

Response form for *Developing the General Licence Conditions: Stakeholder Engagement Document*

If you would like any part of the content of your response (as distinct from your identity) to be kept confidential, you may say so in a covering letter.

We would ask you to indicate clearly which part or parts of your response you regard as confidential. We will endeavour to give effect to your request, but as a public body which is subject to the provisions of the Freedom of Information legislation, we cannot guarantee confidentiality.

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Nature of organisation: Membership Body

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Please write your answers to the following questions below. Please expand the boxes or continue on further sheets if necessary. Then follow the instructions at the end of this form to return your response to Monitor.

Monitor: consultation 1: general licensing conditions: stakeholder engagements document January 2012

As Monitor will be aware from our response to *Developing the new NHS provider licence: a framework document*, (November 2011) the Optical Confederation represents the 12,000 optometrists, 6,000 dispensing opticians, 7,000 optical businesses and 45,000 ancillary staff in the UK who provide high quality and accessible eye care services to the whole population. As a Confederation we work with others to improve eye health for the public good.

As previously stated we believe that the optical sector should be exempted from Monitor licensing, under Clause 82 of the Health and Social Care Bill, for two important reasons

Firstly, as a regulated primary care profession, we already have to be registered with (i.e. licensed to operate by) by the General Optical Council and, as part of that registration, both optical bodies corporate and individual practitioners have to comply

- with the General Optical Council Codes of Conduct for business and individual registrants and
- any guidance issued by our two professional bodies, the College of Optometrists and the Association of British Dispensing Opticians.

Secondly, and uniquely in the NHS, community optical providers operate in a fully open and highly competitive market where each practice competes vigorously for each and every patient, all of whom have value for the practice. This means that by its very structure our market is already skewed against cherry picking and in favour of meeting all patients' needs as well as providers being fully subject to normal business regulation including the Companies' Act 2006, competition, the Office of Fair Trading, and Advertising Standards etc. Any further licensing and regulation would be an unnecessary burden and duplicatory, adding costs to the NHS without any added value or demonstrable benefit.

We believe this would breach the Government's Better Regulation Strategy, which aims to "eliminate obsolete and inefficient regulation", and to which itself Monitor subscribes, and the Better Regulation principle of "targeting" regulation only where it is needed.

We have been given assurances by Ministers that registration with the Care Quality Commission will not be required of us for these reasons and we believe that the same arguments for exemption exist in relation to licensing by Monitor.

It is against this general background, that we are pleased to respond and bring our experience of regulation to the "co-production" of an effective Monitor regime for the future. Our responses to the consultation questions, where we believe we have a contribution to make, are below.

We are happy for this response to be made public.

Mark Nevin
Optical Confederation
23 January 2012

Responses to consultation questions where we have views or experience to contribute.

Question 1: Do you agree that a general information condition such as this one is necessary in order to ensure that we can perform our functions? Please give your reasons for your answer.

No

We understand the reason for this requirement but think that, as drafted, it is currently too widely drawn. We have significant experience of Primary Care Trusts exceeding their brief and using such wide ranging powers to demand from providers any information they feel necessary. In many cases, this has been irrelevant to the contracts to which providers are working. We feel strongly, therefore, that the element of "reasonableness" should apply and would

prefer to see the Condition re-drafted as follows:

“Licensees would be required to provide us with information that we reasonably require for the purpose of performing our statutory functions. They would be required to provide the information in a manner and form, and at places and times, that we would reasonably request.”

As is stated in the consultation document, providers of NHS funded services already supply information to various bodies (under Licence condition 1). We feel it would be helpful if Monitor could confirm it will source this same information from those ‘various bodies’, and not the service provider.

In our experience information supplied to NHS bodies is requested in specific and unique formats by each NHS body, which is in fact an additional burden on the provider since the information needs to be sourced, reviewed and packaged appropriately in each case.

Question 2: Do you have any views on how our licensing functions should be funded? Please give reasons for your answer.

Yes

We have instinctive concerns about open-ended funding requirements. We have no problem with the costs of reasonable regulation being passed on to appropriate providers but it is important for providers to know how the level of fees might be set and how they might be independently reviewed or challenged.

We have had the unhappy experience in the past in our own sector of a regulator significantly over-budgeting, failing to consider efficiencies of scale or marginal cost budgeting, and building up significant surpluses ultimately taking money away from front-line patient care.

We do not doubt Monitor’s intentions but the Conditions have to provide for all eventualities, and given that the entire cost of Monitor’s regulation will have to be met from budgets which would otherwise have gone to patient care (either in the NHS or the private sector), we feel that some reassurance of independent scrutiny of the costing and fee-setting processes would give both public and providers confidence in the prices set and which providers will have no choice but to comply.

Independent scrutiny could be provided by the Department of Health or any other appropriate body and would help demonstrate Monitor’s compliance with the second principle of Better Regulation – accountability.

We have also concerns about requiring payment of fees within 28 days. Many healthcare providers operate to tight budget constraints, especially at certain times of the year. There is no corresponding requirement on NHS bodies to pay providers within 28 days, and we have seen cases where NHS payments are delayed (especially towards the end of the financial year). We would strongly argue that 28 days is too short and should instead be set at eight weeks.

Question 3: Do you agree that fit and proper person requirements on governors, directors and those performing similar roles could help to prevent some instances of poor governance by licensees? Please give reasons for your answer.

