it would be beneficial to have nursing care services designated as CRS so there is protection for patients should providers fail. It is important

that there is a clear mechanism in place so that providers can access support when in difficulty to avoid or minimise the impact of failure.

- 3.26 It was confirmed by some respondents that the provision of NHS Continuing Healthcare (CHC) and NHS-funded nursing care (FNC) is not restricted to social care providers. Therefore, they said that if NHS commissioners are prevented from designating these services as Commissioner Requested Services (CRS) then this may potentially exclude some organisations from any financial oversight.

Against designating nursing care provider services as CRS (so in favour of including CRS in licence exemption)

- 3.27 We were informed by some organisations that designating their services as CRS would be excessive. They believe that existing regulations for licensed organisations are reasonable, so it would be unnecessary, bureaucratic and costly to require Monitor to supervise their services. Thus, they supported the Department of Health's option to include CRS within the continuation of the licence exemption.
- 3.28 Some respondents said that due to new provisions regarding financial monitoring by the Care Quality Commission (CQC) and around provider failure and continuity of care, there wouldn't be any more security afforded to patients by designating providers of nursing care as CRS. They will have the security in any case.
- 3.29 Respondents told us that there was no need to designate as a CRS because CQC already regulated providers. Being designated CRS would provide no guarantee of protection from provider failure, and if a provider failed then it is important that Clinical Commissioning Groups (CCGs) and local authorities took the appropriate action regardless of whether they were CRS designated.
- 3.30 We were told that if nursing care services were designated as CRS, then this would reduce the purchasing power of the monopsony³ local authority. This means that the local authority would have to intervene in order to ensure continuity of nursing care services in the event of provider failure and so would reduce their purchasing power over those providers.

Intention

- 3.31 Nearly 40% of respondents were in favour of maintaining the present situation whereby the exemption of NHS CHC and NHS FNC from licensing can be removed if a

³ A monopsony is the market condition that exists when there is one buyer.

commissioner views some or all of the provider's services to be Commissioner Requested Services (CRS). This represents the option with most support. Both Monitor and Care Quality Commission (CQC) agree and believe that removing the ability of commissioners to designate as CRS, should not be included as part of the exemption as originally proposed by the Department in the consultation.

- 3.32 The Department now intends that CRS should not be included in the licence exemption and that the current position with respect to CRS should not change, i.e. that persons whose only provision of health care services is that of NHS continuing healthcare (CHC) and NHS-funded nursing care (FNC) should not be exempted from the designation of any of those services as CRS. Where a social care provider within the Market Oversight regime is also designated as providing a CRS, Monitor and the CQC will work with the affected provider.
- 3.33 As there will be an overlap between Monitor's CRS and CQC's Market Oversight regimes it is best that this is dealt through their Memorandum of Understanding (MoU) covering the working practices of both these organisations. The MoU working arrangements between Monitor and CQC will be published in 2015. The MoU will be included as part of the Government's full review of licensing which will be undertaken in 2016-17.

ALPHABETICAL LIST OF ORGANISATIONS WHO RESPONDED

Age UK Wiltshire
Anthony Collins Solicitors LLP
Barchester Healthcare
Bath & North East Somerset Council
Borough of Poole
Bournemouth Borough Council
Bracknell Forest Council
Buckinghamshire County Council
Bupa
Bury
Care England
The Care Quality Commission
Cheshire East Council
Cheshire West and Chester Borough Council
Disability Benefits Consortium
Derby City Council
Derbyshire County Council
Doncaster Council
Dorset County Council
Enfield Council
Halton Borough Council
Hammersmith & Fulham, Kensington & Chelsea and City of Westminster (Tri-borough response)
Hertfordshire County Council
Housing & Care 21
Isle of Wight Council
Leonard Cheshire Disability
London ADASS
London Borough of Newham
London Borough of Redbridge
London Borough of Richmond upon Thames

Monitor

National Star

North East Lincolnshire Clinical Commissioning Group

Norfolk County Council

North West ADASS

North Yorkshire County Council

Liverpool

Royal Borough of Greenwich

Royal Borough of Windsor and Maidenhead

Salford City Council

Southend on Sea Borough Council

St Helens Council

Sue Ryder

Torbay

Trafford

United Kingdom Homecare Association (UKHCA)

Wakefield Council

Worcestershire County Council