

SCHEDULE 1

CONTENT OF AGREEMENTS

PART 8

VARIATION AND TERMINATION OF AGREEMENTS

Variation of an agreement: general

59.—(1) Subject to paragraphs 32(8), 60, 61 and 71 of this Schedule and paragraphs 4(8) and 9 of Schedule 4 no amendment or variation shall have effect unless it is in writing and signed by or on behalf of the Health Board and the provider.

(2) In addition to the specific provision made in paragraph 71 the Health Board may vary the agreement without the provider’s consent where it—

- (a) is reasonably satisfied that it is necessary to vary the agreement so as to comply with the Act, any regulations made pursuant to that Act, or any direction given by the Scottish Ministers pursuant to that Act; and
- (b) notifies the provider in writing of the wording of the proposed variation and the date upon which that variation is to take effect,

and, where it is reasonably practicable to do so, the date that the proposed variation is to take effect shall not be less than 14 days after the date on which the notice under paragraph (b) is served on the provider.

(3) In sub-paragraph (1) “writing” does not include transmission by electronic means.

Termination by agreement

60. The Health Board and the provider may agree in writing to terminate the agreement, and if the parties so agree, they shall agree the date upon which that termination should take effect and any further terms upon which the agreement should be terminated.

Termination by the provider

61.—(1) A provider may terminate the agreement by serving notice in writing on the Health Board at any time.

(2) Where a provider serves notice pursuant to sub-paragraph (1), the agreement shall, subject to sub-paragraph (3), terminate 6 months after the date on which the notice is served (“the termination date”), save that if the termination date is not the last calendar day of a month, the agreement shall instead terminate on the last calendar day of the month in which the termination date falls.

(3) Where the provider is an individual, sub-paragraph (2) shall apply to the provider, save that the reference to “6 months” shall instead be to “3 months”.

(4) This paragraph and paragraph 63 are without prejudice to any other rights to terminate the agreement that the provider may have.

Withdrawal by parties to an agreement other than Health Boards

62.—(1) Where the provider comprises more than one party to the agreement, a party to the agreement may withdraw from the agreement by serving notice in writing on the Health Board and the other parties to the agreement at any time.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

(2) Where a party serves notice pursuant to sub-paragraph (1), the agreement shall, subject to sub-paragraph (3), be varied to the extent that that party is no longer a party to the agreement 6 months after the date on which the notice is served (“the variation date”), save that if the variation date is not the last calendar day of a month, the agreement shall instead vary on the last calendar day of the month in which the variation date falls.

(3) Where a party to the agreement is an individual, sub-paragraph (2) shall apply to that party, save that the reference to “6 months” shall instead be to “3 months”.

(4) This paragraph is without prejudice to the right of the Health Board to terminate an agreement in accordance with paragraph 70.

Late payment notices

63.—(1) The provider may give notice in writing (a “late payment notice”) to the Health Board if the Board has failed to make any payments due to the provider in accordance with a term of the agreement that has the effect specified in regulation 20 and the provider shall specify in the late payment notice the payments that the Board has failed to make in accordance with that regulation.

(2) Subject to sub-paragraph (3), the provider may, at least 28 days after having served a late payment notice, terminate the agreement by a further written notice if the Health Board has still failed to make the payments due to the provider, and that were specified in the late payment notice served on the Health Board pursuant to sub-paragraph (1).

(3) If, following receipt of a late payment notice, the Health Board refers the matter to the NHS dispute resolution procedure within 28 days of the date upon which it is served with the late payment notice, and it notifies the provider in writing that it has done so within that period of time, the provider may not terminate the agreement pursuant to sub-paragraph (2) until—

- (a) there has been a determination of the dispute pursuant to paragraph 57 and that determination permits the provider to terminate the agreement; or
- (b) the Health Board ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

Termination by the Health Board: general

64. The Health Board may only terminate the agreement with the provider or a party to the agreement in accordance with the provisions in this Part.

Termination by the Health Board for the provision of untrue etc information

65.—(1) The Health Board may serve notice in writing on a party to the agreement terminating the agreement with that party to the agreement forthwith, or from such dates as may be specified in the notice if, after the agreement has been made, it comes to the attention of the Health Board that written information provided to the Health Board by that party to the agreement before the agreement was entered into in relation to the condition set out in regulation 3 (and compliance with that condition) was, when given, untrue or inaccurate in a material respect.

