

## **ENFORCEMENT UNDERTAKINGS**

### **LICENSEE:**

King's College Hospital NHS Foundation Trust ("the Licensee")  
Denmark Hill  
London  
SE5 9RS

### **DECISION**

On the basis of the grounds set out below, and having regard to its Enforcement Guidance, NHS Improvement has decided to accept from the Licensee the enforcement undertakings specified below pursuant to its powers under section 106 of the Health and Social Care Act 2012 ("the Act").

The enforcement undertakings below supersede the undertakings that were accepted by NHS Improvement on 6 July 2017.

Any reference to "NHS Improvement" in these undertakings is to be taken as a reference to Monitor.

### **GROUNDINGS**

#### **1. Licence**

The Licensee is the holder of a licence granted under section 87 of the Act.

#### **2. Breaches of the Licence**

2.1. NHS Improvement has reasonable grounds to suspect that the Licensee has provided and is providing healthcare services for the purposes of the NHS in breach of the following conditions of its licence: CoS3(1)(a) and (b); FT4(4)(a), (b) and (c) and FT4(5)(a),(b),(c), (d), (e) and (f).

#### **2.2. In particular:**

2.2.1. The Licensee is in a serious financial position, with continued financial decline and lack of financial control.

2.2.1.1. The Licensee was put into enhanced oversight in April 2017. Enforcement undertakings in relation to financial governance and its planned deficit of £38.5m for 2017/18 were accepted by NHS Improvement in July 2017. These undertakings were aligned to enhanced oversight requirements.

2.2.1.2. The Licensee did not accept its Control Total for 2017/18. NHS Improvement and the Licensee agreed a budget deficit of £38.5m in May 2017. The Licensee subsequently submitted a formal Q2 reforecast of £70.6m deficit but on 5 December 2017 informed NHS Improvement that it

was forecasting a £92.2m year end deficit, £53.7m adverse to the Licensee's original £38.5m planned deficit.

2.2.1.3. At month 9 of the financial year 2017/18, the Licensee reported a deficit of £82.8m, a £45.9m adverse variance to the plan agreed with NHS Improvement. The Licensee submitted a second reforecast with its month 9 financial submission for a £92.9m deficit, which was £22.3m adverse to the formal Q2 forecast.

2.2.1.4. The Licensee was placed in Special Measures for financial reasons ("FSM") on 11 December 2017.

2.2.1.5. The Licensee reported 2017/18 year end deficit of £141.4m, a £102.9m adverse variance to plan agreed with NHS Improvement.

2.2.2. Financial governance issues identified following the Windsor Walk and Critical Care Unit projects, including:

2.2.2.1. failure in accounting treatment of the Windsor Walk project proposals;

2.2.2.2. inadequate due diligence and approvals process for the Windsor Walk transaction;

2.2.2.3. lack of oversight and cost control of the Critical Care Unit project by the Board;

2.2.2.4. failures in monitoring and reporting of drawdown for ring-fenced loans expenditure;

2.2.2.5. inadequate Board governance, including scrutiny by Non-Executive Directors ("NEDs") and the capacity and capability of the finance function.

2.2.3. The Care Quality Commission report dated 31 January 2018 identified areas of governance requiring improvement.

2.2.4. The KPMG reports commissioned by the Licensee identified significant governance failures.

2.2.5. The Licensee has failed to meet the Accident and Emergency ("A&E") four hour waiting times constitutional standard since April 2015. The Licensee's A&E Performance has been below both the standard and Sustainability and Transformation Fund (STF) trajectory throughout 2017/18 and has deteriorated significantly in recent months resulting in a widening gap to the 2018/19 Provider Sustainability Fund (PSF) trajectory.

2.2.6. The Licensee has failed to meet the Referral to Treatment (RTT) 18 week constitutional standard since it started reporting the standard in March 2016. In addition, the Licensee failed to reduce its over 52 week waiters to nil by the end of 2017/18, as agreed with NHS Improvement. Furthermore, the number of 52

week waiters has deteriorated month on month from October 2017 to April 2018.

