the voice for social enterprise

Social Enterprise UK Consultation response: Protecting and promoting patients' interests – licensing providers of NHS services

1. Introduction

1. - Social Enterprise UK welcomes the opportunity to respond to the Department of Health's consultation – Protecting and promoting patients' interests – licensing providers of NHS services.

2. - SEUK was established in 2002 as the national body for social enterprise in the UK. We represent a wide range of social enterprises with a combined membership reaching over 10,000 social enterprises.

3. - Social enterprises are businesses driven by social or environmental objectives. They are accountable to their staff and service users, patients and communities, they reinvest their profits back into the organisations and services, and their assets are locked for public benefit. They play a critical role in areas such as community services, mental health provision, sexual health and urgent care.

4. - At Social Enterprise UK, we and our members are supportive of a greater plurality of providers in healthcare. However, we also recognise that in a system that is dependent on pathways and partnerships, where citizen needs are continuously evolving, the introduction of a fair, appropriate and effective licensing regime is complex and challenging.

5. - Social enterprises have been increasingly important players in the health and social care landscape for many years now. Government figures estimate there to be 62,000 social enterprises in the UK contributing £24 billion to the UK economy per year. More than 30% of social enterprises in the UK work in the fields of health and social care.

6. - Please note that we have only responded to those questions relevant to social enterprises.

General Response

7. - The framework for the provider licence will have long term implications for all providers in terms of how they operate. It is therefore critical that the consultation and engagement on how this works in practice is continued to ensure that the license works as well as possible for the whole system. Social enterprises, while often considered to be part of the independent sector, are in fact a sector in their own right. It is therefore important that when assessing how the license will operate it takes the full diversity of providers into account.

8. - Exemptions need to reflect the full breadth of players in the NHS including the social enterprise and charitable sectors. They also need to reflect the fact that many social enterprise and charitable providers will also work in sectors outside the NHS – be it social care, housing, offender management and many other sectors. Such organisations will have other regulators to consider and other strategic considerations to take account of when considering their governance and recruitment decisions.

Q3: Do you agree that it is not appropriate to license small and micro providers of NHS funded services at this stage, pending further review of costs and benefits?

9. - We agree that it is not appropriate to license small and micro providers of NHS funded services at this stage. Additional regulatory burdens inevitably place a disproportionate effect on smaller providers. We also fear that this could discourage new entrants into the market and prevent social enterprises in other public services to diversify into healthcare.

Q4: If so, do you agree that providers of NHS services with fewer than 50 employees (FTEs) and income from the provision of NHS hospital and community healthcare services of less than £10m should be exempt from the requirement to hold a licence?

10. While we note that this is the EU's definition of SME we believe that this is very low for businesses operating in health and care. The health sector is a service industry and as such labour intensive when compared to other industries. As such 50 employees in health and care would not correspond to a £10million turnover. From an initial assessment of our membership a £10million turnover is more likely to equate to close to 400 employees.

Q5: Alternatively, do you think a de minimis threshold based on a provider fulfilling one of the two conditions would be more appropriate (i.e. <50 staff (FTEs) or <£10m turnover)? If so, which?

11. For the reason stated above we believe that NHS turnover is a fairer basis on which to base the de minimis threshold rather than the number of employees.

Q6: If not, on what basis should small and micro providers be exempt?

12. We believe that NHS turnover rather than staff should be the crucial element.

Q7: Is there anything you want to add?

Q8: Do you agree that providers of primary medical and dental services should initially be exempt from the requirement to hold a licence from Monitor?

Yes

Q9: Is there anything you want to add?

13. In principle in the longer term in order to ensure fairness and transparency regulatory functions and contractual functions should be kept separate. This is important, particularly to prevent conflicts of interest in the case of primary medical services.

Q10: Do you think providers of adult social care who also provide NHS services should be required to hold a licence, unless they fall below a de minimis threshold?

14. Yes, as this would bring them into line with all other NHS services.

Q11: If so, do you think the threshold should be fewer than 50 employees (FTEs) and income from the provision of NHS hospital and community healthcare services of less than £10m?

15. Please see question 4.

Q12: Alternatively, do you think a de minimis threshold based on an adult social care provider fulfilling one of the two conditions would be more appropriate? If so which one?

16. Please see question 5. -

Q14: If you think there should be a different de minimis threshold, what is that threshold?

17. Please see question 6.

Q13: Do you know of any adult social care providers who also provide NHS services who would not fall below this specific de minimis threshold?

18. Yes. -We have a number of social care providers within our membership that would be above the de minimis threshold.

Q15: Is there anything else you want to add?

<u>Objection and share of supply percentages in the context of licence modifications</u>

The Secretary of State is proposing two separate but linked thresholds for objections to - licence condition changes. If these thresholds are exceeded, Monitor cannot implement the - relevant licence modification. -

The proposed thresholds are: -
If 20% of licence holders or more objected to the modification -
If the number of licence holders objecting weighted by NHS turnover amounts to 20% -
20% has been chosen as this is the figure OFGEM uses in a similar system -

Q16: Do you think a 20% threshold would be suitable for the standard condition modification objection percentage?

19. Yes

Q17: If not, what figure do you think would be suitable?

Q18: Is there anything you want to add?

20. While a 20% threshold seems reasonable in principle this needs to take account of the fact that the NHS is, at present, dominated by one form of provider – the foundation trust.

21. As the 'fair playing field review' is demonstrating foundation trusts have a number of operating advantages over other providers and are subject to different regulatory burdens. There is a danger that setting a 20% threshold could fail to take account of a situation where any other single group of providers is disproportionate affected by changes to the license conditions. For example if changes proposed were particularly detrimental to the social enterprise sector and they were to object collectively - they would fail to reach 20% of threshold. We believe that 20% could be set as the principle but should a significant proportion of providers in any one sector object this should also be considered.

Q19: Do you think share of supply threshold should be calculated by defining share of supply as the number of licence holders affected by the proposed modification, weighted by NHS turnover?

22. No

Q20: Do you think the threshold itself should be 20% as with the objections percentage?

23. No

Q21: Do you think variations in the costs of providing NHS services should be taken into account when calculating the share of supply?

24. If possible but again this needs to recognise the diversity of supply of providers.

Q22: Is there anything you want to add?

25. Weighting this by turnover could create a situation where a disproportionate effect on the smaller end of providers is missed.

<u>How Monitor will enforce licence conditions</u>

Monitor can take action against a provider when it:

- Breaches a licence condition
- Fails to hold a licence when it is required to
- Fails to provide Monitor with information it has requested

Monitor will have three possible enforcement actions:

- Imposing a "compliance requirement" on the provider to stop the breach or make sure it could not happen again

- Imposing a “restoration requirement” on the provider to take action to restore its position to what it was before the breach occurred
- Imposing a “variable monetary penalty” on the provider, to be determined by - Monitor, up to 10% of turnover in England -

The DH has a statutory input in relation to the fine, as the way turnover is calculated must be set out in regulations.

Q23: Do you think the calculation of turnover for the purposes of the variable monetary penalty maximum should be based on turnover from provision of NHS funded services?

No

Q24: If not, how do you think turnover should be calculated?

Q25: Is there anything you want to add?

26. It should be noted that there are alternative ways to ensure compliance other than the use of fines. The consequence of a fine of 10% of turnover would be to destabilise a provider. Even if not this would be diverting funds away from frontline services.

27. There needs to be a clear rationale from Monitor about how it proposes to impose fines, and an explicit commitment not to do so where the short, medium or long term sustainability of providers of NHS services could be affected.

Social Enterprise UK