(2) Where the provider comprises more than one party to the agreement, the Health Board shall send a copy of the notice served under sub-paragraph (1) to any other party to the agreement with which the agreement is not being terminated.

Other grounds for termination by the Health Board

66.—(1) The Health Board may serve notice in writing on a party to the agreement terminating the agreement with that party forthwith, or from such date as may be specified in the notice if—

- (a) where an individual is a party to the agreement, that individual;
- (b) where a partnership is a party to the agreement, any partner or the partnership; and
- (c) where a company limited by shares is a party to the agreement—
 - (i) the company;
 - (ii) any person legally or beneficially owning a share in the company; or
 - (iii) any director or secretary of the company,

falls within sub-paragraph (3) during the existence of the agreement.

(2) Where the provider comprises more than one party to the agreement, a Health Board that serves notice pursuant to sub-paragraph (1) shall send a copy of that notice to any other party to the agreement whose agreement is not being terminated.

(3) A person falls within this sub-paragraph if—

- (a) the person has been or is the subject of a national disqualification;
- (b) subject to sub-paragraph (4), the person is disqualified or suspended (other than by an interim suspension order or direction pending an investigation or a suspension on the grounds of ill-health) from practising by any licensing body anywhere in the world;
- (c) subject to sub-paragraph (5), the person has been dismissed (otherwise than by reason of redundancy) from any employment by a health service body unless before the Health Board has served a notice terminating the agreement pursuant to this paragraph, the person is employed by the health service body that dismissed the person or by another health service body;
- (d) the person is disqualified from a list unless the person's name has subsequently been included in such a list;
- (e) the person has been convicted in the United Kingdom of murder;
- (f) the person has been convicted in the United Kingdom of a criminal offence other than murder, and has been sentenced to a term of imprisonment of over 6 months;
- (g) subject to sub-paragraph (5), the person has been convicted elsewhere of an offence which would, if committed in Scotland, constitute—
 - (i) murder; or
 - (ii) a criminal offence other than murder, and been sentenced to a term of imprisonment of over 6 months;
- (h) the person has been convicted of an offence referred to in Schedule 1 to the Criminal Procedure (Scotland) Act 1995⁽¹⁾ (offences against children under the age of 17 to which special provisions apply) or Schedule 1 to the Children and Young Persons Act 1933⁽²⁾ (offences against children and young persons with respect to which special provisions apply);
- (i) the person has—
 - (i) had sequestration of the person's estate awarded or been adjudged bankrupt unless (in either case) the person has been discharged or the bankruptcy order has been annulled;

(1) 1995 c. 46.

(2) 1933 c. 12 as amended by the Criminal Justice Act 1988 (c. 33), section 170, Schedule 15, paragraph 8 and Schedule 16, paragraph 16; the Sexual Offences Act 1956 (c. 69), sections 48 and 51 and Schedules 3 and 4 as modified by the Criminal Justice Act 1988, section 170(1), Schedule 15, paragraph 9.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (ii) been made the subject of a bankruptcy restrictions order or an interim bankruptcy restrictions order under Schedule 4A to the Insolvency Act 1986⁽³⁾, unless that order has ceased to have effect or has been annulled;
 - (iii) made a composition or arrangement with, or granted a trust deed for, the person's creditors unless the person has been discharged in respect of it; or
 - (iv) been wound up under Part IV of the Insolvency Act 1986.
- (j) there is—
- (i) an administrator, administrative receiver or receiver appointed in respect of it; or
 - (ii) an administration order made in respect of it under Schedule B1 to the Insolvency Act 1986⁽⁴⁾;
- (k) that person is a partnership and—
- (i) a dissolution of the partnership is ordered by any competent court, tribunal or arbitrator; or
 - (ii) an event happens that makes it unlawful for the business of the partnership to continue, or for members of the partnership to carry on in partnership;
- (l) the person has been—
- (i) removed under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990⁽⁵⁾ (powers of the Court of Session to deal with management of charities), from being concerned in the management or control of any body; or
 - (ii) removed from the office of charity trustee or a charity by an order made by the Charity Commissioners or the High Court on the grounds of any misconduct or mismanagement in the administration of the charity for which the person was responsible or to which the person was privy, or which the person by the person's conduct contributed to or facilitated; or
- (m) the person is subject to a disqualification order under the Company Directors Disqualification Act 1986⁽⁶⁾, the Companies (Northern Ireland) Order 1986⁽⁷⁾ or to an order made under section 429(2)(b) of the Insolvency Act 1986⁽⁸⁾ (failure to pay under county court administration order);
- (n) that person has refused to comply with a request by the Health Board for that person to be medically examined on the grounds that the Health Board is concerned that the person is incapable of adequately providing services under the agreement and, in a case where that person is a partner in a partnership, or a legal and beneficial owner of shares in a company, that is a party to the agreement, the Health Board is not satisfied that the partnership or company is taking adequate steps to deal with the matter; or
- (o) that person would otherwise fall within paragraph 101(2)(p) of Schedule 5 to the GMS Contracts Regulations.
- (4) A Health Board shall not terminate the agreement pursuant to sub-paragraph (2)(c) where the Health Board is satisfied that the disqualification or suspension imposed by a licensing body outside the United Kingdom does not make the person unsuitable to be—
- (a) a party to the agreement;