2.3. The matters set out above demonstrate shortcomings in the Licensee's corporate governance arrangements and financial management standards, including a failure by the Licensee to:

2.3.1. at all times adopt and apply systems and standards of corporate governance and of financial management which reasonably would be regarded as:

- (a) suitable for a provider of the Commissioner Requested Services provided by the Licensee; and
- (b) providing reasonable safeguards against the risk of the Licensee being unable to carry on as a going concern;

2.3.2. establish and effectively implement:

2.3.2.1. effective Board and committee structures;

2.3.2.2. clear responsibilities for its Board, for committees reporting to the Board and for staff reporting to the Board and those committees; and

2.3.2.3. clear reporting lines and accountability throughout its organisation; and

2.3.3. establish and effectively implement systems and /or processes:

2.3.3.1. to ensure compliance with the Licensee's duty to operate efficiently, economically and effectively;

2.3.3.2. for timely and effective scrutiny and oversight by the Board of the Licensee's operations;

2.3.3.3. to ensure compliance with health care standards binding on the Licensee;

2.3.3.4. for effective financial decision-making, management and control (including but not restricted to appropriate systems and/or processes to ensure the Licensee's ability to continue as a going concern);

2.3.3.5. to obtain and disseminate accurate, comprehensive, timely and up to date information for Board and Committee decision-making; and

2.3.3.6. identify and manage (including through forward plans), material risks to compliance with the conditions of its licence.

### 3. Need for action

NHS Improvement believes that the action which the Licensee has undertaken to take pursuant to these undertakings is action to secure that the breaches in question do not continue or recur.

### 4. Appropriateness of Undertakings

In considering the appropriateness of accepting in this case the undertakings set out below, NHS Improvement has taken into account the matters set out in its Enforcement Guidance.

## **UNDERTAKINGS**

The Licensee has agreed to give, and NHS Improvement has agreed to accept, the following undertakings, pursuant to section 106 of the Act:

### 1. 2018/19 Financial Plan

- 1.1. The Licensee will take all reasonable steps to deliver the 2018/19 financial plan as submitted to NHS Improvement on 28 June 2018 ("the 2018/19 Financial Plan").
- 1.2. The Licensee shall provide an update of its progress in delivering the 2018/19 Financial Plan under the reporting procedures set out in section 6. The Licensee will include progress in delivering, and status of, the following areas:
  - 1.2.1. extra controls and other measures the Licensee has put in place since being placed into FSM to immediately strengthen financial control;
  - 1.2.2. how the Licensee is addressing the underlying causes of the deficit;
  - 1.2.3. the Licensee's internal assurance approach around 2018/19 Cost Improvement Plans ("CIPs");
  - 1.2.4. CIP development, supported by schedules showing a scheme by scheme assessment;
  - 1.2.5. actions the Licensee is taking to manage cash and minimise requirements for cash draw-downs from the Department of Health and Social Care;
  - 1.2.6. delivering the productivity efficiencies as set out in the Carter Review, as indicated by the Getting It Right First Time Programme and NHS Improvement's Model Hospital, and from the Licensee's ongoing transformation programme.
- 1.3. The Licensee will also report detail about actions to be taken which are intended to move the Licensee to a position that is significantly better than its current financial position, including:
  - 1.3.1. a high-level milestone plan for delivery of the Licensee's key schemes to deliver the 2018/19 financial plan;
  - 1.3.2. details of how the Licensee can demonstrate quarter on quarter improvement in the underlying Income and Expenditure run rate in 2018/19;

- 1.3.3. details of the exit monthly deficit run rate;
- 1.3.4. details of the capacity the Licensee has, or will put in place to deliver the 2018/19 financial plan;
- 1.3.5. details of proposals for accelerated sub-scale service consolidation or closure, if applicable;
- 1.3.6. a review of any planned investments (capital and revenue);
- 1.3.7. details of how the Licensee will improve its billing processes;
- 1.3.8. details of how the Licensee will deliver opportunities in non-pay spend and estates;
- 1.3.9. details of how the Licensee will deliver opportunities in pay spend including progress against and further steps on:
  - reducing agency and locum spend;
  - consultant job planning and how this will achieve additional productivity;
  - identifying (and maintaining control of) the true level of vacancies;
  - other workforce reviews and productivity savings;
- 1.3.10. a timetable for substantive appointment to and commencement of key leadership posts.

