



NHS Standard Contract 2017/18 and 2018/19 (Shorter Form)

**Consultation on proposed National
Variation**

March 2018

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Consultations

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NHS Standard Contract team

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Target Audience

CCG Clinical Leaders, CCG Accountable Officers, CSU Managing Directors, Care Trust CEs, Foundation Trust CEs, Local Authority CEs, NHS Trust Board Chairs, NHS England Regional Directors, NHS Trust CEs, Commissioners and providers who are party to an NHS Standard Contract

Additional Circulation List**Description**

This document contains proposals for an in-year National Variation to the NHS Standard Contract 2017-19 (Shorter Form): to make the Contract consistent with the General Data Protection Regulation; and to extend the range of performance sanctions suspended for providers within scope of the Provider Sustainability Fund.

Cross ReferenceNHS Standard Contract 2017-19 <https://www.england.nhs.uk/nhs-standard-contract/>**Superseded Docs (if applicable)**

NA

Action RequiredRespond to consultation to england.contractsengagement@nhs.net**Timing / Deadlines (if applicable)****Respond to consultation by 3 April 2018****Contact Details for further information**NHS Standard Contract team
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<https://www.england.nhs.uk/nhs-standard-contract/>**Document Status**

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1 Introduction

This document sets out, for consultation, proposals for an in-year National Variation to the NHS Standard Contract 2017/18 and 2018/19 (Shorter Form).

A separate document, available at <https://www.england.nhs.uk/nhs-standard-contract/2017-19-update-march/> sets out proposals for a National Variation to the NHS Standard Contract 2017/18 and 2018/19 (Full Length).

We welcome comments on the proposed National Variations, which should be sent to england.contractsengagement@nhs.net by Tuesday 3 April 2018.

2 Summary of proposals

The current NHS Standard Contract was published by NHS England (in both full-length and shorter-form versions) on 3 January 2018.

This new consultation proposes changes in two areas:

- to make the Contract consistent with the General Data Protection Regulation; and
- to extend the range of contract performance sanctions which are suspended for providers within scope of the Provider Sustainability Fund.

3 Details of specific changes proposed

Each of the changes we are proposing is explained below.

3.1 General Data Protection Regulation

The General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679) is a regulation by which the European Parliament, the Council of the European Union and the European Commission intend to strengthen and unify data protection for all individuals within the European Union (EU). The GDPR comes into force, and becomes UK law, on 25 May 2018. As the UK is scheduled to leave the EU on 29 March 2019, there will be a period when the GDPR applies in the UK. (It is intended that similar rules to those set out in the GDPR will continue to apply after Brexit.)

NHS England has taken specialist legal advice on the impact of the new regime (having regard in particular to the *Procurement Policy Note 03/17: Changes to data protection legislation* <https://www.gov.uk/government/publications/procurement-policy-note-0317>), and it is clear that we need to make some significant changes to the NHS Standard Contract in order to be consistent with new GDPR requirements and to introduce some consequential additional changes. In summary, the changes we are proposing will introduce the following new requirements or obligations.

- The parties must comply with a more inclusively defined set of data protection legislation and guidance (General Condition 21).
- The provider must appoint a Data Protection Officer and keep commissioners informed as to his/her identity (General Condition 21).
- Where the provider is to process personal data associated with the services provided under the Contract as a data processor, it must comply with the detailed requirements set out in the Provider Data Processing Agreement (new Schedule 6F to the Particulars). (We anticipate that use of this Schedule will only be required in some local contracts let on the basis of the shorter-form Contract, because many will not involve large-scale processing of personal data.)
- The provider must put in place and maintain in force appropriate indemnity cover to protect it against the significantly increased fines which the Information Commissioner's Office may now levy for breaches of data protection legislation (General Condition 11).
- We have made amendments to make clear that the provider must indemnify the commissioners against any clean-up costs incurred by the commissioners as a result of any breach of data protection legislation by the provider (General Condition 11).
- Where a provider commits a personal data breach, reportable to the Information Commissioner's Office, it must report this to commissioners (General Condition 21), and this in turn enables the commissioners to terminate the Contract without notice if they choose (General Condition 17).

In order to accommodate the changes described above, as well as the changes to the operative provisions and Schedules of the Contract, a considerable number of amendments and additions are inevitably necessary to the defined terms listed at the back of the General Conditions.

In a small number of areas, we are proposing additional Contract provisions which will support the mandated provisions, such as the changes in General Conditions 11 and 17 above, for instance. These provisions are considered appropriate for inclusion in new contracts. However, we recognise that some existing contracts, may have been tendered on a different, less demanding basis. We therefore propose that these supporting provisions should be included in the updated version of the NHS Standard Contract for adoption in new contracts which are let from May 2018 onwards, but should not be included in the National Variation which we will publish (to vary ongoing contracts). (The provisions affected are highlighted in yellow in the consultation version of the Contract.)