⁽³⁾ 1986 c. 45. Schedule 4A was inserted by section 257 of and Schedule 2 to the Enterprise Act 2002 (c. 40).

⁽⁴⁾ Schedule B1 was inserted by section 248 of and Schedule 16 to the Enterprise Act 2002.

⁽⁵⁾ 1990 c. 40.

⁽⁶⁾ 1986 c. 45.

⁽⁷⁾ S.I.1986/1032 (N.I.6).

⁽⁸⁾ 1986 c. 46 as amended by the Insolvency Act (2000 c. 39).

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (b) in the case where the person is a partner in a partnership that is a party to the agreement, a partner in that partnership; or
- (c) in the case where the person is—
 - (i) a person legally or beneficially holding a share in a company limited by shares that is a party to the agreement; or
 - (ii) a director or secretary of a company limited by shares that is a party to the agreement, a person legally or beneficially holding share in that company or a director or secretary of that company, as the case may be.

(5) A Health Board shall not terminate the agreement pursuant to sub-paragraph (2)(d)—

- (a) until a period of at least three months has elapsed since the date of the dismissal of the person concerned; or
- (b) if, during the period of time specified in paragraph (a), the person concerned brings proceedings in any competent tribunal or court in respect of the person’s dismissal, until proceedings before that tribunal or court are concluded,

and the Health Board may only terminate the agreement at the end of the period specified in paragraph (b) if there is no finding of unfair dismissal at the end of those proceedings.

(6) A Health Board shall not terminate the agreement pursuant to sub-paragraph (2)(h) where the Health Board is satisfied that the conviction does not make the person unsuitable to be—

- (a) a party to the agreement;
- (b) in the case where the person is a partner in a partnership that is a party to the agreement, a partner in that partnership;
- (c) in the case where the person is—
 - (i) a person legally and beneficially holding a share in a company limited by shares that is a party to the agreement; or
 - (ii) a director or secretary of a company limited by shares that is a party to the agreement, a person legally and beneficially holding share in that company or a director or secretary of that company, as the case may be.

(7) In this paragraph “health service body” does not include any provider who is to be treated as a health service body in accordance with regulation 8.

Other grounds for termination by the Health Board

67. The Health Board may serve notice in writing on the provider terminating the agreement with the provider forthwith or with effect from such date as may be specified in the notice if—

- (a) the provider has breached the agreement and, as a result of that breach, the safety of the provider’s patients is at serious risk if the agreement is not terminated; or
- (b) the provider’s financial situation is such that the Health Board considers that the Health Board is at risk of material financial loss.

Termination by the Health Board: remedial notices and breach notices

68.—(1) Where a provider has breached the agreement other than as specified in paragraphs 65 to 67 and the breach is capable of remedy, the Health Board shall, before taking any action it is otherwise entitled to take by virtue of the agreement, serve a notice on the provider requiring it to remedy the breach (“remedial notice”).

(2) A remedial notice shall specify—

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (a) details of the breach;
 - (b) the steps the provider must take to the satisfaction of the Health Board in order to remedy the breach; and
 - (c) the period during which the steps must be taken (“the notice period”).
- (3) The notice period shall, unless the Health Board is satisfied that a shorter period is necessary to—
- (a) protect the safety of the provider’s patients; or
 - (b) protect itself from material financial loss,

be no less than 28 days from the date that notice is given.