1.4. The Licensee will ensure that the 2018/19 financial plan is:

- 1.4.1. underpinned by robust demand and capacity modelling and integrated financial, activity and headcount assumptions;
- 1.4.2. quality assured and agreed by the Board (including incoming substantive appointees); and
- 1.4.3. consulted on and aligned with the views and plans of its commissioners and the South East London Sustainability and Transformation Partnership.

2. Diagnostic and Financial Recovery Plan

2.1. The Licensee will identify, set out in writing and submit for approval to NHS Improvement, at a date to be specified by NHS Improvement, the following:

- 2.1.1. a robust and up to date understanding of the underlying financial run rate and the causes of the Licensee's financial position, including the identification of any income under-recovery and services and sites driving losses, that need to be addressed to ensure the Licensee's financial recovery ("the Diagnostic"); and
- 2.1.2. taking into account the Diagnostic, a Board-approved long term financial recovery plan ("FRP") consistent with the principles set out in 1.2 to 1.4 above. The FRP will, in particular, ensure a significantly improved financial position, to be agreed with NHS Improvement, within a timeframe to be specified by NHS Improvement.

2.2. The Licensee will undertake to keep the FRP delivery under review and demonstrate to NHS Improvement a period of successful implementation of the FRP and assurance of continued focus, capability and capacity to sustainably maintain financial recovery and deliver the FRP.

### 3. Financial Improvement Director

3.1. The Licensee will co-operate and work with a Financial Improvement Director appointed by NHS Improvement to oversee and provide independent assurance to NHS Improvement on the Licensee's actions to deliver its financial recovery, including the FRP.

3.2. The Licensee will provide the Financial Improvement Director and their team with full access to the Licensee's key personnel, meetings, resources and information.

### 4. Financial Governance

4.1. The Licensee will, at dates to be specified by and within a timeframe to be agreed with NHS Improvement, implement the following:

4.1.1. An external review of Board governance, the scope and resourcing of which to be agreed with NHS Improvement, but to cover in particular:

4.1.1.1. The effectiveness of the non-executive directors in providing challenge to and assurance of the operations and decisions of the Board and sub-committees and in holding the Executive to account;

4.1.1.2. The Board's culture, behaviours and commitment with respect to openness, candour and honesty in particular with regard to enabling and encouraging appropriate channels and mechanisms for senior leaders and managers to raise concerns and report risks and deficiencies;

4.1.1.3. The capacity and capability for continuous learning and improvement;

4.1.1.4. Any other Board governance related issues raised by the Care Quality Commission in its latest inspection report dated 31 January 2018.

4.1.2. Participation by the NEDs in a development programme, the scope, resourcing and timeframe of which to be agreed with NHS Improvement;

4.1.3. A review of financial governance, the scope and resourcing of which to be agreed with NHS Improvement, but to include:

4.1.3.1. the effectiveness of the Licensee's Standing Financial Instructions, Standing Orders and Scheme of Delegation following changes made to these in 2017;

4.1.3.2. the capacity and adequacy of the challenge and assurance processes undertaken for business cases and significant transactions;

4.1.3.3. the procedures and controls for the recording and storage of legal documents;

4.1.3.4. the adequacy of transparency and control over the source and application of different funding sources (other than the controls and reporting requirements currently applied by the Department of Health and Social Care and NHS Improvement in the interim financial support draw procedures); and

4.1.3.5. The adequacy of Board level transparency and authorisation of all external funding proposals.

4.1.4. All recommendations from the KPMG Internal Audit report on King's Commercial Services dated October 2017.

## 5. Financial Control

5.1. The Licensee will comply with any arrangements specified by NHS Improvement for the approval of the Licensee's decisions on expenditure and with any spending approvals processes that are deemed necessary by NHS Improvement.