Yes

Governance in NHS bodies in the past has frequently been shown to be weak and this would not be helped by permitting persons who have demonstrated that they are not fit and proper to manage businesses in other circumstances to take on governance and director roles.

Question 4: Would you like to see a different definition of an unfit person? If so, how would it differ from our proposal?

Yes

The current definitions are too narrowly focussed on the UK. The exclusions should apply to persons falling within these definitions in any jurisdiction.

Question 5: Would our fit and proper person requirements cover all of the appropriate people within potential licensees? Can you provide examples of the types of officials in licensees with different structures who would be performing roles similar to those performed by directors? Please give reasons for your answer.

No view.

Question 6: Do you agree that there should be a licence condition which would require licensees to have regard to guidance that we issue? Please give reasons for your answer.

Yes

However it should also be set out within the statutes governing Monitor that guidance should not be issued without full consultation with bodies representing providers. (In some sectors, this would also involve consultation with other regulators and insurers and underwriters in non-NHS sectors.) Such a requirement would enable Monitor to comply fully with the “transparency” principle of Better Regulation as well as improving the quality of the regulation itself.

Provided that genuine consultation has been carried out (including reasoned responses to issues raised), then licensees should be required to have regard to guidance that Monitor issues.

Question 7: Do you agree with the requirement we are proposing for licensees to appoint a compliance officer with specific duties? Please give reasons for your answer.

No

This would be too onerous a requirement for many NHS providers, particularly those providing primary care services. Whilst it might be appropriate for a hospital trust, many NHS services are provided by small and medium-sized enterprises such as optical practices, pharmacies and dental practices and may not be the best way of enabling these small and medium-sized businesses to comply. Providers must, by definition, comply with the licence to operate, but it should be for the provider themselves to decide how best to do this depending on their specific circumstances.

It follows that we also do not believe that licensees should be required to send an annual report on the compliance officer's activities. Again the "how" should be a matter for the licensee not the regulator and such a requirement would add significantly to costs, especially for small and medium-sized enterprises (SMEs).

Question 8: Do you agree with the requirement we are proposing for licensees to take all reasonable precautions against the risk of failure to comply with the conditions of the licence? Please give reasons for your answer.

No

Providers already have to comply with a wide range of regulations and should obviously take all reasonable precautions against the risk of failing to comply with those regulations. There is no immediately obvious reason why Monitor licensing conditions should be any different.

Question 9: Do you agree that there should be a licence condition which requires compliance with statutory and other requirements? Please give reasons for your answer.

Yes

Although providers are already required to comply with statutory guidance by definition, and other requirements as appropriate, taking this power would provide Monitor with an easy recourse, being then able to suspend or impose conditions on a licensee who breached wider requirements where, potentially patients would be put at risk.

Question 10: Do you agree that there should be a licence condition which requires licensees to be registered with the Care Quality Commission in so far as it is necessary for them to be able to lawfully provide NHS-funded services? Please give reasons for your answer.

Yes

However this has the potential to inadvertently widen the scope for Care Quality Commission registration, or could lead to misinterpretation by Commissioners. Officials drafting the regulations and guidance should take extreme care to ensure that this is not the case.

Question 11: Do you think that there are additional requirements that we should include in the licence in order to prevent cherry picking? If yes, please describe these additional requirements and provide reasons for them.

Yes

Transparency in eligibility and selection criteria for patients, especially for expensive NHS services, is key to fairness and ensuring abuse is avoided by both patients and providers.

Question 12: Can you think of any ways in which we could monitor compliance with this condition? If yes, please describe them.

Yes

It should be a requirement for providers to report immediately to Monitor any complaints alleging cherry-picking or lack of transparency in eligibility and selection criteria.

Question 13: Do you agree that a requirement for licensees to exercise their functions effectively, efficiently and economically in providing health care services is consistent with our new main general duty and should be included as a licence condition? Please give reasons for your answer.

No

The issue of whether services are provided “effectively, efficiently and economically” is surely one for the provider itself and the commissioner, not the regulator. Theoretically, for instance, if a private sector provider wanted to waste money and, say, increase its overheads or reduce its operating margins, that should be entirely a matter for the provider and its shareholders or, to the extent that this was wasting NHS resources, a matter for the Commissioner but not the regulator.

Question 14: Do you have any views on our proposed licence condition requiring assistance and participation in emergency planning and responses? Please give reasons for your answer.

Yes

This seems reasonable, but again we do flag that the principle of “proportionality” should be followed. Often emergency planning exercises can be very significant and involve significant resources. This may not always be possible. For example suspending a day’s business to carry out a planning exercise may not always be possible for small and medium-sized enterprises.

Engagement process

Thank you for responding to this engagement document. Please save this document and email it to licensing@monitor-nhsft.gov.uk with ‘General Conditions’ in the subject line.

Alternatively, you can fax your response to 020 7340 2401, or post it to:

Monitor
Licensing Conditions Engagement

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London SE1 8UG

This document *Developing the General Licence Conditions: Stakeholder Engagement Document* was issued on 16 December 2011. Please submit your responses to the questions and any other comments that you have by 5pm on 23 January 2012. There will also be subsequent opportunities to respond to our licensing engagement documents.

If you wish to do so, you can request that your name and/or organisation be kept confidential and excluded from the published summary of responses. Please tick this box to ensure confidentiality.