(4) Where a Health Board is satisfied that the provider has not taken the required steps to remedy the breach by the end of the notice period, the Health Board may terminate the agreement with the provider with effect from such date as the Health Board may specify in a further notice to the provider.

(5) Where a provider has breached the agreement other than as specified in paragraphs 65 to 67 and the breach is not capable of remedy, the Health Board may serve notice on the provider requiring the provider not to repeat the breach (“breach notice”).

- (6) If, following a breach notice or a remedial notice, the provider—
- (a) repeats the breach that was the subject of the breach notice or the remedial notice; or
 - (b) otherwise breaches the agreement resulting in either a remedial notice or a further breach notice,

the Health Board may serve notice on the provider terminating the agreement with effect from such date as may be specified in that notice.

(7) The Health Board shall not exercise its right to terminate the agreement under sub paragraph (6) unless it is satisfied that the cumulative effect of the breaches is such that the Health Board considers that to allow the agreement to continue would be prejudicial to the efficiency of the services to be provided under the agreement.

(8) If the provider is in breach of any obligation and a breach notice or a remedial notice in respect of that default has been given to the provider, the Health Board may withhold or deduct monies which would otherwise be payable under the agreement in respect of that obligation which is the subject of the default.

Termination by the Health Board: additional provisions specific to agreements with one or more companies limited by shares

69.—(1) Where a company limited by shares is a party to the agreement, if the Health Board becomes aware that a company is carrying on any business which the Health Board considers to be detrimental to the provider’s performance of its obligations under the agreement—

- (a) the Health Board shall be entitled to give notice to the company requiring that the company ceases carrying on that business before the end of a period of not less than 28 days beginning on the day on which the notice is given (“the notice period”); and
- (b) if the company has not satisfied the Health Board that the company has ceased carrying on that business by the end of the notice period, the Health Board may, by a further written notice, terminate the agreement with that company forthwith or from such date as may be specified in the notice.

(2) Where the provider comprises more than one party to the agreement, a Health Board that serves notice pursuant to sub-paragraph (1)(a) or (b) shall send a copy of that notice to any other party to the agreement.

Termination by the Health Board: changes in the provider

70.—(1) The Health Board shall be entitled to terminate the agreement with the provider by notice in writing on such date as may be specified in that notice where, during the existence of the agreement—

- (a) one or more parties to the agreement have withdrawn from or ceased to be parties to the agreement; or
- (b) where one or more partnerships are parties to the agreement, one or more partners have left that partnership or those partnerships,

if in its reasonable opinion, the Health Board considers that the change in the parties to the agreement or membership of the partnership (as the case may be) is likely to have a serious adverse impact on the ability of the provider or the Health Board to perform its obligations under the agreement.

(2) A notice given to the provider pursuant to sub-paragraph (1) shall specify—

- (a) the date upon which the agreement is to be terminated; and
- (b) the Health Board’s reasons for considering that the change in the parties to the agreement or the membership of the partnership (as the case may be) is likely to have a serious adverse impact on the ability of the provider or the Health Board to perform its obligations under the agreement.

Agreement sanctions

71.—(1) In this paragraph and paragraph 72, “agreement sanction” means—

- (a) the termination of specified obligations under the agreement;
- (b) the suspension of specified obligations under the agreement for a period of up to six months; or
- (c) the withholding or deducting of monies otherwise payable under the agreement.

(2) Where the Health Board is entitled to terminate the agreement with the provider or with a party to the agreement pursuant to paragraph 65, 66, 67, 68(4) or (6), 69 or 70 it may instead impose any of the agreement sanctions if the Health Board is reasonably satisfied that the agreement sanction to be imposed is appropriate and proportionate to the circumstances giving rise to the Health Board’s entitlement to terminate the agreement.

(3) Where the agreement includes the provision of essential services, the Health Board shall not, under sub-paragraph (2), be entitled to impose any agreement sanction that has the effect of terminating or suspending any obligation to provide, or any obligation that relates to, essential services.

(4) If the Health Board decides to impose an agreement sanction, it must notify the provider of the agreement sanction that it proposes to impose, the date upon which that sanction will be imposed and provide in that notice an explanation of the effect of the imposition of that sanction.

(5) Subject to paragraph 72 the Health Board shall not impose the agreement sanction until at least 28 days after it has served notice on the provider pursuant to sub-paragraph (4) unless the Health Board is satisfied that it is necessary to do so in order to—

- (a) protect the safety of the provider’s patients; or
- (b) protect itself from material financial loss.