3.2 Financial sanctions in respect of national standards

NHS England and NHS Improvement have recently set out revised planning guidance for the NHS ([Refreshing NHS Plans for 2018/19](#)). Paragraph 2.8 of the guidance makes this commitment in relation to the NHS Standard Contract:

Providers who accept their control totals and so have access to the Provider Sustainability Fund for 2018/19 will continue to be exempt from the application of an agreed range of contractual performance sanctions, as set out in the existing NHS Standard Contract. NHS England will shortly consult on changes to the Contract to extend this exemption to all national contractual performance sanctions except those relating to mixed sex accommodation, cancelled operations, Healthcare Associated Infections and the duty of candour, on the basis that continuing NHS Improvement oversight, including the NHS Improvement Single Oversight Framework, will ensure that NHS providers continue to perform to acceptable levels against all national standards.

The key benefit of the suspension of additional performance sanctions for providers within scope of the Provider Sustainability Fund (PSF) is that it will provide a further incentive for NHS providers to sign up to financial control totals – and adherence to control totals will be crucial in ensuring that the NHS provider sector achieves financial balance in 2018/19.

The suspension of sanctions does not reduce the need for providers to make every effort to comply with the full range of national standards set out in the Contract. The PSF and the Contract continue to require providers to sign up to improvement trajectories or assurance statements in relation to their performance against standards for which sanctions are suspended; providers within scope of the PSF must agree these trajectories or assurance statements with NHS Improvement and NHS England, and our expectation remains that they will then be reflected in local commissioning contracts as Service Development and Improvement Plans. NHS Improvement will monitor provider compliance through their oversight systems, as will commissioners through local contracting arrangements.

In terms of the practical arrangements, the national standards affected by this change are set out in Schedules 4A and 4B of the Particulars. To give effect to the proposed change, we have expanded the list of standards for which sanctions are suspended (this is done simply by showing the affected standards in bold italics). We have also updated references within the Contract, so that they now refer to the PSF rather than the Sustainability and Transformation Fund (Service Condition 36.37, General Condition 9.26, definitions) and to 2018/19 only, rather than to 2017/18 and 2018/19.

4 Presentation of consultation materials

Ultimately, following consultation, NHS England will publish

- a National Variation document for each of the full-length and shorter-form versions of the Contract, which commissioners can use to incorporate the new provisions into their existing contracts; and
- an updated edition of each version of the Contract, which commissioners can use where they place any new contract with a provider.

When we most recently consulted on a National Variation, in autumn 2017, the individual changes we were proposing were self-contained and free-standing. We therefore published a draft National Variation only at the consultation stage, as a way of setting out our proposed changes in a succinct way. The full revised Contract was then only published after the consultation was complete.

With this new National Variation, the nature of the changes required relating to GDPR is such that we will be amending many different sections of the Contract in an inter-related way. We have therefore reversed our approach, so that we are presenting the full revised Contract documents themselves for consultation at this stage, on the basis that it will then be easier for consultees to understand how the proposed new requirements and wording fit together. We will publish the National Variation documents only at the final stage, once NHS England has reviewed the consultation feedback and made changes as appropriate.

5 Applicability and implementation of the National Variation

Subject to the outcome of this consultation, our intention is that a final version of the National Variation will be published during April 2018, with the expectation that commissioners will then implement the National Variation in their local contracts by no later than 25 May 2018 (the date when the GDPR requirements take effect). At the same time, we will also publish on our [website](#) an updated version of the full 2017-19 Contract, for use in any situations where commissioners are letting new contracts with providers. The NHS Standard Contract [eContract system](#) will also be updated as soon as possible following this publication.

6 Separate consultation on arrangements for research

A separate consultation has just concluded on important changes in the processes which Trusts must follow for commercially-funded research trials (for further detail, see <https://www.engage.england.nhs.uk/consultation/simplifying-research-arrangements/>). The consultation included proposed changes to the terms of the NHS Standard Contract.

The consultation closed on 1 February 2018. NHS England is now reviewing the responses received and will set out next steps shortly.

To avoid confusion, we have not included the draft Contract wording proposed for research in this new (March 2018) consultation. However, we anticipate that, following assessment by NHS England of the consultation feedback on the research proposals, final Contract wording on research will be included in the final National Variations and updated Contracts which we expect to publish in April 2018.

7 Consultation responses

We welcome comments on this proposed in-year National Variation to the NHS Standard Contract 2017/18 and 2018/19 (Shorter Form). Comments on the proposals should be sent to england.contractsengagement@nhs.net by Tuesday 3 April 2018.