5.2. The Licensee will not make any application for financial assistance provided by the Secretary of State under section 40 of the National Health Service Act 2006 unless that application has been approved by NHS Improvement.

5.3. The Licensee will comply with any reporting requests made by NHS Improvement in relation to any finance provided pursuant to that application.

## 6. Financial reporting

6.1. The Licensee will meet with the NHS Improvement Executive Sponsor and other representatives of NHS Improvement, including the Financial Improvement Director, for a 'Progress Review Check' at dates to be agreed with NHS Improvement, but expected to be approximately every four weeks. The purpose of the Progress Review Checks is to consider the Licensee's understanding of the underlying causes of the financial position and the FRP and to determine the Licensee's significant progress in delivering financial improvement.

6.2. The Licensee will attend other meetings or, if NHS Improvement stipulates, conference calls, during the period of FSM to discuss its progress. These meetings will, unless NHS Improvement stipulates otherwise, take place at times and places to be specified by NHS Improvement and with attendees specified by NHS Improvement.

6.3. The Licensee will comply with any additional reporting or information requests made by NHS Improvement.

## 7. Quality governance – A&E performance

7.1. The Licensee will take all reasonable steps to achieve sustainable compliance with the 4-hour constitutional standard, within a trajectory to be agreed with NHS Improvement. As a minimum, the trajectory will deliver A&E performance as per the 2018/19 operating planning guidance (*Refreshing NHS Plans for 2018/19, February 2018*).

7.2. In particular, the Licensee will:

- 7.2.1. by a date to be agreed with NHS Improvement, develop and submit a robust, Board-approved A&E plan (“the A&E Plan”) to deliver the A&E recovery trajectory to be agreed with NHS Improvement;
  - 7.2.2. implement all the actions under its control in the A&E Plan, within the timescales set out therein, unless otherwise agreed with NHS Improvement;
  - 7.2.3. develop KPIs and timeframes to measure progress of actions, to be agreed with NHS Improvement;
  - 7.2.4. ensure that it has sufficient capability and capacity to implement the A&E Plan; and
  - 7.2.5. continue to engage proactively with system partners and with improvement support.
- 7.3. The Licensee will keep the A&E Plan and its delivery under review. This includes refresh of the A&E Plan for 2018/19. The Licensee will provide NHS Improvement with a quarterly Board-approved progress report against delivery of the A&E Plan, until a date to be specified by NHS Improvement.
- 7.4. The Licensee will agree with NHS Improvement the governance and oversight arrangements to monitor the implementation of the A&E Plan. If requested by NHS Improvement this will include the development of a set of metrics that will enable the Trust to assess the delivery and impact of the A&E Plan.
- 7.5. Where matters are identified which materially affect the Licensee’s ability to meet these requirements, whether or not identified by the Licensee, the Licensee will:
- 7.5.1. notify NHS Improvement as soon as practicable;
  - 7.5.2. if required by NHS Improvement, update and resubmit the A&E Plan for agreement by NHS Improvement, within a timeframe to be agreed with NHS Improvement.
- 7.6. If required by NHS Improvement, the Licensee will appoint an Improvement Director to support the Licensee with delivery of the A&E 4-hour constitutional standard.
- 7.7. The Licensee will attend meetings, or if NHS Improvement stipulates, conference calls, to discuss its progress in relation to A&E undertakings. These meetings will, unless NHS Improvement stipulates otherwise, take place at times and places specified by NHS Improvement and with attendees specified by NHS Improvement.
8. Quality governance – Referral to Treatment (RTT)
- 8.1. The Licensee will take all reasonable steps to deliver the RTT constitutional standard on a sustainable basis.