(6) Where the Health Board imposes an agreement sanction, the Health Board shall be entitled to charge the provider the reasonable costs of additional administration that the Health Board has incurred in order to impose, or as a result of imposing, the agreement sanction.

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

Agreement sanctions and the dispute resolution procedure

72.—(1) If there is a dispute between the Health Board and the provider in relation to an agreement sanction that the Health Board is proposing to impose, the Health Board shall not, subject to sub-paragraph (4), impose the proposed agreement sanction except in the circumstances specified in sub-paragraph (2)(a) or (b).

(2) If the provider refers the dispute relating to the agreement sanction to the NHS dispute resolution procedure within 28 days beginning on the date on which the Health Board served notice on the provider in accordance with paragraph 71(4) (or such longer period as may be agreed in writing with the Health Board), and notifies the Health Board in writing that it has done so, the Health Board shall not impose the agreement sanctions unless—

- (a) there has been a determination of the dispute pursuant to paragraph 57 and that determination permits the Health Board to impose the agreement sanction; or
- (b) the provider ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

(3) If the provider does not invoke the NHS dispute resolution procedure within the time specified in sub-paragraph (2), the Health Board shall be entitled to impose the agreement sanction forthwith.

(4) If the Health Board is satisfied that it is necessary to impose the agreement sanction before the NHS dispute resolution procedure is concluded in order to—

- (a) protect the safety of the provider's patients; or
- (b) protect itself from material financial loss,

the Health Board shall be entitled to impose the agreement sanction forthwith, pending the outcome of that procedure.

Termination and the NHS dispute resolution procedure

73.—(1) Where the Health Board is entitled to serve written notice on the provider or a party to the agreement terminating the agreement with the provider or a party to the agreement pursuant to paragraph 65, 66, 67 or 68(4) or (6) the Health Board shall, in the notice served on the provider or the party to the agreement pursuant to those provisions, specify a date on which the agreement with the provider or a party to the agreement terminates that is not less than 28 days after the date on which the Health Board has served that notice on the provider or the party to the agreement unless sub-paragraph (2) applies.

(2) This sub-paragraph applies if the Health Board is satisfied that a period less than 28 days is necessary in order to—

- (a) protect the safety of the provider's patients; or
- (b) protect itself from material financial loss.

(3) In a case falling with sub-paragraph (1), where the exceptions in sub-paragraph (2) do not apply, where the provider invokes the NHS dispute resolution procedure before the end of the period of notice referred to in sub-paragraph (1), and it notifies the Health Board in writing that it has done so, the agreement shall not terminate at the end of the notice period but instead shall only terminate in the circumstances specified in sub-paragraph (4).

(4) The agreement shall only terminate if and when—

- (a) there has been a determination of the dispute pursuant to paragraph 57 and that determination permits the Health Board to terminate the agreement with the provider or the party to the agreement; or
- (b) the provider ceases to pursue the NHS dispute resolution procedure,

whichever is the sooner.

(5) If the Health Board is satisfied that it is necessary to impose the agreement sanction before the NHS dispute resolution procedure is concluded in order to—

- (a) protect the safety of the provider’s patients; or
- (b) protect itself from material financial loss,

sub-paragraphs (3) and (4) shall not apply and the Health Board shall be entitled to confirm, by written notice to be served on the provider, that the agreement with the provider or a party to the agreement will nevertheless terminate at the end of the period of the notice it served pursuant to paragraph 65, 66(1), 67, 68(4) or (6), 69 or 70.

Consultation with the area medical committee

74.—(1) Whenever the Health Board is considering—

- (a) terminating the agreement with the provider or with a party to the agreement pursuant to paragraph 66, 67(1), 68, 69(4) or (6), 70 or 71; or
- (b) imposing an agreement sanction,

it shall, whenever it is reasonably practicable to do so, consult the area medical committee for its area before it terminates the agreement with the provider or with a party to the agreement or imposes a agreement sanction.

(2) Whether or not the area medical committee has been consulted pursuant to sub paragraph (1), whenever the Health Board imposes a agreement sanction on the provider or terminates a agreement with the provider or a party to the agreement pursuant to this Part, it shall, as soon as reasonably practicable, notify the area medical committee in writing of the agreement sanction imposed or of the termination of the agreement (as the case may be).