- 8.2. In particular, the Licensee will develop and submit a Board-approved recovery plan for RTT (“the RTT Recovery Plan”) by a date to be agreed with NHS Improvement.
- 8.3. The Licensee will agree the content and the scope of the RTT Recovery Plan with NHS Improvement and stakeholders including any action to be taken by system partners to support the Licensee to deliver that plan.
- 8.4. The RTT Recovery Plan will include details of how the Licensee will deliver RTT performance commitments by the end of March 2019, in particular how it will deliver:
- a reduction in the overall size of the RTT patient treatment list;
  - the elimination of all incomplete pathways longer than 52 weeks and the associated improvement trajectory from the reported RTT position;
  - a level of performance against the 18 week incomplete standard.
- 8.5. The RTT Recovery Plan will be supported by a credible activity plan for the delivery of those objectives set out in 8.4. Where the Licensee has insufficient internal capacity to deliver the RTT Recovery Plan, it will work with system providers to identify and utilise capacity to deliver the plan.
- 8.6. The Licensee will undertake a review of its harm review process, which is to be agreed with NHS Improvement, for all patients who may be adversely affected by extended waiting times including all patients that have waited longer than 52 weeks.
- 8.7. The Licensee will develop a plan to identify the programme resources to support the effective implementation of the RTT Recovery Plan.
- 8.8. The Licensee will agree with NHS Improvement the governance and oversight arrangements to monitor the implementation of the RTT Recovery Plan. If requested by NHS Improvement this will include the development of a set of metrics that will enable the Trust to assess the delivery and impact of the RTT Recovery Plan.
- 8.9. The Licensee will keep the RTT Recovery Plan and its delivery under review. This includes refresh of the RTT Recovery Plan for 2018/19. The Licensee will provide NHS Improvement with a quarterly Board-approved progress report against delivery of the RTT Recovery Plan, until a date to be specified by NHS Improvement.

## 9. Access

- 9.1. The Licensee will provide NHS Improvement and its Financial Improvement Director direct access to its advisors, its board members and any members of its staff considered necessary by NHS Improvement, as needed in relation to the matters covered by these undertakings.

## 10. General

- 10.1. In taking and co-ordinating the actions set out above and otherwise addressing the matters set out in paragraphs 2.2 of the Grounds of these

undertakings, the Licensee will adopt a coherent and comprehensive approach, which will include the actions set out in paragraphs 10.2 and 10.3.

10.2. The Licensee will implement sufficient programme management and governance arrangements to enable delivery of these plans and to meet all other commitments in these undertakings.

10.3. Such programme management and governance arrangements will enable the Board to:

10.3.1. obtain a clear oversight over the progress of delivery of the FRP, A&E Improvement Plan and RTT Recovery Plan and in meeting all other commitments in these undertakings;

10.3.2. obtain an understanding of any risks to the successful achievement of the plans and to meeting all other commitments in these undertakings and ensure appropriate mitigation of any such risks; and

10.3.3. hold individuals to account for the delivery of the FRP and for meeting all other commitments in these undertakings.

The undertakings set out above are without prejudice to the requirement on the Licensee to ensure that it is compliant with all the conditions of its licence, including any additional licence condition imposed under section 111 of the Act and those conditions relating to:

- compliance with the health care standards binding on the Licensee; and
- compliance with all requirements concerning quality of care.

Any failure to comply with the above undertakings will render the Licensee liable to further formal action by NHS Improvement. This could include the imposition of discretionary requirements under section 105 of the Act in respect of the breach in respect of which the undertakings were given and/or revocation of the licence pursuant to section 89 of the Act.

Where NHS Improvement is satisfied that the Licensee has given inaccurate, misleading or incomplete information in relation to the undertakings: (i) NHS Improvement may treat the Licensee as having failed to comply with the undertakings; and (ii) if NHS Improvement decides so to treat the Licensee, NHS Improvement must by notice revoke any compliance certificate given to the Licensee in respect of compliance with the relevant undertakings.

**THE TRUST**

Signed



(Chair or Chief Executive of Trust)

Dated

21/09/2018

**NHS IMPROVEMENT**

Signed



Dated

21/09/2018